

GLOBAL LAW vs NATIONAL LAW? Sovereignty and Representation

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ABSTRACT

The present Chapter, after briefly analysing the notion and the historical developments of representation, examines from a constitutional law perspective the relevant relationship between political representation and sovereignty, focusing on the form of state.

In an increasingly globalized world, the traditional components of the state (people, territory, and sovereignty) are often perceived as inadequate to fully grasp the complexity of the current situation. This weakness also relates to the challenges posed by the globalized world to political representation, here specifically explored concerning the erosion of the concept of representation and to the crisis of representative mechanisms.

Finally, the Chapter analyses the electoral system's impact on the performance of political representation, also adopting a comparative approach. Specifically, it focuses on the Italian case concerning the main "locks" affecting the electoral matter and referring to the recent decisions of the Italian Constitutional Court on the topic.

INTRODUCTION

The concept of “representation” is one of the most debated topics in human and social sciences (Fisichella, 1983). Among other factors, this is due to its vagueness, being a concept that can be “filled” with the most varied meanings.

As a matter of fact, there is a vast literature that offers many different definitions of this elusive concept (Pitkin, 1967; Pennock and Chapman, 1968; Schwartz, 1988).

In the WordReference Vocabulary, “representation” is defined as “the act of representing, or the state of being represented”.

In this sense, the concept of “representation” is built within the framework of the following scheme:

- some party that represents some other party (representative assemblies, as parliaments);
- some party that is represented (the electoral body);
- something that is represented (the political will); and finally
- a setting within which the activity of representation takes place (the political context).

Following the approach of this Section, the present Chapter will examine the concept of “representation” from a constitutional law perspective.

In this regard, Hanna Pitkin (1967) provided one of the more neutral definitions of “representation”, that is: “to represent is to make present again”.

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This statement means that “political representation” could be defined as the activity of making citizens’ voices, opinions, and perspectives “present” in the places in which processes of discussion and choice are carried out.

The main problem with this definition is that it is neutral. In particular, it is not able to acknowledge the capacity of the concept to express something more than mere representation, that is, the “representative common will” (Sieyès, 1789) of the entire society as an organic unitary body.

In other terms, this definition is not able to express the “added value” consisting of the capacity of the concept of “political representation” to convey the idea of “the unity of those who are represented”. This particular idea means that the outcome of the representative decision is distinguished from the “real common will” given by the mere sum of the will of every single social component.

Indeed, it is possible to argue that the Italian language offers a better expression of this *quid pluris*, distinguishing the simple concept of “*rappresentazione*” from the more complex concept of “*rappresentanza*” (both can be translated into English as “representation”, which yet does not catch the differences expressed by the Italian language), specifically declined as “*rappresentanza politica*” (in English, “political representation”).

1. THE HISTORICAL EVOLUTION OF POLITICAL REPRESENTATION

After these short remarks, shedding light on the issues that derive from the idea of representation, it is necessary to analyze the historical development of political representation. Such an analysis is instrumental in getting to the core of this Chapter, which examines the impact of this concept on “representative” democracies.

From a historical point of view, individual suffrage marked an important shift, as it gave a great contribution to boost the idea of “political representation”. In fact, “*la pratique du vote*” was able to enhance the expression of the political will of each voter.

Thus, in a historical framework – that of the Liberal age – where individuals struggled to take part in political life, the suffrage has become the focus of the political scene as the basis of the representation of the individual as a “citizen” and then of all citizens as “the people”.

Yet, it is widely known that, during the Liberal age, citizenship was granted on a census basis and that, consequently, a very small part of the population enjoyed the right to vote.

However, it was exactly in this historical period that the unitary idea of “political representation” came into play. From a general perspective, the restricted suffrage implied the risk of generating an atomistic imagine of the “state community” (“*réduite à une somme d’individus*”, Chabot, 2003), whilst the ambition was to create an organic and unitary political entity.

In order to prevent this risk, it was necessary to give a concrete value to the expression of the vote. Specifically, the suffrage needed to be transformed into an effective tool to give shape to a representation of the society as a product of the human determination of the whole society. Notably, this was also possible thanks to the translation/transhumanation approach, inherited from canon law.

From another perspective, the concept of political representation led to overcome the idea of parliaments as mere meetings of “delegates”, in favour of their conception as representative bodies (Frosini, 2018; Ridola, 2011). Hence, parliaments started to be conceived as fully-fledged “mirrors of the nation”.

