

COLLANA DI STUDI

9

edited by  
TANIA GROPPI  
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Framing and Diagnosing  
Constitutional Degradation:  
*A Comparative Perspective*

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**Framing and Diagnosing Constitutional Degradation:  
A Comparative Perspective**

**Edited by Tania Groppi, Valentina Carlino and Giammaria Milani**

*Collana di studi di Consulta OnLine*

9

This book collects the proceedings of the workshop “**Framing and Diagnosing Constitutional Degradation**”, held at Certosa di Pontignano (Siena, Italy) on June 21<sup>st</sup> and 22<sup>nd</sup>, 2021.

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Andrea Vernata\*

## Governing Bodies and Representative Assemblies: time for a new balance? \*\*

**ABSTRACT:** *The essay aims to highlight how, in contemporary democracies, the strong interactions between representative assemblies and government - also considered as Executive branches - are leading to “eclipsing” parliaments' prerogatives. It also deals with the risks arising from these trends and the consequent verticalization of political power towards governments and supra-national entities, trying to underline the reasons behind such epilogue, in particular with regard to the tendency to address the issue of economic competition in terms of political competition.*

SUMMARY: 1. Introduction. – 2. The Parliament between the Government and the Executive branch. – 3. A new balance for a rediscovery of democracy?

### 1. Introduction

It is clear that modern legal orders are marked by greater complexity than in the past. National States today must confront the encounter of their national rules with a multiplicity of super-national regimes, calling into question the traditional model of a hierarchy among the sources of law<sup>1</sup>. The complex network of interdependencies and connections that characterize States has led to a shift in the internal distribution of powers among their constitutional organs. At the same time, normative instruments have been slow to evolve so as to reflect these transformations, which require specialists able to manage an increasingly specific and sectorial multilevel law<sup>2</sup>. Representative democratic assemblies have difficulty to keep pace with this new situation<sup>3</sup>.

In this context, it is not surprising that the delicate balance between legislative and executive powers has tipped in favor of government organs. The executive, which can call upon the kind of specialized administrative apparatus needed to respond to these new sources of law, has used this complexity to gain ground as the source of new rules at the expense of representative assemblies<sup>4</sup>. This has been manifested, first and foremost, in the increasing recourse to executive sources of law. It can also be found in the endowment of autonomous and independent technical organs with important rule-making functions<sup>5</sup>. More

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\*\* This work has been subjected to blind peer review.

<sup>1</sup> On this issue see, in particular, the considerations in A. PIZZORUSSO, *La produzione normativa in tempi di globalizzazione*, Torino, 2008, and in H.V. MORAIS, *The Quest for International Standards: Global Governance vs. Sovereignty*, in *Univ. Kansas L.R.*, 2002, 50, *passim*.

<sup>2</sup> See M. SPAHIRO, “Deliberative”, “Independent” Technocracy v. Democratic Politics: Will the Globe Echoe the EU?, in *Law contemp. probl.*, 2005, 68, 341 ff.

<sup>3</sup> This aspect has recently been highlighted by the works contained in M. DE BENEDETTO, N. LUPO, N. RANGONE (eds.), *The Crisis of Confidence in Legislation*, London, 2021.

<sup>4</sup> In this perspective, E. ETZIONI-HALEVY, *Bureaucracy and Democracy. A political Dilemma*, Boston, 2013, *passim*.

<sup>5</sup> M. MANETTI, *Le autorità indipendenti*, Roma-Bari, 2007; M. CUNIBERTI, *Autorità indipendenti e libertà costituzionali*, Milano, 2007; PATRONI GRIFFI, *Le Autorità amministrative indipendenti nell’ordinamento costituzionale: profili problematici di ieri e di oggi*, in *Rass. dir. pubbl. eur.*, 2015, 2, 6 ff.; E. CHELI, *Le autorità amministrative indipendenti nella forma di governo*, in *Ass. per gli studi e le ricerche parlamentari. Quaderno n. 11*, Torino, 2000, 129 ff.



recently, we also find an increase in legislative procedures focused primarily on supporting governmental choices, relegating parliament to the role of merely approving these choices<sup>6</sup>.

