

# Chicago-Kent Law Review

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Volume 67  
Issue 2 *Symposium on Parliamentary  
Participation in the Making and Operation of  
Treaties*

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Article 6

June 1991

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### Recommended Citation

Giovanni Bognetti, *The Role of Italian Parliament in the Treaty-Making Process - Europe*, 67 Chi.-Kent L. Rev. 391 (1991).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss2/6>

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## THE ROLE OF ITALIAN PARLIAMENT IN THE TREATY-MAKING PROCESS

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The so-called "democratization" of the treaty-making process—a general trend in the history of all western developed countries—has also taken place in the course of the more than one century long evolution of Italian constitutional law. And yet that democratization in Italy seems, for good or for bad, to have thus far progressed not only much less than in the United States but less in general than in quite a few other western countries. The role of the Italian Parliament was in the past, i.e., in the period of liberal monarchy,<sup>1</sup> a very limited one, although to Parliament were then entrusted, vis-à-vis the executive function of making treaties, all the powers for the minimal protection of the vested rights of citizens that was required by a typical nineteenth century liberal regime. The republican Constitution of 1948 intended certainly to enlarge and strengthen the participation of Parliament. How far, however, is not clear. At any rate, the subsequent prevalent interpretation of the new constitutional provisions, the impact of the developments of international law in the area of intergovernmental agreements, and, last but not least, the indifference that Parliament for a long time manifested with respect to the subject-matter, all made for a substantial continuity with the past. Only recently, in the Eighties, Parliament has awakened and a few changes, both in the law and especially in the practice, have occurred: changes that have given Parliament some more voice in the shaping of the international agreements which Italy enters. This larger participation of Parliament is likely to continue in the future; whether it will also grow in size is uncertain.

I shall first summarily describe the constitutional principles that govern the participation of the Italian Parliament in the making and implementing of international treaties and agreements, as they have been interpreted by doctrinal writers and, in particular, as they have been put into practice by Parliament and the government. I shall then examine the possible legal consequences of the nonobservance of the principles concerning the participation of Parliament both within the Italian legal

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1. The role of the Italian Parliament during the fascist period, for obvious reasons, is not worth discussing.

system and, also, within the international system, with an eye to the relevant behavior of the courts as final interpreters of the law.

Note at the outset that we are dealing here only with the process of treaty-making and treaty-implementation in general. The special case of the treaties that gave rise to the European Community and of the body of Community law that at present directly operates within the Italian legal system is not considered, in as much as it is a case controlled by principles completely apart and different.<sup>2</sup>

## I. THE ROLE OF PARLIAMENT ACCORDING TO THE CONSTITUTION, DOCTRINAL WRITERS AND THE PRACTICE

The constitutional statute of the Sardinian, and later the Italian, Kingdom, the "Statuto albertino" (1848), provided at article 5:

the King . . . makes the treaties, concerning peace, alliance, commerce and other matters, and informs Parliament as soon as the interest and the security of the state will permit. . . . Treaties carrying burdens for the state finances or variations in the state territory will have effect only after the Chambers have given their consent.

That provision was to a large extent borrowed from the text of the 1831 Belgian Constitution, which was in other respects also a blue-print for the Italian "Statuto". In it, the term "the King" was soon interpreted as "the government" (the cabinet, the ministers), because after 1855 the form of government turned, in a stable manner, parliamentary. The government—as the letter of the provision makes clear—had the right to conclude treaties (through all ways able to bind Italy at the international level) without letting Parliament know in advance. If interrogated about on-going negotiations, it could refuse the Chambers any information. It could also keep the transaction secret after conclusion, if it thought that secrecy served the interest of the nation. The treaty of the Triple Alliance, which bound Italy to Austria-Hungary and Germany for many years up to the eve of Italy's entry into World War I, was never known in its details by Parliament. The text of the Treaty of London, that brought Italy into that war, was known only after the end of it.

The provision of article 5 stated, however, that no effect would be given to certain types of treaties without the consent of the Chambers. At any rate, this consent could obviously be obtained by the government *after* the treaty had been concluded. That meant that parliamentary consent was not a condition, even for Italian constitutional law, for the va-

2. In the case of the European Community, Italy has given up part of its sovereignty in accordance with article 11 of the Constitution: a surrender of sovereignty that does not occur when a normal treaty is concluded.

lidity and effectiveness of *any* treaty as a binding *international* agreement. It was instead a condition only for the displaying of effects by some treaties within the Italian legal system.

The group of treaties that needed parliamentary consent in order to become operative within the Italian system was almost immediately recognized to exceed those expressly mentioned in article 5. If a treaty, in order to be implemented by Italy, required modifications in the Italian statutory law (the codes and the special statutes), the consent of Parliament in the form of a statute was held necessary.<sup>3</sup> A statutory act was also necessary to give effect to the treaties affecting the state finances, because the budget was approved by a formal statute.

Occasionally the government found it expedient to submit treaties for parliamentary approval, which needed parliamentary consent, and had been signed but not yet ratified. In such cases it became customary for Parliament to give its consent through a statute which carried a so-called "order of execution" ("Full and entire execution shall be given to the treaty"—to be ratified). The "order of execution" would transform the treaty into Italian legal rules, capable of modifying Italian statutory law. The "order" would become effective only if the treaty were later ratified and became binding at international law. Of course, the "order of execution" would be sufficient to give municipal force to the rules of the international agreement only if these were "self-executing." If not, Parliament was supposed to supply further rules, usually through a subsequent statute, to make the Italian system comply with its duty to perform the obligations assumed through the international agreement. When called upon to approve a treaty *prior* to ratification, Parliament was not allowed, in principle, to introduce changes or reservations to the treaty text as signed by the government. On the other hand, the government had the right not to ratify a treaty even if Parliament had approved it by issuing an "order of execution," or to ratify it with the reservations it believed appropriate. Treaties which did not require the consent of Parliament under article 5 would become effective within the Italian legal system (in the sense that courts would be allowed and obliged to take notice of them) upon a decree by the government that would make them "executory."<sup>4</sup>

3. Just as in Great Britain no international agreement could bring about changes in the *common law* or in the statutes without a special act of Parliament.

