CITIES, ECONOMIC COMPETITION AND URBAN POLICY

edited by
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Contents

Introduction ix

Section I Context 1

1 Cities, Economic Competition and Urban Policy – *Nick Oatley* 3

2 Transitions in Urban Policy: Explaining the Emergence of the 'Challenge Fund' Model – *Nick Oatley* 21

Section II Creating Competitive Localities 39

3 Making Sameness: Place Marketing and the New Urban Entrepreneurialism – *Ron Griffiths* 41

4 Competition and Contracting in UK Local Government – *Robin Hambleton* 58

5 Partnership, Leadership and Competition in Urban Policy – *Murray Stewart* 77

Section III Competitive Bidding Initiatives 91

6 The Rules of the Game: Competition for Housing Investment – *Christine Lambert and Peter Malpass* 93

7 Catalyst for Change: the City Challenge Initiative – *Nick Oatley and Christine Lambert* 109

8 Rural Challenge and the Changing Culture of Rural Regeneration Policy – *Jo Little, John Clements and Owain Jones* 127

9 Restructuring Urban Policy: the Single Regeneration Budget and the Challenge Fund – *Nick Oatley* 146

10 City Vision and Strategic Regeneration – the Role of City Pride – *Gwyndaf Williams* 163

11 The National Lottery and Competitive Cities – *Ron Griffiths* 181

Section IV Conclusion 199

12 Contemporary Urban Policy: Summary of Themes and Prospects – *Nick Oatley* 201

Bibliography 218

Index 234

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Introduction

In recent years there has been a resurgence of interest in the regeneration of towns and cities. This interest has been fuelled by a number of concerns and developments. On the one hand, our towns and cities continue to exhibit all the hallmarks of social polarisation and social exclusion – persistent high levels of unemployment, a scarcity of new employment opportunities, homelessness, high levels of crime associated with an inveterate drugs culture, and poor housing and environmental conditions. Social polarisation has increased and reinforced the spatial segregation of urban areas in the UK (Barclay, 1995; Hills, 1995; Blackman, 1995, pp. 284; Pacione, 1997; Green, 1997; Goodman, Johnson and Webb, 1997). This social polarisation has become a more visible part of city life in the 1990s, characterised by high levels of homelessness and begging in the streets. New patterns of deprivation linked to social exclusion have become apparent (Pacione, 1997). In addition to concentrations of the poor in inner city areas, concentrations of deprivation are also commonly found in post-war social housing areas on the periphery of cities and in smaller cities and towns on the edge of metropolitan areas. The disturbances on the outer estates of Meadowell on Tyneside, Blackbird Leys in Oxford, and Ely in Cardiff in the summer of 1991 and more recent disturbances in Bradford and Luton in the summer of 1995 demonstrate the enduring nature of the complex social and economic problems to be found in our cities and serve as a reminder of the ongoing distress experienced in such areas. Increasingly, the problems experienced in rural areas as a result of the restructuring of the rural economy are acknowledged.

These problems continue to exist in spite of over 25 years of urban policy. In response to these problems an increasing range of agencies spanning the public, private, voluntary and community sectors have become involved in regeneration activities. Interest has been fuelled further by the appearance of books and journal articles on the policy and practice of regeneration. Studies have been published on the approaches taken by local and central government in regenerating urban areas (Stoker and Young, 1993; Lawless, 1996) and the role of partnership agencies in urban policy (Bailey, Barker and MacDonald,

1995). Practitioners and professional bodies have also been busy producing commentaries and critiques of urban policy (Atkinson and Moon, 1994; Association of Metropolitan Authorities (AMA), 1994; Centre for Local Economic Strategies, 1994; Blackman, 1995; Local Government Association, 1996). In addition, the recent publication of a major piece of critical evaluative research commissioned by the Conservative government, 'Assessing the Impact of Urban Policy' (Robson *et al.*, 1995), together with the election of the first Labour government for eighteen years has enlivened the political debate about the future of policy for the cities. This resurgence of interest is reflected in the Economic and Social Research Council's (ESRC) £3.2m research programme on 'Cities, Competitiveness and Cohesion', announced in July 1996. This programme aims to assess the extent to which central and local urban policies and practices are helping to maximise the contribution of UK cities to improving national economic performance and strengthening social cohesion, and to identify measures to make UK cities better places to live for different social groups whilst at the same time enhancing their contribution to economic competitiveness (ESRC, 1996, p. 3).

Cities, then, are facing challenging times and in the evolving economic, political and social context, the nature and purpose of urban policy has been reconsidered. Since 1991 regeneration policy in England has been subjected to a major reorientation involving a paradigm shift in the principles that guide practice. A new wave of initiatives was introduced marking a clear break from what came before. City Challenge (1991) was the prototype for a wave of initiatives based on a controversial competitive bidding process for regeneration funds (Rural Challenge 1994, Single Regeneration Budget Challenge Fund 1994, Regional Challenge 1994, Local Challenge 1996, Sector Challenge 1996, the National Lottery 1996, and Capital Challenge 1996). During this period City Pride (1993) was also launched which encouraged cities to prepare prospectuses setting out a vision for their city's future. Regeneration funds were brought together in the Single Regeneration Budget (SRB) and new regional office structures were established, integrating the functions of four key central government departments – Environment, Transport, Education and Employment, and Trade and Industry (together with Home Office representation). Collectively, these initiatives radically altered the way in which policies aimed at tackling problems of urban decline and social disadvantage were formulated, funded and administered.

These initiatives have had major impacts on the substance and process of policy formulation and implementation. New approaches to deal with economic decline, social deprivation and social exclusion have been encouraged. There has been a renewed emphasis on economic regeneration and the promotion of the competitiveness of both commercial and industrial activity and the localities in which these activities are located. Funds have been allocated, not on the basis of targeting priority areas using indicators of social and economic need, but on the basis of an open competition involving rural areas as well as small towns and large cities. As in other areas of public policy, this new phase

of urban policy has further encouraged a shift from local government to urban governance altering the balance of power at the local level and institutionalising the role and influence of the private sector in regeneration policy.

The purpose of this book is to analyse this most recent phase of (post-Thatcher) state intervention into the problems of urban decline, social disadvantage and social exclusion, traditionally described as 'the inner city crisis' or 'the urban problem'. It addresses two questions. First, why has this form of urban policy with its emphasis on competitive bidding emerged? Second, what impact has this form of urban policy had on communities in urban areas, on practices of policy formulation and implementation, and on the problems it seeks to address?

The approach taken in the book is to see the changes introduced by the recent phase of regeneration policy as part of wider shifts occurring in the economic, social and political spheres of society. On one level, they can be seen as part of the policy response to the increasingly competitive global economic system and the breakdown of Keynesian policies of economic management. This shift in public policy was evident in the mid-1970s, part of what has been described as the beginning of a transition from an era of 'Fordist' production supported by a Keynesian mode of social regulation (embodied in the realisation of the welfare state) to a transitional or contested 'post-Fordist' era characterised by flexible production and a post-Keynesian, neo-liberal mode of social regulation (as pursued by successive Conservative governments since 1979).

For the Conservative government this reorientation of urban policy became an important part of a wider agenda to restructure Britain economically, socially, spatially and ideologically. The government rejected the social democratic consensus of the post-war Keynesian welfare state and set about creating a new political consensus around individualism and entrepreneurialism – the central tenets of a new enterprise state and civil society.

The regulation approach has proved to be a useful heuristic in analysing the nature of these changes and has been used to explain the evolution of local government (Stoker, 1989, 1990) and the emergence of a post-Fordist welfare state (Burrows and Loader, 1994). In this approach, emphasis is given to the socio-institutional structure associated with the mode of regulation. The socio-institutional environment comprises a complex of management strategies, skill requirements, firm structures, infrastructural investments, consumption norms and government policies and all of the institutions and institutional arrangements that impinge upon economic production, investment consumption and employment (Pacione, 1997). In this book, urban state intervention is conceptualised as a specific aspect of this socio-institutional environment and policy since 1979 is seen as part of a transitional mode of regulation with the most recent spate of initiatives the latest in the government's attempt to respond to economic recession and to stabilise the mode of accumulation. A new historical categorisation of urban policy initiatives in England is proposed.

Literature on these regeneration initiatives is scarce, other than official evaluations. There are currently no texts which deal in depth with the distinctive

Challenge initiatives that have emerged since 1991. *Cities, Economic Competition and Urban Policy* provides a comprehensive and authoritative account of this phase of urban policy, characterised by the introduction of competition in the allocation of funding, the respecification of the criteria by which money is allocated (a shift away from the Urban Priority Areas and deprived urban populations towards viable projects which support mainstream economic development in urban or rural areas – a 'de-urbanisation' of urban policy), and the explicit encouragement of a new form of local multi-sector partnership in the formulation and implementation of policy.