However, it is not only the increase in complexity of the objects of rules that has affected the balance between executive and legislative organs. Globalization and financial markets, with their tendency to draw States into a system of interaction and interdependence at a super-national level<sup>7</sup>, seem to have favoured (or perhaps even promoted) a verticalization of power<sup>8</sup>. This reinforces executive organs, the primary players in the process of globalization, as they can assume obligations at this level and offer the reliability that these processes require. Not surprisingly, the result is the tendency to encourage the stabilization of political leaders and reinforcing of government prerogatives: a trend accelerated by a resurgence of nationalism<sup>9</sup> and populism, which directly involves the idea of democracy and constitutionalism itself.

These themes relate directly to the theoretical study of modern constitutionalism and require us to reconsider its foundations, including the principle of separation of powers and sovereignty. As such, it is opportune to study these dynamics to understand their impact and, in particular, the factors able to bring the constitutional institutions of modern democracies into balance, avoiding the exacerbation of the constitutional degradation process. The aim is to evaluate if the shifting balance between the legislative and executive powers is part of the natural evolution of legal orders, or if it is instead a symptom of a much deeper institutional pathology.

## 2. *The Parliament between the Government and the Executive branch*

In the Western world, there has been an acceleration in the process by which the powers of executive organs are being strengthened and national parliaments consequently transformed into “chambers of ratification”<sup>10</sup>. Pluralism has become confined to the space of the representative chambers, thus laying the groundwork for an Executive that may act benefiting from rules on publicity and transparency<sup>11</sup> that are far less invasive compared to

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<sup>6</sup> G. AZZARITI, *Diritto o barbarie, Il costituzionalismo moderno al bivio*, Roma-Bari, 2021, 253-254; N. LUPO, *Emendamenti, maxi-emendamenti e questione di fiducia nelle legislature del maggioritario*, in E. GIANFRANCESCO, N. LUPO, *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione*, Roma, 2007, 41 ff.; D.J. MUCHOW, *The Vanishing Congress*, Washington D.C., 1976, 202 ff.; P. AVRIL, *Qui fai la loi?*, in *Pouvoirs*, 2005, 3(114), 89 ff.

<sup>7</sup> S. CASSESE, *Poteri indipendenti, Stati, relazioni ultrastatali*, in *Il Foro it.*, 96, 119; M.R. FERRARESE, *Prima lezione di diritto globale*, Roma-Bari, 2012, 22 ff., but also consider the financial markets framework and the impact of their “harbingers”, i.e. credit rating agencies (more fully on this perspective see A. VERNATA, *Costituzione, rating e sovranità nello spazio giuridico globalizzato*, in *Dir. pubbl.*, 2018, 3, 979 ff.

<sup>8</sup> See G. AZZARITI, *Diritto o barbarie*, cit., 50 ff.; A. LUCARELLI, *Teorie del presidenzialismo. Fondamento e modelli*, Padova, 2000; C. DE FIORES, *Partiti politici e Costituzione. Brevi riflessioni sul decennio*, in *Costituzionalismo.it*, n. 1 del 2004.

<sup>9</sup> In this direction, still current A. GRAZIANI, *Lo sviluppo dell'economia italiana. Dalla ricostruzione alla moneta europea*, Torino, 1998, 227.

<sup>10</sup> See note 5.

<sup>11</sup> On the central role of this principle in reference to modern constitutionalism and the democratic principle see. J. HABERMAS, *Storia e critica dell'opinione pubblica*, Roma-Bari, 2015, *passim*; Id., *Morale Diritto Politica*, Torino, 1992, 81 ff.; P. RIDOLA, *Diritto comparato e diritto costituzionale europeo*, Torino, 2010, 304-340, and F. POLITI, *Il principio di trasparenza*, in S. MANGIAMELI (ed.), *L'ordinamento europeo. L'esercizio delle competenze*, vol.

those binding on parliaments. Moreover, as we will see below, the new global economic competition<sup>12</sup> has led certain political movements to promote a demonization of some traditional features of democracy, like the compromise, the political mediation and pluralism itself.