So, the right to vote produced a radical change in the placement of parliaments: from bodies of society, accredited, but not integrated into the state, they were transformed into “internal bodies”, belonging to the state itself and constituting a substantive part of it, with the function of transforming the will of the state community into law.

The consequence was a different balance between the powers, which ultimately led to the shift from constitutional monarchy into a parliamentary form of government, emblematic of the transformation described above.

2. THE RELATIONSHIP BETWEEN POLITICAL REPRESENTATION AND SOVEREIGNTY

From the perspective of a constitutional law scholar, it is very interesting to examine the relationship between the concept of “political representation” and the topic of “sovereignty”. Therefore, the analysis has to be focused on the form of state.

During the nineteenth century, it was possible to observe an extension of the electorate that produced a weakening of the relationship between representative and represented bodies. Needless to say, these dynamics were exacerbated by the “universal suffrage”.

In some cases, this trend led to an abstract (and ambiguous) ideal of national sovereignty, with the consequence that representation was eradicated from civil society and transformed into something that lacked any element of concreteness.

In this perspective, it is comprehensible that single individuals felt the substantive insignificance of their contribution, as voters, to political life.

Some further events and distortions of mechanisms developed during the Liberal age had the effect of further weakening the consistency of political representation. Reference is, for example, to the frauds triggered by practices as the “gerrymandering” in the design of the electoral constituencies. Another example is the establishment of “indirect electoral systems” for the parliaments’ elections, considered to be able to destroy “one of the greatest advantages of representative government: that is the capacity to establish frequent relations between the different classes of society” (Constant, 1819).

The weakening of the political representation to a “minimal” consistency resulted in the departure from the objective to implement the principle of “popular sovereignty”, made concrete in Jean Jacques Rousseau’s warning (1762) – according to whom «at the moment when a person allows representation of himself, he is no longer free; indeed he no longer exists» – and enshrined in the 1793 French Constitution, providing that “*le peuple souverain est universalité des citoyens français*” (see also, on this topic, Pasquino, 1987).

In this context, other proposals emerged: for example, a return to forms of “direct democracy” was invoked. In this view, direct democracy was considered as the only method able to guarantee the participation of each citizen in the management of public affairs; a more effective decentralization of powers; as well as the reform of traditionally conservative bodies (e.g., “upper chambers”). There were also supporters of the introduction of renewed forms of techno-political representation, believing that the formation of parliamentary bodies on a tendentially egalitarian basis had deprived parliaments of both motivation and skills to make good laws.

Going ahead through history, it can be said that in the first half of the twentieth-century sovereignty and state representation became essential elements of the political system. This is due to the constitutions enacted after the Second World War, often embracing the principle of popular sovereignty.

Today, in a “global world”, the (three) traditional components of the state – people, territory and sovereignty – tend to be perceived as inadequate to fully grasp the complexity of the current situation.

Starting from the idea of “people”, the concept of citizenship is increasingly incapable of reflecting the social texture and, in particular, the impact of ongoing migratory fluxes that are causing a blatant transformation of society. Moving to “territory”, territorial boundaries are inadequate to give an idea of the globalization of the world, of the interconnectedness of state relationships and of multilevel governance. And, as regards sovereignty, domestic governments are increasingly powerless to address the heart of the complicated issues that arise and need to rely on the action of supranational and international bodies.

It goes without saying that the weakness of the State carries with it the weakness of the idea of the “sovereignty of the State” itself.

For its part, also the concept of representation in relation to the state as its center of gravity became affected by at least two dynamics.

On the one side, a centripetal trend could be observed since the local level started to be considered as the closest one to citizens and so the most appropriate to liaise with society. In this perspective, the representation of specific bodies and interests would be rising from the past.

On the other side, also a centrifugal dynamic should be taken into account, which tends to give more power to international and supranational bodies. In an increasingly globalized world, this aspect automatically triggers an erosion of the concept of representation and a crisis of representative mechanisms (Baldassarre, 2004; Bilancia, 2000).

3. THE CHALLENGES TO THE CONCEPT OF REPRESENTATION IN A GLOBALIZED WORLD

In a globalized world, it is particularly difficult to confute those opinions that, some time ago, complained about the electorate's struggle to raise its voice, as well as those considering the elections as mechanisms aimed at expressing some sort of consensus towards a certain division of power, rather than as the tool aimed at "generating" political power itself.

