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THE BALANCED BUDGET RULE IN THE ITALIAN CONSTITUTION: IT AIN'T NECESSARILY SO... USEFUL?

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1. Introduction

In Italy the Constitutional reform on 2012 added balanced budget rules. A large majority quickly approved the reform. There was no public debate, and the reform was approved and was shared by a large majority of the members of Parliament (and by most of the Italian Parties) because they said 'Europe requires it'. Is this statement correct? Did Europe force the member states to modify their Constitutions? The Fiscal Compact does not contain legally binding obligations as regards the modification of the Constitution, so Italy probably decided to revise its Constitution to give a signal to the financial markets of its ability not only to solve the debt crisis but to also take political decisions able to solve economic and financial crisis.

This article tries to give evidence about some aspects of this reform: the role of Europe (which is considered marginal because the reform was introduced to solve an internal problem); the content of the reform (the changes to the political and legal control of the budget); and the impact of the reform on the whole Constitution, because it seems to give priority to the control of the budget over other constitutional principles because new rules influence the structure of the Italian regionalism, in particular as regards the fiscal federalism and, at last,

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because it could lead to the idea that the protection of rights is related or subordinate to the amount of available resources.

2. the role of the European union in the introduction of the balanced budget rule in Italy

On 5 August 2011, the day after the meeting of the Governing Council of the European Central Bank (ECB) (where it was discussed about the weakness of the Italian bonds in the financial markets), the President of the ECB, Mr Trichet, and his future successor, Mr Draghi, sent a letter to the Prime Minister Mr Berlusconi, suggesting a series of economic and financial measures.¹

The letter urged Italy to implement rules for the restriction of the deficit and public debt, in order to reach a balanced budget in the short term. The reduction had to be achieved primarily through decreasing public sector expenditure, and by a stricter control on debt and the costs of regional and local authorities. The letter also strongly suggested the adoption of a mechanism providing for automatic cuts if Italy had failed to contain the debt. This procedure was unusual for several aspects.

Firstly, the ECB is not an institution called upon to play such a role with a Member State, the Commission and the Council of the European Union could have intervened, but with different tools².

Secondly, this letter was secret so it was not an official act of a European institution to Italy, it was sent to the Prime Minister and not to the Parliament, the institution to which the Constitution assigns the role of deliberating laws and amending the Constitution³. It promoted some amendments of Italian Constitution that not even the Fiscal Compact had imposed on member Countries⁴.

¹ The letter was published in full by the newspaper *Il Corriere della Sera*, <www.corriere.it/economia/11_settembre_29/trichet_draghi_italiano_405e2be2-0a59-11e0-ae06-4da866778017.shtml>, visited 11 September 2011. It can find English text of the letter in E. OLIVITO, *Crisi economico-finanziaria ed equilibri costituzionali. Qualche spunto a partire dalla lettera della BCE al governo italiano*, 1, *Rivista AIC*, 2014, 1-18.

² According to the Articles 121 TFE (ex article 99 TEC), 126 TFE (ex article 104 TEC), Art 136 TFE and Protocol n. 12 of TFE even before the entering into force of Six packs and Two packs.

³ On this point, see M. LUCIANI, *L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità*, Presentation to a Conference "Il principio dell'equilibrio di bilancio secondo la riforma costituzionale del 2012" Corte costituzionale 22 november 2013, 11-12 at www.cortecostituzionale.it/documenti/convegni_seminari/Seminario2013_Luciani.pdf and E. OLIVITO *Crisi economico-finanziaria ed equilibri costituzionali. qualche spunto a partire dalla lettera della BCE al governo italiano*, supra.

⁴The introduction to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union states: 'Noting that compliance with the Contracting Parties' obligation to transpose the "balanced budget rule" into their national legal systems, through binding, permanent and preferably constitutional provisions, should be subject to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Functioning of the European Union'; Article 3(2) clarifies this: 'The rules set out in paragraph 1 shall

It was even stranger that the letter was taken into account by the Italian Parties that evocated it during the approval of the Constitutional reform as a warning of EU for the urgency of introduction of balanced budget rule into the Constitution.

Only a few Countries amended their Constitutions after the Fiscal Compact was approved. Germany, Poland and Hungary had already contained some references regarding balanced budget in their Constitutions.⁵ Also France had already adopted a constitutional revision on 23 July 2008 that had re-written Article 34 of the Constitution of 1958 to ensure an equilibrium of budget, by stating that '*Les lois de financement de la sécurité sociale déterminent les conditions générales de son équilibre financier*'. After the Fiscal compact, France did not have recourse to a constitutional reform, but introduced the rule requiring a balanced

take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. (*I added the italics myself*).

On the Treaty see P. CRAIG, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 *European Law Review*, 2012, 231 and on the peculiarity of this Treaty, which was formally outside the EU legal order, see S. PEERS, *Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework*, 9 *European Constitutional Law Review*, 2013, 37.

⁵ As regards the Constitutional reforms for inserting Fiscal compact and financial measures in Constitution see especially X. CONTIADES (Ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Ashgate, 2013.

Germany has a long tradition of the golden rule and rules about balanced budgets. The Constitutional reform of 2006 (*Föderalismusreform I*) introduced, in Article 109(5), State control on Lander debts. In 2009 the *Föderalismusreform II* introduced a stronger debt brake (*Schuldenbremse*): only the central State (not the Lander) can contract debts, and these debts cannot be greater than 0.35% of GDP (Gross Domestic Product).

The Polish Constitution of 1997 states: 'It shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. The method for calculating the value of the annual gross domestic product and national public debt shall be specified by statute'.

The Hungarian Constitution, approved in 2011 and amended by the Fourth Amendment to the Fundamental law (25 march 2013), contains the Article N states 'Hungary shall apply the principle of balanced, transparent and sustainable budget management' and the Articles 36 and 37, which are dedicated to balanced budget rules. Article 36 states:

'4. Parliament may not adopt a State Budget Act which allows State debt to exceed half of the Gross Domestic Product.

5. As long as State debt exceeds half of the Gross Domestic Product, Parliament may only adopt a State budget Act which contains State debt reduction in proportion to the Gross Domestic Product.

6. Any deviation from the provisions in Paragraph (4) and (5) shall only be possible during a special legal order, to the extent required for mitigating the consequences of the causes, and if there is a significant and enduring national economic recession, to the extent required for redressing the balance of the national economy.'

Article 37 states, too:

'3. During the implementation of the State Budget, as long a State debt exceeds half of the Gross Domestic Product, no debt or financial obligation may be assumed which allows the share of State debt related to the Gross Domestic Product to exceed its level in the previous year, with the exception defined by Article 36(6).'

The English translation of consolidated version of the Fundamental Law of Hungary, that entered into force in 1 April 2013, can be found at:

www.parlament.hu/angol/the_fundamental_law_of_hungary_consolidated_interim.pdf .

budget with a 'loi organique'.⁶ Some Countries like Italy, Spain and Slovenia⁷ decided to amend their Constitutions to introduce balanced budget rules and the requirements of the Fiscal Compact. Spain and Italy share the same problems: they want to reassure the markets by having stable provisions that cannot be modified by the government or by different majorities in parliament. Even if the Fiscal Compact claimed that the insertion of fiscal and budget rules into the Constitution made their introduction stable, a decision to amend a country's Constitution was mainly taken for national political reasons.

3. The introduction of the balanced budget rule in the Italian Constitution: The essence of the reform

The Berlusconi Government submitted to the Chamber of Deputies a first proposal for a constitutional law amendment introducing the golden rule in Constitution just a month after the letter of ECB.⁸ In the meantime, on 16 November 2011, the Monti Government took office, with the aim to deal with the emergency of the financial crisis.