The book, therefore, makes two contributions to the literature; it provides a much needed update in the field of urban policy in England; and it applies regulation theory to locate the phase of urban policy from 1991 to 1997 in a wholly new and original categorisation of urban initiatives based on the shifts that have occurred in economic, political and social structures since 1945.

Outline of the book

The book is divided into four sections. Section I consists of two chapters by Nick Oatley which provide an introduction to urban policy post-1991 and a conceptual framework for the remainder of the book. Chapter 1 argues that a wholly new and distinctive phase of urban policy emerged in the early 1990s. It outlines the defining characteristics of this phase which includes changes in both the process of urban funding and the reorientation of the substantive aims of policy. These changes are set within the context of the competitive pressures exerted by increasing globalisation on both businesses and cities and the government's attempt to respond to these pressures by changing the policy regime and the nature of urban governance.

Chapter 2 uses the regulation approach to interpret the emergence of the Challenge initiatives arguing that urban policy, as a specific form of state intervention, has been subject to the same forces that have led to the reorientation of economic management and the restructuring of welfare state policy and local governance. Changes in urban policy are, therefore, interpreted as part of the shift from a Keynesian to a transitional after-Keynesian mode of social regulation. Distinct periods of policy are identified based on three dimensions of state institutional forms and practices: the representational regime of the state, its internal organisation and its patterns of intervention. The emergence of the current phase of competitive bidding policy is shown to represent a significant realignment of policy priorities and practice, part of an experimental search for new local solutions to the contemporary urban (and rural) crisis.

Section II, entitled Creating Competitive Localities, explores three areas related to the changed context of urban policy in the 1990s. Each of the three chapters in this section explores key aspects of the new policy regime outlined in Section I. Urban entrepreneurialism is emblematic of the current phase of urban policy and is examined by Ron Griffiths in Chapter 3. It describes a mode of urban governance which has emerged from the crisis of managerialism and as a response by localities to the need to become more competitive in a national, European or international sense. Localities have engaged in a competitive search for new sources of economic development in response to the internationalisation of investment flows and the ceaseless process of economic restructuring. By drawing on a range of examples from Britain, continental Europe and America, the contemporary repertoire of urban place marketing is examined. These strategies are critically analysed and shown to be an extremely fragile basis on which to build the fortunes of a city.

This entrepreneurial regime of urban governance has contributed to major changes in the institutional processes of local government. In Chapter 4 Robin Hambleton examines the impact of competition on the internal management of local authorities and shows how local authorities are undergoing a fairly radical shift from management by hierarchy to management by contract. The shifting nature of urban policy in England, and particularly the introduction of competitive bidding for funds, has added another dimension to the changing pattern of governance, demanding the creation of new institutions and patterns of participation. Partnership has become a key requirement for local participation in national regeneration initiatives and an essential ingredient to successful place marketing activities. The emphasis on multi-sector partnerships during the 1990s demanded the creation of new structures of local interest representation and leadership. In Chapter 5 Murray Stewart briefly discusses the experience of urban partnerships and then explores the role of leadership in contemporary urban regeneration partnerships.

Section III of the book is devoted to an analysis of a selection of the new wave of regeneration initiatives introduced since 1991. This section includes empirically informed analyses of City Challenge (Chapter 7: Nick Oatley and Christine Lambert); Rural Challenge (Chapter 8: Jo Little, John Clements and Owain Jones); the Single Regeneration Budget (Chapter 9: Nick Oatley); and City Pride (Chapter 10: Gwyn Williams). Also included in this section is a chapter (6) by Christine Lambert and Peter Malpass on developments in housing policy which illustrate the emergence of a more competitive and market-based approach to the delivery of housing policy objectives. The final chapter (11) in this section, by Ron Griffiths, provides an analysis of the National Lottery. With funds generated on an enormous scale the lottery has come to be seen as the single most important development as far as some aspects of regeneration in the UK are concerned (Pinto, 1995, p. 32; Lewis, 1997, p. 4). This chapter provides an overview of the lottery funding structure and the terms of reference of the distributing bodies and considers some of the main issues regarding the impact of the lottery on cities.

In the concluding chapter, Nick Oatley summarises the themes that have emerged as a result of the analysis of this new phase of regeneration policy. Emerging policy of the new Labour government is assessed in relation to the key issues that face English cities as the new millennium approaches.

Section I

Context

1

Cities, Economic Competition and Urban Policy

NICK OATLEY

Introduction

Cities have played a key role in the evolution of the global economy. Cities are generators of enormous wealth and act as the power-houses of the national economy. In countries gripped by recession, they are seen as the driving force of national economic recovery. There is a clear link between the performance of urban areas and the performance of the economy as a whole. Increasingly, 'The strength of the nation's economy, the contact points for international economics, the health of our democracy and the vitality of our humanistic endeavours – all are dependent on whether cities work' (Cisneros quoted in Lawless, 1996, p. 28).

But, as Cisneros's observation above suggests, cities are not just centres for global capital accumulation and the generation of wealth. They also act as locations for the rich intermingling of cultural difference and diverse social and political practices. In this respect, an important criterion of the success of cities, or whether they 'work', is the existence of social cohesion. For whilst cities may be the physical embodiment of prosperity and wealth, they also contain areas of economic decline and social disadvantage. In the midst of affluence exist poverty, social polarisation and social exclusion. The fortunes of cities may depend heavily on the competitiveness of their commerce, industry and institutions, but increasingly they also depend on how well social exclusion is addressed through government provision of public services and assistance in the regeneration of decaying neighbourhoods (ESRC, 1996). The achievement of social cohesion is no longer seen as merely a costly redistributive activity but one which contributes to economic competitiveness through the mobilisation of skills, creativity and active citizenship.

How to deal with the problems of economic decline, social disadvantage and processes of exclusion has vexed policy makers ever since 'the urban problem' was identified in Britain in the 1960s/70s. Changes in the structure of global economic and strategic relationships are transforming the economic environment and presenting new challenges and opportunities for cities (Clement,

1995). In Britain, urban policy[1] underwent a radical transformation in 1979 informed by the philosophy of the New Right. This transformation has been described variously as a shift away from urban managerialism towards urban entrepreneurialism or privatism, or the shift from Keynesian to post-Keynesian policies (Harvey, 1989a; Barnekov, Boyle and Rich, 1989; Deakin and Edwards, 1993). Since 1991, urban policy in England has experienced a further transformation in which new approaches have been introduced in an attempt to achieve economic and social regeneration of urban areas. These initiatives have widened the policy focus beyond the narrow concerns of property-led regeneration and the traditional concerns of physical obsolescence and social disadvantage to address issues of exclusion and economic competitiveness.

Indeed, in this book we argue that since 1991 regeneration policy for England has undergone a major restructuring in line with shifts in other social policy areas. The type of initiatives introduced since 1991 mark a clear break from the initiatives which characterised the experimental period of the 1960s and 1970s *and* the property-led, market-driven initiatives which dominated the 1980s. At its heart, this paradigm shift in urban policy has redifined the role and function of cities and policy. Global competition, place marketing new patterns of city leadership, and institutionalised inter-urban competition through Challenge funding mechanisms have altered patterns of governance and practices of implementation. The remainder of this chapter outlines each of these dimensions in turn.

Characteristics of contemporary urban policy

There are three key dimensions to urban policy in Britain during the period 1991–97 which constituted a new and distinct approach. They involve changes in both the *process* of urban funding and the reorientation of the *substantive aims* of policy. First, the competitive pressures exerted by increasing globalisation on both businesses and cities struggling to establish a niche in urban hierarchies has led to an overt emphasis in policy on *improving the competitiveness of business and localities*. Second, the British government has introduced a range of *competitive bidding initiatives* to encourage localities to address these issues. Third, these changes in policy have brought about a quiet revolution in urban regeneration policy and practice leading to changes in *urban governance and the process of policy formulation and implementation.* These changes characterise the most recent phase of a major shift in policy that began in 1979 with the election of the Conservative government under Margaret Thatcher. The realignment of urban policy in the 1990s represents the latest manifestation of general policy trends that were established during the 1980s by the Conservative government.