4. For the legal principles governing the treaty-making process under the monarch see DONATO DONATI, I TRATTATI INTERNAZIONALI NEL DIRITTO COSTITUZIONALE (1906); Dionisio Anzilotti, *Alcune considerazioni sull' approvazione parlamentare dei trattati la cui esecuzione importa provvedimenti di natura legislativa*, 4 RIVISTA DI DIRITTO INTERNAZIONALE 467 (1909); GU-

In the period of liberal monarchy, the shaping of Italian foreign policy through the conclusion of treaties rested thus almost exclusively in the hands of the Executive. Parliament would exercise a vague form of control through the vote of confidence that the cabinet was supposed to obtain upon the presentation of its program to the Chambers. The formal consent of Parliament was necessary to give municipal relevance to certain important treaties. But treaties of the utmost importance, such as treaties of alliance, were not included in this group. In addition, because parliamentary consent could be obtained *after* the treaty had come into force at the international level, in practice the consent had to be given by Parliament anyway, in order not to involve Italy in a violation of international law. In such cases, the pressure on Parliament to approve the treaty was particularly strong because a refusal would have "exposed" not only the cabinet but also the King, who had formally signed and ratified the treaty. The Crown—as the saying went—was to be "covered."<sup>5</sup> The practice of submitting treaties to Parliament for approval *before* their ratification enhanced the role of Parliament a little. Because in this case a possible refusal would not entail an international wrong, and Parliament was in theory freer to dissent. But the practice was left entirely to the discretion of the government and was, in fact, at the end of the period, still quite limited. In conclusion, the role of Parliament in the treaty-making process was minimal.

The relationship between the municipal law and international law was structured, in the Italian law of the period, along lines strictly in accordance with the logic of a *dualistic model*. International rules of all kinds—and in particular treaty rules—would have effect within the Italian system only if admitted into it by some special act of the Italian state—a statute or a governmental decree, according to the case. It was on this basis that Italian jurists in general—notably Professor Anzilotti—sided at the time with the dualistic theory and contributed to the development and the rational articulation of the model. For them, international rules would count for the Italian judge only if appropriately "transformed" into national rules.

GIULIO NEGRI, LA DIREZIONE E IL CONTROLLO DEMOCRATICO DELLA POLITICA ESTERA IN ITALIA, 1-15 (1967).

5. The majority in the House of Deputies was opposed to Italy's entering into World War I in May, 1915. But when it learned that a secret treaty had been signed in London a month before, pledging Italy to join the Allies in the war, the House, though still ignoring the exact terms of the treaty, gave in and voted for the war in order not to "expose" the Crown. This was the most important instance of pressure applied on Parliament during the monarchy period in order to make it accept the independent choices of the cabinet, acting in the name of the King, in matters of foreign policy and treaty implementation.

The republican Constitution of 1948, in the first place provides, at article 10, that "the Italian legal system conforms to the norms of international law generally recognized." This provision has been interpreted, by doctrinal writers and the Constitutional Court (decisions no. 32 of 1960, nos. 67 and 68 of 1961), as introducing directly (i.e., without need of any special state action) all the rules of international *customary* law into the Italian legal system. They are, therefore, presently cognizable by the courts and immediately applicable by them in their decisions. Moreover, article 10 grants them a rank, in the system of law sources, superior to ordinary legislation. Thus, a statute conflicting with them should be referred by the proceeding judge to the Constitutional Court and be declared unconstitutional on that basis. A few writers have argued that, as the principle *pacta sunt servanda* is a fundamental element of international customary law, article 10 was to be read as also indirectly introducing all particular international agreements to which Italy is a party into the Italian system, equally giving them a rank superior to ordinary legislation. (The principle *pacta sunt servanda*, possessing constitutional stature, would otherwise be *de facto* disregarded.)<sup>6</sup> This doctrine has been rejected by the overwhelming majority of experts and by the Constitutional Court (decisions no. 14 of 1964, no. 96 of 1982). Therefore, at the moment all treaties and agreements that bind Italy at the international level must still be—unlike international customary law—"transformed" into national law through a special act of the Italian state in order to become "justiciable" in an Italian court. Further, treaty rules have the same legal rank of the act that introduces them into the Italian system. As a consequence, a subsequent state act of the same or a superior rank (a statute, or a governmental decree) might in theory contradict the "italianized" treaty rules and should be considered overriding by all Italian judges. This might cause Italy to default in the eyes of international law but makes no illegal dent in the texture of the Italian law.<sup>7</sup>

As for the formation of treaties and agreements (the *conventional* international law), the Constitution provides simply in article 80 that

6. Giuseppe Sperduti, *Trattati internazionali e leggi dello stato*, 65 RIVISTA DI DIRITTO INTERNAZIONALE 5 (1982); GIACINTO BOSCO, LEZIONI DI DIRITTO INTERNAZIONALE 125 (1981). See also ROLANDO QUADRI, DIRITTO INTERNAZIONALE PUBBLICO 63 (1968), who believes that treaties, once regularly concluded, operate within the Italian legal system without need of a special "order of execution." He does not seem, however, to attribute to them a rank superior to statutes.

7. The different ways by which international customary law and treaties are made to operate within the Italian legal system, and their different rank as law sources, are aptly described by ANTONIO LA PERGOLA, COSTITUZIONE E ADATTAMENTO DELL'ORDINAMENTO INTERNO AL DIRITTO INTERNAZIONALE (1961). This volume has been recently translated into Spanish, with an author's preface bringing it up to date: CONSTITUTION DEL ESTADO Y NORMAS INTERNACIONALES (1985).

“The Houses of Parliament authorize by statute the ratification of the treaties that are by nature political, or provide for arbitrations or judicial settlements of disputes, or involve variations in the state territory or burdens on the state finances or modifications in the statutory law.”

Further, in article 87 the Constitution provides that: “[t]he President of the Republic . . . ratifies the international treaties, after they have been authorized by the Houses, if the Constitution so requires.”

Through these provisions the framers of the Constitution wanted to put an end to the old practice of secret treaties such as the Triple Alliance and the London treaties. Beyond that the new constitutional principles were intended to make some changes in the previous rules and uses of monarchical Italy; but the precise extent of the changes remains open to argument.