The main reasons for this persistent "incompleteness" will be examined, pointing out that the "procedural" dimension of democracy is constantly hindered by several "obstacles" that prevent an adequate performance of democratic institutions and tools. Not only does the described mechanism affect the ultimate goal of political representation, i.e. the achievement of "merit in impartiality", but it even impacts on its bare essential purpose, i.e. making popular will effective.

Nowadays, the "procedural" dimension of democracy seems to be continuously "mortified", to different extents. Not only do these "obstacles" negatively impact on the objective to achieve "merit in impartiality", but they also decrease the possibility to manifest some popular will, which would be the very "minimum" goal of representation.

The consequence of this situation is the creation of preconceived solutions to the prejudice of the freedom and of the equality of the suffrage (Trucco, 2011).

As Sabino Cassese (2019) has written, after the consecration of the universal suffrage by contemporary constitutions, "political representation" has become "ternary", because the political parties have assumed the role of political "mediators" (especially when it is time to set up electoral lists). Moreover, representatives often do not directly know those whom they are called to represent.

In this context, the only element capable of ensuring accountability would be to root elections in the territory, i.e. in very small constituencies (Russo, 1998). However, this approach would result in re-establishing representation of "bodies of society", which was typical of the past and had considerable drawbacks.

Therefore, in a radical way, this perspective seems to exclude the possibility to affirm the existence of any "political representation" – at least in its proper and full meaning – in the contemporary age.

4. THE IMPACT OF THE ELECTORAL SYSTEM OVER THE PERFORMANCE OF POLITICAL REPRESENTATION

During the nineteenth century (and until a certain degree of social homogeneity of the electoral body was kept) the "plurality" formula was not identified as the main cause of the poor performance of the relationship between the voters and the members of elective bodies.

The first more evident issues emerged with the increase of the interests to be represented in relation to the enlargement of the suffrage. Specifically, to the problems of representativeness (which, as has already been said, the very enlargement of the suffrage had brought to light) the supporters of the "theory of popular sovereignty" reacted by initiating a "struggle for proportional representation".

The birth and diffusion, from the second half of the nineteenth century and then onwards, during the twentieth century, in the European continent, of the proportional formula should be conceived as

a response to the demand for a more equitable representation, coherent with society and its components.

In fact, the proportional representation has been seen as a way to mitigate the excessively selective nature of the majority formula, facilitating, at the same time, the extension of the suffrage, the crossing of the “entry thresholds”, which the plurality system involved and that unrepresented parts of society considered to be “excessively high”.

In particular, the political groups (which would then become the so-called mass political parties) intercepted this social need and promoted it both in society and at the institutional level.

4.1. THE COMPARATIVE SCENARIO

Special attention should be paid to comparative law issues related to the subject at stake. As it is known, it is not possible to identify the “best” electoral system (in absolute terms): rather, it is necessary to consider the issue case by case. This is because the performance of the electoral system depends on its ability to take into consideration all social issues and (more widely) the context in which it must work.

On the contrary, it is possible to identify “the worst electoral system”: i.e. the electoral system in which the result is prefigured regardless of the vote of the electorate (this is the so-called plebiscitary system).

Therefore, to evaluate the “quality” of each electoral system, it is necessary to assess the impact of some other electoral mechanisms on the individual vote.

In this scenario, the role of the suffrage can change between free and unpredictable situations (in which the electorate has decisive playing cards in its hands) and almost symbolic situations (in which the voters have reduced or no power of choice).

More in general, in order to be effective, democratic representation needs to be set up on voting systems that allow the choices of voters to have a similar weight on the final results of the elections within the framework of open and fluid institutional systems.

This is the conception of the vote as a part of the whole “power” of the sovereign body. And each member of society is entitled to be part of this sovereign body.

Technically, the principle of popular sovereignty involves that each voter must have a similar and significant influence over the results of the elections.

More in general, in order to be democratic political representation needs to be based on the principle of popular sovereignty that should not be violated or misinterpreted.

In this regard, the Venice Commission has affirmed that «[w]hile it is a sovereign choice of any democracy to determine its appropriate electoral system, there is the assumption that this latter has to reflect the will of the people. In other words, people have to trust the chosen system and its implementation».

4.2. THE ITALIAN CASE

After this wide overview, it is useful to examine the impact that technicalities aimed at establishing election results have on political representation within the Italian legal system.