These changes constitute the most important restructuring of English urban policy funding and organisational structures since the 1978 Inner Urban Areas Act. The competitive bidding approach together with the contract culture that

accompanies it has now become widespread, not only in urban regeneration programmes but in initiatives targeted at rural areas (the Rural Challenge) and even in local authorities' main spending programmes (Capital Challenge).

Competitiveness

The acceleration of the globalisation of economic activity and the growing internationalisation of investment flows have accentuated competitive pressures on businesses and led many cities to seek competitive advantage in the urban hierarchy. An important component of many of the urban initiatives introduced since 1991 is the emphasis given to developing both the competitiveness of business and the competitive edge of cities through initiatives directed at supporting local businesses and the improvement of the physical, cultural or human resources of an area. Cities are now part of an increasingly competitive world and place marketing has become an important part of economic development strategies. This emphasis on inter-area competition and place marketing has become clearly articulated and transparent in initiatives such as City Challenge, the SRB, Local and Sector Challenge, City Pride and the National Lottery.

Although there is a wealth of literature on the concept of competitiveness from the traditional standpoint of the national economy, until recently little has been written about the notion of the competitiveness of individual cities, in spite of the growing realisation of the important contribution that cities make to the competitiveness of national economies (Porter, 1990; Fainstein, 1990; Duffy, 1995; Kresl, 1995; Kresl and Gappert, 1995). Porter's (1990) work does provide a bridge between these two areas. He identifies cities as significant economic actors in the determination of 'competitive advantage'. Competitive advantage is a relational concept. It is about the advantages (and disadvantages) enjoyed by a particular city, region or nation relative to other cities, regions or nations. Different cities come to play different roles within the urban system. Cities are under constant pressure to retain or enhance their competitive advantage by maintaining their roles within a functional hierarchy or by diversifying and adopting new roles. Porter (1990, pp. 158, 622) makes the link between the competitiveness of business and competitive cities in the following way:

> Internationally successful industries and industry clusters frequently concentrate in a city or region, and the bases for advantage are often intensely local . . . While the national government has a role in upgrading industry, the role of state and local governments is potentially as great or greater . . . The process of creating skills and the important influences on the rate of improvement and innovation are intensely local.

Porter (1995, p. 62) has recently described the 'new' model of inner city economic development as identifying and exploiting the competitive advantage of inner cities. Past approaches have been built around a 'social model' which

attempted to cure the inner city's problems by increasing social investment and hoping that economic activity would follow. Initiatives have lacked an overall strategy and treated the inner city in isolation from the surrounding economy. Porter argues that a sustainable economic base can be created in the inner city through private initiatives and investment based on economic self-interest and genuine competitive advantage – not through artificial inducements, charity, or government mandates.

A number of factors that help to shape and constrain the capacity of localities to adapt to a changing external economic and political environment have been identified. For instance, Kresl (1995, p. 51) has attempted to conceptualise the determinants of urban competitiveness in terms of a set of economic and strategic factors. The former includes factors of production, infrastructure, location, economic structure, and urban amenities whilst the latter includes governmental effectiveness, urban strategy, public–private sector co-operation, and institutional flexibility.

Fainstein (1990) identifies a range of factors operating at a number of different levels that determine the relative competitiveness of different cities and the success of local economic development strategies. Central to Fainstein's conceptualisation is the way national political responses to international, national and regional forces of growth and decline shape the kind of policies it is possible for localities to pursue. The interaction between government policies on urban and regional development and local government powers and resources and the socio-institutional milieux specific to particular places determines the differential potential for local pro-activity. Harvey (1989b) has discussed similar interactions in terms of the 'structured coherence' of a locality.

The capacity for local pro-activity is increasingly exercised through inter-organisational relationships and research has focused on the motivations and activities of different local institutions and relations between them (Oatley and Lambert, 1997). These have been alternatively conceptualised as leadership (Judd and Parkinson, 1990; Stewart in Chapter 5 of this book), growth coalitions (Harding, 1991), policy regimes (DiGaetano and Klemanski, 1993), local modes of regulation (Mayer, 1994), institutional thickness (Amin and Thrift, 1994), and collective action (Cheshire and Gordon, 1996). All of these studies suggest that 'successful' localities display certain characteristics in terms of local institutional arrangements. At the centre of these arrangements is co-operation between a wide range of governmental and non-governmental agencies institutionalised in various forms of partnership. The aims of these partnerships are to establish consensus and a shared vision for the development of a locality; the mobilisation of skills, expertise and resources to enhance competitiveness; to engage in networking and lobbying in relevant markets and political arenas; to exercise clear and effective leadership while maintaining flexibility; and to deliver on plans (Oatley and Lambert, 1997, p. 3).

Ashworth and Voogd (1990) noted that this shift in priorities of urban policy has occurred due to the recognition of a series of fundamental shifts in Western economies that have variously been described as transitions towards

advanced capitalism, post-industrialism, post-modernism or post-Fordism. In this new context cities have been thrust into a new competitive relationship with internal and external markets presenting simultaneously threats and opportunities. Ashworth and Voogd (1990, p. 3) argue 'that this relationship of cities and markets is in essence new, applicable to cities of a wide range of sizes, economic structures, cultural contexts, and locations, and international in its incidence'.

However, as Ashworth and Voogd (1990, p. 2) observe, the increased mobility of capital without constraints imposed by the friction of physical distance does not mean

> that commercial activities have become completely footloose and thus indifferent to the qualities of particular locations; on the contrary the decline in the importance of material transport, the increasing mobility of labour, and the internationalisation of markets has allowed a new set of local place attributes and new definitions of the accessibility of places to become prominent locational determinants.

Cornford *et al.* (1992) have noted that rapid transformations in the European urban system are providing added impetus for British cities to adopt policies and practices that increase their competitive advantage. Changes in industrial production processes and the rise of multi-locational firms have given many companies a new locational freedom. The decline of regional assistance from national governments, the gradual merging of national urban systems to create a European urban system through national policies of economic liberalisation and the economic integration of Europe through the Single European Market, effectively creating a single economic space, combined with the limited amount of mobile industrial investment have heightened inter-urban competition.

Further trends pushing localities to be more pro-active include the need to develop a distinct function in the context of increasing functional specialisation among cities in Europe which is already seeing a spatial polarisation between those cities in the geographical core of the emergent European urban system and those on its periphery.

In this context, cities and regions are becoming critical agents of economic development. Castells and Hall (1994, p. 7) have argued that because the economy is global, national governments suffer from failing powers to act upon the processes that shape their economies and societies. Regions and cities have been more flexible in adapting to the changing conditions of markets, technology and culture. Although it is noted that they have less power than national governments (and in Britain this is acutely so) they have shown a greater capacity to respond to generate targeted development projects, negotiate with multinational firms, foster the growth of small and medium endogenous firms, and create conditions that will attract new wealth, power, and prestige. Castells and Hall (1994, p. 7) observe that 'In this process of generating new growth, they compete with each other; but more often than not, such

competition becomes a source of innovation, of efficiency, of collective effort to create a better place to live and a more effective place to do business.'

In the 1990s central government has attempted to assist localities in meeting the challenges posed by these trends at the European level and beyond. British urban policy since 1991 can be seen as a self-conscious attempt to encourage the development of the institutional capacity of localities to improve their competitive advantage in an increasingly competitive world. Since 1991 regeneration initiatives have encouraged localities to develop forward-looking strategies based on public–private partnerships to improve their structural competitiveness by enhancing infrastructure, urban amenities and the factors of production in the locality, particularly labour.

M. Howard MP, in a speech at the Cities 93 Conference, stated:

> The Government is encouraging cities to become more competitive through a 'quiet revolution' in the way in which public money is used. More is allocated through competitions than ever before – some £1.75 billion in 1993/94. I have been much encouraged by the catalytic effect that this is having – new relationships have formed with the private sector and local people are active and involved in improving their cities.
>
> (DoE News Release, 1993a)

The publication of the Competitiveness White Papers (Cmnd 2563, May 1994; Cmnd 2867, May 1995; Cmnd 3200, June 1996) demonstrates the government's commitment towards strategies to enhance the competitiveness of cities and industry. There is an acknowledgement that both increasingly compete in a European and international context for economic activity, investment, residents, and other resources. The first of these White Papers devotes a whole chapter to 'Regeneration' and notes that the aims of contemporary urban policy 'are to improve the competitiveness of firms, the job prospects and quality of life of local people, and the social and physical environment' (Cmnd 2563, 1994, p. 128).