For instance it might be argued, assuming that the provisions of articles 80 and 87 must be taken in their literal sense, that the Constitution implies principles of this kind, vastly innovating vis-à-vis the old law:

a. Because the term “treaty” must be taken to refer to all kinds of international agreements, article 87 requires Italy to conclude *all* its agreements in a form that keeps signature and ratification distinct and makes the agreements internationally binding and operative only after ratification.

b. The rule that the President ratifies the treaties is a particular application of the idea of his role as a “guarantor” of the Constitution and of legality. All international agreements must therefore be submitted to the President before ratification so that he may check that they are not contrary to the Constitution and to the law.

c. The negotiation and signature of treaties belong to the government, while ratification can occur only after the President has determined their lawfulness. This holds for all treaties. But with respect to the treaties mentioned in article 80, there is an additional condition for their being validly concluded from the point of view of the Italian Constitution. After a treaty is signed, and before it comes into force at international law via ratification, Parliament must consent to the treaty. In particular, the phrase “treaties by nature political” must be taken at its face value. And because almost all international treaties have political implications, Parliament would enjoy a sort of preventive *veto* on nearly all the international engagements into which Italy enters.

Perhaps this construction was what the framers actually had in mind, perhaps not. In any case, strict compliance with it would have made it impossible for Italy to participate in the international life of the

post-World War II world without serious impairments. So, the construction was never accepted by the Italian constitutional and international lawyers (at least not without important qualifications) and was even more largely disregarded by the practice of the constitutional state organs (government, Parliament, the President).

The principle (under part a.) above would have prohibited Italy from concluding agreements in simplified form. Currently the simplified form is by necessity and convenience the most usual way international agreements are concluded. The solemn, cumbersome form of ratification is not suited for most of the numerous transactions that take place between contemporary nations. All the Italian writers have therefore read article 87 as implicitly admitting the valid existence in Italian law of treaties or agreements concluded by simple governmental signature, without presidential ratification. Cassese, Carlassare, and Lippolis reach this conclusion because article 87 has been said to refer only to the treaties that the government freely chooses to conclude via ratification.<sup>8</sup> Monaco and Franchini argue it is because a constitutional convention or a customary rule must be considered to have modified the article's original meaning.<sup>9</sup> One writer, Giuliano, has maintained that agreements in simplified form are admissible on the theory that the President has generally and permanently delegated to the government the power to conclude treaties without his intervention.<sup>10</sup>

Without bothering to adduce any particular theoretical justification, the Italian government did not hesitate to conclude hundreds of treaties in simplified form after 1948. And neither Parliament nor the President have, at least with respect to the question of principle, raised any objection.

Further with respect to the interpretation of the term "treaties by nature political," the prevailing trend among the writers is to shun the construction mentioned above. In general, jurists hold that the category is confined only to treaties that are of some serious importance to the

8. Antonio Cassese, *Articolo 87, comma VIII*, in COMMENTARIO DELLA COSTITUZIONE 223, 226-31 (Giuseppe Branca ed., 1978); Antonio Cassese, *Articolo 80*, in COMMENTARIO DELLA COSTITUZIONE, 150, 154 (Giuseppe Branca ed., 1979); LORENZA CARLASSARE, *REGOLAMENTI DELL'ESECUTIVO E PRINCIPIO DI LEGALITA'* 298 (1966); VINCENZO LIPPOLIS, *LA COSTITUZIONE ITALIANA E LA FORMAZIONE DEI TRATTATI INTERNAZIONALI* 206 (1989).

9. Riccardo Monaco, *La ratifica dei trattati internazionali nel quadro costituzionale*, in STUDI PER IL XX ANNIVERSARIO DELL'ASSEMBLEA COSTITUENTE 456-59 (1969); Marco Franchini, *I poteri del governo nella conclusione degli accordi internazionali*, 30 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 26, 36 (1980).

10. MARIO GIULIANO, ET AL., 1 *Diritto Internazionale* 672 (2d ed. 1983). See also Manlio Udina, *Gli accordi internazionali in forma semplificata e la Costituzione italiana*, 45 RIVISTA DI DIRITTO INTERNAZIONALE 201, 211 (1962).



state. Hence an authorization by Parliament need not precede presidential ratification in cases of minor consequence, and the government has some discretion in choosing whether or not, in doubtful cases, to proceed without involving Parliament.<sup>11</sup>

On the questions of the validity of agreements in simplified form and of the scope of the clause concerning political treaties, Italian legal theory is disposed to admit for the government a larger role in the treaty-making process than the letter of the Constitution would perhaps countenance. Legal theory is, in general, far less ready to justify the bold line of interpretation chosen by the government, and the substantial acquiescence towards it of Parliament (and of the President), when it comes to other fundamental problems concerning the formation of treaties.

The first of such problems involves the possibility of the government choosing to conclude treaties in simplified form, or omitting a request for a preventive approval by Parliament, in areas that articles 80 and 87, taken together, seem to reserve to treaties concluded by way of presidential ratification preceded by an authorization by Parliament.

One writer, Monaco, believes that at least in some of these areas, e.g. important political treaties and treaties carrying financial burdens, the government is on principle entitled to proceed without previous parliamentary permission and in simplified form, if the interest of the state so requires.<sup>12</sup> In other words, the Constitution would have introduced almost no basic changes with respect to the law of the monarchy on this point. But all other jurists are of the opinion that such a procedure would be highly irregular. Some expressly mention the possibility of Parliament raising a "conflict of powers" before the Constitutional Court in order to have this unconstitutional behavior of the government stopped. And a similar "conflict" could be raised by the President, when bypassed through an agreement in simplified form in one of the areas of article 80.<sup>13</sup>

However, most of the writers who consider the procedure irregular also believe that Parliament can, once the treaty has been concluded without the prior necessary consent, validate it later through a subsequent statute providing for the municipal execution of it or even through a simple resolution.<sup>14</sup> The reason to concede the possibility of a belated

11. LIPPOLIS, *supra* note 8, at 102-07.

12. Monaco, *supra* note 9, at 456, 459; See also Riccardo Monaco, *I trattati internazionali e la nuova Costituzione*, I RASSEGNA DI DIRITTO PUBBLICO 202, 204, 214 (1949).