This assessment will be carried out considering the electoral procedures in the perspective of the fundamental principles of the Italian constitutional framework.

The Italian Constitution does not say much about the technical aspects of electoral systems and it says nothing about electoral justice. Instead, it focuses on other aspects of electoral legislation.

It is unquestionable that this situation represents an obstacle to the control of the legality of electoral issues by courts and, in particular, by the Constitutional Court.

On this basis, it is possible to observe that in Italy at least three types of “locks” affecting the electoral matter existed (and some of them, actually, still exist, at least to some extent).

These “locks” are the following:

I. The lack of any specific legislation on political parties. As a matter of fact, there is no law concerning political parties and their role before and after the elections. Even after the fall of the Berlin Wall in 1989, some constitutional provisions (specifically, as far as this analysis is concerned, art. 49 of the Italian Constitution) were not concretely implemented. So, there is no legislation aimed at better guaranteeing the democratic nature of political parties. Indeed, since the referendum of 1993, Italy has had a very complex and opaque legislation regarding political party financing, movement and parliamentary groups.

II. The lack of any mechanism of oversight of elections by an impartial body. Art. 66 of the Italian Constitution provides that “[e]ach House must verify the credentials of its members and the causes of ineligibility and incompatibility that may arise at a later stage”. This provision has been broadly interpreted, but no impartial body (meaning other than the Houses of Parliament themselves) was established to carry out this very delicate task.

III. The lack of a preferential voting system. For a long time (from 2005 until 2017), in the political elections, the voting system was strongly blocked. This is a very significant aspect of Italian electoral law, on which also the Constitutional Court focused. As it will be soon clarified, the consequence of this scenario – as highlighted by the Italian Constitutional judges – was in substance a pre-established result of the election, to the detriment of freedom and equality of the individual suffrage.

4.2.1. JUDGMENTS NO. 1/2014 AND NO. 35/2017 OF THE ITALIAN CONSTITUTIONAL COURT

With judgment no. 1/2014, the Constitutional Court ruled that, whilst the contested provisions contained in the electoral law no. 270 of 2005 pursued an objective of constitutional significance, namely that of ensuring stable government for the country and efficient decision-making processes within Parliament, such legislation was incompatible with the requirement of the least possible sacrifice of other interests and values protected by constitutional principles.

In fact, the legislation was considered not proportionate having regard to the objective pursued, on the assumption that it was excessively restrictive of the individual right to vote (guaranteed by art. 3 of the Italian Constitution).

In particular, the situation in which, without exception, no elected member of Parliament was supported by the individual votes cast by voters was considered at the origin of the violation of the freedom of choice of voters when electing their own representatives in Parliament (free voting is enshrined in art. 48 of the Italian Constitution).

Consequently, a sharp violation of the requirement of the representativity of the Assemblies (guaranteed by art. 68 of the Constitution) was detected by the Court.

Due to these voting conditions, according to the Constitutional Court, the system produced a profound alteration of the composition of the democratic representative bodies “at the heart of the system of representative democracy” and that are vested with fundamental functions of “a typical and unique nature”, without following the constitutional amendment procedure set by art. 138 of the Constitution.

More in general, these provisions clashed with the entire architecture on which the whose constitutional order is based, being in contrast with one of the main manifestations of popular sovereignty (guaranteed by art. 1 of the Constitution).

Hence, the Constitutional Court declared the unconstitutionality of Law no. 270 of 2005.

In judgment no. 35/2017, the principles established in the aforementioned decision were consolidated.

In fact, in the 2017 ruling, the Italian Constitutional Court confirmed the limit set by the constitutional requirement that the right to vote and the representative nature of the elected assembly

have not to be excessively compromised by the electoral system (as framed, in the case at hand, by Law no. 52 of 2015).

In the opinion of the Court, also in this case, the challenged provisions would have caused a disproportionate divergence between the will of the citizens, expressed by means of their vote, which constitutes “the principal instrument for expressing popular sovereignty pursuant to Article 1(2) of the Constitution”, on the one hand, and, on the other hand, the composition of one of the two assemblies that make up the national political representative system, or rather, as written in Judgment no. 1 of 2014, “the heart of the system of representative democracy and the parliamentary form of government set out in the Constitution”.

Instead, electoral systems should take into account the specific function and constitutional position of the representative assemblies, as they are essential bodies in any democratic framework.

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