Although the Conservative government espoused a free-market ideology, it became closely involved in the regulation of this newly emergent competitive culture of the 1990s. Stewart (1996a, pp. 24–5) has observed that there are five structural forms through which the state has intervened to regulate the process of competition in urban regeneration and economic development. First, during the 1980s the government participated directly in the market by establishing state-run bodies that act as a model of the competitive/entrepreneurial spirit. The obvious example here is the Urban Development Corporation. More recently the government has pursued an alternative strategy of establishing new frameworks for competition (e.g. City Challenge, Challenge Fund, Rural Challenge, Regional Challenge, Local and Sector Challenge and the National Lottery) and has taken direct control of the competitive process. Central government has also been involved in selective intervention to assist localities in the wider competitive arena. The assistance given to Manchester's Olympic bid and matching funding for European Union resources are examples of this form of intervention.

Two further forms of intervention and regulation involve the restrictions imposed on local government powers and resources and the enforcement of a level playing field through the adjustment of tax regimes (the establishment of the Uniform Business Rate in 1989) and attempts to equalise resources in the face of differential needs through revenue and capital grant. Stewart (1996a, p. 25) concludes that 'while there is espousal of the open market and in principle the ideology of competition prevails, in practice a mix of regulatory mechanisms is in place providing a fluid and often internally inconsistent setting for urban policy'.

Competitive bidding – the Challenge Fund model of resource allocation

Competitive bidding, involving competition between localities for a limited pool of resources, became the pervasive culture of public sector resource allocation in urban policy under the Conservatives during the period 1991–97. It became the favoured method of resource allocation and the government actively sought ways of extending the 'challenge approach': 'the government will consider later this year how to extend the "challenge approach" to further domestic programmes, in the light of the encouraging early experience of its effectiveness as a means of allocating public expenditure' (Cmnd 2563, 1994, p. 132).

One can identify a number of defining features that distinguished the Challenge Fund model of urban policy from previous approaches. First, it was based on a highly controversial competition in which winners and losers were decided on the basis of the quality of the bids rather than on the scale of deprivation to be addressed. It rejected the traditional resource allocation method based on the demonstration of need, replacing it with a greater emphasis on economic opportunity. The government and those who supported competition argued that it encouraged greater value for money and had a galvanising effect, motivating people to be innovative in developing proposals and encouraging more corporate and strategic approaches in regeneration activity. Critics of the Challenge model argued that it was a distraction, used to mask the decline of regeneration resources and mainstream expenditure and a way of rationing scarce resources. Critics argued that it placed the government and the newly restructured regional offices in a powerful position which undermined the avowed aim of government to encourage local empowerment and ownership of proposals. Furthermore, competition between localities reduced the scope for inter-local co-operation and the new regime of governance tends to weaken local democratic accountability. The competitive allocation of resources had also been open to the accusation of political manipulation and waste.

Second, the Challenge Fund model consolidated the 'contract culture' involving a contractualisation of urban policy associated with the new public management in which performance indicators or output measures are used to

define funding agreements between central government and local bodies, be they local authorities or quangos. Under this system the measured outputs and outcomes 'are what the government is buying with public money' (DoE, 1995a, p. 9). Although quantitative output indicators in policy programmes were first introduced in 1982 under the Financial Management Initiative, the current 'procurement' model of funding, first used in the funding of Training and Enterprise Councils in 1990–91, did not become widely established until City Challenge and the SRB. This refinement of the contract culture involves local agencies (e.g. SRB partnerships) bidding for funds within an established framework set out in guidance, in which a package of outputs and outcomes are specified and which, if awarded funding, they would be committed to deliver. The SRB partnership then undertakes to 'procure' the specified outputs by contracting with delivery agents such as training providers, developers, local voluntary/community organisations, business support organisations, etc. The SRB partnership, therefore, takes on the role of a 'procurement manager'. Hence, in the 1990s the 'procurement' model replaces the 'grant aid' discourse associated with earlier initiatives such as the Urban Programme (Gray, 1997).

Third, the Challenge Fund model involved partnerships identifying local priorities for regeneration funding (albeit within closely specified bidding guidance) rather than these being decided centrally. The government claims that a 'hands-off approach' is adopted allowing projects to be locally designed and delivered with the responsibility resting with the successful bidder to drive the project forward on a local rather than national basis.

A fourth set of features revolved around the operating characteristics of the Challenge initiatives. They operated on the basis of comprehensive multi-year regeneration programmes (five- to seven-year time horizons) and multi-agency participation and funding ignoring functional boundaries. Challenge Fund initiatives promoted integrated development strategies, cross-departmental liaison, local development capacity, and improved linkage between the mainstream economy and deprived communities.

Finally, the introduction of the Single Regeneration Budget (SRB) in April 1994 put a seal on the radical transformation of urban policy begun in 1991 by reorganising budgets and the internal structure of the state. New government regional offices were established integrating the functions of four key central government departments – Environment, Transport, Education and Employment, and Trade and Industry. Home Office interests were also represented. The new Government Offices for the Regions facilitate co-ordination of departmental interests and are intended to be more responsive to local needs. A new Ministerial Committee for Regeneration (EDR) was also established responsible for setting priorities and allocating resources. The Challenge Fund element of the SRB consolidated the shift towards competitive bidding as a method of resource allocation and marked a radical shift away from needs-based allocation formulas based on measures of deprivation or cases of special need first established by the Urban Programme in 1968. Under the Urban Programme funding was made available to any local authority that could

demonstrate 'special social need'. This situation was formalised with the designation in England and Wales of seven Partnerships, fifteen Programme Authorities and nineteen Designated Areas under the Inner Urban Areas Act 1978. In 1986–7 a range of authorities not designated under the Inner Urban Areas Act of 1978 were invited to bid for Urban Programme resources in the final year of the 'Traditional Urban Programme'. As a result a further ten districts were designated New Programme Authorities in 1987–8, amounting to 55 districts altogether.

These designations were determined on the basis of the scale and intensity of their deprivation and the concentration and persistence of their unemployment, using ward-based indicators from the 1981 Census (Robson, 1988, pp. 103–11; Lawless, 1989, pp. 52–9; Atkinson and Moon, 1994, pp. 75–7). This set of Urban Priority Areas has provided the main targeting mechanism through which Urban Programme resources and funding for related policy instruments have been distributed, although the spatial targeting within the Urban Programme has in some instances been counteracted by the different logic of non-Urban Programme resource allocation (Robson, 1988, pp. 106–7; Robson *et al.*, 1994). With the introduction of competitive bidding spatial targeting has been abandoned in favour of a process in which bids from any rural[2] or urban district in England can be submitted for Challenge Funding (SRB), Winning Partnerships, the Millennium Fund, Capital Challenge, Sector and Local Challenge. For the Challenge Fund in particular, bids can be submitted by any organisation. The local authority no longer acts as the conduit through which public regeneration funds are channelled. In this process, deprivation, as represented by the rankings contained in the 1991 Index of Local Conditions, may still be used in framing bids but other criteria have assumed greater importance, particularly the notion of 'capacity to deliver' which replaces local needs as the central criterion for support.

The 'competitive bidding' approach was first articulated in a speech by M. Heseltine to Manchester's Chamber of Commerce and Industry on 11 March 1991 (pre-City Challenge). 'Competitive bidding' was associated with enterprise and vision, opportunity and incentive. Localities were to be invited to bid against one another for a limited pool of resources, allocations being made on 'merit'. The competitive bidding approach was designed to 'break the chains that have made us "slaves to the distribution formula" which [Heseltine said] was the "oxygen that feeds the dependency culture"'. The Press Release linked this new approach to the launch of the (then) new Estate Action Programme which had established the principle of competitive bidding (DoE, 1991d).