13. LIPPOLIS, *supra* note 8, at 301.

14. CONSTANTINO MORTATI, *ISTITUZIONI DI DIRITTO PUBBLICO* 684 (9th ed. 1976); Giuseppe Sperduti, *Rilevanza internazionale delle disposizioni costituzionali sulla stipulazione dei trattati e suoi limiti*, in 2 SCRITTI DI DIRITTO INTERNAZIONALE IN ONORE DI TOMASO PERASSI 301, 323

parliamentary approval is obvious. It would be incongruous to prohibit Parliament from giving effect to an agreement, which is meanwhile in force at the international level, and which the Houses consider favorably. On the other hand, allowing for approval *after* the event practically takes away much of the institutional strength of the prescribed pre-approval. The government may always be tempted to act without prior parliamentary authorization in the hope of obtaining a confirmation later.

In the realm of fact, the government, at least until a few years ago, has repeatedly concluded binding agreements in matters falling unquestionably within the categories contemplated by article 80 without previous authorization by Parliament. The examples abound. Following are a few of them:

a. Italy joined the United Nations in 1955 upon demand of admission by the government, only later confirmed by Parliament through a statute carrying an "order of execution".

b. The London Agreement of 1954, concerning Trieste and the surrounding territory, was concluded by the government in a simplified form (simple signature) and was later "approved" by Parliament while voting on the budget of the Ministry of Foreign Affairs.

c. In 1976, Italy and the United States concluded an agreement in simplified form concerning mutual judicial assistance in the Lockheed case, an agreement which on the side of Italy involved modifications in the law of criminal procedure. The municipal consequences of the agreement were later regulated by the Italian government through a decree-law.

d. The participation of the Italian mine-sweepers in the naval operations at the Tiran Straits in 1982 was the object of an agreement between the Italian government and the Sinai Multinational Force. The government gave it "immediate, temporary execution," while introducing in Parliament a bill for the authorization of a belated ratification. The bill was passed into law when the naval operations had already ended.

e. A similar procedure (immediate, temporary execution and subsequent parliamentary approval) was also adopted in the case of the agreements between Italy and Lebanon, for the participation of Italian military forces in the two peace missions in Beirut in 1982. The procedure was used again with the agreement between Italy and

Egypt, for Italian participation in the mine-sweeping of the Suez Canal in 1984. The list goes on.<sup>15</sup>

In such cases, the government, if it has advanced a justification at all, has relied in general on the theory that the international practice contemplates as legitimate the forms that were adopted for the conclusion of the agreements, and the circumstances were, at any rate, urgent. A justification more specifically to the point was advanced by the government in cases where the agreements, concluded in simplified form, could be placed within the framework of a previous treaty, concluded according to the rules of article 80. Those agreements, the government contended, were only instances of "execution" of the original treaty and did not need, as such, a previous authorization by Parliament. Accordingly, the government asked neither for previous nor subsequent specific approval by Parliament, for instance, of the agreements concluded in simplified form with the United States in 1959 for the installation of the Jupiter missiles at Gioia del Colle; in 1972 for the concession of a naval base at La Maddalena; in 1984 for the installation of Cruise missiles in Italian territory. These agreements were not "new treaties" in as much as they simply "implemented" general obligations already existing under the NATO treaty. In 1959 the government added that a presentation to Parliament of agreements implementing the NATO treaty and concerning military matters was impossible because national security required that such matters be kept secret.<sup>16</sup>

In some of these various cases the opposition of the left protested that the rules of article 80 had been violated; but in other cases, where the action of the government was deemed politically acceptable, the very same opposition forgot about constitutional objections and joined in a vote of late approval. This was true, for example, in the two cases of the 1982 Beirut missions. The majority, however, always stood behind the government, and Parliament never censured, with a vote or otherwise, the practice of making treaties without its prior approval, even in the special areas named by article 80.

15. A detailed description of the cases mentioned above, together with the story of other similar cases, can be found in Augusto Barbera, *Gli accordi internazionali tra Governo, Parlamento e corpo elettorale*, QUADERNI COSTITUZIONALI 439, 450-64 (1984); A. Massai, *Parlamento e politica estera: l'Italia*, QUADERNI COSTITUZIONALI 559, 576-94 (1984).

See also Sergio Marchisio, *Sulla competenza del governo a stipulare in forma semplificata i trattati internazionali*, 58 RIVISTA DI DIRITTO INTERNAZIONALE 533 (1975); Cassese, *Articolo 80*, *supra* note 8, at 181-91; Silvano Labriola, *Principi costituzionali, ordinamento e prassi nella disciplina della autorizzazione legislativa alla ratifica degli accordi internazionali*, 18 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 209, 242-48 (1982); LIPPOLIS, *supra* note 8, at 194, 228.

16. Cf. SERGIO MARCHISIO, *LE BASI MILITARI NEL DIRITTO INTERNAZIONALE* 117-22 (1984); Franchini, *supra* note 9, 54-58; LIPPOLIS, *supra* note 8, at 195.

Another group of fundamental problems regarding the participation of Parliament in the treaty-making process involves the nature of the authorizing statute prescribed by article 80, and the powers that Parliament can exercise when discussing and voting on it.

Here the jurists are divided. Some, moving explicitly or implicitly from the idea that the Constitution wants to make Parliament a participant almost with equal rights in the making of treaties, tend to define for Parliament rather large powers with respect to the shaping of the statute in question; others, instead, believing that foreign policy is, by the Constitution, an almost exclusive province of the Executive, lean towards interpretations that restrict more severely the role of Parliament.

