PRIVATE AND PUBLIC LAW

INTRODUCTION TO ITALIAN PUBLIC LAW

TOMMASO SENNI

TABLE OF CONTENTS

CHAPTER 1.

FORMS OF STATE. FORMS OF GOVERNMENT

Table of contents	
1	The main features of State
2	The forms of State
3	Centralized and decentralized forms of States
4	Decentralization in the Italian Constitution
5	Unions of States and Confederations
6	The Constitutional elements of States
7	Forms of government

1. THE MAIN FEATURES OF STATE

The essential features of the State are as follows:

1) originality (independency) of its legitimacy/source of power;
2) territoriality: the laws and regulations issued by the State apply (and relate) to the interests of the community established within the boundaries of the territory of the State;
3) preeminence: the State must be supported by an apparatus enabling to enforce laws and regulations and to make them applicable irrespective of the citizens' will;
4) general aims pursued by the State.

2 THE FORMS OF STATE

As mentioned, the State has general features (see above). However, it may have different forms or shapes, depending on the historical context. In particular, depending on the form of State which is considered, the forms of participation by citizens in public administration may be different. Below are summarized some of the main forms of State which appeared during the historical evolution of State.

- FEUDAL STATE -> there is no clear distinction between public and private law (which are still unknown figures, in their technical meaning); the territory is "owned" by the sovereign (and the various feudal entities). The authority holding the sovereign power does not consider public interest as the ground for its own legitimacy and does not feel to be required to take care of the interests of the community. The political power is scattered and fragmented among various local "authorities", which do not necessarily have a connection with one another.
- ABSOLUTISM -> the monarch has absolute power over people and territory, and has monopole over sovereignty. This form of State arose in order to "react" to the fragmentation of powers which took place during feudalism.
- POLICE STATE -> the State exercises repressive control of political, economic and social life, usually by an arbitrary exercise of power by means of the police, rather than by the regular operation of administrative and judicial procedures. On the other hand, the State holds a "paternalistic" behavior and assumes to be under the duty to take care of citizens' individual wealth and welfare.

- MODERN STATE -> at the end of the 18th century, the middle class rises to power. The modern State is based on formal equality and the duty to protect fundamental rights and freedoms. The authority is based on the consent of citizens and said principles are set out in written constitutions or charters.
- SOCIALIST STATE -> developed after world war I, this form of State is based on the Marxist-Leninist doctrine and is based on the State ownership of the means of production. This ends up with a significant limitation of individual ownership rights (and, more generally, of the freedom of trade). Historical examples of such form of State are the People's Republic of China, the Soviet Union and North Korea.
- AUTHORITARIAN STATE -> on the one hand, this form of State attaches great importance to national identity and, on the other hand, it considers the community as politically unable to govern itself: charismatic leaders are then deemed as necessary to represent and guide the political community.
- WELFARE STATE -> world war II marks the transition from the modern State to the welfare State. The latter is based on the importance attached to the action of public authorities, promoting the citizens' well-being through a widespread participation to economic and social activities and in the field of social protection. Unlike the police State, the welfare State tends to solicit the participation and consent by the members of the community. Its primary purpose is to ensure a more equitable distribution of income.

3. CENTRALIZED AND DECENTRALIZED FORMS OF STATE

Although there is no "golden rule", since it depends on historical and political factors, centralised States (*i.e.*, a typical form of State during the nineteenth century and the first decades of the twentieth century), in which the fundamental powers are exercised by organs of the State (as opposed to peripheral entities), tend to evolve into decentralized States, in which pre-existing local authorities are guaranteed and recognized, and, furthermore, a more intense form of decentralisation is implemented, by granting legislative and administrative powers to local or territorial entities in certain fields (on the other hand, the dispute-settlement function still tends to be included within the exclusive competence of the central State). Decentralisation can have several degrees of intensity, from a maximum (federal States) to a minimum (States granting restricted fields of autonomy to local authorities).

It is also important to highlight the following definitions:

- institutional decentralisation: administrative functions are distributed among central and peripheral authorities (*i.e.*, from a public entity to another). Local or territorial entities are only granted with administrative functions as well as with decision-making power on policy areas impacting on the local communities;
- bureaucratic decentralisation: part of the sovereign functions and the related decision-making powers are transferred within the scope of one single entity (*e.g.* from a branch to another branch of the same entity);
- self-government: peripheral authorities are comprised of representatives elected by members of the local communities.

4. DECENTRALIZATION IN THE ITALIAN CONSTITUTION

One the one hand, the Italian Constitution declares and confirms the unity of State (see Article 5), while, on the other, it requires the legislator (*i.e.*, the ensemble of entities and bodies entitled to exercise the legislative power, namely the Parliament, the Government and, to a certain extent, the Regions) not only to recognize

and promote local autonomies (*i.e*. institutional decentralisation), but also to implement, in the context of the public-interest services, an administrative decentralisation (*i.e*., bureaucratic decentralization). Significant obstacles have been raised to the implementation of this provision. In 2001, a new legal system was created to recognize and govern the powers granted to territorial entities (in particular, Regions).

5. UNIONS OF STATES AND CONFEDERATIONS

A plurality of States may create a Union, by giving rise to structures and bodies entitled to exercise functions and powers *vis-à-vis* the members. In such case, States may want to retain part of their sovereign powers, but significant powers may be also afforded to the bodies representing the Union. Such powers may be specifically held as legally binding on member States (in other words, the legal order of each member should not allow for any conflict with decisions made at the Union level).

Typical examples of unions of States are, amongst others, the UNO and the Council of Europe. These are supranational organizations, contemplating a partial limitation of sovereignty of the member States. Such limitations may also entail the direct effect of certain acts issued by the bodies representing the organizations within the domestic legal systems (without the need, for member States, to implement the decisions issued by the supranational bodies). In particular, it is worth mentioning, by way of example, the following provisions of the UNO Charter:

- Art. 41 - *The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations*

- Art. 42 - *Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations*

As far as the European Union is concerned, please note the following. An international organization is commonly defined as "*a body that promotes voluntary cooperation and coordination between or among its members*". There are many types of international organizations, but one way of categorizing them is to distinguish between *intergovernmental organizations* and *supranational organizations*. The European Union is partly an intergovernmental organization and partly a supranational organization. With respect to supranational elements, many aspects of the EU policy involve economic and political integration policy (but also social policy, immigration policy and education): as far as these aspects are concerned, the policies adopted by each member State automatically conforms to the principles enacted at the EU level. On the other hand, with respect to the intergovernmental elements of the EU, all Member States typically co-operate to formulate common foreign policy and security policy: in these areas, Members States retain their authority and autonomy and, dissenting States may choose to pursue its own policy (even in conflict with the line adopted by the majority).

Confederations of States are a particular kind of Union, created by virtue of an international treaty. Most frequently, neighbouring States which retain their sovereignty. The phenomenon giving rise to a confederation may be either "*upstream*" or "*downstream*", depending on the initiative to create the Confederation being taken by the States (getting together and creating the supranational structure) or by the central State (allowing for an increasing decentralization, leading to the creation of independent member States, although belonging to the Confederation: in such case, a unitary State evolves into a Confederation). Typically, States take part in a Confederation in order to better ensure the means for their own military defence and to ensure an appropriate degree of freedom of trade. Confederations usually contemplate common institutions and bodies, the most important of which is the Federal Assembly (comprised of representatives of the various member States) exercising legislative powers within the limits and under the conditions set forth by the treaty.

6. THE CONSTITUTIONAL ELEMENTS OF STATES

States (in order to be recognized as such) must meet three fundamental conditions. They must have the following main elements:

1. TERRITORY -> this is generally held as a piece of land which is recognized as belonging to a community or people, in particular. Territory is a particular type of land that is identified, mapped and organized in a particular way by the government, so that sovereignty can be exercised over it. Territory may be important to establish the application scope of laws and regulations enacted by the State. For example, as far as Italian law is concerned, according to the Italian Banking Act, Italian law regulating banking activities apply to all such activities performed within the Italian territory.
2. PEOPLE -> this relates to the (legal) relationship between the State and the citizens who are resident or domiciled on the territory. The State is fundamentally comprised of a permanent population over which it exercises its unlimited authority. The nature of the State depends upon the quality and quantity of its population.
3. SOVEREIGNTY -> it implies that the State is independent from external interference, as well as can maintain integrity within itself.

1) TERRITORY

The first essential element of States is a territory or land upon which the State exercises its authority. The territory of a State includes the surface of the land, the soil beneath the surface, lakes and rivers within the State borders, waters connected to boundary rivers, air space falling within the surface of the State and the maritime area of the territorial sea. State boundaries can be both natural and artificial, depending on the availability of any natural elements aiding to identify the territorial borders. Borders, however, are mostly connected to historical and political factors.

The Italian Criminal Code and international law confirm the essentiality of the territory as an element of the State. In particular, Article 241 of the Italian Criminal Code includes, among the crimes against the State, the "*use of force against its territorial integrity*". In addition, a principle of international law states that, in case of total or partial military occupation of territory by the enemy, the State still continues to exist (as a legal entity) as long as the war is ongoing. Such principles further confirm that territory is generally held as a fundamental element of States.

In addition, two "figures" are closely linked to the territory: extraterritoriality and immunity.

- Extraterritoriality. On certain conditions, the law of a State may be enforced and applied to acts put in place outside the State territory. Such situations are usually connected, for example, to facts occurring on board of vessels or airplanes (irrespective of the place where they are, at the time when the act is done). In particular, according to article 4, paragraph 2 of the Italian criminal law, Italian vessels, ships and airplanes are always subject to Italian law, irrespective of the place where they are localized, unless they are subject to another jurisdiction, in the light of a particular rule of international law.

- Territorial immunity. On certain conditions, acts put in place on the State territory are exempt from local laws/jurisdiction. Territorial immunity is a general exemption from the local jurisdiction (including the application of criminal law), as usually granted to diplomatic missions. Territorial immunities may be applied to actions or behaviors put in place in specific areas, such as embassies, military bases of foreign countries, or to specific individuals (*e.g.*, offices of the United Nations).

"Colonies" are generally not part of the State territory. Due to historical reasons, in case that the "motherland" loses control (and "sovereign" powers) over colonies, this does not affect the "motherland" territory.

The State's rights over its territory does not fall under the category "*ad rem*" rights (such as ownership rights, as regulated by the Civil Code). *Ad rem* rights assume that the object of the right is something legally separate from the holder. As far as the State territory is concerned, the territory is one of the fundamental elements of State, therefore no distinction may be drawn between the "holder" of the right and its "object".

The territory may also be an essential element for entities other than the (central) State. According to Article 114 of the Italian Constitution, "*the Republic is comprised of Municipalities, Provinces, Metropolitan Cities, Regions […]*". These are also commonly defined as "*territorial entities*": unlike non-territorial entities (such as Chambers of Commerce, government-owned companies, etc.), territory is a fundamental element of such entities, since their functions and authorities may be only exercised within the limits of the relevant territory.

The State may own assets (*e.g.*, pieces of land, immovable assets, real estate units, buildings incorporated to the land, etc.). The Italian Civil Code provides that beaches, bays, rivers, lakes and other public waters must belong to the State and are subject to a special legal regime. The State, in particular, is not entitled to dispose of those assets (by either selling those to private individuals, or creating rights over them).

2) PEOPLE

The people is identified as the community of all those to whom the legal state assigns the status of citizen. From this status derive several legal implications. Generally speaking, certain cultural values and interests lie behind the idea of citizenship. A "people" is held as existing as long as the citizens share associative ties ("*idem sentire de re pubblica*"), *i.e.*, citizens generally feel to be a part of the same community, which is based on common principles, rules and interests. Under Italian law, Article 1 of Law 91/1992 provides that citizenship can be automatically acquired:

a) by birth to an Italian parent, in line with the principle of *jus sanguinis*;
b) by birth in Italy to stateless parents, to unknown parents, or to parents who cannot transmit their nationality to their children: this is in line with the principle of *jus soli*.

The legislation on citizenship also regulates the status of foreigners (*i.e.*, citizens of another State) and stateless persons. Stateless persons are those who do not have the citizenship of any State (*e.g.*, the foreign child adopted by an Italian citizen, the foreign or stateless spouse of an Italian citizen); these are subject to the laws of the State where they are based, in particular as regards the exercise of civil rights.

The law in question also contemplates situations in which citizenship may be denied, lost or waived. As a general rule, pursuant to article 22 of the Italian Constitution, no one may be deprived, for political reasons, of his/her capacity to be subject to rights and obligations, as well as of his/her name and citizenship. On the other hand, any citizen may voluntarily waive his/her citizenship, if the relevant place of residence is fixed abroad. In addition, citizenship may be lost in case that public office is taken in a foreign country (or in an international organization to which Italy does not adhere): in case that the Italian government formally requests a citizen to interrupt his/her office and the latter refuses to give his/her consent, citizenship may be lost.

Conversely, under certain conditions, the President of the Republic may grant the Italian citizenship to foreigners or stateless persons. Persons so acquiring the status of citizens are subject to the laws of the State (in particular, with regard to the right of entry and stay).