However, City Challenge, officially launched in May 1991, was the first urban initiative established to promote this competitive approach. With its overt emphasis on competitive bidding, its reassessment of the role of the local authority and return to coalitions of multi-sector interests it heralded a transformation in urban policy. Although City Challenge only lasted for two years, it had a greater significance as an indication of the wider direction of urban

Table 1.1 Urban initiatives based on competitive bidding introduced since 1991

Name and date of initiative		Brief description of initiative
1991	TEC Challenge	A proportion of TEC funding is allocated on the basis of bids submitted to the Regional Offices related to promoting competitiveness, business support, and a world class workforce (initially known as the Local Initiative Fund and now known as the TEC Discretionary Fund).
1991	Estate Action	Aims to transform run-down local authority housing estates by providing extra resources (in the form of credit approvals). Resources awarded competitively based on a two-stage assessment process.
1991	City Challenge	Innovative programme (launched in May) aimed at creating new jobs, constructing and renovating housing and commercial/industrial space, and providing training. Two rounds of bidding led to 31 winners each receiving £7.5m a year over 5 years.
1992	Capital Partnership (Urban Partnership Fund)	57 Urban Priority Authorities in England invited to bid for projects which stimulate growth and bring lasting benefit to local communities and industry (one round only). To support their bids, the authorities were encouraged to offer up a share of their capital receipts and to identify additional private sector resources.
1993	City Pride	In November 1993 an invitation was extended to the civic and business leaders of London, Manchester and Birmingham to prepare a prospectus detailing a vision of their city's strategic development over the next decade. Partnerships expected to define necessary action and to establish priorities for resource procurement (no resources available from central government). In November 1996 a further seven areas were invited to prepare prospectuses.
1994	Rural Challenge	An initiative introduced by the Rural Development Commission aimed at addressing problems of economic and social decline in the countryside through the promotion of rural regeneration. An annual competition in which six 'prizes' of up to £1m each are made to projects within designated Rural Development Areas.
1994	Single Regeneration Budget (The Challenge Fund)	In April 1994 the SRB brought together under one budget 20 previously separate urban aid programmes ranging across five government departments (£1.4bn in 1994/95). Most is earmarked for existing projects but each year there is bidding for the unallocated Challenge Fund. The Budget is administered through 10 specially created integrated regional government offices. Challenge Fund open to any organisation/ locality within England regardless of Urban Priority Area status. Majority of bids led by local authorities and/or TECs. Budget priorities decided locally within an overall aim of improving economic competitiveness and the industrial competitiveness of firms as well as job prospects, the social and physical environment and the quality of life. Initiatives need to be comprehensive and part of a wider strategy, targeted at specific areas or groups, supported by partnerships, and providing added value and value for money.

Name and date of initiative		Brief description of initiative
1994	The Lottery	Money generated from the National Lottery targeted on arts, sports, national heritage, charities and the commemoration of the millennium. Distributed through eleven bodies (the Millennium Commission, Arts and Sports Councils, National Heritage Memorial Fund, National Lottery Charities Board). Now an important source of funding for a range of urban revitalisation initiatives.
1995	Regional Challenge	Regional Challenge, launched in February 1995 is modelled on the City Challenge concept. It involves top-slicing 12% (£160m in 1995) of the national allocation of EU structural funds for competitive bidding open to eligible public–private partnerships. A further £160m has been set aside for a second round starting in 1997. The aims are to enhance local partnership, stimulate innovative regional development and maximise the contribution of the private sector.
1995	Estates Renewal Challenge	This initiative provides regeneration funding to those local authority housing estates which vote for a transfer to new landlords in the private sector. Twenty-nine first round winners received £174m in the first year (announced in June 1996). The government estimates that this will lever in a further £250m. £314m of public funds over 3 years has been identified to fund the Estates Renewal Challenge.
1996	Capital Challenge	An extension of competitive bidding to local authorities' capital expenditure. In the pilot round carried out over the summer of 1996 £600m of credit approvals for capital investment projects was made available. 326 bids received, 189 successful. Twenty per cent of Capital Challenge expenditure in the first round spent on economic development projects.
1996	Local Challenge	A Challenge Fund run by the DTI aiming to enhance the competitiveness of UK businesses through assisting local partnerships to design and deliver high quality business support services. It will seek to strengthen the Business Link Partnership and to reinforce opportunities offered to small firms through Business Link.
1996	Sector Challenge	A Challenge Fund run by the DTI aiming to support specific business sectors at the local level. Promotes the competitiveness and long-term profitability of UK industry by encouraging a culture of business excellence and innovation through training, exploiting UK technological innovations, exploiting new market opportunities and sources of capital and finance.

regeneration policy under the Conservatives led by John Major than as an initiative in itself. City Challenge can be seen as a pilot initiative in which the culture of competition for funding was tested. It was deemed to be so successful by the government that the principle of competing for funding became an integral part of subsequent initiatives. A summary of a selection of initiatives based on competitive bidding is shown in Table 1.1.

The importance of this new approach was noted in a DoE Press Release (1992a) in which Michael Howard commented that 'City Challenge marks a revolution in urban policy. The stimulus of competition has transformed the way in which authorities and their partners have approached the task of urban regeneration.'

Although, the most important distinguishing characteristic of City Challenge and all subsequent 'Challenge' initiatives is the process of competitive bidding for a limited pool of resources, these new initiatives are also associated with a range of new concerns and processes. Burton and O'Toole (1993) suggested that City Challenge embodied a shift away from the prime concerns of the 1980s, viewed in terms of the three 'E's (efficiency, economy and effectiveness), towards an emphasis on the three 'C's (*co-operation* between regeneration initiatives and between organisations and groups, *concentration* of resources and *competition* between areas for a limited pool of resources).

City Challenge and subsequent Challenge initiatives departed from the emphasis on trickle-down, property-led development that characterised the 1980s by encouraging greater access to the benefits of growth, rather than focusing mainly on ways to stimulate growth itself. Challenge initiatives have focused on opportunities rather than problems and have sought to achieve a balance between investing in people and places. The new wave of initiatives have looked at finding processes and mechanisms to stimulate change as well as relying on the market. Importantly for the local authority, these new initiatives have encouraged the formation of multi-sector partnerships rather than government agencies or quangos for the delivery of urban policy (De Groot, 1992; Hooton, 1996).

Blackman (1995, p. 53) suggests that the new direction in urban policy, as evident in the SRB, Housing Investment Programmes, local bids to central government for EU structural funds and new 'place-marketing' initiatives such as City Pride, is characterised by four new principles:

1. 'Need' is a necessary but not sufficient condition for cities to receive central government funding for urban regeneration and economic development.
2. Agencies which spend public money must also demonstrate the competence to spend the money in ways the central government considers appropriate.
3. Public expenditure on urban regeneration should be targeted on where there is development potential.
4. Bids for public money should be subject to competition.

In terms of a policy model it is widely acknowledged that competitive bidding regimes represent a new departure. However, initiatives introduced since 1991 do embody some elements of continuity with previous policies. It has already been suggested that contemporary urban policy embodies many of the strategies established by the Conservative New Right government of the 1980s. Many of the underlying policy themes that were evident in initiatives such as the Urban Development Corporations, the Enterprise Zones, City Grant, and the Task Forces have become incorporated into the new wave of initiatives introduced

since 1991. The principal theme has revolved around attempts to change the ideological climate of Britain by creating an enterprise culture in which state action is replaced by market forces. Policies of the 1980s involved a shift from urban managerialism and municipal collectivism to urban entrepreneurialism in which the private sector took over leadership roles previously occupied by local authorities and private finance was encouraged to replace public expenditure. Investment in physical capital was prioritised while expenditure on social capital was cut back. Wealth creation became the prime policy goal replacing redistributive or welfare concerns. The government weakened alternative local power bases by by-passing local political processes and centralising power in Whitehall. These political and economic strategies were not confined to urban policy but extended to the policy arenas of planning, education, housing, welfare, finance and transportation (Parkinson, 1993b).

Many of these strategies adopted during the 1980s had been tried in America and the British government was heavily influenced by the apparent success of regeneration efforts in cities such as Boston, New York, Baltimore, Pittsburgh and Philadelphia (Parkinson, Foley and Judd, 1988; Parkinson, 1993b; Hambleton and Taylor, 1993). In America this approach became known as privatism (Barnekov, Boyle and Rich, 1989).

What was different in the period 1991–97 was the form that policy took to achieve these strategies. For example, after the more confrontational approach towards recalcitrant local authorities in the 1980s, including abolition, initiatives to by-pass them and legislation restricting the range of their activities, the government seized on the introduction of competition into the allocation of public funds as an alternative way of encouraging local authorities to adopt a different approach to urban local economic development in terms of both the substance of their proposals and the process by which the proposals were produced. The Challenge Fund may be viewed not only as an experiment in urban policy but as an experiment in Treasury policy. That is to say, the nature of the programmes and the funding streams attached to them form part of the ongoing debate about how central government funds should be distributed and to whom. In this respect, the competitive initiatives can be seen as a more subtle approach, based on collaborative partnership and inter-area competition, than the confrontational tactics employed during the 1980s, to achieve certain political aims, such as the continued dilution of local government powers and the increased involvement of the private sector in local governance, together with the promotion of an enterprise culture via competitive bidding.

