**9. The LEGISLATIVE POWER; THE PRESIDENT OF THE REPUBLIC**

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1. **The President of the Republic**

The President of the Republic is elected by both Chambers of the Parliament jointly. This is in contrast with the rules usually adopted in other legal systems, such as France, where the President is elected by citizens directly.

The Italian Constitution provides for a number of eligibility requirements, which the President has to meet in order to be validly elected. In particular, the President must hold Italian citizenship, he must be at least fifty years old and fully entitled to all civil and political rights (in other words, he must not have been deprived of any such rights, by virtue, for instance, of a judgment issued by a Court).

The term (*i.e*., the period of time through which the President holds his/her charge) is equal to seven years. A thorough Constitutional debate has been in place with respect to the *rationale* of the rule regulating the Presidential term: why is the length of such term different from the one regarding the Parliament (*i.e*., five years)? The answer lies on the need to ensure full independence of the President (as opposed to any other power, including powers and bodies contemplated by the Constitution, such as the Parliament). Since the President may hold his/her charge for seven years (*i.e*., for two years more than the Parliament), the President will be more able to maintain his/her independence from the views expressed (from time to time) by the political majorities within the Parliament.

According to a general rule, the President may be reelected. However, according to the opinion of scholars, reelection should be avoided as much as possible: such conclusion derives from the need to avoid any “blockage” or any situation where Constitutional players are “crystallized”, in contrast with the principle encouraging a continuous shift and turn-around of people holding Constitutional charges.

The office held by the President is generally held as incompatible with any other public charge (including, by way of example, the charge as Mayor, member of the Parliament, member of the Government, etc.). Such rule is based on the need to ensure independence of the President from any other power.

The Presidential charge may be early terminated upon any of the following circumstances:

- death or voluntary resignation;

- loss or forfeiture of any requirement to take office / hold the charge (*e.g*., loss of the Italian citizenship);

- he/she becomes permanently unable to perform his/her duties.

In certain specific (exceptional) situations, the President may be also replaced. These are generally situations where the President is prevented from holding the charge or properly fulfilling his/her duties. Said situations are typically the following:

- the President may be replaced on a temporary basis (according to article 86 of the Constitution), if he/she is temporarily unable to attend his/her duties. According to the general opinion, the President’s absence from the Italian territory is not held to as a “temporary inability” to attend his duties (since this usually ends up with a temporary stay in a foreign country, for a limited period of time, provided that the possibility for the President to carry out his/her functions is not physically interrupted or prevented). However, in case that his/her absence is expected to be in place for a significant period of time (due to the need to attend complicated negotiations with foreign countries’ representatives, or within the scope of top-rank international organizations), temporary suspension of the President may be evaluated.

- on a permanent basis, in case that the President turns out to be permanently unable to fulfill his/her duties.

If either said situation occurs, the President is replaced by the President of the Senate. In case that the President’s inability is permanent, the Parliament must be also promptly convened to appoint a new President. In the meanwhile, however, the President of the Senate will not be entitled to carry out any act whatsoever: in other words, the power afforded to the President of the Senate does not entirely overlap with those which the Constitutions attributes to the President. Irrespective of the President’s inability being temporary or permanent, the President of the Senate will be only entitled to carry out provisional acts, which are strictly necessary to ensure political-Constitutional steadiness (until the President’s temporary inability disappears, or a new President is appointed) and to avoid any interruption in the proceedings in place when the suspension event occurred. In particular, according to the general opinion, the President of the Senate is not entitled to declare general political elections open (such power should only belong to the President in charge).