The constitutional Law 1/2012 was adopted on 20 April 2012, some months after the Fiscal Compact had been signed, and a few months before the Fiscal Compact had entered

⁶ France began the process of constitutional review, but the Senate elections of 2012 resulted in a majority that is now hostile to reform. The decision of the *Conseil Constitutionnel* n. 2012-653 DC of 9 August 2012 allowed an organic law to introduce the Fiscal Compact in France. On this decision see M. LOMBARD, *Le futur rôle de régulateur financier du Conseil constitutionnel*, 31, *Actualité juridique-Droit administratif*, 2012, p. 1717-1718; X. MAGNON, *La ratification du traité sur la stabilité, la coordination et la gouvernance dans l'Union économique et monétaire (TSCG) peut ne pas exiger de révision constitutionnelle préalable*, 92, *Revue française de droit constitutionnel*, 2012, p. 854-862; J. ROUX, *Le Conseil constitutionnel et le traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire: Busiris, rue de Montpensier, 4*, *Revue trimestrielle de droit européen*, 2012, p. 855-876.

⁷ Article 148 of the Constitution of the Republic of Slovenia, about budget, was amended by the Constitutional Act adopted on 24 May 2013 that entered into force on 31 May 2013 (Official Journal of the Republic of Slovenia No. 47 of 31 May 2013). It states:

'All revenues and expenditures for the financing of public spending must be included in the budgets of the state.

Revenues and expenditures of the budgets of the State must be balanced in the medium-term without borrowing, or revenues must exceed expenditures. Temporary deviation from this principle is only allowed when exceptional circumstances affect the state.

The manner and the time frame of the implementation of the principle referred to in the preceding paragraph, the criteria for determining exceptional circumstances, and the manner of acting when they arise, shall be regulated in detail by a law adopted by the National Assembly by a two-thirds majority vote of all deputies.

If a budget has not been adopted by the first day it is due to come into force, the beneficiaries financed by the budget are temporarily financed in accordance with the previous budget.'

The original text of Article 148 read as follows: 'All revenues and expenditures of the State and local communities for the financing of public spending must be included in their budgets.

If a budget has not been adopted by the first day it is due to come into force, the beneficiaries financed by the budget are temporarily financed in accordance with the previous budget.'

⁸ Proposal for constitutional amendments n. 4620 presented on 11 September 2011 by Prime Minister Berlusconi to the Chamber of Deputies.

into force under the Italian legal system.⁹ It modified Articles 81, 97, 117 and 119 of the Italian Constitution.¹⁰ The results of the reforms are:

- The insert of the budgetary equilibrium between revenue and expenditure (Article 81);
- The introduction within the Constitution of an obligation on all public administrations to reach a balanced budget (Article 97);
- The insertion of the harmonisation of public accounts as an exclusive legislative power of the State (Article 117(2) (e));
- A modification of Article 119(1) of the Constitution as regards regional and local finances, so that all Regions and local authorities (provinces and municipalities) are required to achieve balanced budgets, while Article 119(6) limits the level of indebtedness in accordance with an overall budgetary equilibrium within a Region.

The complete revision has entered into force in 2014.

The new rules contain the outlines for a flexible and dynamic model for achieving a balanced budget,¹¹ which leaves wide room for political bargaining¹². The text of the new Article 81 of the Constitution provides in paragraph 1 that: 'The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle'. The general principle of a balanced budget is stated. Its flexibility is immediately underlined when the Constitution allows the equilibrium to take into account the different phases of the economic cycle. Article 81(1) must be interpreted to mean that all public administrations ought to achieve a balanced budget, but that the adverse phases of the economic cycle can soften this requirement. This is a way to avoid an automatic mechanism for reducing the debt, and promotes political discussion.

The new Article 81(2) provides exceptions to the general rule for a balanced budget. There can be recourse to borrowing (breaking the balanced budget rule) only when there are negative effects in the economic cycle or there are exceptional circumstances. While the first

⁹ The Law 23 July 2012 n. 114 ratified the Fiscal Compact.

¹⁰ Legge costituzionale 20 aprile 2012, n. 1, *Introduzione del principio del pareggio di bilancio nella Carta costituzionale [Introduction to a principle of balanced budget in the Constitution]*, published in Official Journal No 95 of 23 April 2012. About the impact of this reform on Italian Constitution see M. LUCIANI, *Costituzione, bilancio, diritti e doveri dei cittadini*, 58° Convegno di studi amministrativi ("Dalla crisi economica al pareggio di bilancio: prospettivi, percorsi e responsabilità"), Varenna, Villa Monastero, 20-22 settembre 2012, ora in 1-2, *Rivista della Corte dei Conti*, 2013, 512-533; G. BOGGERO, P. ANNICHINO, *Who Will Ever Kick Us Out?: Italy, the Balanced Budget Rule and the Implementation of the Fiscal Compact*, 2, *European Public Law*, 2014, 247-262. See also G. GRASSO, *Il costituzionalismo della crisi*, ESI, 2012, 89-128; F. BILANCIA, *Note critiche sul c.d. "pareggio di bilancio"*, 2 *Rivista AIC*, 2012, 1-6; A. MORRONE, *Pareggio di bilancio e stato costituzionale*, *Lavoro e diritto*, 2013, 357-381; T. F. GIUPPONI, *Il principio costituzionale dell'equilibrio di bilancio e la sua attuazione*, 1, *Quaderni costituzionali*, 2014, 51-77; C. BERGONZINI, *Il c.d. «pareggio di bilancio» tra costituzione e l. n. 243 del 2012: le radici (e gli equivoci) di una riforma controversa*, 3 *Studi iuristici*, 2014, 15-22.

¹¹ G. RIVOCSECCI, *Il coordinamento dinamico della finanza pubblica tra patto di stabilità, patto di convergenza e determinazione dei fabbisogni standard degli enti territoriali*, 1 *Rivista AIC*, 2012, 1-21.

¹² M. LUCIANI, *L'equilibrio di bilancio e i principi fondamentali*, *supra*, 12, 17-18 and T. F. GIUPPONI, *Il principio costituzionale...*, *supra*, 58.

condition is clearly established by the economic global context, the second one is about the domestic consequences of certain events, so it must be authorised by a resolution of both Chambers in a special voting procedure that requires an absolute majority in each. It is up to Parliament to decide when these exceptional circumstances occur, probably because they could be linked to specific domestic conditions¹³. It is important to remember that the notion of 'exceptional circumstances' is contained in Article 3(2)(b) of the Treaty on stability, coordination and governance and includes "periods of severe economic downturn". The Treaty allows temporary deviations from national respective medium-term objective or the adjustment path when exceptional circumstances occur (art. 3, b).¹⁴ In other words, even if national parliaments decides that these exceptional conditions exist, the Fiscal Compact suggests that there must be an unusual event that directly influences financial affairs.

The article would seem to recognize a great role of policy decisions, but there are the limit of EU institutions, which decide whether to accept or not the resolutions of the national parliaments.

Article 81 maintains the disciplines of the classic rules of a balanced budget. In the old version, the balanced budget rules were focused on Article 81(4), which required that any law that increases public spending should also 'indicates' new resources to cover this increase. The word 'indicates' was replaced by 'provides' in the new Article 81(3), which can be considered stronger.

The Constitutional Law of 2012 adds to Article 97 of the Constitution a new first paragraph: 'General government entities, (i.e. both central and local governments), in accordance with European Union law, shall ensure balanced budgets and the sustainability of public debt'. This extends the goal of a balanced budget to all public administrations, which is a fundamental aspect with regard to the specific importance assumed in the 'area of public finance'.

This Constitutional Law also modifies article 117 of the Constitution. The harmonisation of public accounts comes under the legislative competence of the State, while before it was shared between the State and the Regions. The role of the central State is emphasised, and it is focused on the coordination and on centralised control of all local authorities.