One might argue that competition for urban funding and many of the characteristics associated with these initiatives have existed in earlier forms of policy (Wilks-Heeg, 1996). A form of competition was operated in relation to Urban Programme funds and the Transport Policy Programme. Competition for funding also made an appearance in 1985 when the Estate Action programme began to allocate resources for investment in problem estates on a competitive basis. Prior to this local authorities had received an annual allocation for the management and development of their housing stock. The Estate

Action programme was the first regeneration initiative involving a switch away from formula-based allocations on the basis of need towards an overtly competitive process in which local authorities had to maximise private sector contributions as well as demonstrating their own level of commitment to the project. In 1986–7 only a modest £50m was allocated in this way. By 1992–3 this had reached £348m (Bailey, Barker and MacDonald, 1995, p. 57).

City Challenge, Estate Action, the Challenge Fund, Regional Challenge and Rural Challenge do share many of the characteristics of the area-based initiatives of the late 1960s and 1970s, including targeted strategies and the bending of main spending programmes, concentration on special priority areas, small-scale neighbourhood projects, support for community development and social projects, consultation and the establishment of multi-sector structures/alliances/partnerships. Attempts at integrating government functions at the regional level had also been tried in the early 1960s when the Department of Economic Affairs, under the Labour Deputy Prime Minister, George Brown, established Regional Planning Councils and Regional Planning Boards. The latter were made up of civil servants from the various government departments already working in the regions and were intended to co-ordinate their departmental activities and to provide the nuclei of integrated regional administrative centres (Sharpe, 1975; Rees and Lambert, 1985, p. 103).

Furthermore, each new phase of urban policy can never be totally discrete and will incorporate elements of earlier policy characteristics and cultures. This means that at any one time there will be a mix of initiatives from different policy phases. So although the dominant form of urban policy in the 1990s has been the Challenge Fund approach, this co-exists with policies introduced prior to 1991 and with new initiatives such as the Urban Regeneration Agency or English Partnerships as it came to be known, which has been described as a roving UDC, which focuses on the physical regeneration of derelict sites.

However, although continuities of policy from previous phases can be identified and the new wave of initiatives co-exists with initiatives introduced during these earlier phases, the combination of a set of distinctive processes sets these initiatives apart and constitutes a new approach in urban policy, dominated by new forms of intervention and new institutional relations. The explicit introduction of a competitive form of funding allocation and procurement model of delivery, the relaxation of spatial targeting, the emphasis within the initiatives on projects designed to improve the competitiveness of businesses and localities' competitive edge in attracting new investment, the restructuring of the internal structures of the state and the institutionalisation of new governance practices are the more prominent defining features of this new phase.

Governance and policy practice

The shift towards competitive bidding regimes has had a number of consequences for state forms, structures and practices. New social norms and habits, customs and networks have emerged associated with the new institutional arrangements. In urban policy, as in other areas of public policy, there has been a shift from local government to local governance. The new Challenge initiatives have altered the balance of power at a local level and institutionalised the role and influence of the private sector in regeneration policy.

Bailey, Barker and MacDonald (1995, p. 65) suggest that the new form of urban policy post-Thatcher represents a return to local corporatism.[3] Drawing on the work of De Groot (1992), Hambleton (1993a) and Parkinson (1993a), Bailey, Barker and MacDonald emphasise the positive features which are associated with this new approach. In particular, they observe that the agenda for urban funding is not so closely defined and limited to specific, single-issue programmes. There has been a transfer of responsibility to local partners to apply imagination, flair and quality to the definition of local needs and to identifying ways of meeting them. Although strong corporate leadership and a reduced role for committees are features of many of these initiatives, there is also an emphasis on involving residents and building on the capacity of the community to play its full part. There is now an official recognition that regeneration can best be achieved by combining physical and property-related strategies with those aimed at social and community needs. It is also acknowledged that this requires a flexible approach in which partners must operate laterally across departmental, organisational and policy boundaries. And finally, the new policy regimes have tried to promote a commitment to detailed strategic action plans with clearly identified 'milestones' and outputs. Blackman (1995) argues that these processes are indicative of new public sector management practices which are likely to be introduced more widely in the public sector.

When the government announced its package of measures, primarily concerned with the organisation of government and the management of public expenditure designed to transform the machinery of policy planning and control, of which the establishment of the Single Regeneration Budget (SRB) and Government Offices for the Regions was a central part, the Secretary of State for the Environment (DoE, 1993b) claimed that a 'new localism' would emerge involving a shift of power from Whitehall to the regions, thereby delivering a greater responsiveness to local priorities.

However, the nature of this new form of 'localism' has been called into question by Stewart (1994, 1996a). Stewart (1994, p. 142) observes that although the SRB and the new status of the Regional Offices involves a deconcentration of central government functions to a regional base there is no increase in autonomous local decision-making to government beyond that of the central state. Stewart (1994, p. 143) identifies three dimensions to the notion of the 'new localism' that have emerged in practice: managerial localism, competitive localism and corporatist localism.

Managerial localism is based on a renewed public/private sector managerialism embodied in the new financial and administrative arrangements of the integrated regional offices and the SRB. This purports to offer a coherence of planning and policy delivery which political and administrative structures or-

ganised on departmental lines failed to deliver. Competitive localism is characterised by a process of marketing and the presentation of bids prepared by localities for funding on a competitive basis to government (City Challenge, Rural Challenge, Regional Challenge, Local and Sector Challenge and Capital Challenge), to the European Commission (structural funds) or to finance and development capital (City Pride and urban prospectuses). Corporatist localism, argues Stewart (1994), reaffirms the government's commitment to remove urban policy from local government politics by changing the form of urban governance in which local elected politicians are distanced in the development of local regeneration strategies.

An important distinction can be drawn, therefore, between the political process associated with contemporary urban policy as represented by the Challenge Fund model compared with earlier initiatives. The 'new localism'

> relies less upon representative democracy and more upon a consensual corporatism. Local interests, organisations and institutions can play a major part, but the skills needed are those to do with the brokerage of support, the mobilisation of interest, the negotiation of mutual position, the packaging of collective resources and the orchestration of local stakeholders rather than those relating solely to the exercise of democratic choice through the traditional machinery of formal and informal local authority politics.
>
> (Stewart, 1994, p. 144)

A corollary of this form of 'new localism' is the emergence of a new pattern of leadership at the local level. The establishment of partnership bodies to guide, co-ordinate and promote regeneration activities has, in some cases, altered the traditional axis of power, creating a more open process of priority setting and decision-making. Whilst business leaders, elected members and powerful chief executives of councils have traditionally occupied the role of 'power brokers', the reassembly of interests through the active formation of partnership bodies has made previously hidden influences of power more visible and has created a new context in which elected members, council officers, representatives of the Chamber of Commerce, Training and Enterprise Councils and Development or Promotional Coalitions relate to one another. Stewart (1996a, p. 22) has even asserted that the interlocking nature of many of the urban partnerships and the pivotal role played by key members 'has led to the emergence of a positional elite in the new urban governance'.

This phenomenon is a continuation of the wider strategy pursued by both British and American governments during the 1980s in the areas of health, education, housing, transport and infrastructure provision. It involves the maintenance of centralised control and the privatisation of policy through the promotion of an entrepreneurial culture and the institutionalisation of the role of the private sector in key positions of power (Barnekov, Boyle and Rich, 1989).

In summary, the overall thrust of urban policy in England in the 1990s has been towards the creation of 'entrepreneurial' cities which have the capacity to compete nationally and internationally for public resources and private investment. The British government has acknowledged the importance of the global context in which this process of competition occurs and urban regeneration funding has been directed at removing obstacles to competitiveness and encouraging multi-sector partnerships to develop forward-looking regeneration strategies to realise the potential for economic growth by supporting businesses, overcoming dereliction, and tackling the various forms of social exclusion. Although this shift towards encouraging entrepreneurialism was apparent in the 1980s, the policy instruments introduced by central government, institutional structures and practices of policy formulation and implementation are very different in the 1990s. The aim of this book is to analyse this new phase of urban policy through an account of significant features of the contemporary period (place marketing, changes in local governance and the emergence of the competitive local authority, and the role of leadership in regeneration partnerships) and an analysis of a selection of policy initiatives introduced in the early 1990s. The next chapter explains why the transformation in urban policy since 1991, outlined here, has occurred.

Notes

1. One can argue that almost all government policies impact on cities and there are those who have defined urban policy very broadly. For example, Blackman (1995) defines urban policy as 'essentially about the welfare of local residents in an urban society. This involves planning and delivering public services and supporting the development of the local economy' (p. 5). 'Urban policy as a general term is about the activities of government in urban areas' (p. 12). Accordingly, Blackman not only focuses on the range of central government initiatives directed at 'the urban problem' but also discusses wider education and training policy, health policy and sustainable urban policy.