The idea of “people” is not necessarily a synonym of “nation”. The idea of "nation" is related to the existence of an *ethnic and social community*, identified by common language, culture, habits, traditions and interests. “Nation” is, therefore, a cultural (rather than legal or Constitution-related) concept, representing a sociological ground of the State. A “multinational State” is a sovereign State which is viewed as comprising two or more nations (*e.g.*, the former USSR is an example of historical multinational states, given that it used to encompass a large group of local communities, which could each identified as a “nation”, due to its specific territorial, social and cultural features).

3) SOVEREIGNTY

This idea of sovereignty may be interpreted in the light of two different meanings. In a first meaning, sovereignty is the element allowing a State to be regarded as original and independent. On the other hand, sovereignty may be also identified as the supremacy of the State legal system over all other “authorities”.

Sovereignty materializes into a series of acts adopted by the State bodies, exercising administrative, legislative and dispute-settlement powers. There is a number of theories about sovereignty, aimed at identifying which subject is actually entitled to exercise and “hold” sovereign powers and to determine its source of legitimacy. Article 1 of the Italian Constitution states that "*sovereignty belongs to the people and is exercised in the manner and within the limits set out in the Constitution*".

The State may also agree to limitations to its sovereign powers as a result of its participation to international organizations (*e.g.*, the EU or UNO). Such limitations, however, must be agreed on a reciprocity basis and provided that said organizations are aimed at “*ensuring peace and justice among Nations*”. As mentioned, organizations may be granted with powers and functions interfering with the State domestic powers (see art. 11 of the Italian Constitution).

7. FORMS OF GOVERNMENT

The functions of the State may be organized and distributed, among the various constitutional bodies, according to different schemes.

- **Parliamentary form of government** -> democratic governance of a State, originally conceived in the United Kingdom in the XVIII century. The body entitled to exercise administrative functions (*i.e.*, in essence, the Government) is formally separated from the Parliament (which is entitled to the legislative power), in accordance with the principle of segregation of powers. The Government, however, derives its legitimacy from its relationship of trust with the Parliament (the administrative and powers are, thus, interconnected with each other).

  The Chief of State is normally separate from the Prime Minister. States which are based on a parliamentary system may be either constitutional monarchies (where a monarch formally holds the charge as the Chief of State, while the head of Government is often also a member of the Parliament: see, for instance, Sweden and Japan), or parliament-based republics, where the President is also appointed as the Chief of State, while the head of the Government (although appointed by the President of the Republic) is de facto endorsed by the Parliament (Ireland, Germany and Italy).
- **Presidential form of government** -> republican system where the head of Government also acts as the Chief of State. Here again, the subject holding administrative power is separate from the body entitled to legislative power (see, for instance, the USA). The head of the administration (*i.e.*, the President) is formally not responsible to the Parliament, which is not entitled to force the latter to resign (however, in limited circumstances, the Constitution may allow the Parliament to compel the President to resignation).
- **Directorial form of government** -> the State is ruled by an administrative body elected by the parliamentary assembly. One of the few countries resorting to such kind of form of government is Switzerland, where directories rule at all levels of administration, federal, cantonal and municipal. The Swiss Federal Council is elected by the Federal Assembly for 4 years (usually the members of the Federal Council cannot be forced by the Federal Assembly to resign) and is comprised of seven members. There is no relationship of trust between the Federal Assembly and the Federal Council: so, even in case that the political approach changes over time (*e.g.*, due to a political majority being overturned), the Federal Council remains in charge for the full period (*i.e.*, 4 years). The Chief of State is appointed among the members of the Federal Council.

2. THE SOURCES OF LAW

Table of contents	
1	The main features of norms
2	"*Sources of production*" and "*sources on production*"
3	Institutional sources and factual sources
4	Direct and indirect sources
5	Summary of the system of sources
6	Other sources of law
7	Interaction among sources of law
8	Deregulation

1. The main features of norms

Before analyzing the contents of any specific legal norm, the main features of norms in general should be first analyzed. First of all, we should ascertain whether legal norms have specific "*addressees*" (and, if so, whether such addressees may be grouped together and belong to specific categories). When we talk about *addressees* we consider the subjects falling under the application scope of a norm, as well as those who may be somewhat affected by the norm or may be requested to apply it.

In broad terms, depending on the specific situation at hand, norms may be "*addressed*" to:

(i) all citizens (*e.g.*, article 24 of the Italian Constitution, regarding fundamental freedoms, with particular reference to the right to sue other subjects before Court); and/or
(ii) some of the members of a group or community (*e.g.*, article 38 of the Italian Constitution, regulating rights attached to disabled or handicapped persons, or persons unable to perform any work activity); and/or
(iii) individuals (*e.g.*, decrees or administrative decisions targeting individual persons); and/or
(iv) bodies, entities, authorities or the like (*e.g.*, article 74 of the Italian Constitution, regulating relationships between the President of the Republic and the Chambers of the Parliament).

Norms may also have no addressee at all (*e.g.*, article 13 of the Italian Constitution, simply highlighting general principle on individual freedoms).

The main features of norms may be described as follows:

1. The norm must be in force and effect ("*positività*")
   The norm must be able to express an interest/value, which is felt as existing ("alive") by the members of the community, or it must set up conditions (procedures, deadlines, competent bodies, etc.) to ensure that the relevant rule is actually applied. By contrast, if the norm is generally unobserved, this may lead to believe that it does not express a real interest/value of the community.
   The norm has to be *effective*, meaning that it must create (binding) legal effects.
   In order to assess whether a legal norm is in force and effect, we should analyse the text of the norm. Any potential conflict between the literal content of the norm and the "actual" content of the rule might be identified: a judge may have to depart from a merely literal interpretation of norm, in order to capture the "genuine" content of the rule (which may have to be interpreted beyond the literal text of the norm).

2. The norm must be enforceable ("*coattività*")
   The norm has to be applied irrespective of the individual's will or intentions. To that end, the legislator usually provides for sanctions or fines, which may be applied in case that anyone acts in breach of the norm.
   Italian law contemplates several examples of norms meeting such requirement. For instance, reference may be made to article 1516 of the Italian Civil Code (regulating the rights of the purchaser in the typical sale and purchase transaction), or to article 624 of the Italian Criminal Code, providing for the sanctions applicable to theft.
   On the other hand, there are also exceptions: in particular, some norms are not "supported" by sanctions, fines or other penalties (reference may be made, for instance, to norms which only set forth the ultimate aim to be pursued, without establishing any sanction or fine, or provide for a general principle to be applied). For example, article 4 of the Italian Constitution (regulating the right to work) does not lay down any specific sanction or fine, in case that it is not "applied" (for example, the Italian Parliament or the Government could be held liable in case that they do not implement article 4 of the Constitution and no "sanction" may be imposed on them on that scenario). Other examples are article 1 of the Italian Constitution and article 769 of the Italian Civil Code (definition of "*donation*" and "*gift*"). This does not mean that norms belonging to the category in question are not "effective": Citizens (or, more generally, addressees of the norms) are anyway requested to conform to the rule (although this is expressed by a general principle or a rule without a specific sanction).

3. The norm must be inherent to social life ("*esteriorità*"). The norm must be inherent to social life (*i.e.*, relationships among individuals or entities), in contrast with rules regarding each private individual (or affecting each individual conscience or behaviour) only – *e.g.*, moral or religious norms.

4. The norm must be general in content, and not linked to specific situations or individuals ("*generalità e astrattezza*").

   Some examples of such principle are article 53 of the Italian Constitution (stating the general duty to contribute to the State expenses), article 575 of the Italian Criminal Code (regulating homicide), article 922 of the Italian Civil Code (containing the legal definition of ownership rights and of the ways to acquire them) and article 18 of the Italian Code of Civil Procedure (regulating the procedure to be followed to identify the competent Court/judge).

   On the other hand, there are also exceptions. In particular, we may come across with the following categories of norm:

   - "special" norms: norms which affect individuals belonging to a specific category of subjects, rather than to the generality of the community members.
   - "exceptional" norms: norms deviating or departing from a rule which is held to be "general" (*e.g.*, the rule providing for the suspension of all delays relating to judicial proceedings from 1 August to 15 September of each year).
   - "*legge-provvedimento*": norms which are addressed to specific individuals and which, therefore, are not truly *general*, or have not a general content. It is generally held that "*leggi provvedimento*" do not fall under the definition of legal norms (which are supposed to be always of a general nature). Such kind of "decisions" may be embedded to administrative orders or in ordinary laws.

For instance, "*espropriazione"* (a compulsory purchase of assets belonging to an individual) may be ordered either *(i)* by operation of law or *(ii)* by means of an administrative decision. When *espropriazione* comes into play, practical implications may arise from the choice of the scheme which is used to purchase the asset at hand. In particular, different regimes concerning challenges are applicable: in case that expropriation is ordered *by an ordinary law*, the latter may be only challenged before the Constitutional Court (the affected person may file a complaint about formal defects or mistakes made by the legislator in the merits); by contrast, should expropriation be included *in an administrative order*, the latter may be challenged before the competent administrative Courts (*Tribunale Amministrativo Regionale*), without the need to file any claim before the Constitutional Court.

2. "*Sources of production*" and "*sources on production*"

Sources of law may be sorted by category, depending on their capacity to create norms. In particular, scholars usually talk about "*sources of production*" when they want to refer to sources creating (or otherwise giving rise to) new norms. We talk about "*sources on production*" to define sources which do not give rise (as such) to new rules, but simply describe *procedures* and methods to create norms (*e.g*., they regulate who is competent to legislate, and by which procedure new norms may be created). In a nutshell, "*sources of production*" provide answers to the question" *what?*", while "*sources on production*" provide answers to the question "*how?*". Examples of "*sources on production*" are the following:

- Article 70 of the Italian Constitution, establishing that both Chambers of the Parliament are entitled to participate to the proceeding creating (ordinary) laws;
- Article 72 of the Italian Constitution, setting out the main rules governing the proceeding to create new laws.

In both cases, we are not dealing with norms which represent "*sources of production*", since they do not directly entail the creation of new norms and only envisage procedural aspects (these are "*sources on production*").

3. "*Institutional*" sources and "*factual*" sources

Scholars usually refer to "*institutional*" sources to describe the process of creating new norms by means of a formal *expression of will* by the competent authorities. In other words, when new norms are created by virtue of a formal decision, intention, act or expression of will by the competent bodies, the relevant source falls under the definition of "*institutional*" sources (*e.g*., a decree issued by the Government). By contrast, new norms may be also created as a result of a factual circumstance, *e.g*. by virtue of custom or other sources other than an authority's act or decision.

Quite surprisingly, norms resulting from the implementation of international treaties into the Italian legal order are usually considered as a "*factual*" source of law (even though this may be regarded as an expression of will by the relevant parties): international treaties derive their legitimacy from outside the scope of the domestic order. From a domestic law standpoint, the existence of an international treaty is regarded as a *factual* circumstance (which should be acknowledged by the domestic authorities entrusted with its implementation into national law).

The above distinction triggers important consequences from a legal point of view, since the Constitutional Court is entitled to review and issue judgements on matters involving "*institutional*" matters (while it is not competent where a "*factual*" source comes into play). As a consequence, subjects intending to claim invalidity of a legal act or claiming that a given source was improperly applied, may bring such claim before the Constitutional Court only if the relevant sources is "*institutional*".

4. Direct and indirect sources

Direct sources encompass sources which form part of the Italian domestic legal order, while indirect sources are those which derive their legitimacy from elements which are outside the scope of the domestic order (*e.g.*, an international convention or treaty which is made applicable at a domestic level by virtue of a domestic order or implementation law).

5. Summary of the system of sources

Under Italian law, the Constitution is not formally mentioned among the sources of law. However, it undoubtedly forms part of the system of sources. The Constitution is ranked above all other sources of law (which, in turn, derive their legitimacy from the Constitution). There could be no conflict between the Constitution and one of the subordinated sources (any such conflict would be settled in favor of the Constitution).

Some sources are regulated by an "external" source: *e.g.*, the internal regulation of the Constitutional Court. This regulates the internal functioning of the Court. Although this is based on article 137, paragraph 2 of the Constitution, it is adopted by an act of the Court itself. So, in a nutshell, the first-level source is adopted by the Court, while the second-level source is the Constitution itself (which, as mentioned, represents an "external" source, which has to supplement the rules contained in the Constitution).

Some sources are not expressly contemplated by the Constitution (*e.g.*, military orders, EU-law sources, by-laws of non-territorial entities). This does not mean that they are not based on the Constitution (or that they do not derive their legitimacy from the Constitution). The latter remains the primary source of legitimacy for all sources of law.

The Constitution does not contemplate custom ("*consuetudine"*) and mechanisms enabling implementation of foreign laws into Italian law. Although Article 10 of the Constitution recognize the "*generally recognized principles of international law*", custom (both at a domestic and international level) is not expressly recognized. However, according to scholars (and based on several decisions of Italian Courts), custom forms part of the Italian system of sources of law.

6. Other sources of law

- "Unclear" sources (sources which are not clearly identifiable among the Italian sources of law):

Regional laws

Referendums repealing existing norms ("*referendum abrogativo*")

Decrees issued by the President of the Republic implementing the by-laws of certain specific Regions

- Examples of regulations relating to the internal functioning of public bodies

Each Chamber of the Parliament

Supreme Council of Magistrates

The Constitutional Court

National Council on Labour and Economy

The President of the Republic

- Custom ("*consuetudine*")

As mentioned, the Italian Constitution contains a list of sources of law. Although custom is not included in such list, it is generally held that custom is a source of law. On the other hand, custom is explicitly mentioned as a source of law in the "*Preliminary provisions on law in general*" (articles 1 and 8), which are embedded to the Civil Code. In essence, custom may be defined as a "factual" source of law.