Another transformation has taken place in the relation between political decisions and political responsibility<sup>13</sup>, which tends to facilitate the factual overcoming of the limits imposed by the democratic process. The relation between political decisions and political responsibility seems weakened also due to a multiplication of regulatory bodies at supranational level without clear mechanisms of legitimization, which fades the clear allocation of political responsibilities and increase the distrust of constituencies towards non-national organisms, with an adverse effect on multilateralism.

At national level, decades spent verticalizing power and political representation have favored the strict selection of the political class<sup>14</sup>, often giving rise to the subordination of the membership of a political party to its leadership<sup>15</sup>. The reasons for the lack of parliamentarians undertaking a “decisive” exercise of its powers of direction and control over the executive are therefore entirely political: that the party would not endorse the undisciplined parliamentarian in the next elections and - in the meantime - him would be ostracized by the media<sup>16</sup>.

All this guarantees a *souple* exercise of parliamentary prerogatives, which therefore tend to remain under the thumb of the Executive, coinciding with the leadership of the party.

However, the reinforcement of the Executive not only reinforces the Government but - more generally - also the upper levels of the administrative bureaucracy. Whether or not there are spoil system mechanisms present, the directors of agencies take on the role of “filters of information”<sup>17</sup> for the enormous amount of quantitative and qualitative data under the purview of the public authorities. In the first place, this significantly weakens the activity of the Government, which must rely on information and data that it cannot possibly verify without the collaboration of the same directors that provided the data in the first place. But secondly, it demonstrates how hard – or impossible – it can be for representatives to control the Executive branch and conduct investigations.

This problem - part of the well-known question of the relationship between technical and political organs - is certainly not new, but the situation today is different from that of the past in two ways. First, as we have seen, the representative chambers have little incentive to exercise their powers of supervision over the actions of the Government due to tendency

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2, Milano, 2006, 280, who recalls those principles that, according to Häberle, characterize the modern constitutional; see P. HÄBERLE, *Stato costituzionale: I) Principi generali*, in *Enc. giur.*, IX, Roma, 2001.

<sup>12</sup> On this topic, N. FELDMAN, *Cool War: The United States, China, and the Future of Global Competition*, New York, 2015.

<sup>13</sup> In this terms, G.U. RESCIGNO, *Trasformazioni e problemi della responsabilità politica oggi*, in G. AZZARITI (ed.), *La responsabilità politica nell'era del maggioritario e nella crisi della statualità*, Torino, 2005, 14, has doubts that, at supranational level, the bond between the exercise of power and responsibility can be considered maintained.

<sup>14</sup> See M. WEBER, *La politica come professione* (1919), Torino, 1976, 45 ff., and P. MAIR, *Ruling the void. The hollowing out of western democracy*, London, 2016, 9 ff.

<sup>15</sup> H. TRIEPEL, *La Costituzione dello Stato e i partiti politici* (1927), Napoli, 2015, 3 ff.

<sup>16</sup> With particular regard to the relationship between media and party leadership see B. MANIN, *Principi del governo rappresentativo*, Bologna, 1995, 246 ff.

<sup>17</sup> On this issue, see M.S. LARSON, *The production of expertise and the constitution of expert power*, in T. HASKELL (ed.), *The Authority of experts: studies in history and theory*, Bloomington, 1984, but most widely see J. MEYNAUD, *Technocracy*, New York, 1969; R.D. PUTMAN, *Elite Transformation in Advanced Industrial Societies*, in *Comp. pol. stud.*, 1977, 10(3), 385-387; F. FISCHER, *Technocracy and the Politics of Expertise*, London, 1990.

towards the (political) subordination of the former to the latter, discussed above. Second, parliaments lack technical organs capable of challenging government claims<sup>18</sup> and the data on which they are based, in a context much more complicated than in the past and often characterized by a multilevel governance.