   Although, it is important to maintain this holistic approach when considering the way in which main spending programmes can be applied to the problems found in urban areas, the scope of this book is more limited. It adopts a narrower definition focusing on area-based government-sponsored initiatives directed at the problems of economic decline and social disadvantage found in and around many English cities. It is a definition which has been commonly used by writers such as Lawless (1996), Stewart (1996a), Parkinson (1996), Robson (1994a) and Atkinson and Moon (1994).
2. The extension of regeneration funds to rural areas, particularly via the SRB and Rural Challenge, is an important step in acknowledging not only the nature and scale of problems to be found in rural localities, but the potential for economic development in these areas. Problems of poverty, isolation and community breakdown in rural areas have been well documented (Rural Development Commission, 1994, 1995a). However, rural enterprise continues generally to outperform its urban equivalent and levels of unemployment in rural areas are, on average, lower than for England as a whole. Government is attempting to integrate rural concerns fully into national and regional policies. The government's economic objectives for rural areas are to maximise the competitiveness of rural business and to encourage further diversification of rural enterprise (MAFF/DoE, 1996). The interdependence of urban and rural areas can be observed in the processes of production, circulation, exchange and consumption. In other respects rural society in England is essentially urban, influenced by the pervasive forces of the late-twentieth-century urban process. In

policy terms, then, the chapter on Rural Challenge explores the impact of an initiative previously applied in urban areas to the rural context. In conceptual terms, an analysis of the links between social and economic conditions in rural areas and shifts in the mode of accumulation and the mechanisms of regulation (e.g. Rural Challenge) provides useful insights into the way patterns of social, cultural, and economic practices are currently being reconstituted in rural areas.

3. Corporatism refers to a partnership between government, the trade unions and the private sector. In the current regeneration partnerships organised labour is rarely represented, although a variety of other non-governmental organisations are. It would seem more accurate, therefore, to talk of a coalition of multi-sector interests or, given the strong representation of private sector interests, 'privatised partnerships'.

2

Transitions in Urban Policy: Explaining the Emergence of the 'Challenge Fund' Model

NICK OATLEY

Introduction

This chapter identifies the processes leading to the emergence of the distinctive phase of English urban policy that emerged in the early 1990s. It explains the emergence of this form of intervention by relating changes in urban policy to transformations in the economy and political changes in the neo-liberal project of the Conservative government. Economically, the Challenge Fund model of policy can be interpreted as one variant of the neo-liberal project of the former government to address the ongoing decline of cities. Politically, the shift in policy post-1991 represents the continuation of political strategies to undermine municipalist/collectivist policy approaches and to assert strong control over local authorities and to encourage new forms of governance based on multi-sector partnerships within a contract culture. The new phase of policy has created a range of new institutions and practices which represent the construction of a new local mode of regulation in response to continuing after-Fordist crises of the economy and the state.

Transitions and the regulation approach

In recent years Britain has experienced tremendous social, economic and political transformations. In each of these areas it is acknowledged that British society is undergoing wholesale and pervasive changes. In the economic sphere these changes have been described as a transition from 'industrial' to 'post-industrial' or 'Fordist' to 'post-Fordist' forms of production. It is suggested that social and cultural practices have shifted from 'modern' to 'post' or 'late-modern'. In the political arena there has been a shift from 'the welfare' to 'the workfare' state, from Keynesian to post-Keynesian policies and from 'managerial' to 'entrepreneurial' practices. These transformations have posed challenges to prevalent social theory and have brought about substantial intellectual shifts (Thrift, 1992).

Regulation theory has attempted to capture these diverse changes taking place throughout contemporary society. It is an approach which has many

attractions for social scientific inquiry and although highly disputed it has proved a useful heuristic (Tickell and Peck, 1995, p. 381). It attempts to understand how broad forces of capitalist development take particular institutional forms at different times by linking changes in the economy to those in politics, both through a high level of abstraction and through middle range theory. A recent example of this is the attempt to reconceptualise regime theory through the lens of regulation theory (Lauria, 1997). Hence, one of the main strengths of the regulation approach lies in the emphasis which is placed, first, on the interpenetration of the political and economic spheres, and second, on the institutional specificities of capitalist development over time and space.

Regulation theory is increasingly being adopted to explain the economic restructuring of Britain and the associated restructuring of the state and social policy. Regulation theory is concerned with the way the inbuilt tendencies towards contradiction and crisis within capitalism are managed through institutionalised structures of regulation as the basis for sustained economic growth (Aglietta, 1979; Lipietz, 1987). Emphasis is given to the 'structural coupling' between the regime of accumulation (a macro-economically coherent production–distribution–consumption relationship) and the ensemble of state forms, state action and legislature, social and behavioural norms and habits, political practices and institutional networks which regulationists term the 'mode of social regulation' (MSR) (Tickell and Peck, 1995, pp. 357–8).

This approach is not intended to imply that economic conditions determine social and political processes, although it does claim a 'certain correspondence' between economic, social and political structures in periods of stability and growth and that together these structures constitute a 'regime of accumulation' (Stoker, 1990, p. 243). Peck and Tickell (1995a, p. 18) point out that the 'concern with the intrinsically sociopolitical character of restructuring processes, with the role of social institutions in underpinning modes of economic development, and with the historically and geographically specific nature of capitalist (re)production' gives regulation theory its distinctive character and explanatory power in analysing economic restructuring, societal change and state intervention.

The regulation approach is not a single, consistent theory but, rather, an ongoing research programme within urban political economy (Tickell and Peck, 1992; Painter and Goodwin, 1995). For example, there is much dispute over the nature and extent of 'the transition' from Fordism to post-Fordism and, although not all regulationist studies are concerned with the transition from Fordism to post-Fordism, a regulationist approach is one of the more promising means for theorising this contentious aspect of contemporary transition. There are those who argue that current changes are still part of a transitional regime and that the conditions for a new, distinctive, coherent and durable mode of accumulation and regulation have not been met (Jessop, 1991a, 1991b, 1993, 1994, 1995a; Peck and Jones, 1995; Peck and Tickell, 1995a; Painter, 1995). For example, Jessop (1994, p. 34) suggests that we are witnessing a transition from flawed Fordism to flawed post-Fordism and from

a defective Keynesian welfare state to an ineffective post-Keynesian state (or what Jessop calls the Schumperterian workfare state). It has been suggested that extended crisis, rather than extended periods of relatively stable regulation, may well be the norm (Goodwin and Painter, 1996, p. 4; 1997). In this scenario attention is focused on the emerging state structures, political forms and policy initiatives and their impact on the current Fordist crisis.

Notwithstanding these disputes, useful insights have been gained from the application of the regulation approach to changes in local government (Stoker, 1989, 1990; Cochrane, 1993), and changes in the welfare state and social policy (Hoggett, 1987, 1990, 1991; Burrows and Loader, 1994). It has been used by Florida and Jonas (1991) to discuss post-war urban policy in the United States and by Oatley (1996) in a tentative attempt to analyse the broad evolution of urban policy in England from 1945 to the present. Gaffikin and Warf (1993) have explained recent shifts in (1980s) urban policy in Britain and the US in terms of a transformation from a Keynesian to a post-Keynesian state.

Transitions in urban policy: from Keynesian to post-Keynesian intervention

This section develops the argument that changes in urban policy can be interpreted as part of the shift from a Keynesian to a post-Keynesian mode of social regulation. As a specific form of state intervention, urban policy has been subject to the same forces that have led to the reorientation of economic management and restructuring of welfare state policy and local governance. In the sphere of urban policy, distinct changes have occurred that both correspond and contribute to the shift from a Fordist (1930s–1970s) to a post-Fordist or transitional (1970s onwards) mode of accumulation and associated mode of regulation.

Three key dimensions of the political system centred on the state derived from Jessop (1991b, 1994) are used in Table 2.1 to illustrate the ways in which Thatcherism has achieved a major break with the defining features of post-war politics in the United Kingdom. Two of the dimensions relate to governance (or new institutional relations): the representational regime or the institutional form taken and the interests that are represented; and changes in the internal structures of the state including changes in central–local government relations and the mode of policy delivery. The third dimension relates to the pattern or form of state intervention in relation to the aims and substance of policy. Two distinct periods of urban policy can be identified that reflect the dominant principles of the Keynesian and post-Keynesian welfare state approaches. Within each of these periods further nuanced phases can be observed that reflect the changing contingent political, economic and social processes associated within each major phase (see Table 2.1 and Oatley, 1996).