Looking back to the Constitutional history, there was only one precedent regarding permanent inability of the President. The circumstances evolved as follows:

* the General Secretariat of the President sent a notice to the Prime Minister and the Presidents of the Chambers, regarding the President health conditions;
* the Prime Minister and the Presidents of the Chambers declared that the President of the Senate should hold the charge as President (pursuant to article 86 of the Constitution);
* the President health conditions turned out to be worse than expected: the Parliament was convened to acknowledge the “*permanent inability*” of the President to fulfill his duties;
* the President voluntarily resigned (so, there was ultimately no need for the Parliament to take any action).
1. **Legal and political liabilities of the President**
* *political liability*

According to a general rule, the President may never be held politically liable. In a broad sense, political liability is triggered by “mistaken” actions by entities or bodies, which are subject to criticisms due to political reasons (actions or decisions are held as inappropriate or ineffective in the merits, or as conflicting with the view adopted by the political majority in place). By definition, political liabilities may be only incurred by the competent Minister and by the Prime Minister (*i.e*., by the Government and/or by its members anyway), while they would be never incurred by the President of the Republic. Such conclusion is confirmed by the fact that each Presidential Decree must be signed by the competent Minister (in addition to the President of the Republic): any political liability may be only incurred by the Minister, while the President may never be held liable from a political point of view.

By the way, it is also worth noting that, in recent times (in 2006), article 279 of the Criminal Code was repealed. According to such norm, criminal sanctions could be imposed to anyone raising objections or criticisms against any actions taken by the President of the Republic. According to the ancient article 279 of the Criminal Code, “*chiunque, pubblicamente, fa risalire al Presidente della Repubblica il biasimo o la responsabilità degli atti del Governo è punito con la reclusione fino ad un anno e con la multa da lire duecentomila a due milioni*”.

* *Legal liability*

With regard to acts done by the President while performing his/her duties, the President is not legally liable (even from a criminal law viewpoint, unless for “*high treason*” or “*attempt to attack the Constitution*”).
However, when the President acts as a private individual, he/she may be held liable, but may be only prosecuted after the elapse of his/her term (provided that the applicable statutory limitations have not elapsed yet).

1. **The main powers of the President**

The powers of the President affect several areas and are connected to multiple powers contemplated by the Constitution. In particular, those powers may be regarded as connected to the legislative power, the administrative power and to the Courts’ functions, depending on the case under consideration.

- powers connected to the legislative power

The President declares political elections / referendums open; he/she may appoint five senators in charge for an unlimited period of time (“*senatori a vita*”); he/she may deliver speeches / messages to the Parliament; he/she may request the Parliament to carry out a second-reading of a draft new law (however, in case that the Parliament decides to ignore the suggestion of the President, and submits the same text to the President, the power of the President is held as exhausted and the latter is not entitled to exercise his power to request for a second reading again).

The power to declare the opening of general political elections is particularly relevant, since it materially affects performance of the legislative duties by the Parliament. Such power is typically exercised if either of the following circumstances occur: (i) a conflict between the Government and the Parliament arises and remains uncured. In such scenario, the Parliament typically adopts a resolution highlighting that the relationship of trust between the latter and the Government is no longer in place and, therefore, the Government does not have the Parliament support anymore (“*mozione di sfiducia*”). This should compel the Government to resign (this would trigger, in turn, the President decision to open political elections); (ii) facts or circumstances occur, clearly highlighting that citizens no longer support the Government and the activities brought forward by the political majority. In such case, even in absence of a formal obligation of the Government, the latter should be induced to consider resignation as an option.

In both cases, the President must hear the opinion of the President of each Chamber of the Parliament (reporting to the President on the main facts and circumstances regarding political debate and outstanding issues, and highlighting, if ever, the opportunity to postpone or suspend the decision to launch political elections), even though said opinions are generally not held as legally binding on the President. The need to gather such opinions is based on the opportunity to consider any political and legal implications of the decision to trigger the Parliament renewal.

As a general rule, the President may not declare the opening of elections within the last six months of his/her term.

- powers connected to the administrative power

The President appoints the Prime Minister and, upon suggestion of the latter, each Minister; he/she ratifies international treaties; he/she is formally head of the Army; he/she settles disputes arising from “extraordinary petitions”; in exceptional situations, he/she may revoke Mayors from charge.

- powers connected to the Courts’ function

The President appoints five members of the Constitutional Court; he/she is head of the High Council of Magistrates (CSM); he/she may grant “pardon”, cancelling criminal liabilities and/or criminal sanctions (as ascertained or imposed by virtue of a Court judgment).