Custom may be defined as:

- "*contra legem*" if it is in conflict with an existing legal norm;

- "*secundum legem*" if it further confirms (and is essentially in line with) an existing rule of law;

- "*praeter legem*" if it purports to set out a new rule, on a subject matter which is not yet regulated by any norm (or supplementing an existing norm).

The main features of "custom" may be summarized as follows. In order for custom to be held as existing (and as a valid source of law), it must materialize a uniform and constantly repeated behavior, held by the generality of members of the community. In other words, custom is spontaneously created by the members of the community, without the intervention of the public authorities, nor with the adoption of any formal act or regulation. In addition, all members of the community must see such behavior as somewhat compulsory and legally binding, and conforming to an existing principle of law (although it is not embedded in a formal norm): this is commonly known as "*opinio iuris ac necessitatis*". Should people contravene to such customary rules, a reaction of the "community" is expected to arise, since the norm in questions is "felt" as binding and effective.

Customary rules are usually gathered in "registries" (*e.g.*, those held by the local Chambers of Commerce), which, however, do not have any formal authority and do not represent, as such, a source of law. While custom is a source of law, registries are a mere tool to gather and collect customary rules and to make access to such rules easier to interpreters (by definition, custom is a non-written source of law). Therefore, in case that a dispute arises with respect to customary rules (and it is questioned whether a given custom actually exists), registry may be validly claimed as a basis to establish that such rules exist and are legally binding.

Constitutional custom. In specific circumstances, custom may also affect the Constitution (or the way it is interpreted). In such case, however, custom has specific features, which differ from those applicable to "general" custom: constitutional custom involves a limited number of subjects (rather than the generality of the members of the community), since it only involves public bodies/authorities (it may be possibly involve one single subject); the "underlying behavior" may be relevant even though it was repeated a few times; constitutional custom may be also "*contra constitutionem*" (if it gives rise to a rule which is in conflict with the Constitution, or supplements the contents of a rule contained in the Constitution). By way of example, we may refer to the creation of Ministries without power of expenditure or of Vice-President of the Council of Ministers (none of them is contemplated by the Constitution).

- Case law

In broad terms, the Italian legal system only contemplates "codified" sources of law, therefore factual or "self-created" law is generally irrelevant as a source of law (with the exception of custom). However, case-law (although this belongs to "factual" sources of law) is extremely important, since the Courts' decisions represent the actual application of law to practical situations.

In particular, on certain scenarios, norms need to be interpreted and "oriented", in order to make sure that they are applicable to the situation at hand. For instance, article 923 Civil Code regulates possession of abandoned goods: such norm may be only applied if "good", "abandoned" and "possession" are properly defined, identified and interpreted. To that purpose, Courts play their roles in interpreting and applying norms (specifying definitions, concepts and principles lying behind them).

Thus, the activity carried out by Courts essentially relate to interpretation of norms. In particular:

- if more than one norm seems applicable, Courts are in a position to identify the prevailing norm (or source of law). As explained in paragraph 7 below, Courts select the prevailing norm, *e.g*. according to the relevant date of entry into force, or its hierarchical position in the legal order.
- interpretation may be affected by subjective or variable factors, such as political, social or generally recognized cultural views, in a broad sense (these may change from time to time, or depending on the geographical region which comes into play). In addition, interpretation may entail the need to define general concepts, such as "*diligence*", "*public order*", "*social benefit*", etc. The Courts are required to focus their attention on the specific situation submitted to them and, at the same time, to apply (and interpret/specify) the general concepts contemplate by the applicable norms.

In the light of the above, in a technical sense, case law is not a source of law, since Courts are not entitled to *create* new law. However, it may still be regarded as a source of law (in a broad sense), to the extent that we consider said undertaking to define/better specify the general concepts contained in the norms.

The Courts' decisions do not create *binding* precedents (such as in common law systems). Each Court remains free to adopt the solution it retains as appropriate to settle the dispute, irrespective of the conclusions stated in decisions made by other Courts (even in similar cases), and irrespective of the hierarchical position of the Court issuing the prior decision. Pursuant to article 2909 Civil Code, the Court decisions bind all parties, their successor and assigns, as well as any third party (but it does not bind any other subject, including the other Courts, which may deal with similar cases).

By way of exception, pursuant to article 65 of the law regulating the Italian Court system, the Supreme Court plays a special role in "*ensuring unity and uniformity in the application of law*". Although its decisions do not represent legally "*binding precedents*", territorial Courts generally tend to consider (and possibly follow) the trends emerging from the Supreme Court's decisions (although they are not compelled to).

Last, under articles 113 and 114 of the Italian Code of Civil Procedure, the Courts may base their decisions on **"*equità*"** (*i.e*., they may decide the merits of a dispute in the light of a general principle of reasonableness and justice), to the extent that: (a) the parties involved in a dispute so request and the dispute relates to disposable rights (*i.e.*, the dispute does not involve fundamental rights or freedoms of the individual, which are generally held as undisposable rights); (b) the value of the dispute is lower than a threshold established by the law; (c) in the reasonable opinion of the judge, the dispute could be not fairly and reasonably solved by simply applying the available set of norms. If so, the judge may somewhat "create" law, since the

applicable rule may be created by the judge (in the light of said principle of reasonableness and justice) to solve the dispute at hand.

- National labor agreements

According to article 39 of the Constitution, agreements entered into by "registered" Trade Union associations **bind all persons belonging to the relevant category/sector**.

By contrast, individual labor agreements bind the relevant parties only.

National agreements **may not be in contrast** with laws or general regulations (which, in turn, may not regulate matters covered by such agreements in details). **However, in certain matters, the intervention of the legislator is essential** (as stated by the Constitutional Court: *e.g.*, minimum wages).

- The opinion of scholars ("doctrine")

Scholars often provide their contributions to the evolution of law. In particular, such contribution often materializes in comments, remarks, criticisms, expression of expectations, suggestions or hints for the purpose of applying law. All of such comments is commonly known as "doctrine".

From a technical point of view, doctrine may not be regarded as a source of law. However, it may strongly influence the views taken by Courts and by other "players" (such phenomenon may be regarded as an "indirect" application of law).

7. Interaction among sources of law

Sources of law may interact with one another and conflicts might arise among them. Scholars identified the following criteria to solve conflicts:

- Hierarchy: according to the principle of hierarchy, a given source of law takes priority over another, which is subordinated or ranked below the former. So, if a conflict arises between multiple acts, the norms deriving from the "higher" source of law prevails over the other.

- Chronology: if a conflict arises between two acts (one of which entered into force after the other), the one which entered into force first takes priority.

- Segregation of powers: if a conflict arises between two acts regulating the same subject matter, the one which is issued by the "competent" Authority prevails. For instance, if a subject matter falls within the scope of competence of the legislative power, and there is a conflict between an act of the Parliament and a Government regulation, the former may be held as prevailing (such conclusion, however, is subject to a scrutiny of the factual background, on a case-by-case basis, given that the Government is also entitled to exercise legislative powers, to the extent allowed by the Constitution).

8. Deregulation

The analysis on the sources of law should be also contemplate a phenomenon which is commonly known as "deregulation". By virtue of second-level "deregulation" acts, previous norms are repealed, supplemented, replaced, integrated, restated or otherwise amended (possibly, by specifying the relevant date of entry into force). Deregulation acts (regulations) are usually issued by the Government (although they affect acts

adopted by the Parliament). More generally, deregulation may take place by any of the following acts (most of which are regulated by the Law no. 400/1988):

1.- Regulations repealing existing norms. Such regulations are issued by the President of the Republic, upon initiative of the Government, and in consultation with the Council of State (*Consiglio di Stato*). The regulations in discussion may not be adopted within the scope of the Parliament reserved matters. These may repeal ordinary laws adopted by the Parliament, but may not be issued unless the Parliament enacts a "framework law", authorizing the Government to repeal (by virtue of a formal act of the President of the Republic) obsolete norms and to enact new norms.

2.- Regulations setting forth rules regarding the internal organization of single branches of the Government (*Ministeri*). Regulating the Ministries' internal functioning is held as a "reserved matter" of the Government (in other words, the Parliament may not regulate such matters on its own initiative, in conflict with a Government regulation). Such regulations may depart from ordinary laws.

3.- Annual deregulation acts. By 31 January of each year, the Government is usually required to submit a draft law to the Parliament, highlighting norms to be repealed. Such norms must be related to the exercise of central and peripheral administrative powers. To that effect, a formal opinion of the Council of State and of the competent Parliament commissions must be acquired by the Government. The Parliament then votes on the Government proposal.

4.- Regulations implementing EU law into Italian legislation. Implementation of EU law into Italian law may take place by virtue of Government regulations (rather than by Parliament acts).

For the sake of completeness, with respect to the economic activities, the following distinction should be also taken into consideration:

DEREGULATION: as mentioned, public bodies generally (and voluntarily) withdraw from the duty to regulate economic activities, leaving such task to private players. The overall "volume" of acts and regulations issued by public powers is reduced and private players are induced to take the initiative and self-regulate.

PRIVATIZATION: State dismisses its stake in a company, entity or economic activity (which is no longer held as strategic or involved on public-interest policies) in favor of another subject (which is usually a company). The relevant activity, therefore, will be subject to the common rules regulating free market.

DEBUREAUCRATIZATION: public powers reduce the "volume" of formalities and actions to be accomplished by citizens and private players with respect to economic activities.

3 - INTERNATIONAL LAW. THE RELATIONSHIPS BETWEEN THE INTERNATIONAL LEGAL ORDER AND DOMESTIC LEGAL ORDER

Table of contents	
1	Introduction
2	International custom
3	International treaties
4	The role played by Regions in the international legal order
5	The international liability of States

1. INTRODUCTION

Constitutions traditionally include references to foreign affairs and international law. Classic examples are constitutional provisions regulating the State powers in foreign affairs, especially with regard to international treaties. However, in recent decades, constitutional provisions relating to international law and international institutions were significantly redefined. Constitutions usually provide for the binding effect of international law within the domestic legal order and often recognize the principle of supremacy of international law over domestic law. Many Constitutions contain references to international organizations and/or to other supranational forms of association, which are declared as constitutionally legitimate (upon certain conditions being met). More particularly, the Constitutions of several EU Member States refer to (or allow) the transfer of sovereign powers to the European Union or the pooling of sovereignty within the EU. More recently, specific provisions regarding the International Criminal Court (in particular, defining the scope of jurisdiction), have also been included in some Constitutions.

As far as the Italian Constitution is concerned, in respect of the implementation of international law into domestic legislation, article 10, paragraph 1 of the Constitution states that "*the Italian legal system conforms to the generally recognized rules of international law*". Moreover, the Italian Constitution contains provisions on State and regional legislative power, providing that European and international law limit domestic governmental powers: according to article 11 of the Italian Constitution, "*Italy consents, on a reciprocity basis with other States, to limitations to sovereignty for the purpose of ensuring peace and justice among Nations; it promotes international organizations devoted to that purpose*"; in addition, pursuant to art. 117 of the Italian Constitution, "*the legislative power is exercised by the State and the Regions, within the limits set out by the Constitution, the EU law and the international legal order*".

When it comes to the mechanism to adapt domestic law to the international legal order, a voluntary decision of the Italian Authorities to implement international law is needed only in case that *international treaties, conventions or agreements* come into play. By contrast, when international *custom* is at stake, there is no need for any transposition act, since this happens automatically, by virtue of article 10 of the Constitution.

As concerns international treaties, typical transposition proceedings are:

- "***ordinary***" proceedings: under these proceedings, international norms are "reworded" according to Italian law, so that Italian norms "replace" international norms. In other words, the Italian legislator adopts an ordinary law (or other kind of domestic legislation) containing the full text of the international norms.
- "***special***" proceeding: by virtue of these proceedings, an "order" is issued by an Italian Authority (*e.g.*, the Parliament or the Government), declaring the international norm as binding in Italy. The

"order" only refers to the international law source, without rewording the full text of the international norms (such implementation technique is also commonly defined as "incorporation by reference").

In Italy, international law may have a different ranking (within the system of sources of law), depending on the status (and ranking) of the domestic law by which the international treaty is transposed into Italian law ("*legge di esecuzione"*). In particular:

- If the implementing norm is a provision contained in the Constitution, the norm has constitutional ranking: for instance, as mentioned, under article 10 of the Constitution, international custom is automatically applicable in Italy: so, by virtue of a provision contained in the Constitution, custom is held as having constitutional ranking;
- if an international law norm is implemented by virtue of an ordinary law, the ranking of that international norm is equal to that of ordinary laws;
- similarly, international norms will have administrative ranking if they are transposed by virtue of an administrative decision.

2. INTERNATIONAL CUSTOM

International custom is a source of international law.
In order to ascertain whether an international customary rule exists, the following requirements should be met:

(i) repetition: a behavior should be constantly repeated by multiple States, giving rise to a common practice;
(ii) the members of the community should hold such behavior as legally binding, although not confirmed by a written source of law (*opinio juris ac necessitatis*).

As mentioned, article 10.1 of the Constitution states that "*the Italian legal system conforms to the generally recognized rules of international law*". Implementation of international custom in Italian domestic legal system is, thus, automatic and permanent.