Writers generally acknowledge that the government has the exclusive power of initiating the negotiation, of signing the text and of introducing the bill in Parliament for the authorization to ratify. But a handful of them hold that in the absence of a bill presented by the government, members of the Houses would be entitled to take the initiative.<sup>17</sup>

The real division between scholars pertains to the problem of whether Parliament may, through amendments, make its consent to the text signed by the government conditional, or whether the only possible thing Parliament can do is to answer "yes" or "no" to the question of ratification and to the question of giving the treaty municipal effect. The statute contemplated by article 80 usually carries, along with authorization to ratify, an "order of execution." This practice had begun under the monarchy and has been continued with the Republic. Some writers—e.g., Lippolis—maintain that the statute of article 80 should always carry an "an order of execution," in addition to the clause concerning the authorization to ratify, at least when the treaty which is authorized for ratification is "self-executing."<sup>18</sup>

Only a few jurists—e.g., Chimenti—believe that the Houses can, through the statute, reshape the clauses of the treaty already signed, thereby indirectly compelling the government to reopen the negotiations

17. The prevailing opinion, reserving to the government all phases of the treaty-making process up to the consent vote to be cast by Parliament, is expressed, e.g., by Walter Leisner, *La funzione governativa di politica estera e la separazione dei poteri*, 10 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 342, 359, (1960) and more recently, by LIPPOLIS, *supra* note 8, at 16, 125. The right of parliamentarians to initiate autonomously the bill of authorization is asserted, e.g., by ANTONIO BERNARDINI, *FORMAZIONE DELLE NORME INTERNAZIONALI E ADATTAMENTO DEL DIRITTO INTERNO* 204 (1973).

18. LIPPOLIS, *supra* note 8, at 48, 87.

at the international level.<sup>19</sup> One writer—Giuliano—argues that the statutory clause of authorization cannot contain modifications of a text that has been agreed upon internationally in a definitive way; but that the “order of execution” can instead reshape or change, *with regard to the municipal effects of the treaty*, the rules established by this.<sup>20</sup>

The consequence of this, however, would be that the President would then ratify a treaty when the internal, precise execution of it would be, to say the least, in doubt from the moment of ratification. As discussed earlier, Italian constitutional law admits of derogations by subsequent statutes from treaty rules in force in the municipal system. But Giuliano seems to approve of a derogation already announced at the very moment Italy binds itself internationally through the treaty ratification.

Jurists who would like Parliament to be able one way or another to tamper openly via the statute of article 80 with the obligations of the treaty to be ratified or with its internal effects are in a minority. Much more numerous are those who would confer upon Parliament vast powers, at least in the area of *reservations*.

Reservations, both “interpretative” and “exception-making,” can be attached essentially only to the adhesion to multilateral treaties and on principle should not be able to alter the rules of a treaty, but simply aim at eliminating the applicability of one or more rules to the party making the reservation. Many believe that the government should obtain from Parliament an express authorization to ratify with reservations, so that all reservations attached to the text as finally ratified ought to have been expressly consented to by the authorizing statute.<sup>21</sup> Some maintain that Parliament can also formulate reservations on its own initiative and of its own choice in the statute. The government, if it then proceeds to ratify, ought to ratify with the reservations established by Parliament.<sup>22</sup>

All this would give Parliament a definite control over the shaping of reservations. Some lawyers, especially those of the internationalist branch, consider this inappropriate.<sup>23</sup> They argue that would unduly complicate the process of making and applying treaties and excessively

19. CARLO CHIMENTI, *IL CONTROLLO PARLAMENTARE NELL'ORDINAMENTO ITALIANO* 268 (1974).

20. Mario Giuliano, *E' emendabile o inemendabile l'ordine di esecuzione di trattati internazionali?*, 18 *RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 5 (1982).

21. MORTATI, *supra* note 14, at 683; Cassese, *Articolo 80*, *supra* note 8, at 163; Barbera, *supra* note 15, at 449.

22. Livio Paladin, *Ciò che rimane del concetto di legge formale*, in *STUDI IN ONORE MANILO UDINA* 1754 (1975); LIPPOLIS, *supra* note 8, at 113.

23. Gaetano Morelli, *Ordine di esecuzione e adattamento . . . del diritto internazionale al diritto interno*, 62 *RIVISTA DI DIRITTO INTERNAZIONALE* 229 (1979).

restrict the power of the Executive. They point out that article 80 simply wants Parliament to consent (or to deny consent) to the treaty as such; the business of reservations is the government's business. The government should not be compelled to obtain from Parliament any authorization with respect to reservations. If they were formulated when the treaty was signed, they must not be submitted together with the text to the vote of Parliament. After the vote, the government can add all further reservations it sees fit. The authorization of Parliament should concern only the *whole* of the treaty; Parliament can be presumed, once its consent has been given and the government has attached reservations, to have also consented implicitly also to something which is simply *less* than the *whole* of the treaty authorized (the treaty *minus* the reservations).

While lawyers dispute this issue, Parliament has consistently taken a very specific position on all these problems. Briefly, the position is completely favorable to the absolutely predominant role of the Executive in the treaty-making process. It is therefore no surprise that Parliament and the government should have always agreed on the scope of their respective rights in these matters.

In the standing rules of the two Houses, there is no express provision forbidding members of Parliament from introducing amendments to a bill presented by the government, in accordance with the principles of article 80. But the steady practice of Houses' Presidents is to declare any amendment of that kind unreceivable.<sup>24</sup> When Senator Giuliano, the jurist, tried to make the Senate accept his distinction between amendments to the "authorizing clause" (inadmissible) and amendments to the "order of execution" (admissible), his attempt was flatly rejected. The President said the bill must be voted on the text prepared by the government.<sup>25</sup> As for reservations, apparently in only one case (concerning the multilateral U.N. treaty on civil and political rights) the government, perhaps by mistake, presented to Parliament a bill in which the reservations it intended to attach at the moment of ratification were included. Parliament approved the clauses containing the reservations in 1977, but later it was explained that the clauses had to be interpreted not as "real reservations" but as "interpretive declarations" of the meaning of the treaty text. At any rate, when the government finally ratified the treaty, further reserva-

24. See ATTI PARLAMENTARI. CAMERA DEI DEPUTATI. VII LEGISLATURA, 3646-7; VIII LEGISLATURA, 26594. Apparently, however, there has been recently an exception to the practice: ATTI PARLAMENTARI. CAMERA DEI DEPUTATI. IX LEGISLATURA. DISCUSSIONI (May 30, 1985), 28304.