The limited autonomy of local authorities is also underlined by the amendment to Articles 119(1) and 119(6) of the Constitution, which restricts the use of debt by local authorities. The revenues and expenditure of all local authorities are circumscribed by balanced budget

¹³ Only for the second condition it expected the vote of both Chambers, as said A. BRANCASI, *Il principio del pareggio di bilancio in Costituzione*, 2 *Osservatorio sulle fonti*, 2012, 6-7; M. LUCIANI, *L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità*, *supra*, 23-24; M. BERGO, *Pareggio di bilancio "all'italiana"*. *Qualche riflessione a margine della legge 24 dicembre 2012, n. 243 attuativa della riforma costituzionale più silenziosa degli ultimi tempi*, 6 *Federalismi.it*, 2013, 4

¹⁴ Art. 3(2)(b) reads: "Exceptional circumstances" refers to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term'.

obligations and by the economic and financial constraints imposed by European Union law. Local authorities may recourse to borrowing only as a means of financing investment expenditure and only with a simultaneous adoption of amortization schedule. The legislative decree no. 267/2000 (particularly Article 162(6)) had already tied the smaller local authorities to an obligation to achieve an overall balanced budget in what was called the 'Pact of domestic stability', and Article 119 of the Constitution (after the constitutional reform of 2001 and before the most recent reform of 2012) had emphasised the achievement of a balanced budget for local authorities and Regions. Currently, this Article is even more restrictive with regard Regions and local authorities, since these are mainly responsible for the Italian financial problems. This exceeds the 'golden rule' imposed on local authorities by the Constitutional Law 3/2001. In fact, borrowing is only allowed for investments and not for paying off debt. Even investments can only be made if budget balance is respected at the regional level. In other words, only Regions with their accounts in order can recourse to borrowing. It becomes difficult to bridge the debt of the poorest Regions and to reduce inequality: the most indebted Regions will not be allowed to make new investments. However, the State may allocate supplementary resources and adopt special measures in favour of specific local authorities to eliminate social imbalances (Article 119(5)).

4. The reinforced law introduced by the Constitutional Law 1/2012

Article 81(6) states that the contents and the criteria for ensuring balance between revenue and expenditure shall be established by a parliamentary act approved by an absolute majority of the Members of each House in compliance with the principle established by the constitutional law 1/2012.

It satisfies the requirements of a rule ranked above ordinary Act of parliament¹⁵. It is not a 'organic law' as in the Spanish and French models. In Italy these terms are not explicitly used in the Constitution; instead we can talk in general terms about a 'reinforced Act' that is approved by a special procedure¹⁶. It is a special source of law: Constitution provides for a content of that law, which can be modified only by another law approved with the same special procedure. However, it is considered by Constitutional court as a ordinary act, which can be both subject and parameter of constitutional process¹⁷.

¹⁵ G. VEGAS, *Il nuovo bilancio pubblico*, Il Mulino, 2010, 52. About the reinforced law see D. CABRAS, *La legge di attuazione del principio costituzionale del pareggio di bilancio*, *Quaderni costituzionali*, 124-128, M. NARDINI, *La legge n. 243/2012 e l'adeguamento dell'ordinamento nazionale alle regole europee di bilancio*, 1, *Osservatorio sulle fonti*, 2013; M. BERGO, *Pareggio di bilancio "all'italiana". Qualche riflessione a margine della legge 24 dicembre 2012, n. 243 attuativa della riforma costituzionale più silenziosa degli ultimi tempi*, 6, *Federalismi.it*, 2013, 4;

¹⁶The same opinion appears in T. GROPPI, I. SPIGNO and N. VIZIOLI, *The constitutional consequences of the financial crisis in Italy*, in X. CONTIADES (ed.), *Constitutions in the global financial crisis. A Comparative analysis*, Ashgate, 2013, 97.

¹⁷ Constitutional court, on 12 april 2014, Case 88/2014; Scholars had already considered in this sense the reinforced law: see M. LUCIANI, *L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di*

It must be emphasised that Parliament has used a gimmick. In fact, it introduced into the Constitution only the essential elements of a balanced budget rule, and preferred to regulate the most important issues through a reinforced Act of Parliament. This confirms the impression that the Constitutional Law set out an open decision-making model aimed at harmonising the fiscal balance with the broader economic and social needs of the Country¹⁸.

The new Article 81 of the Constitution refers to reinforced law for the identification of technical criteria designed to establish a balanced budget, to reach a sustainability of the debt and the conditions that allow borrowing, but there is no mention of how to restore the debt,¹⁹ which is the main Italian problem. Italian policies aimed to reduce deficit have substantially done this, but Italian public debt remains alarmingly high (well above the threshold of 60% of GDP established by Union criteria).

Constitutional law 1/2012 in Articles 1 (6) and 5 provides the reinforced law should put in place mechanisms and sanctions to control public administration, including regional and local ones; sets out in detail the financing and borrowing of local authorities, but nothing is said about the political development of the nation that could lead to such a balanced budget. The strict regime that is currently implemented fails to address this issue, and public debt is still increasing. This reduces the financial resources that can be used to promote growth and redistribution. These are essential aspects in providing an understanding of the real extent of the constitutional amendments, especially in terms of their effectiveness.

It is strange, for example, that sanctions for Regions and local authorities, which do not reach balance budget are established by ordinary law (as provides article 9 (5, f) the reinforced law); the same referral to the ordinary law is expected to determine the ways and limits to which regions may have recourse to debt when constitutional law 1/2012 seemed to refer only to the reinforced law the circumstances and limits its application.

In the relationship between State and Regions, an ambiguous formula was introduced (in Article 5(1)(g) of the Constitutional Law 1/2012) that establishes the reinforced law may determine 'the means by which the State, in periods of adversity of the business cycle or in the event of exceptional circumstances ensures the financing of other levels of government (Regions and local authorities) of the minimum levels of performance and basic functions relating to civil and social rights'. It could be interpreted in the easiest way: the State will guarantee resources during the worst economic periods about essential services and basic functions relating to civil and social rights. The State can intervene to support the Regions in this domain only during periods of severe economic downturn or of exceptional circumstances, but not in other cases. It is more likely to mean, however, that even during a crisis or an ad-

costituzionalità, *supra*, 19 and G. M. SALERNO, *Equilibrio di bilancio, coordinamento finanziario e autonomie territoriali*, in A. BRANCASI et al., *Costituzione e pareggio di bilancio*, Il Filangeri Quaderno 2011, Jovene, 2012, 145.

¹⁸ Members of the Constituent Assembly of 1946 built a flexible model. They wanted to 'set the budget discipline essentially as a decision-making process' without dictating rigid content, see M. LUCIANI, *Costituzione, bilancio, diritti e doveri dei cittadini*, *supra*, 27.

¹⁹ This has been criticised by G. M. SALERNO, *All'approva del nove la via europea e sovranazionale per la costituzionalizzazione del pareggio di bilancio*, 4 *Guida al diritto - il Sole 24 ore*, 2012, 8.

verse part of the economic cycle, the government should continue to fund at least the basic levels of public services. This explicit reference was necessary because local authorities can no longer borrow in order to counteract the negative effects of the economic cycle, but only to finance investment costs (Article 119(6)), therefore, only the State can provide such services when the economic situation is not favourable²⁰. The purpose seems to prevent actions that lead to inequalities or reinforce the existing ones. In case of favourable economic cycle regions are expected to contribute to the consolidation of the debt of the State (Constitutional law 1/2012 Article 5 (2, c) and reinforced law 243/2012 art. 12(2)).

Constitutional law 1/2012 (art. 5 (f)) regulates an important aspect by establishing an independent body within the Parliament and the reinforced law specify its competences (art. 16-19). This institution is similar to the Fiscal councils already adopted elsewhere in Europe²¹. The European institutions recommend this model of authority, and it has been proposed several times. Council Directive 2011/85/EU of 8 November 2011 mentioned the establishment of independent audits to control public accounts (art. 3(1)); Regulation (EU) 473/2013 of 21 May 2013 expected that member states should have in place independent bodies, incorporated in the national budgetary processes, for monitoring the compliance with fiscal rules and budgets (article 5)

A fiscal council carries out an analysis and verification of fiscal developments and assesses whether budgetary rules are being respected, according to the parameters laid down by the same law in paragraphs(b), (c) and (e). This independent agency should play a technical role in providing macroeconomic forecasts, and should not have a controlling function²².