International custom prevails over ordinary laws, since it has constitutional ranking. But what if a conflict arises between an international customary rule and the Constitution? In such scenario (which is rather unlikely to happen), Italy would be under an obligation to conform to international custom (and, thus, to amend the Constitution, according to the applicable proceedings). However, it is generally held that the "domestic fundamental principles" (such as the citizens' fundamental freedoms) may not be overturned.

3. INTERNATIONAL TREATIES

Article 87 of the Italian Constitution provides that the President of the Republic ratifies treaties, unless the authorization of the Chambers is required (by virtue of Article 80, in specific cases, transposition of international treaties is reserved to the Parliament). However, ratification of an international treaty is merely a formal act of the President; as a matter of fact, his participation in the conclusion of international treaties requires a specific initiative by the Government.

In contrast with Article 10 of the Constitution, regulating international custom, the Italian Constitution does not provide for any obligation or automatism, to adhere to or implement international treaties.

International treaties may contain either 'self-executing' norms or ‘non self-executing’ norms (to the extent that they may require implementing legislation, so a change in domestic law, to ensure application of the treaties at a domestic level).

Ratification of international treaties may also involve a handing over of sovereignty to an international body. Some treaties establish a committee, which receives reports and monitors the implementation of obligations flowing from the treaty by Member States. Treaties may define the scope of a State's action, and treaties which Italy ratifies may influence the way in which the latter behaves, both internationally and domestically. Implicit, however, in any Italian decision to ratify a treaty is a judgment that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement. Italy also retains the right to withdraw from the treaty if it judges that the latter no longer serves Italy's national and international interests.

4. THE ROLE PLAYED BY REGIONS IN THE INTERNATIONAL LEGAL ORDER

Regions are also entitled to implement international norms. Article 117 of the Constitution states that:

(i) the central State is entitled to issue norms regarding foreign policy and its relationships with the EU.
(ii) Regions, on the other hand, are entitled to issue norms, in cooperation with the central State, regulating the Regions’ relationships with the EU and with the international legal order, including international trade law.

All “implementation orders” are generally issued by the central State: any Regional laws conflicting with such orders may be declared as void and unconstitutional. Regions, instead, are entitled to issue detailed regulations, to ensure that international norms are adequately applied in their respective territories. According to the Constitutional Court, the central State may at any time replace the Regions when the need to ensure compliance with international obligations comes into play.

5. THE INTERNATIONAL LIABILITY OF STATES

The term “international responsibility” covers the legal relationships arising under international law from internationally wrongful acts of a State (or an international organization). The United Nations Commission on International Law generally identifies the general conditions for a State to be considered responsible, and the legal implications flowing from any such liability.

There is an internationally wrongful act of a State when a conduct (consisting of either an action or omission) is attributable to a State under international law and constitutes a breach of an international obligation.

The attribution of a liability to a State is a question of international law. Before a State is held responsible for any action, it is necessary to prove a link of causation between the damage and an act or omission attributable to the State (which is alleged to be in breach of its obligations). The State is responsible for all actions of its officials and bodies, even if the body or official is formally independent from the central State and even if the body or official is acting beyond the scope of its powers and competences. Persons or entities not classified as “*bodies of the State*” may still be liable, when they are otherwise empowered to

exercise governmental powers. Persons or entities not performing public functions may be equally liable, if they acted under the direction or control of the central State.

4 - THE EUROPEAN INTEGRATION PROCESS AND THE EUROPEAN LEGAL ORDER (OVERVIEW)

Table of contents	
1	On which conditions is the European Union entitled to legislate?
2	The monitoring of the principle of subsidiarity

1. ON WHICH CONDITIONS IS THE EU ENTITLED TO LEGISLATE?

Article 5 of the Treaty on the Functioning of European Union defines the share of competences between the European Union and the Member States. The main principles governing the scope of powers granted to the European Union are as follows:

- according to the PRINCIPLE OF CONFERRAL, the Union has only those competences that are conferred upon it by the Treaties. Any policy area which is not explicitly contemplated by the Treaties (as falling under the scope of powers of the EU) remains within the domain of the Member States. More specifically, powers conferred on the Union may be either exclusive (*i.e.*, the Union is the only subject entitled to exercise those powers) or "shared" (*i.e.*, the relevant competences are shared between the Union and Member States).

- according to PRINCIPLE OF SUBSIDIARITY, *in areas regarding "shared" competences*, the Union may take action only if the objectives of the proposed action (*e.g.*, regulating a certain matter or policy area) cannot be sufficiently achieved by the Member States and would be better achieved by the Union. In other words, the principle of subsidiarity is "satisfied" (and the Union is entitled to legislate) if an action at the EU-level may provide some "added value" (as opposed to the action which Member States would be able to take).

  The principle of subsidiarity does not apply to exclusive competences of the Union (as far as those powers are concerned, there is no need to evaluate whether the Member States could take adequate steps to meet their purposes, since, under the Treaties, the Union is the only subject entitled to act).

- by virtue of the PRINCIPLE OF PROPORTIONALITY, the means used by the EU in order to meet the objectives set out by the Treaties cannot go beyond what is necessary to achieve the relevant purpose or goal. In particular, in establishing whether the EU may legislate by virtue of a regulation or a directive, the most appropriate type of legislation will have to be identified, provided that the latter could not exceed what is necessary to meet the purpose set out by the Treaties. Therefore, it the purpose of the EU legislation is only to harmonize the Member States' legislations, a directive will be sufficient (unless specific aspects lead to believe that a direct-effect instrument, such as regulations, is needed).

The *Protocol (No.2) on the application of the principles of subsidiarity and proportionality* lays down three criteria, aimed at establishing when the intervention at the EU-level may be held as "appropriate". In essence, under the Protocol, an answer should be given to each of the following questions:

1) Does the action have transnational aspects that cannot be resolved by Member States?
2) Would national action (or an absence of action) be contrary to the requirements of the Treaty?

3) Does action at EU-level have clear advantages?

The principle of subsidiarity also aims at bringing the EU and its citizens closer to one another, by guaranteeing that action is taken at local level, where it proves to be necessary (however, the principle of subsidiarity does not mean that action must always be taken at the level that is closest to the citizen).

2. THE MONITORING OF THE PRINCIPLE OF SUBSIDIARITY

The Protocol on the principles of subsidiarity and proportionality also puts in place mechanisms to monitor such principles. Under the Protocol, before proposing the adoption of new acts at the European level, the European Commission must arrange consultations, in order to collect opinions from national and local institutions (namely Parliaments) on the proposal at hand, in particular, in order to make sure that the the principle of subsidiarity is complied with.

The Treaty of Lisbon reformed the above Protocol in order to improve and reinforce monitoring of the application of the principle of subsidiarity by national Parliaments. National Parliaments are now entitled to exercise twofold monitoring functions:

- they have a right to object when EU legislation is submitted as a draft (but not yet formally adopted). They can dismiss a legislative proposal before the European Commission if they consider that the principle of subsidiarity has not been duly observed.

  Any national Parliament or any Chamber of a national Parliament may, within eight weeks from the date of transmission of a draft EU act, send an opinion to the Presidents of the European Parliament, of the Council and of the European Commission, explaining why the draft act should be considered as being in breach of the principle of subsidiarity.

  Each national Parliament is entitled to cast two votes. Where such (unfavorable) opinions represent at least one third (1/3) of all votes allocated to national Parliaments, the draft *must* be reviewed by the EU institutions before adoption. After such review, the European Commission or, where appropriate, the Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft act belongs to their respective scope of powers, may decide to maintain, amend or withdraw the act. Any such decision must be supported by specific grounds.

  Furthermore, the proposed act must be also reviewed in case that, under the ordinary legislative procedure, said opinions (highlighting a breach of the principle of subsidiary) represent at least the simple majority of votes attributed to the national Parliaments.

- they may challenge an act before the European Court of Justice if they consider that the principle of subsidiarity has not been observed. Such claim may be formally filed with the European Court of Justice by the relevant Member State Government. Similarly, the Committee of Regions (which is a body created within the framework of the EU legal order) may also challenge an EU act before the European Court of Justice, claiming that it does not comply with the principle of subsidiarity.

5. THE PRINCIPLES OF THE ITALIAN CONSTITUTIONAL ORDER: THE ECONOMIC RELATIONSHIPS

Table of contents	
1	Ownership in general. Private property
2	Public property

1. OWNERSHIP IN GENERAL. PRIVATE PROPERTY

The right of ownership is regulated by both the Constitution and the Civil Code. In broad terms, according to article 42 of the Constitution:

- property may be either public or private. "*Economic goods*" belong to the State, to public entities or to private individuals. Private property is recognized and guaranteed by the law, which determines the ways it is acquired and enjoyed, as well as the relevant limitations, in order to ensure its social functions and to make it accessible to all;

- owned goods may be expropriated, in the situations provided for by the law, for reasons of general interest, provided that appropriate compensation is granted to the owner;

- the legislator is required to regulate (by virtue of ordinary laws) the scope and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance.

In the light of the above, if may be inferred that:

- ordinary laws may not limit or affect individuals' ownership rights, but they may only regulate/limit the ways it is acquired and enjoyed;

- expropriation may not occur to deprive an individual of his/her ownership rights and to grant those to another individual: expropriation may be only aimed at ensuring achievement of public goals (public interest).

As regards the regulation contained in the Civil Code, the following norms should be taken into consideration.

ownership: art. 832 of the Civil Code

The owner has the right to enjoy and dispose of the owned goods fully and exclusively, within the limits and in compliance with the obligations set out by the law.

ownership: art. 834 of the Civil Code

No one may be deprived of ownership rights unless for public interest reasons, provided that: (i) such reasons are ascertained and acknowledged in accordance with the law; and (ii) adequate compensation is paid to the person who is subject to expropriation.

In the light of the above (and of the other applicable provisions on private property), it should be noted that:

- ideally, ownership is regarded as a "tool" to promote / increase social welfare, not as something which is enjoyed by the owner only;

- owned goods should be dynamically "oriented" to production and trade, they should not be just statically held by the owner;

- soil and natural resources should be exploited for production purposes in accordance with the social needs and public interest;

- production should be organized in accordance with the need to harmonize social relationships;

- minor undertakings should be encouraged: special care is taken for agricultural businesses (in particular those managing small pieces of land). Limitations may be imposed to the extension of land owned.

2. PUBLIC PROPERTY

Articles 41 to 47 of the Italian Constitution set out general principles regulating public property. In addition, important rules are also set out by articles 822 and following of the Civil Code. In general terms, depending on each case, public property may be owned by the State, a Region, a Municipality or another public entity. The general category of "public property" encompasses "*beni demaniali*" and "*beni patrimoniali*".

- "*Beni demaniali*" are properties which are held as directly connected to a general or public interest or need of the community (*e.g.*, beaches, rivers, works connected to national security and defense, roads, highways, real estate properties with a national historical or archeological relevance, etc.). Save for a few exceptions, "*beni demaniali*" may not be owned by private individuals. In certain cases (*e.g.*, beaches and rivers), public properties may be only owned by the State (in other words, in such cases, they may be neither owned by private individuals, nor by any public entity other than the State). In general terms, irrespective of the identity of the relevant owner, "*beni demaniali*" may not be disposed of by the relevant owner and may not form the object of any *ad rem* rights in favor of any third parties, unless in accordance with the rules set out by ordinary laws in force.

- "*Beni patrimoniali*" are properties which, by nature, are owned by public entities, but are not directly subjected to a general-interest limitation or constraint (for instance, real estate properties hosting public offices). "*Beni patrimoniali*" may be either "*indisponibili*" (in such case, the relevant owner may not dispose of such properties, nor create any rights over them in favor of third parties) or "*disponibili*" (if no such limitation is in place: in such case, the applicable legal regime tends to overlap with the one applicable to private property).

All of them are generally set to meet a public/general need or interest and may not be diverted from their public usage or destination. As mentioned, in certain cases, public property may not be disposed of ("*beni patrimoniali indisponibili*").

It should be also noted that, under article 9 of the Constitution, *"The Republic promotes development of culture and scientific and technical research. It safeguards the natural landscape and the historical and art heritage of the nation"*. This is an additional source of constraints to which public properties may be subject.

6. THE INDEPENDENT AUTHORITIES

Table of contents	
1	The Independent Authorities: main features
2	Are Independent Authorities legitimate from a constitutional point of view? What is their constitutional coverage?
3	The citizens' right to have access to Authorities' documents and files, and to participate to the proceedings
4	The Independent Authorities and their interaction with Regions
5	Liabilities which may be incurred by the Independent Authorities

1. THE INDEPENDENT AUTHORITIES: THE MAIN FEATURES

There is no specific norm clarifying the identity and common features of Independent Authorities. However, the main features of such Authorities may be somewhat inferred from the scattered pieces of legislation which have been enacted to regulate their activities. The Authorities are not regulated by any specific act (or set of norms), except for the Law no. 59/1997 and the Law no. 205/2000: such laws, however, do not define Independent Authorities as such and only regulate specific procedural aspects. In particular, according to the Law 59/1997, the State is expressly prevented from granting Regions, Municipalities or other peripheral entities with "*supervisory and regulatory powers which are afforded to Independent Authorities by virtue of an ordinary law*".