Even where such organs are present, they tend to be structured to merely “verify” the Executive’s claims, but rarely are they not dependent on information and data provided by the government itself. The potential impossibility of independently collecting information and the substantial disappearance of the party structure, which in some way mirrors that of the public agencies, inevitably ends up relegating the representative chambers to the role of an observer of government decisions, directly affecting the very principle of the separation of powers.

In this context, it is not the representative chambers but the executive branch - understood as the leadership of the administrative apparatus - that becomes the most solid and natural interlocutor of the government and stakeholders. The Executive holds information, serves as a gatekeeper for legislative activity, has a permanent structure<sup>19</sup>, a technical know-how and, free from the dynamics of consent, is therefore considered to be a more reliable interlocutor. This has implications on two levels. First, it has an effect on the form of government, as the Executive-Government connection entails the substantial pre-eminence of government policies over those of parliament - which must have recourse to any means available to overcome the administrative-government “block”. Second, it influences the legislative level, because the Executive – in addition to the Government – tends to take on a role in the globalization process due to the fact that it can provide greater continuity at the level of national policies, especially towards stakeholders. The most extreme result in these cases seems to be the substantial exclusion of the representative chambers from the definition of any policies: pluralism gives way to decision-making<sup>20</sup>. and the idea that the former is the most dangerous obstacle to success of the latter gains ground.

### 3. A new balance for a rediscovery of democracy?

Similar trends seem to be taking place at a higher level as well.

Over the last few decades, Western democracies have found themselves facing a situation that is largely unprecedented at a geopolitical level. A new world bloc has embarked on an economic strategy which, on the one hand, has extended its sphere of influence over Western economies to the point of making them dependent on their own economy in many respects (even if only on the supply side), while on the other it has pursued - and almost achieved - national economic self-sufficiency<sup>21</sup>. In this context, the Western sphere of influence has not only been greatly reduced, but has also been put to the test by a broader crisis, initially economic in nature, then extending to the political and social spheres.

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<sup>18</sup> On this matter and for greater deepening see A. VERNATA, *L’Ufficio parlamentare di bilancio. Il nuovo organo ausiliare alla prova del primo mandato e della forma di governo*, Napoli, 2020, 161 ff.

<sup>19</sup> See M. WEBER, *The Nature of Charismatic Domination*, in W. RUNCHIMAN (ed.), *Max Weber: Selections in Translation*, Cambridge, 1978, 226-250.

<sup>20</sup> E. OLIVITO, *Le inesauste ragioni e gli stridenti paradossi della governabilità*, in *Costituzionalismo.it*, n. 3 del 2015, 39 ff.

<sup>21</sup> *Ex multis*, A. BROWNE, *Self-Reliance is China’s Endgame*, in *Bloomberg*, 10 December 2021.

The worsening of economic inequalities, together with the resurgence of poverty, unemployment and the kind of class-based society that the welfare state was supposed to relegate to the past, has shaken the foundations of pluralist democracy<sup>22</sup>. Economic planning - the main tool of economic policy - has been largely absent, instead giving way to a kind of neoliberalism that has met no limits, with the sole exception of policies to combat climate change<sup>23</sup> and (now) with the EU Recovery plan. Instead, economic planning has been used in all its potential in the new world bloc, directing the system of production from the start towards proper purposes of the tool of economic planning, that is those of a political nature.