In the reinforced law 243/2012, this independent body has assumed the character of a 'parliamentary budget office' within the Assemblies. This parliamentary office is envisaged by Article 16, and includes three members chosen from experts in public finance. It plays a consultative role in providing estimates, analyses and macroeconomic forecasts and studying the related on public finances.

Instead, this independent body is called upon to verify the achievement of a balanced budget, as well as the sustainability of certain types of expenditure, in particular pensions

²⁰ A. BRANCASI, *La nuova regolazione costituzionale del pareggio di bilancio. Effetti sui rapporti Parlamento-Governo e sugli indirizzi delle politiche sociali: il caso italiano*, 2 *Rivista del Gruppo di Pisa*, 2012, 7 at www.gruppodipisa.it/wp-content/uploads/2012/08/Brancasi.pdf : this mechanism 'explains the idea that this law has to establish the ways in which the State in times of adversity or in case of exceptional events, participates in the financing of essential levels of services which should be provided by regional and local authorities'.

²¹ European Countries, which have a fiscal council, are Austria, Belgium, Denmark, France, Ireland, Germany, the Netherlands, Portugal, Slovakia, Slovenia, Sweden and the United Kingdom. See on this point D. CABRAS, *Un fiscal council in Parlamento*, 20 *Federalismi.it*, 2012, 6.

²² G. BOGGERO, P. ANNICHINO, *Who Will Ever Kick Us Out? Italy, the Balanced Budget Rule and the Implementation of the Fiscal Compact*, *supra*, 258 believe that this institutions "have no real power" and it split its competences with the Court of Auditors. There are relevant differences between these institutions: parliamentary budget office give a technical advice that contribute to form the political decision of parliament, Court of Auditors does a juridical and accounting control.

and health care funding²³. Fiscal council has a parliamentary origin and it is not linked to the Government, like in other EU member Countries, this not for emphasising the political nature of this body but for allowing the debate between majority and opposition within the Chambers²⁴.

5. A questionable Constitutional reform: Some formal and substantive objections

The Maastricht Treaty on 1992 and the Stability and Growth Pact, signed on 1997 and entered into force on 1999, have already introduced budgetary discipline and oversight on debt and deficit, which prevails over national norms.²⁵

The decision by the Government to amend the Constitution including the balanced budget rule raises the following questions:

- A formal objection: the *binding force and permanent character, preferably constitutional* of the Fiscal Compact could have been guaranteed without a constitutional review, as other Countries did;²⁶

- A substantive objection: the reform does not legally guarantee a balanced budget and it cannot ensure a rigorous policy by itself.

6. Formal objections

Fiscal Compact aims at introducing in national legal orders a budget rule that ranks above ordinary law. It can thus guarantee both the effectiveness of the norm within the na-

²³ It can be referred to the opinion of the Finance and Treasury Commission of the Senate at its meeting on 13 December 2011: 'Finally, the Commission, while appreciating the introduction of an independent analysis and monitoring of developments in public finance, hopes it will be the first step towards the establishment of an independent authority in public finances to guarantee impartiality and independence at the service of the Parliament and the Government, with the further task of verification and certification of the financial statements of the whole public administration'.

On the fiscal council see C. GORETTI, *Pareggio di bilancio e credibilità della politica fiscale: il ruolo del Fiscal council nellariforma costituzionale italiana*, 5 *Astrid.it*, 2012, 1; D. CABRAS, *Un Fiscal Council per l'Italia*, in A. Brancasi et al., *Costituzione e pareggio di bilancio*, Il Filangeri, Quaderno 2011, Jovene, 2012, 177. Some questions concerning the relationship between the fiscal council and Parliament are still unsolved, see E. GRIGLIO, *Il protocollo sull'Ufficio parlamentare di bilancio: una «fuga» dairegolamentiparlamentari?*, 1 *Quaderni costituzionali*, 2014, 117.

²⁴ The doubt that it is a institution linked to political decisions was raised by N. D'AMICO, *Oplà: il pareggio di bilancio non c'è più*, <<http://www.brunoleoni.it>>, visited on 12 December 2011, 4.

²⁵ Regarding the European Union law approach to a balanced budget, there were many other regulations after 1992 and 1997. On this point, see L. S. ROSSI, *Fiscal Compact e Trattato sul Meccanismo di Stabilità: aspetti istituzionali e conseguenze dell'integrazione differenziata nell'UE*, 2 *Il Diritto dell'Unione europea*, 2012, 293.

²⁶ N. LUPO, *La revisione costituzionale della disciplina di bilancio e il sistema delle fonti*, in A. BRANCASI et al., *Costituzione e pareggio di bilancio*, *supra*, 109.

tional legal framework and its permanent effect²⁷. To comply with the requirements of the European Union and of the Fiscal Compact without changing the Constitution, one could have opted for a correct interpretation of Article 11 and the first paragraph of Article 117 of Italian Constitution. It means that the obligations contained in the Fiscal Compact would have been respected. It also means that any violation of these obligations results in a violation of Constitution.

In other words, the constitutional incorporation of the Fiscal Compact already existed. In the Italian constitutional system, the majority of the rules issued by the European Union or contained in EU Treaties are already binding. Their inclusion in the Constitution can be considered politically appropriate but not legally necessary²⁸.

Alternatively, to ensure the superiority of the reform to the law, one could opt for the approval of a 'organic law' modelled on the French or Spanish standard. However, a reference to this new source of laws should then be introduced into the Constitution. It could be simpler do this than to amend the text of Constitution.

7. ...and some substantive objections

Was it possible to make the rule for balancing the budget effective, to establish strict legal controls and also to comply with the obligations assumed as a result of the Fiscal Compact, without constitutional reform? This is the stronger objection: there was no need to amend Italian Constitution (it provided the tools for a serious scrutiny of accounts) but the ordinary act of parliament must be reviewed²⁹.

We shall try to explain the reasons.

The old Article 81 could be interpreted in a strict sense, which the constitutional Court had been doing since 2008. The old Article 81 required a substantial balance between revenue and expenditure. It would have been enough to strengthen the institutions responsible

²⁷ As regards the impact of Fiscal compact in the Eurozone Countries see F. FABBRINI, *The Fiscal Compact, the "golden rule," and the paradox of European federalism*, 36 *Boston College International and Comparative Law Review*, 2013, 1; D. PICCIONE, *Revisione e legislazione costituzionale ai tempi della crisi*, 3 *Giurisprudenza Costituzionale*, 2012, 3863.

²⁸ See G. TOSATO, *I vincoli europei sulle politiche di bilancio*, in A. BRANCASI at al., 83, although with the qualifications set out above, i.e. also taking into account the effect of the imposition of legal constraints in the Constitution and concluding that there have been other reasons leading to the overriding Constitutional revision.

²⁹ See C. BERGONZINI, *Teoria e pratica delle procedure di bilancio dopo la legge n. 196 del 2009*, 1 *Quaderni costituzionali*, 2011, 39-62. As regards the weak role of the parliament about the economic decisions see also C. BERGONZINI, *La tempesta perfetta: una manovra economica per decreto-legge*, 3 *Quaderni costituzionali*, 2013, 557-583; E. BERTOLINI, *La nuova dimensione della sovranità dei Parlamenti nazionali in materia finanziaria e di bilancio*, 1 *Diritto pubblico comparato ed europeo*, 2013, 135-168. It should be also improved the regulation of relationship between European and National parliament, as said long time ago P. BILANCIA, *The Role and Power of the European and the National Parliaments in the Dynamics of Integration*, 1 *Perspective on Federalism*, 2009, 1-14.

for budgetary surveillance to adopt only a reinforced law (as 243/2012) to satisfy any purpose of the Fiscal Compact.³⁰

In the Constituent Assembly prevailed the idea that a budgetary Act of Parliament should have more political than constitutional constraints. Therefore, Article 81 was interpreted in a flexible way³¹. However, in times of crisis, it could be interpreted in the stricter way as the constitutional Court did.³² Regulating the budget by an Act of Parliament would have the advantage of both restoring the importance to political bargaining and modulating the restrictions caused by varying economic cycles.