As mentioned, existing norms do not contain a list or description of the Authorities' general features. As a consequence, in the light of the existing legislation, there is no absolute certainty about the common features and elements distinguishing the Independent Authorities from other public entities or bodies. On the other hand, based on the existing norms and Courts' decision, scholars have attempted at defining the common features of Independent Authorities.

In general terms, Independent Authorities act in specific technical matters and policy areas. Typically, such areas are held to be particularly sensitive, especially when conflicting (public and/or private) interests come into play. Independent Authorities are typically created when there is a need for a neutral and technical "entity", especially in areas in which strong private interests affect social life and wide economic activities. In such situations, highly sophisticated issues usually need to be solved and dealt with, and the degree of technical knowledge and skill which is commonly owned by ordinary officers is held as insufficient to meet the purpose. This is why a higher degree of skill and technical competence (such as that expected from Independent Authorities) is required.

In a broad sense, the "phenomenon" of the Independent Authorities highlights:

(i) a change in the State approach to the market. The State tends to withdraw from direct management of economic activities and to let Independent Authorities to lead the way, even granting those with the power to issue binding regulations and to settle dispute; in other words, the State acknowledges that it has proven to be sometimes unable to face strong private interests and to fulfill its tasks properly, due to the lack, *inter alia*, of adequate skills and technical knowledge;

(ii) the Courts' failure to cause remedy to a confused legislation. In particular, the Courts have sometimes shown their inability to act as genuine third-party "referees", especially when dealing with disputes between strong public and private interests;

(iii) a shift from a "pyramidal" to a "polycentric" model: the classical organization of the State, comprised of the Government (on top of the "administration"), the Parliament and the judicial power, tends to be replaced by a different organizational model, based on multiple elements (including, as mentioned, the Independent Authorities), which do not form part of the typical threefold system of powers.

Independent Authorities are entitled to a high degree of independence (depending on the case at hand) from the Government and other administrative and politically-liable entities. From a theoretical point of view, such independence may be assimilated to that which is granted to Courts, by virtue of article 101 of the Constitution. In other words, Independent Authorities (although these are not expressly contemplated by the Constitution) benefit of almost the same degree of independence which is granted to Courts and to the judicial power in general.

This being said, how should "*independence*" be interpreted? In essence, Independent Authorities are independent from the Government and do not fall within the scope of the principle of political responsibility (please see article 95 of the Constitution: in other words, Independent Authorities are not politically liable for actions done or omitted to be done in accordance with applicable law). However, when it comes to the technical contents of *independence*, there are conflicting opinions. In particular:

(A) according to a restrictive approach, although Independent Authorities must be regarded as *independent*, these should be held liable, in some cases, *vis-à-vis* the public powers. In particular, all Authorities are under an obligation to disclose information regarding all acts and decisions (and the relevant reasons/legal grounds) to the public. If they fail to do so, they may incur legal liabilities *vis-à-vis* the public powers. In addition, the Government may be held liable for "*culpa in eligendo*", in case that the members (or the Chairman) of an Independent Authority (if appointed by the Government) turns out to be inadequate to meet the relevant tasks (according to this view, although the Government does not hold a higher rank in the hierarchical order, it would be entitled to revoke members and the Chairman of an Independent Authority);

(B) the majority of scholars, however, take a different view. Independent Authorities should be regarded as being *absolutely independent* (in analogy with the UK "Independent Commissions"). Authorities are created to tackle abuses of power and overwhelming private interests, therefore their independence should not be affected by any supremacy of State (nor by any power to revoke the Authority members). Authorities should not be regarded as "instrumental entities", since they do not belong to the general "structure" of the State and do not represent a "tool" by which the State may reach its targets: by contrast, Independent Authorities deal with dispute settlement, in view of the composition of conflicting interest (so, they do not represent public powers, as such). In addition, Independent Authorities are not subject to directives or supervision of the State, although it is generally admitted that Authorities are subject to account control by *Corte dei Conti* (this does not entail any form of supervision in the merits).

In the light of the above, in accordance with the view described under paragraph (b), *independence* should be defined as follows: Independent Authorities are not bound by any directive of the Government; the latter may not cancel any decision of the Authorities, nor may it interfere with their powers.

By the way, "*independence*" does not overlap with "*autonomy*", since such latter commonly refers to a relationship between two equal subjects, while, when it comes to Independent Authorities, no relationship is in place between the Authority and the "addressees" of its powers (or with the Government): in order to preserve its ability to perform its duties, Independent Authorities should not create any "relationship" with any other subject (therefore, *independence* is more appropriate than *autonomy* to describe the activity of Independent Authorities).

Moreover, *independence* is not a synonym of *impartiality*: article 9 of the Constitution states that the administration should be impartial, meaning that, in pursuing public interest, it should avoid creating discriminations or causing prejudice to third entities (unless this is necessary in the light of a prevailing public interest). By contrast, *independence* means that the Authorities must not necessarily act in the light of a specific public interest (since, as mentioned, they may settle disputes between conflicting private and public interests) and, therefore, they must be neutral and equidistant from the interests they are dealing with.

Independent Authorities are generally entitled to exercise the following powers:

- powers which are analogous to ordinary administrative functions (*e.g.*, the power to issue administrative decisions and measure on specific situations submitted to them);

- the power to solve disputes and conflicts. Scholars usually refer to the Authorities' technical-discretionary powers, since they are entitled to settle disputes not only in the light of the applicable legislation, but also in the light of a discretionary evaluation of the factors at stake.

  For instance, CONSOB (the Authority dealing with financial market regulation and supervision) is granted with the power to settle disputes (in specific situations, private investors may resort to CONSOB in order to challenge public orders or administrative decisions affecting securities' market regulation). To a certain extent, CONSOB is expressly entitled to evaluate facts and circumstances submitted to it on a discretionary basis. So, in general terms, the intervention of Independent Authorities may turn out to "anticipate" the decision which will be ultimately made by the Courts, since a dispute may be "pre-settled" at the Independent Authority-level, and, then, if needed, solved by the Court.

- The power to enact regulations and second-level norms (to ensure application of "primary" rules, which are typically included in ordinary laws). Such power may be either embedded in general laws (such as the law creating an Independent Authority) or specifically delegated, from time to time, by the Parliament. For instance, CONSOB was delegated by the Parliament to issue second-level regulations implementing the Italian "Consolidated Finance Act" multiple times.

  The power in discussion, however, has often been debated among scholars. Originally, some authors took the view that Independent Authorities should not be held as allowed to issue binding norms, since they would not be politically responsible *vis-à-vis* the Government (which would not be entitled to intervene to suspend or revoke decisions of the Independent Authorities); the latter, in turn, would not be in a position to report to the Parliament on the matters dealt with by the Independent Authorities (since, as mentioned, these would not be politically responsible), and article 95 of the Constitution (requiring the Government to be fully liable *vis-à-vis* the Parliament and to electors in general) would be breached. In other words, a substantial part of the administrative activity would be exempt from the duty to supervise and control, hence from the democratic mechanisms envisaged by the Constitution. The Independent Authorities do not report to (and are not liable *vis-à-vis*) the Government or the Parliament:

according to the view taken by said scholars, should Authorities be granted with the power to issue *binding regulations*, this would give rise to a breach of the Constitution.

This opinion, however, was rejected by the Council of State multiple times. First, in its opinion no. 11603 of 25 February 2005, the Council of State expressly affirmed that ISVAP (the Authority in charge of regulation and supervision of the insurance sector) should be held as entitled to issue regulations. Then, according to the opinion of 6 February 2006, the Council of State further confirmed (although the opinion was only related to the Supervisory Authority on Public Works) that Independent Authorities are entitled to the power in question: the Authorities' powers would be based on the possibility, for citizens and individuals affected by their decisions, to participate to the decision-making powers (and possibly to attack their decisions before Court). In other words, the Authorities' power to issue regulations would be counterbalanced by procedural guarantees for all citizens (which would be somewhat involved in the decisional process, although in a form other than the "traditional" one). Last, the Law no. 262/2005 expressly provides for the power of some Authorities (CONSOB, ISVAP and *Banca d'Italia*) to issue regulations. The law also sets out the procedural norms and guarantees which must be complied with. In particular, Independent Authorities are required to provide a description of the grounds on which each decision is based (this is also aimed at procuring citizens with a tool to supervise and control their activity). Although the same rules are not expressly provided with respect to the other Authorities, it is arguable that all of them are subject to the same legal regime. So, the Independent Authorities must ensure that the individuals concerned or affected by their decisions are in a position to participate to the proceeding and to raise any counter-interest.

- supervisory powers.

- power to impose sanctions and fines.

Independent Authorities do not necessarily have legal personality. For instance, CONSOB, which is held to be one of the most important Authorities within the Italian legal order, was deprived of the legal personality from its creation (in 1974) until 1985. In case that an Independent Authority has no legal personality, as such, it may not hold rights and obligations (which shall be referred to another legal entity, possibly holding such rights and obligations in the name and on behalf of the Authority). However, the overwhelming majority of Independent Authorities in Italy do have legal personality.

Decisions issued by Independent Authorities may be challenged before Administrative Courts (and before the President of the Republic), for breach of law.

Some examples of Independent Authorities are:

- *CONSOB*

- *IVASS (formerly, ISVAP)*

- *Autorità Garante della concorrenza e del mercato*

- *Garante per la tutela dei dati personali*

- *Autorità sulla vigilanza dei lavori pubblici*

- *Consiglio di Stato* and *Corte dei Conti*

- *Difensore civico ("Ombudsman")*

- *Autorità di vigilanza sulle ONLUS*

- *Banca d'Italia*

2. THE CONSTITUTIONAL COVERAGE

As mentioned, although Independent Authorities are entitled to enact binding regulations and to settle disputes, they are not bound to report to the Government and, therefore, are not politically liable. In addition, their ability to solve disputes may turn out to be in conflict with the principles regulating the independence of Courts (which are primarily entrusted with judicial powers. We should then clarify whether Independent Authorities may be legitimate from a constitutional point of view and, if so, in the light of which norm / principle they may be held as legitimate. The main constitutional norms which may be relevant are the following:

- According to Art. 95, each Minister is responsible for acts done within the scope of its competences, while all members of the Council of Ministries are jointly responsible for acts connected to the latter. As regards the activity of Independent Authorities, Ministries could not be held "responsible" for acts done by those, since Ministries have no power to supervise or revoke acts issued by the Independent Authorities.

  According to the view taken by some scholars, article 95 of the Constitution should be held as breached by the provisions regulating powers of Independent Authorities, since these would carry out administrative actions, which would, in turn, be exempt from the appropriate liability regime (which is connected to Ministries). However, article 95 should be only applied to actions which are subordinate (or anyhow conditioned) to an act of the Government: as mentioned, deeds and acts done by Independent Authorities are not subordinate, nor ranked below the acts of the Government (which has no hierarchical supremacy over the Authorities).

- According to Art. 97 of the Constitution, "*Public offices are organized according to the provisions of the law, in order to ensure the proper conduct and impartiality of administration*". One may wonder whether "impartiality" should have the same meaning as "independence" (if so, article 97 of the Constitution would be distorted, since Authorities falling outside the scope of the "Government" would not necessarily be "impartial", although they perform "administrative" duties). In other words, article 97 would be disregarded, by granting "administrative" powers to entities other than the Government, and which are exempt from the guarantees set out by the Constitution (impartiality does not necessarily match with independence: see paragraph 1 above). However, according to the majority of scholars, such "exemption" of Independent Authorities from the scope of article 97 would be counterbalanced by their institutional duty to serve the interests of the community.

- By virtue of Art. 101 of the Constitution, the Courts are granted with the highest degree of independence from the Government and the legislative powers. One may wonder whether Courts are entitled to a sort of "monopoly" of independence, or other entities or bodies (*i.e.*, the Independent Authorities) may be granted with a similar degree of independence. May "independence" be only referred to Courts? Most scholars hold that "independence" may be legitimately referred to

Independent Authorities, without giving rise to any breach of article 101 of the Constitution. In particular, there would be no overlapping between the Independent Authorities and Courts, since, when settling disputes, Authorities intervene to "anticipate" a final ruling of the competent Court, possibly enabling the parties to bring a claim before Court.

In a nutshell, the above norms of the Constitution are not affected by the "phenomenon" of Independent Authorities. Such conclusion, however, is subject to the following conditions being met:

- Any decision made by the Independent Authority should be challenged before Court. In other words, any counter-interested party may anytime sue an Independent Authority to claim invalidity of a decision issued by the latter and, possibly, to request for restoration of damages. Independent Authorities are granted with the power to enact binding regulations, which may, in turn, affect individual positions and rights. Affected subjects should be in a position to react to any illegitimate attack of their own rights. This directly arises from articles 24, 103 and 113 of the Constitution;

- The activity done by Independent Authorities should be always open to inspection and check by any interested party (see paragraph 3 below);

- Should an Independent Authority perform "pure" administrative functions, such as decisions or measures affecting specific situations, or imposing sanctions (rather than dispute settlement or enactment of binding regulations), the full liability regime (pursuant to article 95 of the Constitution) should apply to them. In such cases, the Independent Authorities generally act as public entities (pursuing public interest, which appear as "prevailing" over other conflicting interests).