25. Giuliano, *supra* note 20, at 23-26.

tions were added to the ones approved by Parliament, so that it was unmistakably clear that the government considered itself the only *dominus* in the subject-matter of reservations.<sup>26</sup> And of course there are many instances of reservations made by the government to various other multi-lateral treaties without even orally informing Parliament.

Another set of problems has to do with the "life" of the treaty subsequent to ratification, considering the possible termination, renewal and consensual variation of treaties. The doctrinal opinion is practically unanimous that the government, even after the statute authorizing ratification, is perfectly free not to ratify. However, quite a few jurists believe that once the ratification has occurred the government is not free to dispose of the subsequent destiny of a treaty without parliamentary consent when the treaty had to be, and was, authorized by Parliament in accordance with article 80. In order to terminate or to prolong the duration of such a treaty, the government should ask for a new statutory authorization, except perhaps when the possibility of termination or prolongation was contemplated by an express clause in the treaty itself. This is also the case with modifications.<sup>27</sup>

Some contest this opinion, and the practice at any rate is in the opposite direction. The Italian government has, in forty years, denounced, prolonged and modified many treaties of all sorts (including some belonging to the categories mentioned by article 80) without previously consulting Parliament.

From the discussion thus far, the role of the Italian Parliament in the treaty-making process appears to be a very modest one. However, in recent times things have changed to a certain extent, and Parliament has taken a keener interest and a more active role in the shaping of foreign relationships. But the change has not occurred up to now through a reinterpretation of parliamentary rights under articles 80 and 87. The principles governing the practice, outlined in the preceding pages, still essentially hold. The change has taken place through another route and through the use of other institutional tools.

As in many other western constitutional systems, Parliament in Italy can get information about the intentions of the government and can direct its behavior up to a point through such means of control as inter-

26. On the whole episode, see Giorgio Badiali, *Le riserve formulate dall'Italia al Patto delle Nazioni Unite sui diritti civili e politici nel quadro dei rapporti costituzionali tra Parlamento e Governo*, 19 COMUNICAZIONI E STUDI DELL'ISTITUTO DI DIRITTO INTERNAZIONALE DELL'UNIVERSITA DI MILANO 25 (1980).

27. Cassese, *Articolo 80*, *supra* note 8, at 168; GIULIANA ZICCARDI CAPALDO, *LA COMPETENZA A DENUNCIARE I TRATTATI INTERNAZIONALI* 63 (1983); LA PERGOLA, *supra* note 7, at 162; LIPPOLIS, *supra* note 8, at 116.

rogations, interpellations, hearings, inquiries and motions. In the 1950s and 1960s these means of control were seldom used in the area of foreign policy with respect to treaties about to be negotiated, or in course of internal implementation. The attitude of Parliament changed in the 1970s. In the 1980s, the dialogue between Parliament and the government through these channels became constant and rather intense. The standing committees on foreign affairs of the two Houses now keep permanently in touch with the government in order to monitor the moves of the latter.

The first, and until now perhaps most important, instance of an international agreement in the negotiation of which Parliament indirectly but actively participated was the New Concordat with the Holy See. The government, while the negotiations were progressing, was willing to discuss the subject with the Houses and was willing to accept, as a starting point for further negotiations, their recommendations approved through motions. The New Concordat was finally approved by Parliament and ratified in 1984.<sup>28</sup>

Perhaps in this instance the willingness of the government to involve Parliament in that phase of the negotiations was due to the special matter that was at stake and to the desire to solicit a particularly large consent. But the impression is that the government is presently far less reluctant in general than it was thirty or forty years ago to let Parliament participate in stages of the treaty-making process which belong in theory to its exclusive sphere.

The recent readiness and desire of Parliament to have a larger say in the treaty-making process are also evidenced by other facts. In 1984, the government asked that a special fund be permanently appropriated in the budget in order to provide for expenditures connected with possible agreements to be concluded in the future and to be put into immediate execution (as in the case of the participation in the peace missions to Beirut). Parliament refused. If it had consented, it would have given a general, blank authorization to future, important political engagements still undetermined in their precise nature and contents, without even preserving to itself the duty and the power to approve or disapprove them after the event in the course of the discussion over the necessary appropriations.<sup>29</sup>

In 1984 Parliament passed a statute whereby all international agree-

28. Antonio Cassese, *I trattati internazionali e il ruolo delle Commissioni affari esteri*, in *PARLAMENTO E POLITICA ESTERA* 112 (1982); LIPPOLIS, *supra* note 8, at 20.

29. See Massai, *supra* note 15, at 583-84.



ments, including the ones in simplified form, must be inserted, as soon as concluded, in the "Raccolta ufficiale" and must be communicated to the Presidents of the two Houses (legge no. 839 of 1984, articles 1, 4).<sup>30</sup> By this law, Parliament is now in a position to know the obligations contracted by the government at the international level without first informing the Houses. Before 1984, many agreements concluded in simplified form remained instead unknown, or almost unknown, to the public at large and to their representatives. Now the people's representatives can at least discuss the merits of all agreements of that kind and suggest possible better lines of action to the government for the future. It can be doubted, however, that really *all* the agreements concluded after 1984 by the government have been published. Some concerning details of military matters may have remained secret.<sup>31</sup>

Finally, the wish on one hand to further "democratize" the treaty-making process and the growing perception on the other hand that the procedures of articles 80 and 87, if followed to the letter, are not suited to adequately meet the needs of contemporary international life have prompted many in the 1980s to advocate constitutional reforms in the field. Parliament, for its part, set up in 1984 a special parliamentary committee ("Commissione Bozzi") charged with the task of making proposals concerning possible amendments to the Constitution in general. The committee came forward with a particular proposal in regard to the treaty-making process. Article 80 should have been replaced by a longer article, of the following tenor:

Every international agreement or treaty is made known by the government to the Houses before the signing of it.

Upon petition of one third of the members of a House, presented within 15 days, Parliament expresses its judgment on the agreement or treaty. This time limit can be shortened in exceptional cases, if the government so requests. If the petition is not presented within the prescribed time, Parliament is presumed to have consented, for all pur-

30. A comment on, and a critical evaluation of, the statute is provided by Silvano Labriola, *La pubblicazione degli atti normativi e la circolazione delle notizie sulle relazioni internazionali della Repubblica italiana*, 21 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 235 (1985). See also LIPPOLIS, *supra* note 8, at 221.