1. **The Parliament**

The Parliament is comprised of members who, according to art. 67 of the Constitution, “*represent the Nation*”. In this respect, it should be ascertained whether this imply a power to represent *electors*, and, more generally, the definition of “*representative*” in accordance with the Constitution.

According to the majority opinion, “representative” powers under the Constitution are materially different from those regulated by article 1387 of the Civil Code (“*rappresentanza*”). According to the Civil Code, a subject may grant another with the power to represent the latter *vis-à-vis* a third party. By virtue of representative powers (which usually materialize in a document named “*power of attorney*” or “*PoA*”), the representative acquires the power to act in the name of the person grating the power, and all acts and deeds put in place by the representative will be automatically referred to the person granting the power. For instance:

**C**

**B**

**A**

“A” is willing to enter into an agreement with “C”. Due to several factors (*e.g*., “A”’s inability to reach “C”, who is based in foreign country), “A” grants “B” with the power to represent him in his relationships with “C”. “B”, in turn, will approach “C” and will be entitled to make an agreement with the latter: all effects arising from the agreement between “B” and “C” (as far as “B” is concerned) will be *automatically* referred to “A”. As a matter of fact, the agreement will be only made between “A” and “C” (“B” will never appear as a party to the agreement). “A” is entitled to revoke anytime the powers granted to “B” (as long as the agreement has not been put in place with “C” yet).

As mentioned, under the Constitution, the definition of “*representative*s” is materially different from that contained in the Civil Code. In particular, in the system outlined by the Constitution:

- electors are not entitled to revoke “*representatives*”. Once elected, members of the Parliament may not be revoked by the electors.

- the relationship is set up only between electors and the representatives: there is no “third party” (in the above example, there is no party “C”).

- members of the Parliament are not bound by any mandate or other tie with their electors: under article 67 of the Constitution, members of the Parliament only represent a “theoretical” entity (*i.e*., the “Nation”), not their electors. As a consequence, these would never be entitled to claim any “breach of mandate” by the members of the Parliament. Representatives and Senators are only expected to make voting decisions in the light of their own individual consciousness and political evaluations, which may come into play from time to time.

The Italian Parliament is comprised of two separate Chambers (*i.e*., the House of Representatives and the Senate). Each such Chamber has specific features, which do not entirely overlap with those of the other. In particular, the Constitution sets out the following:

- different age requirements apply to elect and to be elected;

- the number of members is different, depending on the Chamber under consideration;

- the applicable electoral systems are different;

- all members of the House of Representatives are elected, while some members of the Senate are appointed by the President of the Republic or are automatically declared as members of the Senate (*e.g.*, former Presidents of the Republic);

- the Senate should tend to have closer connections with local/territorial communities (as opposed to the House of Representatives). In particular, according to article 57 of the Constitution, *“The Senate is elected on a regional basis. The number of Senators to be elected is three hundred and fifteen […]. No region may have fewer than seven senators; Molise shall have two, Valle d'Aosta one. The allocation of seats among the regions, in accordance with the provisions of the preceding Article, is made in proportion to the population of the regions […]”.*

The recent Constitutional reform (adopted in 2015) envisages to bring along the following changes in the structure of the Parliament (and is likely to have a deep impact on the topics described above):

- a reduction of the overall number of seats;

- the conversion of the Senate into a “*Regional Senate*” / “*Senate based on territorial autonomies*”. However, as mentioned, it is questionable whether the Senate is already “connected” to territorial communities (article 57 of the Constitution, to a certain extent, already provides for such principle), and, therefore, whether the incoming amendment is likely to give rise to a material change;

- functions of each Chamber have been better specified and major overlapping should be avoided (*e.g*., in a nutshell, a Chamber may legislate, the other may have supervisory functions); most “shared” competences between the central State and the Regions will be abolished (this would also have some impact on the procedures regulating performance of the legislative functions);

- the Parliament internal regulations (codifying the procedural norms to be followed by the Parliament, in order to adopt laws, amendments, resolutions, etc.) will be streamlined, in order to ensure a better selection of proposals and projects of law to be discussed within the Parliament (in particular, the Assembly should not be overloaded by bulky amendments or draft laws, which may be submitted with the aim to delay the Parliament work schedule).