Last, it is worth noting that, in 2002 the Supreme Court issued a decision on the nature and functions of one of the main Independent Authorities, "*Garante Privacy*". According to such decision:

- There is no "third option" between the legislative power and the Courts' entitlement to solve disputes. Independent Authorities fall under the general category of "administration" and may not be assimilated to the judicial power;

- Independent Authorities are entitled to solve disputes, but they do not represent "new special judges" (otherwise they would be in conflict with the Constitution, according to which no "special judge", other than the "natural" one, may be created);

- The decisions made by Independent Authorities may be challenged anytime before Court (or before the President of the Republic, depending on the factual background). Independent Authorities may be validly sued before Court and are fully entitled to take part in the trial.

3. THE CITIZENS' RIGHT TO HAVE ACCESS TO AUTHORITIES' DOCUMENTS AND FILES, AND TO PARTICIPATE TO THE PROCEEDINGS

As underlined in paragraph 2 above, citizens must be entitled to have access to acts, deeds and files of Independent Authorities. They may also inspect and ascertain the legal basis and factual backgrounds / reasons on which decisions are based; they may also ascertain whether procedural rules were complied with. More specifically, article 23 of Law no. 241/90 expressly refers to "*supervisory and guarantee authorities*" as entities to which substantially all procedural norms apply.

4. THE INDEPENDENT AUTHORITIES AND THEIR INTERACTION WITH REGIONS

Regions may create Independent Authorities, within the scope of their functions. In particular, Regions may set up Authorities within the scope of their exclusive powers, to the extent that such Authorities do not cross over into the central State's powers and functions. The central State and Regions also have shared competences: "regional" Independent Authorities may be also created within those areas, but the central State is also held as entitled to create "central" Authorities, ensuring that appropriate minimum service levels are granted to citizens and the "*economic and legal unity of the State*" is not jeopardized (as required by article 120 of the Constitution). To that purpose, the central State is entitled to create Independent Authorities even within the scope of exclusive powers of the Regions. Of course, the central State has no limitations or constraints when creating Independent Authorities falling within its own exclusive competences.

5. LIABILITIES WHICH MAY BE INCURRED BY THE INDEPENDENT AUTHORITIES

According to the decision no. 500/1999 of the Supreme Court, the Independent Authorities may be held liable for damages *vis-à-vis* individuals, in case that acts or decisions are issued in breach of applicable laws. By contrast, no restoration of damages may be allowed in case that the damages arise from omission / failure to act.

Original approach of the Courts: individuals are not entitled to enforce any rights (neither a "*diritto soggettivo*", nor a "*interesse legittimo*")

2001 decision of the Supreme Court: Consob was held liable for failing to supervise. Individual is entitled to claim restoration of damages suffered as a consequence thereof ("*diritto soggettivo*")

2003 decision of the Supreme Court: confirmed the 2001 decision

2005 decision of the Supreme Court: confirmed the 2001 and 2003 decisions

The latest Supreme Court decisions have been criticized, since:

- the individual claims that a "receivable" has to be paid by Consob. His restoration right, however, does not appear as something analogous to a "receivable". The activity in discussion relates to the use of *Authority (=> interesse legittimo*, rather than *diritto soggettivo)*

- the Court draws a distinction between "**addressees**" of Consob regulations (i.e., the financial intermediaries) and the "**beneficiaries**" of such legislation. Such distinction, however, appears unsatisfactory

- the administrative Court (rather than the ordinary Court) should be competent to solve the dispute

- the decisions in discussion do not clarify to what extent the judge should check or inspect the use of power by the Authority (technical discretion)

The burden of proof must cover the following:

- negligence on the Authority's part;

- damage suffered by the claimant;

- link of causation.

Within the scope of EU law: the European Court of Justice explicitly allowed for restoration of damages claimed against the European Commission (illegitimate antitrust decisions issued against companies).

7. *REFERENDA* AND THE PEOPLE'S LEGISLATIVE POWERS

Table of contents	
1	Foreword
2	Scope of *referenda*
3	Other procedural rules
4	*Referenda* as a legally binding instruments
5	*Referenda* on strategic matters (referendum "*di indirizzo*")
6	Constitutional *referenda*
7	The people's right of initiative

1. Foreword

Referendum is a typical proceeding regulated by the Constitution. It was conceived in order to enable the people to express their views with respect to a draft laws (typically, ordinary laws which are suggested to be repealed). A referendum may be launched in order to either: (i) repeal an existing law or (ii) amend, supplement or change the Constitution. As it will be described in this chapter, further categories of referendum are also contemplated.

The Italian Constitution also provides for an additional possibility to give the floor to electors: this is the so-called "*people's right of initiative*", *i.e.*, the power of electors to submit a project of law to the Parliament.

Referendums are regulated by both the Constitution and by scattered pieces of legislation (ordinary laws adopted by the Parliament). In particular, according to art. 75 of the Constitution, "*a referendum is not admissible in respect of tax, budget, amnesty and pardon, as well as on the authorization or ratification of international treaties. All citizens eligible to vote for the House of Representatives have the right to participate to referenda. The referendum is approved if the majority of voting rights have voted and the majority of votes validly cast have been reached. The law shall regulate referendums in detail"*.

In addition, referendums are regulated by the Law of 25 May 1970, no. 352, setting out the main procedural norms which have to be followed in order to launch a new referendum. According to the applicable rules, referendum promoters must fulfill the following requirements:

- at least 500,000 citizens / 5 members of a Regional Parliament (*Consigli Regionali*) must promote the referendum;
- the referendum must be formally opened by a Decree of the President of the Republic
- the referendum is aimed at repealing a law or an act assimilated to ordinary laws (*e.g.*, a Legislative Decree). No referendum may be proposed with respect to an act other than an ordinary law (or an assimilated act).

2. Scope of referendums

As mentioned, there is a number of items (or matters) in which a referendum is constitutionally prohibited. These are: *tax, budget, amnesty and pardon, as well as on the authorization or ratification of international treaties*. It should be ascertained whether such list is exhaustive, or additional items/matters must be also included, although article 75 of the Constitution does not expressly refer to them. According to the common opinion, the list contained in article 75 of the Constitution does not include all matters in which a referendum is prohibited: the following additional matters should be also held as falling outside the scope of referendums (and, thus, prohibited):

- Laws amending the Constitution
- Constitutional laws
- Law-decrees
- Laws delegating the Government to act
- Laws by which the Parliament approves the Regions' By-laws
- Planning laws
- Laws "implementing" the Constitution
- Laws impacting on fundamental freedoms
- "Framework-laws" adopted by the Parliament (joint competences with Regions, pursuant to Art. 117 of the Constitution).

In addition, in light of specific decisions of the Constitutional Court, a request to set up a referendum should be rejected if it envisages an intervention in the following matters:

- items having constitutional coverage
- laws which are "bound" by the Constitution (which could not be otherwise implemented)
- unclear, confused, cryptic, illogical, contradictory or inconsistent proposals
- "miscellaneous" proposals.

3. Other procedural rules

The applicable legislation provides for the following procedural rules (please consider, however, that the recent constitutional reform will impact on the current legal framework). As regards time schedule, no petition for referendum may be filed during the year before the expiry of the Parliamentary term, or during the six month-period following the formal start of the elections ("*convocazione dei comizi elettorali*"). According to the general opinion, such rule was set out in order to avoid any overlapping between referendums and the general political elections (given that any such overlapping may potentially create distortions on the Parliament renewal; people should be called to express their views on separate occasions, depending on the decision to be made: renewal of the Parliament or repealing existing legislation).

According to certain scholars, the above rules lead to significant limitations to the right to promote a referendum, and should justify proposals aimed at cancelling (or mitigating) such limitations, in order to grant people with wider possibilities to express their views and impact on the legislative process (without the intermediation of the Parliament).

Further, petitions for referendum must be filed with the Supreme Court (*Corte di Cassazione*) between 1 January and 30 September of any year, but no later than 3 months of the date when the sheets (containing the signatures supporting the referendum) were sealed and certified by the competent officer.

The Supreme Court officers, in turn, check that all formal and procedural requirements are met. Promoters may be requested to intervene and provide clarifications or more detailed information on the proposed referendum; irrespective of a specific request by the Supreme Court, promoters may voluntary file deeds or papers supplementing the petition. The Court fixes the "tile" of the referendum (the original suggestion by the promoters might be disregarded or changed, to the extent that the Supreme Court deems that the latter is not appropriate to ensure a clear display of the proposal to citizens).

As mentioned, the referendum is opened by a Decree of the President of the Republic, upon resolution passed by the Government. The referendum date must be a Sunday between 15 April and 15 June of any year.

If the referendum is successful (*i.e.*, the majority of citizens vote in favor), the law in question is formally repealed by virtue of a Decree issued by the President of the Republic. In other words, the law is not *automatically* repealed, as a consequence of the referendum being approved: a subsequent deed (a Presidential Decree) needs to be adopted. This confirms that the referendum must be held as one of the sources of law.

The Decree of the President of the Republic enters into force the day after publication on the Official Gazette. However, the President *may postpone* the effective date (but no later than 60 days of publication of the Decree on the Official Gazette).

On the other hand, if the referendum is unsuccessful, no further petition may be filed on the same subject during the following five years.

4. Referendum as a legally binding instrument

In case that a referendum is launched, unusual scenarios might take place. In particular:

(i) the law which forms the object of the referendum may be voluntarily repealed by the Parliament (or as a consequence of a judgment of the Constitutional Court) *before* the voting date fixed by the referendum promoters/the Supreme Court (so before the referendum actually takes place); or

(ii) even in case that a referendum turns out to be successful (*i.e.*, the majority votes in favor), as a matter of fact, the Parliament ignores or disregards (in whole or in part) the outcomes of the referendum and adopts laws in conflict with the latter.

In the situation under (i), based on the applicable law, it is unclear whether the referendum should take place anyway, regardless of the fact that it could be useless (since the ultimate aim of the referendum has already been achieved). According to the majority of scholars, the referendum proceeding should be stopped (*inter*

alia, costs, expenses and other burdens arising from the referendum could be easily avoided, since these would no longer be justified by the need for the referendum to take place).

With respect to the situation under (ii), it should be ascertained whether the referendum is actually binding on the legislative bodies (*i.e.*, the Parliament, the Government and the Regions). According to the general view, if the Parliament ignores the outcomes of a referendum (typically, by approving laws in conflict with the referendum outcomes), a conflict between sources of law arises. As clarified in Chapter 2, such conflict should be solved according to the principle of hierarchy and, therefore, the source holding a higher raking should prevail over the other. In the Italian system of sources, the laws of the Parliament hold a higher position (as opposed to referendums): as a first conclusion, therefore, referendums may be overturned by the Parliament, which could disregard the outcomes of consultations and adopt acts in conflict with those. However, conflicts may not be fixed by just resorting to the principle of hierarchy. Other principles may also come into play (*e.g.,* fundamental freedoms or special rights protected by the Constitution: in case that a conflict arises between a referendum "linked" to Constitutional freedoms/rights and an ordinary law, a petition may be submitted to the Constitutional Court: the latter may be requested to issue a judgment declaring that the law of the Parliament is invalid and must not prevail over the referendum).

5. Referendum on strategic matters (referendum "*di indirizzo*")

The Constitutional Law no. 2/1989, promoting a referendum on the approach to be adopted with respect to the EC's evolution towards the Union: "*Ritenete voi che si debba procedere alla trasformazione delle Comunità europee in una effettiva Unione, dotata di un Governo responsabile di fronte al Parlamento, affidando allo stesso Parlamento europeo il mandato di redigere un progetto di Costituzione europea da sottoporre direttamente alla ratifica degli organi competenti degli Stati membri della Comunità?*".

Such referendums are typically launched if the people's opinion is requested on political or general strategic issues (irrespective of any specific law to be repealed).

It is generally held that the above does not create a new kind (or "category") of referendum (in addition to the referendum repealing existing laws and Constitutional referendums).

In general terms, to date, referendums on strategic matters are generally held as deprived of any binding effect. In other words, they are not binding on the political (legislative) bodies. In the above example, the referendum (in which, by the way, the overwhelming majority of citizens voted in favor), no legally binding effect could be envisaged, since, otherwise, this would have triggered a paradoxical consequence: the Italian representatives within the EU Parliament would have been under an *obligation* to procure a shift in the structure of the European Communities into a "Union" (such goal could not be achieved by the Italian members of the EU Parliament, since the evolution of the EU is clearly a historical phenomenon, which does not simply rely on the individuals' will, but, rather, depends on more complex factors, which are often not connected to the individuals' political choices).

6. The Constitutional referendum

Once both Chambers of the Parliament approved (twice) a law amending the Constitution, within 3 months of the relevant publication date, the following subjects may promote a referendum (to confirm or reject the

law):

- 500,000 citizens
- 1/5 of members of any Chamber of the Parliament
- 5 Regional Parliaments (*Consigli Regionali*)

However, if, upon the second reading, a 2/3 majority of member of the Parliament approves the law, there is no room for referendum.

7. The people's right of initiative

As mentioned, in addition to referendums, the Italian Constitution also provides for an additional possibility to leave the floor to electors: this is the so-called "*people's right of initiative*", *i.e.*, the power of electors to submit a project of law to the Parliament. If the following requirements are met, a project of law may be submitted to the Parliament (which, however, is not legally bound to transpose the people's suggestion into a law, nor even to take this in consideration):

- 50,000 citizens must promote the draft new law
- a project of law (in its technical sense) must be drafted, article by article
- a report must be attached to the draft law, highlighting the relevant aims and explaining its contents
- the project of law must be filed with the President of either Chamber of the Parliament.