31. To begin with, the publication in the GAZZETTA UFFICIALE of the agreements concluded in simplified form often is not *de facto* complete; technical appendices to the agreements are at times not reported.

With respect to military and secret service agreements, a justification for their not being disclosed may be found in the general principle that state security requires secrecy. Secret treaties do not seem to be, on principle, admitted by the Constitution. But agreements only "implementing" treaties already consented to by Parliament may perhaps be kept secret. The government has, in the past, so contended. And for such agreements an implicit exception may be read in the general rule of publicity established by statute no. 839 of 1984, article 4. On all these problems, see LIPPOLIS, *supra* note 8, at 217.

poses, to the subsequent steps leading to the conclusion of the agreement or treaty.

An authorization by statute is always necessary for the ratification of agreements or treaties involving variations of the territory, financial burdens, modifications of statutory law and of those relative to the assumption of military obligations.

The same procedures must be followed in case of denunciation of, or recession from, an agreement in force.

Once the above mentioned procedures have been accomplished, the Italian legal system ensures full observance of all international agreements and treaties duly concluded.

This proposed amendment to the Constitution has not been adopted, and is not likely to be in the near future. Therefore, detailed comment is not necessary. But the simple reading of it is sufficient to give an idea of how much larger the role of Parliament and how different on the whole the Italian law on treaty-making would have been if the proposal of the Bozzi committee—which at the moment reflected the feelings of a majority in Parliament—had gotten through.<sup>32</sup>

## II. THE ROLE OF PARLIAMENT AND THE ITALIAN COURTS

Which are the judicial processes that can be used to protect, within the Italian legal system, the role of Parliament in the treaty-making process as established by the Constitution and the laws? And what has been, *in fact*, the behavior of the Italian courts towards the problem of the participation of Parliament in that process?

In order to answer these questions, the first court to consider is, of course, the Constitutional Court. In theory this Court has the task of determining, in a final, authoritative way, the meaning of articles 80 and 87 of the Constitution and the scope of Parliament's powers under them. But the Court has had minimal opportunities to speak to the subject, and its contributions in this area are quite limited and hardly conclusive.

As already mentioned, Parliament, when by-passed by the government through agreements in simplified forms in matters in which article 80 seems to require *previous* parliamentary authorization, could probably commence a "conflict-of-powers" suit before the Constitutional Court to vindicate its rights. But Parliament thus far has never decided to act, and so the Court was not spurred, from this side, to spell out the meaning of the article.

The Court can be reached, however, also from another side. Ordi-

32. On the Bozzi amendment: RELAZIONE DELLA COMMISSIONE PARLAMENTARE PER LE RIFORME ISTITUZIONALI 36 (1984).

nary and administrative courts could refer to it the question of constitutionality of statutes *ex post facto* approving international agreements for which the letter of article 80 contemplates an authorization in advance. This has indeed happened, but up to now only once. And the Court has sidestepped the issue, by deciding the case on another ground.<sup>33</sup> The Court annulled the statute under attack because the procedure followed to approve it had not been correct in other respects. Namely, the vote had been cast in a committee meeting and not by the whole House. The decision nevertheless carried some important consequences. The Court's reasoning and some dicta seem to indirectly validate the practice of later approvals even in areas apparently reserved to previous authorizations. At any rate, the Court at a minimum did not disturb the practice, and this *de facto* helped the cause of the government.<sup>34</sup>

The Constitutional Court has issued other pronouncements dealing with treaties, the importance of which cannot be doubted. But they are not immediately relevant to the problem of the participation of Parliament in the *formation* of treaties. The decisions that come closer to being relevant here are the ones by which the Court, while interpreting article 75, has ruled that *referenda* may not be held on proposals to abrogate, not only statutes authorizing the ratification of a treaty, but also statutes providing rules intended to implement a treaty in force.<sup>35</sup> These decisions indeed protect the role of Parliament in the area of treaties, not against the Executive—the other agency operating in the treaty-making process—but against any encroachment in the process by the institutions of direct democracy, to the possible detriment of the prerogatives both of Parliament and of the Executive.

Parliament cannot, by its own adopted procedures, modify the rules of a treaty, or attach to it reservations of its own, when approving the statute of article 80 authorizing ratification and issuing the "order of execution." Thus, ordinary and administrative courts, when called upon in deciding cases to apply treaty rules introduced into the Italian system by virtue of any such statute, are not facing a problem of reconciling possible parliamentary norms attached to the treaty and the rules of the treaty. The courts' duty is to apply the treaty made "executory" by the statute, i.e., the rules of the treaty, together, possibly, with the reserva-

33. Decision of Dec. 18, 1984, Corte costituzionale [Corte cost.], 29 Giurisprudenza Costituzionale [G. cost.], No. 295, at 2186 (Italy).

34. *Id.*

35. I.e., Decision of Feb. 7, 1978, Corte cost., 23 G. cost., No. 16, at 79; Decision of Feb. 13, 1981, Corte cost., 26 G. cost., No. 30, at 191; Decision of Feb. 13, 1981, Corte cost., 26 G. cost., No. 31, at 198.

tions expressed by the government at the moment of ratification. These reservations are part of the treaty as ratified by Italy and as binding upon it internationally; they are usually published together with the treaty, or soon after, by the government. The interpretation of the rules of a treaty must be made, according to Italian law, on the basis of the canons governing at international law the interpretation of treaties. And the interpretation must be made by the courts, theoretically, in full independence from any influence of the government or of Parliament. Treaty rules, made "executory" by statute, are the equivalent of Italian statutory law rules, the meaning of which the courts are supposed to determine autonomously. Only with respect to reservations is the opinion of the government (their only originator) likely to have, by itself, a decisive weight as to their scope.<sup>36</sup>

Parliament may, through a subsequent statute (purporting further implementation of, or simply dealing with the matter regulated by, a treaty) depart from the rules, already "executory" in Italy, of the treaty itself. In such a case, ordinary and administrative courts are obliged, by current Italian constitutional law, to give precedence to the subsequent statute. Nevertheless, it is well established that courts are supposed to interpret the statute, as far as possible, so as to avoid all conflict with the treaty.<sup>37</sup> In other words, the will of Parliament can and should be disregarded to the advantage of the treaty, unless it is expressed in ways that defy all possible circumvention by judicial interpretation.