It is therefore no surprise that the regulation of the marketplace in a multi-year and finalistic perspective has led to much higher rates of growth than where the options have been to leave the market to its own devices<sup>24</sup>. However, what has been surprising has been the tendency of Western political systems to validate the criticism that democratic processes are the true obstacles within the new competition between the global hegemonies. In other words, instead of questioning the neoliberal paradigm and taking advantage of the possibility of directing the economy (as is being undertaken, in fact, for climate change), there has been a tendency to look at the processes of democratic legitimation with suspicion, arguing that concepts such as “the general interest” and “consensus” are irreconcilable and explaining the prevalence of the Chinese bloc over the Western one as the result of its decision-making structure<sup>25</sup>. These beliefs have inexorably ended up transforming economic competition in a conflict between political models, which has taken on the guise of a struggle between models of the basis of power and its limits (the real question is: democracy vs what?). The verticalization of power has therefore gained new momentum and, as is typical of all conflicts, the logic of identitarianism and plebiscitarianism have gained ground: it is a quest for a political authority that can do all, salvific, able to respond to contingency by compensating any formal transgressions with the *furor populi*. At the same time, the paradigm of modern constitutionalism<sup>26</sup> is severely tested by the attempt to free the political authority from the forms and procedures put in place to defend pluralism and guarantee rights, which are presented as obsolete hindrances and obstacles to facing new global challenges.

In this context, it is clear that the economic and social challenges of the present – made worse by the pandemic - will advocate a new institutional equilibrium in Western democracies. Less clear is in which way the democratic consensus will be interpreted by the political system.

In a constitutional perspective, such consensus must necessarily aim towards the objectives of social transformation and freedom from poverty that have characterized the long path of modern democracy. So, this approach certainly cannot exclude reforms to readjust the balance among institutions with a view to its rationalization but, at the same time, it imposes that this adjustment should not crystallize the process of the verticalization of power and the consequent surmounting of democratic pluralism, whatever the cause, nature and origins of

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<sup>22</sup> On the importance of giving a direction to the democracy see J. SCHUMPETER, *Capitalismo, socialismo, democrazia*, Milano, 1964, 231 ff.

<sup>23</sup> The reference is to the European Green Deal; on this subject see, in particular, R. DE PAOLIS, *Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism*, in *Riv. quadr. dir. amb.*, 2021, 1, 112 ff.

<sup>24</sup> See L. FERRAJOLI, *La democrazia attraverso i diritti. Il costituzionalismo garantista come modello teorico e come progetto politico*, Roma-Bari, 2013, 146 ff.

<sup>25</sup> See D.A. BELL, *The China Model: Political Meritocracy and the Limits of Democracy*, Princeton, 2015.

<sup>26</sup> To provide a foundation to the power and to limit it, as highlighted by G. AZZARITI, *Diritto e conflitti. Lezioni di diritto costituzionale*, Roma-Bari, 2010, 347 ff.

such processes may be. This can be done, for example, by recognizing the failures and contradictions of markets left to their own devices with respect to these objectives and by rediscovering the tools of economic planning<sup>27</sup>, not only to oppose ongoing trends, but to propose solutions aimed at achieving social emancipation and progress.

Only through such a rediscovery will Western democracies be able to resist the rise of identity politics and rediscover the virtues of pluralism, preventing the pitfalls of the *Freund-Feind* opposition<sup>28</sup> and the imbalances in the relations between powers. While the reaffirmation of the theoretical principles of modern constitutionalism may not be able to prevent a new global hegemonic order on their own, they would nevertheless offer a basis for reaffirming the centrality of the person and pluralistic society within constitutional systems. The choice, in other words, is between the inertial abandoning of the constitutionalist paradigm and its reaffirmation, with the understanding that the political, economic and social perspectives of the first choice are far from reassuring, while the virtues of the second are yet to be unfold.

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<sup>27</sup> In this perspective, the EU Green Deal and the US Climate change agenda seem to be the first steps towards a reconceptualization of the economy and a rediscovery of the importance to give a political direction to the markets.

<sup>28</sup> See C. SCHMITT, *Le categorie del politico* (1929), Bologna, 1972, 113 ff.

This book collects the proceedings of the workshop “Framing and Diagnosing Constitutional Degradation”, held at Certosa di Pontignano (Siena, Italy) on June 21st and 22nd, 2021. Both the workshop and this book are funded within the PRIN 2017 project “Framing and Diagnosing Constitutional Degradation” (Principal Investigator Professor Tania Groppi).

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