8. THE LEGISLATIVE POWER; THE PRESIDENT OF THE REPUBLIC

Table of contents	
1	The President of the Republic
2	Legal and political liabilities of the President
3	The main powers of the President
4	The Parliament

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 be an Italian citizen, he must be at least fifty years old and 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 on 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-over of people holding Constitutional charges.

The office held by the President is generally held as incompatible with any other public charge (including, for instance, 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 the other powers.

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 functions of the President are not physically interrupted or prevented). However, in case that his/her absence is expected to last 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 the same powers afforded to the President: the powers of the President of the Senate do 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 ends, or a new President is appointed) and to avoid any interruption in the proceedings in place when the suspension happens. 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).

2. 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[1].

- *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).

3. 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 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

[1] 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*".

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.

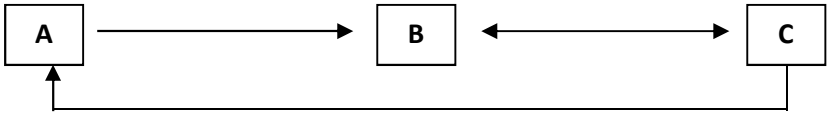
- powers connected to the Courts' function

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).

4. 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 opinion of the majority of scholars, "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:



"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 not act 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 "*representatives*" 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 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 […]"*.

A recent reform proposal (adopted by the Parliament in 2015) envisaged 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).

Such proposal, however, has been rejected by the referendum held in December 2016.

9. THE GOVERNMENT AND THE PUBLIC ADMINISTRATION: OVERVIEW OF THE ITALIAN ADMINISTRATIVE BODIES

Table of contents	
1	The Government
2	The main Constitutional provisions affecting the activity of the Government and the "Administration"
3	Liability of civil servants and of the Administration
4	The decision-making processes. The power to enact norms and regulations

1. The Government

According to the Constitution, the Government is comprised of the following:

- the Council of Ministers, which includes its President (*i.e.*, the Prime Minister) and the single Ministers. Ministers may be, in turn, with or without expenditure power;
- the Sub-Secretaries of State;
- the Vice-Ministers;
- the Deputy-Ministers (*sottosegretari*);
- the Vice-President (which is not expressly contemplated by the Constitution, but it has been often set up in accordance with a customary rule).

The Government is generally vested with the following powers:

- Decision-making powers. The Government is entitled to take the initiative to submit draft laws to the Parliament; additional decision-making powers may be granted to the Government by an act of the Parliament (in particular, within the typical scheme of "Legislative Decrees", the Parliament delegates the Government to draft a set of norms, within the limits of the criteria and general principles set out in the act of delegation); further decision-making powers are attributed to the Government in the ordinary exercise of administrative powers (*i.e.*, ensuring that laws are applied); the Government is also generally entitled to issue regulations. Please also refer to paragraph 4 below, regarding the Government decision-making powers and its power to legislate (on delegation of the Parliament).
- Power to issue optional/mandatory/binding opinions. Depending on the situation at hand, a subject (*e.g.*, the Parliament, the President of the Republic, a public entity, etc.) may be required to obtain a governmental opinion. The nature (and legal implications) of the opinion may change depending on the relevant factual background: in certain cases, the legislation mentions "*optional opinions*", while sometimes it refers to "*mandatory*" or "*binding*" opinions. Optional opinions are those which are not necessarily required to be obtained: asking for an optional opinion is left to the discretion of the addressee. When a "mandatory" opinion is to be issued, a

request for opinion must be filed, but the addressee is not bound to comply with the opinion (in other words, the addressee has to request the opinion, but, once the opinion is issued, he/she may disregard its contents and behave as he/she deems appropriate in the relevant context). When a "binding" opinion is required, the addressee must ask for an opinion and, once the latter is issued, he/she must comply with the suggestions so released (the actual contents of the opinion are legally binding on the addressee).

- Duty to supervise and control bodies falling under the definition of "*public administration*".

- Power to define the general views of the Administration.

The Prime Minister

Art. 95 of the Constitution specifically envisages the status of the Prime Minister. In particular, such provision sets out the following: "*The Prime Minister directs the general policy of the Government and is responsible for it. He makes sure that the political and administrative policies are uniform and homogeneous, and promotes and coordinates the activity of the Ministers"*.

The Prime Minister is also entitled to the following powers (and is subject to the following duties/obligations):

- power to address directives to the Ministries;
- duty to coordinate and harmonize the Ministries' activity;
- power to suspend any act of the Ministries and to submit it to the Council of Ministries, for a more thorough evaluation.

On the contrary, the Prime Minister is not entitled to:

- define the Government general views (such power belongs to the Council of Ministries);
- revoke the Ministries (such power formally belongs to the President of the Republic, upon suggestion of the Prime Minister).

The Government (and, more specifically, the Prime Minister) is typically supported by the following additional bodies (which are not necessarily contemplated by the governmental structure: the initiative to set up the bodies below relies on a specific decision of the Government, from time to time):

- the "Cabinet";

- the "Agencies";

- the Inter-Ministerial Committees (*e.g.*, the so-called "C.I.P.E.");

- the "General Secretariat" / Departments;

- extraordinary Commissioners;

- the Committee of Ministers.

The "Cabinet"

The "Cabinet" is an ancillary body supporting the Prime Minister in specific policy areas, in connection with the Constitutional duties attached to the latter (see article 95 of the Constitution). It is usually comprised of Ministers identified by the Prime Minister (in other words, the Cabinet may be defined as a group of Ministers: some members of the Government will be requested to form part of the Cabinet, while other Ministers will not). As a consequence, considering that certain Ministers will be also members of the Cabinet, those may play a different (and more significant) role within the Government. Such situation may trigger some inequality among Ministers: those excluded from the Cabinet may be in a position to play a weaker role within the Government.

In certain situations, the Cabinet might also give rise to a sort of "directorate", where key decisions are made. Although decisions should be made by the Government (since the Constitution and the applicable legislation so require), these would be de facto *made by the Cabinet: this could also end up with a lack of transparency (the ultimate decisions would be made by a restricted group of Ministers and then formally "ratified" by the Government: this could be in contrast with the Constitution and with the need to ensure full transparency of the Government activity: in particular, if key decisions are ultimately made by the Cabinet, who will bear the relevant liabilities? It is unclear whether these would be borne by the Government – since the decisions would be formally made by the latter – or by the Ministers forming part of the Cabinet – since, as a matter of fact, the decisions in question would be made at a Cabinet level).*

In addition to the Cabinet, the Prime Minister may be also supported by:

- "Agencies", which may be set up and entrusted to gather information on specific technical matters and report to the Prime Minister, in order to enable the latter to make more effective strategies and decisions. Agencies may be also entrusted with a limited decision-making power within the scope of the relevant activity area;
- the General Secretariat;
- administrative departments;
- extraordinary Commissioners, who may be entrusted to take care of sensitive and urgent situations (*e.g.*, managing companies controlled by the State, in case that the relevant business activity – which is usually connected to the care of a public interest – is not properly conducted: in such situation, a Commissioner may be appointed to inspect and possibly replace the management in charge);
- one or several Vice-President(s), assisting and replacing the Prime Minister, as the situation may require.

2. The main Constitutional provisions affecting the activity of the Government and of the Administration

The Constitution dedicates multiple provisions to the activity of the Government and of the Administration as a whole. Such provisions are also aimed at providing citizens with possible means of protection against any possible abuse by the Administration.

Art. 95 Constitution

The Prime Minister's office is regulated by a law of the Parliament, which also determines the number, attributions and organization of the Ministers.

Art. 97 Constitution

Public offices are organized according to the provisions of the law, in order to ensure the proper conduct and impartiality of the Administration.

Art. 97 Constitution

Civil servants and the Administration personnel are hired by means of competitive examinations, save for the situations envisaged by the law.

Art. 51 Constitution

All citizens of either sex are eligible to take office as civil servants, according to the conditions established by a law of the Parliament.

Art. 98 Constitution

The law may set out limitations to the right to be enrolled with political parties, for members of the Courts, military personnel in office, civil servants, police agents and diplomatic representatives.

Citizens are, then, protected against any possible influence deriving from the overlapping between administration and political engagement: should civil servants be entirely free to undertake a political engagement (*e.g.*, by getting enrolled with a political party), the action taken by the administration could be somewhat influenced by the political views "supported" by such members of the Administration, and this could negatively affect the need to ensure impartiality and proper conduct of administrative functions.

Art. 23 Constitution

Citizens may not be compelled to perform any action unless within the scope of a law of the Parliament.

Art. 13 (and following) Constitution

The citizens' fundamental freedoms may be limited only in cases and manners provided for by law.

Art. 5 Constitution

The Republic conforms to the principles of "autonomy and decentralization".

The above principles imply, *inter alia*, that citizens are entitled to have access to the Administration internal documents and files, in order to inspect and double-check whether the decisions impacting on their individual situations have been properly made (in accordance with the applicable procedural rules). In the light of the information gathered during the inspection, citizens may opt to sue the Administration before Court, and claim invalidity of a decision made by a public entity, and possibly request for damages to be restored. Public entitles are generally not entitled to deny the citizen's right to inspect their internal document and files.

Art. 52 Constitution

The rules regulating military personnel conform to the general principle of democracy.

Notwithstanding the Constitution provides for the principle of democracy, in certain situations, some conflict may arise. For instance, it is generally held that persons belonging to the military personnel may not freely exercise the right to strike, to set up trade-unions or labor associations, to express their opinions and political views, and to make political propaganda (unless such freedom is exercised outside the scope of their functions and workplace). In such situations, the general principle stated by the Constitution (*i.e.*, the "principle of democracy") is counterbalanced by other (conflicting) interest and principles (such as the principle of military hierarchy and the set of rules regulating the activity of military forces).

3. Liability of civil servants and of the Administration

As a general principle, the State / public entities may be liable for procuring unjust damages (according to article 2043 of the Italian Civil Code). In addition, the State / public entity may be also held *jointly* liable *with the civil servant* (who acted in the relevant circumstances) to restore damages caused to citizens (pursuant to article 1292 of the Italian Civil Code). In addition, the Constitution sets out the following general principles.

Art. 28 Constitution

Civil servants and State employees are directly liable, according to criminal, civil and administrative laws, for breach of the citizens' rights. Civil liabilities may be incurred by both the State and other public entities.

Art. 113 Constitution

Citizens are always entitled to challenge acts of the Administration in breach of the citizens' rights ("diritti soggettivi" or "interessi legittimi") before the ordinary or administrative Courts. Such right may not be excluded or limited for particular categories of acts. The law shall determine which Court is competent to cancel acts of the Administration upon the conditions and with the consequences provided for by a law of the Parliament.

According to a general rule, citizens are not entitled to challenge *political* acts or decisions made by public entities (*e.g.*, the appointment of Ministers, if those are held as inadequate or inappropriate to hold the charge; the decision to open political elections; the order to execute/ratify an international treaty; any other political decision, to the extent that it may be subject to criticisms in the merits). In other words, no one is entitled to sue a public entity (or a body contemplated by the Constitution, such as the Parliament), to claim restoration for damages suffered as a consequence of a *political decision* being (allegedly) inappropriate or ineffective, or mistaken in the merits: this pertains to a subjective evaluation of the underlying facts, therefore political decisions may not be challenged just because the claimant purely disagrees on the (political) evaluations made of the merits.

When it comes to the Government, some liability may be attributed to Ministers, either jointly or on an individual basis, depending on the relevant circumstances. According to article 95 of the Constitution, a Ministry may be held individually liable for acts (or omissions) falling within the scope of his/her branch of Administration (*i.e.*, the branch falling under his/her competence and responsibility), while all Ministers are jointly liable for acts falling under the scope of competences of the Council of Ministers (as a whole).

4. The decision-making processes. The power to enact norms and regulations

The Government may issue acts belonging to any of the following categories: (i) Law Decrees (which must be in accordance with art. 77, paragraph 2, Constitution); (ii) Legislative Decrees (see art. 77, paragraph 1, Constitution); (ii) Regulations. We will analyze below the main features of such acts, as well as the main conditions which must be met in order to ensure that they are validly issued.

Law Decrees

Law Decrees are a special kind of act, which is drafted and submitted by the Government to the Parliament. The latter, in turn, is requested to convert that into ordinary law. In order words, the initiative is taken by the Government, which submits a complete text to the Parliament, for conversion. The main conditions which must be met, regarding Law Decrees, are the following:

- an "*extraordinary situation of urgency and need*" must be in place (and it must remain in place as long as the proceeding leading to conversion of the Law Decree into an ordinary law is under way).

  Due to historical reasons, the Government has been often using Law Decree even in absence of an "*extraordinary situation of urgency and need*". The Parliament did not always raise objections to such practice (which is not in line with the conditions set out by the Constitution). If ever, even in case that the Parliament does not object to an illegitimate use of Law Decrees by the Government, the Constitutional Court may issue a judgment declaring the act of the Government invalid.

- the Decree must be submitted to the Parliament on the same date when it is enacted. In other words, the Government is not entitled to postpone the filing of the Law Decree with the Parliament, which must receive that as soon as it is approved by the Council of Ministers.