The Italian constitutional has already provides for various types of control on costs and on budget.

The President of the Republic has a fundamental role in preventive controls on expenditure Acts. Under Article 74(1) of the Constitution, before promulgating an Act of Parliament, he may request amendments with a reasoned message to the Chambers. Even if the instructions of the President of the Republic can be overcome by a new vote of the two Houses of Parliament, his requests seldom remained unheeded³³. It is true that the President rarely uses this power, but it is also true that many presidential requests for amendments have been focused on Article 81(4) of the Constitution³⁴.

Article 100(2) of the Constitution states that the Court of Auditors exercises *ex post* auditing of the administration of the State budget³⁵.

Under the Italian system, the control of the Court of Auditors should be central as regards expenditure acts³⁶ and because this Court may challenge a spending bill or budget bill

³⁰ During the Constituent Assembly, there was a discussion about whether to include and to regulate explicitly in the text of the Constitution a balanced budget rule, but it was preferred to relegate the matter to ordinary law. However, a requirement to indicate a source of financing for all expenditure laws remains in Article 81(4) of the Constitution. See *Atti assemblea costituente [Constituent Assembly debates]*, II Sottocommissione, seance 24 October 1946 in 'La Costituzione della Repubblica e I lavori preparatory dell'Assemblea costituente', [*The Constitution of the Republic in the Constituent debates*], vol. VII (Camera dei deputati 1970), p. 1235.

³¹ About the different interpretation of Article 81 before the reform on 2012 see S. BARTOLE, *Art. 81*, in BRANCA (Ed.), *Commentario della Costituzione, La formazione delle leggi*, II, 1979, 197-302.

³² See A. BRANCASI, *L'ordinamento contabile*, Giappichelli, 2005, 161.

³³ The presidential powers are however mitigated by the second paragraph of Article 74 of the Constitution, which states: 'If the Houses pass the bill once again, then the law must be promulgated'.

³⁴ See G. SCACCIA, *La funzione presidenziale di controllo sulle leggi e sugli atti equiparati*, in A. BALDASSARRE and G. SCACCIA, (eds.), *Il Presidente della Repubblica nella forma di governo*, Aracne, 2011, 127, which illustrates the procedure for referring matters back to Parliament and shows that, to the present day, references made by the President of Republic for violations of Article 81 remain the most frequent.

As regards requests for amendments to the Chambers by the President of the Republic, see R. ROMBOLI, *Il rinvio delle leggi*, 1 *Rivista AIC*, 2011, 5.

³⁵ Brancasi reminds us that 'the rules of public finances require that non-compliance will not so much be sanctioned but rather prevented', and he is therefore convinced that preventive checks must be strengthened, A. BRANCASI, *La nuova regola costituzionale di bilancio. Effetti sui rapporti Parlamento-Governo...*, *supra*, 6.

³⁶ The competence of Court of Auditors are extended by 196/2009 'Legge di contabilità e finanza pubblica' [Accounting Law and Public Finance], especially Articles 17, 37 and 38.

to the constitutional Court³⁷. The challenge to the constitutional Court, could be extended to ensure greater effectiveness, it could be useful provide for a incidental challenge to the constitutional judges for violations of the financial provisions of the spending laws³⁸.

Some modifications have been introduced by Article 20 of the reinforced law 243/2012, which states that the Court of Auditors plays a coordinating role in public finance, as well as an auditing function for the accounts of local authorities (Regions, provinces and municipalities). This control allows the Court of Auditors to evaluate both actual results and forecasts for the Regions (and for local authorities just before as it was laid down in previous laws on 2003 and 2006)³⁹.

Its competences are also enlarged by ordinary acts: in particular the Decree-law 174/2012 (converted as Law n. 213/2012) had clarified the *ex ante* and *ex post* control of regional and local authorities accounts. Constitutional court with the decisions 39 and 40 of 2014 recognizes the importance of these texts, which are based on Articles 100, 81 and 119 of Constitution⁴⁰. It adds that Court of Auditors can exercise its control in different way: some controls require forms of cooperation between Regions or local authorities and the Court, others controls must impose penalties on regional and local institutions⁴¹.

Strengthening the role and powers of the Court of Auditors did not require a constitutional reform, but it can be done through the reinforced law 243/2012 and a ordinary act of parliament. Constitutional court has also contributed to enlarge the competences of Court of

³⁷ The opportunity to challenge the Constitutional Court by the Court of Auditors was recognised by the Constitutional Court on 18 November 1976, Case 226/1976, on 28 July 1993, Case 384/1991, when the Constitutional Court granted the Court of Auditors the right to challenge the Constitutional Court for violation of the rules on expenditure under Article 81(4), and on 3 July 1995, Case 244/1995 when it admitted its action in the annual general report of the State.

³⁸ A. ODDI, *La Corte dei Conti*, in F. ANGELINI and M. BENVENUTI (eds.) *Il diritto costituzionale alla prova della crisi*, Jovene, 2012, 430–431; N. MASTROPASQUA, *Corte dei conti e autonomie: nuove prospettive dei controlli*, 58° Convegno di studi amministrativi (“Dalla crisi economica al pareggio di bilancio: prospettive, percorsi e responsabilità”), Varenna, Villa Monastero, 20-22 settembre 2012, 1-2, *Rivista della Corte dei Conti*, 2013, 489-497.

³⁹ See M. MORVILLO, *La Corte dei conti e i controlli sulla finanza locale: spunti per una lettura congiunta della sent. n. 60/2013 e del d.l. n. 174/2012*, in *Forum di Quaderni costituzionali*, 6 www.forumcostituzionale.it, 2013, 1-6.

⁴⁰ See B. CARAVITA, E. JORIO, *La Corte costituzionale e la Corte dei conti (una breve nota sulle sentenze 39 e 40 del 2014)*, 6 *Federalismi.it*, 2014, 1-7. Already with the decision n. 60/2013 constitutional Court had broadly interpreted Law 213 of 2012 and a strict control on accounts of local authorities and regions is deemed to comply with the Italian Constitution. See D. MORGANTE, *Controlli della corte dei conti e controlli regionali: autonomia e distinzione nella sentenza della corte costituzionale n. 60/2013*, 9 *Federalismi.it*, 2013, 1-24.

⁴¹ As regards the new competencies of the Court of Auditors, see the intervention of its President to the Conference for the 150th anniversary of the Court of Auditors (1862- 2012) Rome on 11 december 2012 at:

www.corteconti.it/documenti/chi_siamo/presidente_giampaolino/11_dicembre_2012_intervento_presidente_giampaolino.pdf, visited 10 November 2013.

Auditors with a extensive and current interpretation of the Constitution and of the Constitution reform⁴².

Could it do the same in order to insert the rules of the fiscal compact in our legal system?

Constitutional reform has not affected the Court of Auditors, probably it was not considered an essential institution for compliance with the fiscal rules.

When it was decided in France in 2008 to reform the Constitution by introducing stricter rules of the budget, a reform of the Court of Auditors was expected. Article 47 of the French Constitution was revised, and an Article 47-2 was added⁴³. Article 11 of the French organic law 1403/2012 placed the fiscal council with the Court of Auditors, and entrusted to the President of the Court of Auditors the role of chairman of this independent body, which is called the '*Haut Conseil des finances publiques*'. From this point of view the Italian constitutional review has been a missed opportunity⁴⁴.