An indirect but important defense of the prerogatives of Parliament in the treaty-making process comes from ordinary and administrative courts in the less frequent cases in which international rules must be applied that have been stipulated without prior statutory approval and have been introduced into the Italian legal system by a simple governmental decree. If such rules are in contrast with Italian statutory law, they cannot prevail. According to the Italian system of law sources, rooted in the Constitution, only a rule having the same rank and force as a statute (or a superior rank and force) can modify, or derogate from, statutory law. An international rule introduced by a governmental decree can prevail over governmental regulations, but not over statutes. If it conflicts with these, the courts must refuse to apply it. In this way, article 80's requirement that modifications of statutory law by treaties must be approved by

36. On the interpretation of international treaties to be applied in Italy, see QUADRI, *supra* note 6, at 76; GIULIANO, ET AL., *supra* note 10, at I, 427, 640; A. Ruini, *L'interpretazione delle convenzioni internazionali e delle norme straniere in genere da parte del giudice interno*, I FORO ITALIANO, 518 (1955).

37. GIULIANO, ET AL., *supra* note 10, at I, 641-42.

Parliament through a statute is guaranteed. The letter of article 80, to be sure, seems to require in all cases a *prior* approval. This cannot be guaranteed by the courts because the Constitutional Court has also apparently countenanced the remedy of a *subsequent* approval. Prior or subsequent, at any rate, a statutory approval must be there, and the courts make certain that the principle is not flouted.

The same can be said of international agreements carrying financial burdens. In one way or another, sooner or later, they must find a statutory basis in order for the necessary funds to be spendable. An administrative court, the Court of Accounts, would stop any state expenditure not justified by a provision in a chapter of the state budget, which Parliament must approve by statute.<sup>38</sup>

Also, treaties providing for arbitrations or judicial settlements should, in order to be enforceable in Italy at least towards private subjects, probably be approved by statute; a governmental decree would not suffice. Finally, as to agreements "political by nature," but not involving any of the other aforementioned situations, ordinary and administrative courts may refuse to enforce them, alleging article 80, if the "orders of execution" are expressed in simple decrees and not in statutes. The event is, however, highly unlikely. It is not known to have ever occurred.

### III. THE ROLE OF PARLIAMENT AND INTERNATIONAL LAW

According to the Vienna treaty of 1964, article 46, a state may not invoke the violation of its internal rules of competence to invalidate a treaty it has concluded, unless "the violation was manifest and concerned a rule of its internal law of fundamental importance."

One issue is whether Italy could, by invoking the letter of articles 80 and 87 of its Constitution, claim that agreements concluded by its government without prior statutory authorization in the matters indicated by article 80 are invalid. The answer to the question must be a negative one.

It would be difficult to deny that the rules of article 80, in themselves, are "fundamental" in Italian law. But the point is that their interpretation is, to say the least, controversial. Jurists are divided as to their scope and as to the internal legal consequences of their violation. Moreover, and more important, the Italian Parliament has never formally objected to the conclusion of treaties by the government without prior

38. Nevertheless there are cases where the state finances may be affected and Parliament might never be called upon to give specific consent. This happens, for instance, when the Executive simply agrees in a simplified form to the postponement of the payment of a debt by a foreign nation.

statutory authorization in cases where the letter of article 80 would seem to require it. It has confirmed, *post factum*, the action of the government, through approval by subsequent statute. The Constitutional Court did not disturb the practice; indeed, it seems to have validated it. All this shows that the letter of article 80 cannot be considered controlling.

The practice indicates that the prior authorization is not essential. Therefore, at a minimum, the alleged violation of the rules of articles 80 and 87, concerning the role of Parliament in the treaty-making process, would not be "manifest" to the other party (or parties) to the treaty. The other party would have concluded the agreement in good faith, believing, on a reasonable assumption, that the Italian government was competent and was not violating Italian constitutional law. By similar reasoning, the hypothetical claim that agreements concluded by Italy in simplified form are invalid because excluded by the letter of article 87 would have to be found completely groundless.

#### IV. CONCLUSION

The progress of the "democratization" of the treaty-making process has been, in Italy, slow and limited. The potential impact of the provisions of article 80, which could have been substantial if the provisions had been followed to the letter, has been contained and checked in actual practice. The government, which in matters of internal politics has been often compelled, at least since the 1960s, to accept compromises with the various and divergent forces present in Parliament, has had a truly free hand in matters of foreign policy and in particular in the process of treaty-making.

I do not regard these developments as negative. On the contrary, I believe that they correspond to the true interest of the nation. There was, of course, the problem of adapting the behavior of the Italian state organs to the practices of concluding treaties that became prevalent after the Second World War, a problem that could not be solved except by bypassing the letter of the provisions of articles 80 and 87 of the Constitution. But the real problem lay deeper in the very structures of the Italian political system. After 1960, the conduct of Italian foreign policy through treaty-making (and through other operations) would have been severely hampered if it had been passed through a prior scrutiny and authorization by Parliament. A *Ponsonby rule* applied consistently in the context of the Italian political life could have been highly obnoxious. Unlike the British cabinet, the Italian government is a coalition government, weak and exposed to all possible forms of covert blackmail. Giv-

ing Parliament the power, not capable of being bypassed, to stop the government's actions in advance would have complicated the latter's already difficult tasks.

This is also the reason why I would not view favorably the adoption of the constitutional amendment proposed by the Bozzi committee or any other similar amendment. The existing, normal means of parliamentary control (interrogations, motions, resolutions, etc.) are, at the moment, largely sufficient to ensure that Parliament, if it cares, can cooperate in the shaping of foreign policy and in the making of treaties.

Of course, this judgment could radically change if structural reforms of the political system gave to the Italian government the steadiness, the power of leadership and the efficiency that characterize the British cabinet. But that is another question.