- the Law Decree is issued by the Government "*under its responsibility*": the Government (or any of the Ministers, as applicable) will bear all legal and/or political liability in connection with the Law Decree. Approval by the Parliament (and counter-signature by the President of the Republic) will not entail any relief from liability in favor of the Government/Ministers.

- the draft Law Decree must be converted into law by sixty days of the relevant publication date. If it is not, the whole proceeding must be re-started from scratch.

- each Chamber of the Parliament has a given deadline (usually five or six days) to obtain an opinion of the competent Parliamentary Commission; then, the Law Decree is voted by the Assembly.

- a same Law Decree must not be submitted by the Government twice. If a Law Decree was rejected, or was not converted into law by the Parliament (within the applicable deadline), the Government is not entitled to draft a new Law Decree with substantially the same contents or proposals.

- as mentioned, not only the Parliament, but also the Constitutional Court is competent to assess whether the condition regarding the "*extraordinary situation of urgency and need"* is met. However, the Constitutional Court generally focuses its controls over legal and technical aspects (and intervenes upon request of another subject), while the Parliament essentially evaluates the

general political conditions in the merits (and its checks are irrespective of a request by any other subject).

Without prejudice to the rules described above, no Law Decree may be enacted in the following sectors (which are held to be particularly sensitive: therefore, the Parliament is felt as the only body competent to resolve upon those):

. regulation of the legal relationships arising from a draft Law Decree which was not converted into law by the Parliament;

. restoration of any provision which was declared unconstitutional by the Constitutional Court;

. regulation of the matters covered by article 72, paragraph 4 of the Constitution (*e.g.*, matters impacting on the Constitution; authorization to ratify international treaties; approval of annual balance sheets; etc.).

It is generally held that the Parliament may ignore a draft Law Decree submitted by the Government (in other words, the Parliament is under no obligation to consider or to approve a Law Decree submitted by the Government). Essentially, the competence to exercise legislative powers lies with the Parliament (even though, as mentioned, the Government may take part in the process leading to the creation of new law).

By the way, if the Parliament rejects the draft Law Decree (which, then, will not enter into force and will not become legally binding), such Law Decree might have already triggered some (irreversible) effects (for instance, citizens might have already conformed to the rules contained in the Law Decree, even before final approval of the Parliament): in such case, legal issues may arise when it comes to regulate the effects created by the (unconverted) Law Decree, considering that the Parliament's decision has no retroactive effect.

Last, the majority opinion allows for the right of the Parliament to propose amendments to the Law Decree (within the context of its conversion into ordinary law).

Legislative Decrees

Legislative Decrees are a special kind of act, which is based on a delegation by the Parliament in favor of the Government. In essence, the latter is delegated to issue a legislative act in compliance with the principles and limitations set out by the Parliament in its delegation act. This is typically used to create "Codes" or "Consolidated Acts" (*i.e.*, wide sets of norms gathering and recollecting scattered or fragmented pieces of legislation on a same subject). Typical examples are:

- the "*Italian Finance Act*" (Legislative Decree of 24 February 1998, no. 58), regulating the activity of financial intermediaries and, in particular, the provision of investment services and placement of financial products; and

- the "*Consolidated Banking Act*" (Legislative Decree of 1 September 1993, no. 385).

Legislative Decrees may be opted for in case that either: (i) a mere recollection of existing norms is needed; or (ii) existing norms needs to be recollected and amended or updated.

The main conditions to which Legislative Decrees are subject are as follows:

1- the general principles and guidelines (which are binding on the Government) are set out by the Parliament;

2- the Parliament will set out deadlines and time limits by which the Government is required to act;

3- the Parliament act outlines in detail a specific subject-matter in which the Government is requested to legislate.

In case that the Government does not issue any delegated act (and therefore ignores the Parliament delegation), the delegating act is automatically forfeited and (subject to limited exceptions) is not able to give rise to any legal effect (since the "core" act, *i.e.*, the act of the Government, is missing).

Regulations

As mentioned, the Government is also entitled to issue regulations. Regulations play an important role in the following sectors.

- *deregulation*. In case that the legislation in force is to be streamlined or simplified, or the aggregate number of decisions/measures/laws needs to be reduced or shrunk, the Parliament may leave the word to the Government, which may be entrusted to adopt one or more regulations repealing or amending the existing legislation, according to the general principles stated by the Parliament.

- *implementation of EU law into domestic law*. In certain situations, EU law (specifically, EU directives) may be implemented by virtue of regulations of the Government. EU law does not necessarily need to be implemented by means of ordinary laws of the Parliament (a regulation may be sufficient, depending on the specific goal to be achieved: in particular, if a EU directive binds the Member States to achieve a goal which, under Italian law, may be effectively gained by means of a regulation, an ordinary law is not necessary). Implementation through regulations may generally be more effective and less time consuming than ordinary laws.

- *"reserved" matters*. Certain matters are expressly "reserved" to the Government and must be subject to a regulation adopted at a Government-level.

Regulations are usually sorted by category. The most important types of regulation are:

- *enactment regulations*, which are adopted by the Government in case that a law of the Parliament only contains very high-level principles, needing a second-level regulation specifying technical aspects or details;

- *regulations supplementing laws (or assimilated acts)*, which are adopted in case that ordinary laws need to be supplemented or completed. This is a kind of second-level regulation, which assumes that a first-level act (*i.e.*, an ordinary law of the Parliament) was adopted;

- *organizational regulations*, which are typically adopted by each single Minister to regulate the branch of Administration falling under his/her responsibility. Please consider, on the other hand, that, according to article 95 of the Constitution, *"the Prime Minister's office is regulated by a*

law of the Parliament, which also determines the number, attributions and organization of the Ministers" (as a consequence, the room left to organizational regulations is fairly limited);

- *"authorized" regulations*, which are adopted by the Government upon delegation of the Parliament.

10. THE POWER OF THE PUBLIC ADMINISTRATION TO ENTER INTO AGREEMENTS, ACCORDING TO THE ITALIAN CIVIL CODE; LEGAL ENFORCEMENT OF ADMINISTRATIVE DECISIONS

Table of contents	
1	The capacity of the Administration to make agreements: general principles
2	The applicable regulation
3	Project financing

1. The capacity of the Administration to make agreements: general principles.

As a general principle, the Administration (*i.e.*, the "aggregate" of all public entities and the Government) is allowed to negotiate and enter into agreements with private individuals and companies. However, the Administration is not held to be entirely free to choose *any* method to entertain relationships with private individuals or companies. In a nutshell, on the one side, the Administration is entitled to make agreements (rather than using authority and imposing decisions on citizens), but, on the other, such faculty is not to be regarded as an absolute freedom, since a number of limitations and constraints should be also complied with.

Article 1, paragraph 1-bis of Law no. 241/1990 sets out the general principle of *contractual autonomy* of the Administration: when issuing decisions other than those based on public authority, the Administration *is generally allowed* to resort to agreements and to other "tools" regulated by the Civil Code. However, if it uses agreements (rather than authority) the Administration is under an obligation to specify the reasons justifying the choice to act under the norms of the Civil Code (in the light of the duty to pursue public interest).

When the Administration acts under the norms of the Civil Code (hence, it decides not to use authority, but resorts to the power to make agreements with citizens), it is subject to the general rules regulating relationships among private individuals (*e.g.*, liability regime, etc.). In other words, public entities (such as any other subject acting under Italian law) are subject to the rules contained in the Civil Code. In particular, citizens are generally entitled to have access to internal documents and files (*i.e.*, documents used by public entities to make decisions and to exercise their powers); in addition, the Administration's employees are regulated by "general" labor law (subject to limited exceptions, public entities' employees are not subject to a specific set of norms, but to the general rules regulating labor relationships).

In addition, the Administration should *preferably* resort to agreements (rather than authority), unless any specific reason should induce to use authority-based powers. On the other hand, *there is no obligation* for the Administration to use authority (nor to act under the norms of the Civil Code): a general evaluation of the interests coming into play should be made, on a case-by-case basis. By way of exception, applicable laws may provide that, in certain situations (*i.e.*, areas which are considered as particularly sensitive), the Administration *must* resort to authority.

In general terms, the need to set up relationships with private entities must take into consideration the duty to pursue public interest (which does not necessarily match with a "bilateral" and equal relationship with citizens: in other words, the duty to take care of public interest may suggest to use authority rather than bilateral negotiations with citizens).

In addition, the ultimate aims of the Administration are set out by the law (*i.e.*, they are not an option for the Administration). As a consequence, the Administration is not entitled to make agreements establishing new aims for the latter, or ending up with an amendment of its ultimate aims (which, as mentioned, must be set out by the law, not by bilateral agreements). In other words, all agreements entered into by the Administration must be always in accordance with the aims set out by the law.

Most frequently, the activity of the Administration (as far as its agreements with citizens are concerned) relates to *contracts*. The definition of "contract" ("*appalto*") under the Civil Code does not match with the definition applicable for the purpose of public law. The latter includes all "passive" agreements (i.e., all agreements in which the Administration acts as the payor, while its counterparty acts as service provider, or good supplier), and all agreements regarding the carrying out of public works, the provision of services and the supply of goods.

Other principles governing the contractual activity of the Administration are: impartiality; duty to act in accordance with the applicable law; duty to preserve third parties' rights; prohibition to create any discrimination.

2. The applicable regulation

As mentioned, when the Administration acts under the norms of the Civil Code (hence, it decides not to use authority, but resorts to the power to make agreements with citizens), it is subject to the general rules regulating relationships among private individuals (*e.g.*, liability regime, etc.). In other words, public entities (such as any other subject acting under Italian law) are subject to the rules contained in the Civil Code. When the Administration acts under the norms of the Civil Code, the following norms are applicable to the Administration:

- the norms regulating pre-contractual and contractual liability;

- the norms regulating default interest and termination of the agreement, in case that the Administration commits a breach of the agreement;

- the obligation to enter into the final agreement (when a preliminary agreement was entered into);

- the obligation to specifically consent to "*clausole vessatorie*" (*i.e.*, particular clauses which need to be specifically approved in order to be enforceable: this is due to such clauses being held as particularly burdensome to one of the parties' interests).

By way of exception, under article 21-*sexies* of Law no. 241/1990, the Administration is entitled to unilaterally withdraw : "*il recesso unilaterale dai contratti della pubblica amministrazione è ammesso nei casi previsti dalla legge o dal contratto*". In such situations, the Administration is entitled to freely withdraw from the agreement, without the need to justify its decision in the light of public interest, or specify the reasons justifying its decision to withdraw.

As long as an agreement (rather than a unilateral decision) is to be put in place (typically, a contract), the Administration has to identify and select its counterparty. In this respect, it is important noting that public entities are not entirely free to establish criteria to identify the subjects which whom negotiations should be

brought. To that purpose, a proceeding has to followed, in order to get to execution of the final agreement. Such proceeding generally includes the following main stages:

Phase 1: the Administration first adopts a resolution regarding the entering into of the agreement. As an alternative, the Administration approves a draft agreement, to be submitted to the counterparty/ies.

Phase 2: the Administration selects and identifies the counterparty and the latter is formally entrusted to carry out the works ("*aggiudicazione*").

Phase 3: the agreement is entered into between the public entity and its counterparty. As a general rule, all agreements involving public entities must be made in writing.

Phase 4: a formal approval of the agreement is issued. Considering that the agreement has already been signed, formal approval typically has retroactive effects. Unless such formal approval is issued, the agreement may not become enforceable.

3. Project financing

Project financing is a typical structure in which public entities make agreements with private entities in order to fulfil public interests. In a project financing scenario, however, actions are not taken by means of a contract ("*appalto*"), but, rather, by means of a different structure. Project financing is typically based on the following elements:

- A company (which is also commonly known as "*special purpose vehicle*", or "*SPV*") highlights its interest to carry out public interest works (*e.g.*, to build up a parking area);
- To that purpose, the SPV is granted with a concession by a public entity (*i.e.*, the entity which is competent to govern and supervise the works at hand). Such concession provides, *inter alia*, for the SPV's right to build up the project and (once the project will be completed) to manage and exploit the latter, as well as retain substantially all proceeds arising from the project. According to the concession, all costs of the works in question will be entirely borne by the SPV, while the public entity will have no obligation to contribute to costs;
- In order to fund costs relating to the project, a bank loan is made available to the SPV;
- The loan will be primarily reimbursed by the SPV by means of the cash proceeds flowing out of the project. As a consequence, the banks' right to obtain reimbursement of the loan is based on the expectation that the project will be profitable and originate proceeds for debt servicing.
- The project's assets, rights, and interests will be typically acquired by banks as collateral. In particular, securities will be typically represented by: a mortgage over real estate assets (premises) included within the perimeter of the project; a pledge over the shares held by the SPV's shareholders in the SPV corporate capital; receivables arising from the project may be assigned to the banks by way of security: therefore, all moneys flowing out of the project would be directed towards the bank and allocated to reimbursement of the loan. In case that the loan is not properly reimbursed, the banks will be entitled to enforce their security rights over the assets pertaining to the project;
- As a general rule, third parties (including banks) will have no right of recourse against the project sponsors (*i.e.*, the SPV shareholders, in their capacity as project promoters). All obligations undertaken by the SPV shall be fulfilled by the latter only, while, typically, no request for indemnification or guarantee will be requested from the SPV shareholders (but exceptions are also possible).

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