The constitutional Court is another institution that makes stricter checks on budget and spending laws, even if this control is more focused on the spending by the Regions. The State and Regions can challenge the constitutional Court, but Regions can only challenge State acts for violations of the parameters of their competences. So a violation of Article 81 is not expected for them. Conversely, the regional act can be challenged to the constitutional Court by the State for any violations, including violations of Article 81(4). The majority of Act declared to be unconstitutional for violations of financial obligations are therefore regional Acts⁴⁵.

The new Article 119(1) requires that all local authorities contribute to ensuring compliance with the economic and financial constraints imposed under European Union law. From a theoretical point of view, it does not exclude their autonomy. However, the interpretation that the Constitutional Court has given to the autonomy of local and regional authorities is very restrictive: it has given greater importance to the function of *coordinamento della finanza pubblica* that constitutional judges interpreted not as a concurrent competences but *de*

⁴² See, Constitutional court on 21 June 2006, Case 267/2006; on 23 Mai 2007 Case 179/2007; on 9 June 2008, Case 213/2008; on 19 July 2012, Case 192/2012; on 20 July 2012, Case 198/2012; on 26 February 2013, Case 60/2013; on 6 Mars 2014, Case 39/2014; on 10 Mars 2014, Case 40/2014

⁴³ See M.-P. PRAT and C. JANVIER, *La Cour des comptes, auxiliaire de la démocratie*, 3 *Pouvoir*, 2010, 97-107.

⁴⁴ The need to extend the powers of the Court of Auditors has been expressed by A. PACE, *Pareggio di bilancio: qualcosa si può fare*, 4 *Rivista AIC*, 2011, 1-4 and G. BOGNETTI, *Il pareggio di bilancio nella Carta costituzionale*, 4 *Rivista AIC*, 2011, 5.

⁴⁵ This is the most frequent constitutional control. The control originated by a process (*via incidentale*) is not more difficult, because it is less frequent because often the budgetary question are about public institutions especially Regions and State that can challenge directly to the constitutional court, see G. SCACCIA, *La giustiziabilità delle regole di bilancio*, A. BRANCASI at al., *supra*, 211.

Other Authors consider that challenges to the Constitutional Court by the Regions and the State are not very numerous and not very effective, because they are limited to the control of regional Acts: see T. GROPPI, I. SPIGNO and N. VIZIOLI, *supra*, 95.

facto like as state exclusive competence, this makes regional and local authorities weak⁴⁶. It is also recalled that constitutional reform on 2012 has transformed the harmonisation of public accounts from a concurrent competence to an exclusive legislative power of the State (Article 117 (2) Constitution). The picture is so complete and worrying for regional fiscal autonomy.

This reform confirms the interpretation of the constitutional Court that in times of crisis a re-centralisation of tax and spending must be implemented. Already in its decision n. 52/2010, the constitutional Court had in fact ruled that the use of derivatives by the Regions and other local authorities could be restricted or forbidden by central government by an Act of Parliament, even though the old Article 119 allowed the use of derivatives as debt instruments if they were used to finance the capital expenditure of the Region. The new Article 119 therefore matches the interpretation of the constitutional Court⁴⁷.

In more recent decisions⁴⁸, the constitutional Court has welcomed State laws imposing stability objectives in public finance, even though these objectives were sometimes on the verge of infringing the financial autonomy of local authorities⁴⁹.

The gradual increase in the number of decisions began in 2008 with the arrival of the economic crisis. The largest number of these decisions occurred in 2012-2014.⁵⁰ Unfortunately, the challenge to the constitutional Courts is the only (juridical) way to settle conflicts because the political methods are weak: Italy lacks a Senate of the Regions that might over-

⁴⁶ See Constitutional Court, 12 april 2014 case 88/2014.

⁴⁷ G. M. SALERNO, *Equilibrio di bilancio, coordinamento finanziario e autonomie territoriali*, 3 *Quaderni costituzionali*, 2012, 565; A. BRANCASI et al., *Costituzione e bilancio*, *supra*, 145.

⁴⁸ Constitutional Court on 7 June 2012 Case 148/2012; 14 June 2012 Case 151/2012 and 19 July 2012 Case 193/2012.

⁴⁹ For a reconstruction of the constitutional Court's case on the principles of the coordination of public finance, see F. CALZAVARA, *L'infinita tensione tra autonomia costituzionalmente garantita e concorso all'equilibrio di bilancio, in particolare con riferimento alla legislazione c.d. emergenziale, (osservazioni sulla sentenza della Corte cost. n. 193 del 2012)*, 19 *Federalismi.it*, 2012, 1.

⁵⁰ The new approach to juridical control of budgetary rules started in 2008 with the decision of the Constitutional Court on 18 June 2008, Case 213/2008, when it declared a law of the Sardinia Region, which did not comply with the balanced budget requirements to be unconstitutional. In an earlier period, the Constitutional Court on 10 January 1966 Case 1/1966 had interpreted paragraphs 3 and 4 of Art. 81 as a requirement to achieve an overall 'equilibrium' in the budget rather than a balanced budget; this does not mean that any lesser rigour was called for, but rather assumed that a certain leeway was granted in the preparation of the accounts. In 2008, however, this understanding was significantly reduced, see on this point V. ONIDA, *Portata e limiti dell'obbligo di indicazione della «copertura» finanziaria nelle leggi che importano «nuove o maggiori spese»*, *Giurisprudenza costituzionale*, 1966, 4-34.

During 2012 it can be found many decisions where the control of the Constitutional Court under Article 81 of the Constitution was very strict: in particular, see the year 2012 (constitutional Court 28 march 2012 Case 70/2012, 10 may 2012 Case 115/2012, 6 June 2012 Case 142/2012 and 31 October 2012 Case 241/2012) and 2013 (constitutional Court 18 January 2013 Case 3/2013; 26 February 2013 Cases 26/2013 and 28/2013; 9 July 2013 Case 219/2013; 17 October 2013 Case 241/2013, 25 October 2013 Case 250/2013, 13 November 2013 Case 266/2013) and 2014 (constitutional Court 6 March 2014 Case 39/2014, 10 March 2014 Case 40/2014, 10 April 2014 Case 88/2014, 18 April 2014 Case 108/2014, 25 July 2014 Case 224/2014) .

come some budget conflicts, and there are no other political instruments of dialogue between central and regional governments.

Before the constitutional reform entered into force on 2014, the constitutional Court had given a broad interpretation of the old Article 81(4) extending its effects on budgets of the Regions as well. In these cases constitutional judges ask for a more rigorous control and imposed that the sources of financing reported in the regional budget rule should be effective.

Constitutional judges checks that this “financial coverage” is obtained from actual and assured resources and not achieved from future and uncertain resources⁵¹. In short, financial statements must be factual in order to comply with the constitutional requirements.⁵²

The constitutional Court is becoming more careful and rigorous when considering the public finances. It has also extended its financial control in the special statute Regions, which enjoy greater autonomy in both legislative and financial terms. After the constitutional Act 3/2001, which introduced a ‘golden rule’ into Article 119(6) of the Constitution, the constitutional Court held that the rule was also applied to these Regions⁵³.

Any form of autonomy has been deleted because of the crisis and has led to a uniform control by the State over all sub-state autonomies.

Furthermore, the constitutional Court demonstrated that strict control is also possible under the old Article 81. In other words, the recent judgements of the constitutional Court have shown that budgetary constraints, even without applying any changes to the Constitution, could have been considered to have a legal, rather than a political nature⁵⁴.

8. The reasons for the constitutional reform

Some reasons of the Constitution reform could be sought within the institutional relationship between the EU and member States.

Fiscal compact is a international source of law; this is not new because European integration often had to make use of international Treaties⁵⁵. Different international, European and domestic sources of law coexist in the European economic integration. It confirms the

⁵¹ See, *ex plurimis*, constitutional Court 18 February 2012 Case 52/2010, 28 March 2012 Case 70/2012 and 10 July 2012 Case 192/2012.

⁵² Constitutional court on 19 July 2012, Case 192/2012.

⁵³ See Q. CAMERLENGO, *La legge finanziaria friulana per il 2012 davanti alla Corte costituzionale: stabilizzazione del personale, rispetto del patto di stabilità interno, finanza locale*, 3 *Le Regioni*, 2013, 618.

⁵⁴ It is not to say that constitutional reform did not extend the powers of the Constitutional Court, as stated by M. LUCIANI, *L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità*, *supra*, 28-35 but it could get a strict control of public spending also through a broad interpretation of Constitution.

⁵⁵ P. BILANCIA, *La nuova Governance dell'Eurozona: alla ricerca del demos*, F. ANGELINI, M. BENVENUTI (eds.), *Il diritto costituzionale alla prova della crisi economica*, Jovene, 2012, 22-40; most critical S. FABBRINI, *Intergovernmentalism and Its Limits Assessing the European Union's Answer to the Euro Crisis*, *Comparative political studies*, 2013.

thesis of a European Constitution built by stratification of different sources of laws result of a composite model of the Union and the member states⁵⁶.

It is more persuasive incorporating the controls on deficits and public debt in national laws involving both States and Europe. Shifting the responsibility to the member states aims to avoid new problems or difficult decisions for European policy that is going through a crisis of democracy⁵⁷.

The weakness of the EU institutions with regard to budgetary issues was also clear: if there is a violation of the Stability Pact, the Court of Justice has to impose sanctions, but it has failed to enforce its decisions.⁵⁸

⁵⁶On the pragmatic and non-linear path of European constitutionalism, see P. CRAIG, *Constitutions, Constitutionalism, and the European Union*, 7 *European Law Journal*, 2001, 125; Joseph Weiler speaks about the complex mixture of informal and formal constitutionalism in J. H. H. WEILER, *On the Power of the Word: Europe's Constitutional Iconography*, 3 *International Journal of Constitutional Law*, 2005, 173; see also N. SCIACLUNA, *EU Constitutionalism in Flux: Is the Eurozone Crisis Precipitating Centralisation or Diffusion?*, 18 *European Law Journal*, 2012, 490 – 492.

For a long time the existence of a 'composite constitutional order of Europe' has been maintained – see L. F. M. BESSELINK, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, Europa Law Publishing, 2007 and L. F. M. BESSELINK, J. H. REESTMAN, *The Fiscal Compact and the European constitutions: 'Europe speaking German'*, 8 *European Constitutional Law Review*, 2012, 7. N. LUPO, *La revisione costituzionale della disciplina di bilancio...*, *supra*, 91 also contends that these stratification of different sources can be a confirmation of the thesis that the European Constitution has a composite nature.

⁵⁷ As regards the crisis of democratic institutions in Europe and the lack of economic policy, see M. RUFFERT, *The European debt crisis and European Union law*, 48 *Common Market Law Review*, 2011, 1793, and F. SNYDER, *EMU revisited: Are we making a constitution? What Constitution are we making?*, in P. CRAIG and G. DE BÚRCA (eds.), *The Evolution of EU Law*, Oxford University Press, 1999, 457.

At the international level there is ambivalence: on the one hand an increasing governance is entrusted to international organisations such as the International monetary fund and World Bank, but on the other hand, at least as regards the European Union, an increasing number of European powers are entrusted to member states. As regards the first issue, see N. WOODS, *Global Governance after the Financial Crisis: A new Multilateralism or the Last Gasp of the Great Powers?*, 1 *Global Policy*, 2010, 51.

The thesis that the European Union is not, at the present time, to all intents and purposes a democracy, is supported by A. VON BOGDANDY, *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, 23 *The European Journal of International Law*, 2012, 316; the increasing involvement of member states in the most important decisions at a time of severe identity crisis within the European Union is a way to strengthen the democratic legitimacy of the EU institutions.

⁵⁸ ECJ, 13 July 2004, Case C-27/04 *Commission of the European Communities v Council of the European Union* on the government deficit in France and Germany. Until then infringement proceedings had only been initiated against Portugal (November 2002).

The Commission complained about France and Germany having exceeded the maximum threshold of 3% of the ratio of government deficit to Gross Domestic Product (GDP), following Art. 104, paragraph 6 and the Protocol n. 20, on the excessive deficit procedure (Annex to the EC Treaty in 1992).

The Council's recommendations on 3 June and 21 January 2003 addressed to France and Germany reminded them of the existence of an excessive government deficit, and asked them to correct the situation.

The two States did not comply with the recommendation, and the Commission on 27 January 2004 therefore appealed to the Court of Justice to cancel:

1) The decisions of the Council not to adopt the recommendations of the Commission pursuant to Art. 104, par. 8 and 9, EC;

There is yet another reason that may explain the introduction in Constitution of a balanced budget rule: by acting through a constitutional source the member states allow themselves to overcome the international nature of the Fiscal Compact and to turn it into a source of domestic law⁵⁹. In theory, this means an increased efficiency and tighter standards. After the reform, the constitutional Court will have to consider the new budget rule as a constitutional parameter, so it makes budget rules justiciable and not only subject to political controls⁶⁰.

When fiscal or budget rules are not in accordance with this constitutional parameter, the constitutional judges can annul all Acts that are contrary to the constitutional rules on balanced budget. This is stronger than the European remedy. The European Court of Justice has had many difficulties in introducing this juridical control, and the domestic courts could do it better.

9. Conclusions

The reform raises several issues of compatibility with the entire Constitution. This is mainly due to the characteristics of the Italian Constitution. The Italian economic model contained in the Constitution was open to different solutions. It would have been the task of political majorities to define the contents from time to time. This is the reason why the excess of rigour can make the Constitution ineffective⁶¹.

2) The 'conclusions' of the Council, as they implied the suspension of the procedure, the use of an instrument not envisaged by Community law and a *de facto* change in the decisions of 3 June and 21 January 2003.

The Court of Justice declared the Commission's actions to be inadmissible, and took the opportunity to reaffirm the Council's discretion (and hence the ineffectiveness of the judicial powers assigned to it). The judgment therefore confirms that the Stability Pact cannot be applied and that the controls of the Court of Justice (which in any event represents a last resort after policy decisions made by the Council and the Commission) are weak. On the ECJ decision See B. DUTZLER and A. HABLE, *The European Court of Justice and the Stability and Growth Pact - Just the Beginning?*, 9 *European Integration Online Papers*, 2005, 8 – 12.

⁵⁹ See P. LEINO and J. SALMINEN, *The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?*, 9 *European Constitutional Law Review*, 2013, 473. See also J.-H. REESTMAN, *The Fiscal Compact: Europe's Not Always Able to Speak German On the Dutch Implementing Act and the Hazardous Interpretation of the Implementation Duty in Article 3(2) Fiscal Compact*, 9 *European Constitutional Law Review*, 2013, 481, which considers the Fiscal Compact an instrument to combat the eurocrisis, but it asks to the States to keep the eurozone within the agreed budgetary parameters. For a critical position of Fiscal compact and of Financial european Constitution see E. MOSTACCI, *La sindrome di Francoforte: crisi del debito, Costituzione finanziaria europea e torsioni del costituzionalismo democratico*, 4 *Politica del Diritto*, 2013, 481-558.

⁶⁰ V. RUIZ ALMENDRAL, *The Spanish Legal Framework for Curbing the Public Debt and the Deficit*, 9 *European constitutional law review*, 2013, 189 also claims it.

⁶¹ On this point, see F. ANGELINI, *L'iniziativa economica privata*, in F. ANGELINI and M. BENVENUTI (eds.), *supra*, 121: 'The social State within its own structure requires an extremely articulate and complex discipline of economic activities, both private and public. It is not a fixed structure, rather one that adapts to social, political and economic transformations that are gradually determined and involve the evolution of the State itself, as previously

The economic model proposed by the Union is too rigid and it is not able to deal the effects of the crisis. It has the only aim to propose a uniform control of expenditure, but does not have the ability to impose common policies that produce better economic development. This would require a political capacity by European institutions that do not yet exist. Imposing strict budget controls and sanctions can not be a solution to the crisis, and in fact while more advanced Countries slowly exit to the crisis, Europe is still embroiled.

The rigidity of the EU rules that has now been inserted into the Constitution deeply modifies the original structure of the Constitution. In the Italian Constitution, there is, in fact, no clear separation between economic choice and civil and social rights⁶². The new structure imposes a hierarchy in favour of the economy choice and of control of budget.

The people's rights, and in particular social rights, could be profoundly affected by these changes, so those who originally framed the Constitution had consciously avoided to include financially restrictive policies⁶³. After the constitutional reform on 2012, we assist of a research of difficult balancing between different parts of Constitution. Constitutional court seems to have accepted the budget constraint as a "super rule"; thus declared unconstitutional regional laws, which place greater spending, e.g., on cancer care or providing palliative care⁶⁴.

mentioned. In particular the economic structure, in the Constituents' idea, because it is useful for the democratic growth and social structure, appears to be greatly informed about democratic economy tools. This is clear especially in the link between workers' democratic participation and their social status, which are entrusted to constitutional laws regarding employment'.

⁶² On this point, see M. LUCIANI, *La produzione economica privata nel sistema costituzionale*, Cedam 1983, 197. The Author recognises an implicit and deep link between Art. 41 and Art. 3 (2), of the Italian Constitution, and hence a deep link between economics and rights, especially where social rights are concerned.

About the link between Article 41 of the Constitution and human dignity and rights, especially in times of crisis, see also C. PINELLI, *Riflessioni sull'art. 41 Cost., Aperta Contrada*, 2011, 1.

The close connections between economics and rights and between economics and dignity are clearly explained in Art. 41 which reads as follows:

'Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.'

The relationship between economic and public power is clear from Art. 42:

'Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all. In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest. The law establishes the regulations and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance.'

⁶³ As A. BRANCASI, *La nuova regola costituzionale di bilancio. Effetti sui rapporti Parlamento-Governo...*, *supra*, 4.

⁶⁴ See Constitutional court, on 18 April 2012, Case 91/2012; on 12 Mai 2012, Case 115/2012; on 29 Mai 2013, Case 104/2013; on 10 April 2014, Case 85/2014.

Also the regional pattern that it has shaped on 2001 (obtained with a constitutional reform on 2001) is now in crisis⁶⁵.

In the Italian regionalism the shift of competencies from the State to the Regions and local authorities has contributed to the creation of additional cost centres, which are difficult to be monitored by central State. The constitutional Law 3/2001 modified Article 119 by introducing fiscal autonomy and a significant expenditure autonomy for the local authorities and the Regions⁶⁶. The Act of Parliament 42/2009 implemented these constitutional provisions⁶⁷. Fiscal federalism in Italy has evolved through several steps with the aim to improve the efficient delivery of services. The framework called by the Constitution described a large degree of federalism, but the implementation of this framework has been highly non-linear and uneven, due to political disagreements and distributional issues.⁶⁸

Later, the constitutional Law 1/2012 and the reinforced law 243/2012 revised and corrected this *schema* by subjecting the budgets of the local authorities and Regions to central State control. Only the central State can assess the “exceptional circumstances” or “periods of severe economic downturn”; a veritable balanced budget rule is required to the regions while State may reach a more elastic “equilibrium” between revenues and expenditure⁶⁹.

Constitutional court has been interpreted the State role of coordination of public finance in strict sense: in decision n. 88/2014 it laid down the room of local autonomies is almost erased⁷⁰. It is also recalled that constitutional reform on 2012 has transformed the harmonisation of public accounts from a concurrent competence to an exclusive legislative

⁶⁵ As regards the impact of EU regulation and fiscal federalism in Italy, see F. BALASSONE and D. FRANCO, *Fiscal federalism and the Stability and Growth Pact: A difficult union*, XVII *Journal of Public Finance and Public Choice*, 1999, 137. Law 42/2009 has not been fully implemented. On this point, see N. LUPO, *Il procedimento di attuazione del federalismo fiscale alla luce della legge di delega*, in G. CAMPANELLI (ed.), *Quali prospettive per il federalismo fiscale? L'attuazione della legge delega tra analisi del procedimento e valutazione dei contenuti*, Giappichelli, 2011, 77.

⁶⁶ On the different contents of constitutional reform on 2001 aimed at affirming a strong decentralization and a wide fiscal autonomy of local authorities see F. COVINO, *La perequazione finanziaria nella Costituzione*, Jovene, 2008, 166-170.

⁶⁷ For a history of different phases of fiscal federalism and regional and local authorities autonomy see C. NAPOLI, *Autonomia finanziaria*, *Rivista del gruppo di Pisa*, 2014, 1-17 at www.gruppodipisa.it/wp-content/uploads/2014/05/cristina_napoli-berghamo.pdf.

⁶⁸ See P. BILANCIA, F. PALERMO and O. PORCHIA, *The European fitness of Italian Regions, 2 Perspectives on Federalism*, 2010, 10 – 12.

⁶⁹ As Article 9 of reinforced law 243/2012 provides and as L. MOLLICA POETA, *L'autonomia degli enti territoriali alla prova della crisi economica: nuovi vincoli ed equilibrio di bilancio*, *Rivista del gruppo di Pisa*, 2014, 14, at www.gruppodipisa.it/wp-content/uploads/2014/09/Mollica.pdf argues.

⁷⁰ Article 10 of reinforced law provides an analytical discipline of the State about regional borrowing. It defend the regional competences especially of special regions (that have a special and most favorable statute of autonomy). Constitutional court declared this article not in violation of the Italian Constitution. See L. GRIMALDI, *La Corte accoglie solo parzialmente alcune istanze regionaliste, ma conferma, nella sostanza, la disciplina di attuazione del principio di equilibrio dei bilanci pubblici (note a margine della sentenza Corte cost. 88/2014)*, *Amministrazione in cammino*, 2014, 7.

power of the State (Article 117 (2) Constitution). The picture is so complete and it is worrying for regional fiscal autonomy.

Even the role of Constitutional court is in transformation after the reform. It is forced to become more similar to the Court of Auditors and it tends to become a judge of public accounts because it is conditioned by emergency conditions⁷¹.

Finally, despite the hopes of a re-evaluation of the role of Parliaments after the Lisbon Treaty, the role of Chambers is not so vigorous after the constitutional reform⁷². On domestic domain Parliament is not central in budget decision: Government has a fundamental role. During the economic crisis executive power can adopt emergency measures by decree-law. On European domain the role of parliament is subordinated: it can decide to postpone the balanced budget for exceptional circumstances, but the final decision is up to the European commission and European Council⁷³.

⁷¹ Constitutional court always justified his decisions by appealing to an emergency period and to the economic crisis. See, *ex plurimis*, Constitutional court, on 7 June 2012, Case 148/2012; 223/2012; on 5 December 2012, Case 284/2012; on 15 February 2012, Case 26/2013; on 3 July 2013, Case 220/2013; on 12 December 2013, Case 304/2013; Case 310/2013; on 14 April 2014, Case 85/2014.

⁷² See R. BELLAMY, S. KRÖGER, *Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU's System of Governance*, 2, Parliamentary Affairs, 2014, 437-457.

⁷³ A Resolution of Italian Parliament on 17 April 2014 decided to postpone the balanced budget to 2016, European Council adopted a Recommendation on 2 June 2014 that criticized Italian economic situation but accepting this postponement due to the severe economic conditions.