In analysing changes in urban policy it is necessary to 'take care not to treat these policies as the simple products of generic post-Fordist tendencies' for

Table 2.1 Transitional phases in British urban policy

Dimensions of the state	Keynesian		Post-Keynesian	
	Physical redevelopment 1945–69	Area-based social welfare projects (the inner city problem) 1969–79	Entrepreneurialism 1979–91	Competitive policy 1991–97
Representational regime	Construction of corporatist consensus around reconstruction programme. Central–local government partnership in council housing redevelopment programme. Close links with construction industry (system build, high-density, high-rise).	Area-based projects run by local government gave way in 1978 to 'Partnerships' involving central government and designated local authorities, other statutory bodies (such as area health authorities) and local voluntary organisations and local industry (but not labour organisations). 'Programme Areas' also designated. Local government seen as the natural agent of regeneration. Local government dominated by urban managerialism.	Greater emphasis placed on the role of the private sector in urban policy (privatism). Creation of business elites and growth coalitions. 'Privatised' partnerships and business representation on a range of national and local institutions.	Patterns of interest representation shifted requiring new patterns of local leadership with private sector, community representatives and voluntary sector organisations, alongside city councillors in boards and companies at arm's length from the local authority. Consolidation of trends towards urban governance to prevent municipalisation of policy.
Internal structures of the state	Monolithic state characterised by corporate planning, bureaucratic paternalism, functionalism, uniformity and inflexibility. Constructive partnership between central–local government. Department of Economic Affairs created (1964) together with a set of official regions and Regional Planning Councils and Regional Planning Boards.	Home Office and the newly created Department of the Environment were key departments during this period. Urban Deprivation Unit created in the Home Office. Some attempt to co-ordinate policy across a number of areas but thwarted by inter-departmental rivalry. Attempts to adopt corporate working and the bending of main programmes to address the urban problem. Co-operation between central and local government.	Centralisation of power. Shift in local government towards urban governance with private sector having greater role. Confrontational approach to local government (rate capping, cutbacks, abolition, and quangos by-passing local authorities). Urban entrepreneurialism promoted involving leaner and flatter managerial structures, generic roles, team working and flexibility.	Purported 'new localism' developed through the establishment of integrated Government Offices for the Regions and the Challenge Fund. Cabinet committee (EDR) established to oversee Challenge Fund. In reality, 'remote control' exercised via the contract culture. Central–local government relations characterised by an 'authoritarian decentralism' or 'centralist localism'. Local partnerships involved in a process of centrally controlled local regulatory undercutting. New public management (to promote privatisation and competition) creating the enabling authority.
Patterns of state intervention	The long post-war boom period dominated by policies to achieve national unity through regional balance, containment of urban growth and the reconstruction of urban areas, involving slum clearance and comprehensive redevelopment. Instruments included establishment of the development plan system, new towns, industrial development certificates, office development permits and development areas; National Plan published in 1965 advocating 'growth through planning'.	Area-based experimental social welfare projects attempting to respond to economic, social and environmental problems resulting from structural decline of the economy. Inner cities policy, e.g. • Urban Programme 1969 • General Improvement Areas 1969 • Educational Priority Areas • Community Development Projects 1969 • Inner Area Studies • Housing Action Areas 1974 • Comprehensive Community Programmes 1974 • Enhanced Urban Programme 1978 Inner Urban Areas Act (1978) acknowledged the economic nature of the urban crisis. Keynesian demand management techniques used to counter the emerging crisis ('stagflation') of the 1970s.	Neo-liberal philosophy pursued involving deregulation, liberalisation and privatisation. Social needs subordinated to the needs of business. Emphasis given to property-led initiatives and the creation of an entrepreneurial culture, e.g. • Enterprise Zones 1979 • UDCs 1979 • Urban Development Grants 1982 • Derelict Land Grant 1983 • City Action Teams 1985 • Estate Action 1985 • Urban Regeneration Grants 1987 • City Grant 1988	Competition for funds and competitiveness of business and localities the leading priorities for regeneration policy. Initiatives to improve the competitive advantage of localities, e.g. • City Challenge 1991 • Urban Partnership 1993 • City Pride 1993 • Single Regeneration Budget 1994 • Rural Challenge 1994 • Regional Challenge 1994 • Capital Challenge 1996 • Local Challenge 1996 • Sector Challenge 1996

they are likely to be the product of a variety of contingent factors (Jessop, 1991b, p. 143). Furthermore, some of the new institutional forms and practices may be attempts to manage the crisis of Fordism; others may be attempts to escape it and establish innovatory regulatory forms or practices. It is, therefore, necessary to be open to the complexity and indeterminacy of policy change and to avoid the criticism of a mechanical and functional application of regulation theory to the interpretation of changes in urban policy.

Urban policy during the period 1930s through to the late 1970s was almost exclusively concerned with welfarist issues: slum clearance, the provision of new housing through planned redevelopment and stimulation of the private building industry, the improvement of housing standards through rehabilitation and gradual renewal, and in the later part of the period various policies directed at tackling poverty and urban decline. During the early part of the period (1930s to 1968) the main urban problem was perceived as physical obsolescence of the Victorian housing stock and supporting infrastructure. Consequently, policy was directed at slum clearance and planned redevelopment. During the 1960s poverty and deprivation were 'rediscovered' as the long post-war boom faltered. Influenced by initiatives undertaken in America under the 'War on Poverty' programme, a range of area-based experimental initiatives was introduced during 1969–79 in Britain, ostensibly designed to address the problem of social disadvantage but also to diffuse growing racial unrest. Policies were initially driven by the concept of social pathology and the need for improved welfare service delivery and better co-ordination between different strata of government (Lawless, 1989), although towards the end of this period, from 1976–79, the limitations of policy were becoming increasingly apparent and greater emphasis was focused on addressing structural economic change (Parkinson, 1996). The dominant institutional approach during this post-war period was paternalistic, corporatist and managerialist. The dominant values underpinning policy were those of the post-war consensus of universal welfare rights, public planning and the pursuit of redistribution and equity, the prioritisation of social needs, and one-nation politics.

The approach to urban policy changed in 1979 with the election of the Conservative government under Thatcher. Thatcherism, defined in terms of a style of leadership and a set of doctrines and a programme of policies, was one particular national response to a specific conjuncture of events and circumstances that were global in nature (Gamble, 1994). Gaffikin and Warf (1993, pp. 69–70) suggested that this conjuncture of events that led to a new era of global political and economic relations included

> the collapse of the Bretton Woods agreement in 1971 and the subsequent shift to floating exchange rates; the oil crises of 1974 and 1979 and the subsequent recession in the West, with stagflation and rising interest rates; the explosive growth of third world debt; the steady deterioration in the competitive position of industrial nations, including the USA and the UK, as reflected in their growing trade deficits, and the concomitant rise of Japan, Germany and newly industrialising nations; the emergence of 'flexible specialisation' and computerised production technologies;

the steady growth of multinational corporations and their ability to shift vast resources across national boundaries.

These changes have been variously described as an accumulation crisis in the transition from state monopoly to global capitalism (Graham *et al.*, 1988), a 'great U-turn' (Harrison and Bluestone, 1988) or the end of one Kondratieff long wave and the beginning of another (Marshall, 1987). This shift towards global capitalism also created a crisis of Keynesian welfare state policy where the viability of continuing state welfarism was questionable (Harvey, 1989a; Leitner, 1990; Gaffikin and Warf, 1993).

The election of the Thatcher government in Britain in 1979 'witnessed the fracture of three main pillars upon which post-second world war social democratic politics were constituted – Fordism, Welfarism and Keynesianism' (Gaffikin and Warf, 1993, p. 71). The Thatcher government immediately set about a structural transformation and fundamental strategic reorientation of the capitalist state involving a shift of emphasis away from welfarist concerns to the stimulation of an efficient economy, the generation of wealth and competitiveness, and the creation of a culture of entrepreneurialism, whilst reducing the role and expenditure of the state (Jessop *et al.*, 1988; Gamble, 1988; Deakin and Edwards, 1993). At the macro-economic level, Keynesian demand management gave way to attempts to strengthen the structural competitiveness of the national economy through neo-liberal economic measures such as monetarist supply-side policies including tax cuts, deregulation and privatisation. The subordination of social policy to the needs of labour market flexibility and/or the constraints of international competition marked a clear break with Keynesian welfare state approaches. Full employment was de-prioritised in favour of international competitiveness and redistributive welfare rights took second place to a productivist re-ordering of social policy (Jessop; 1994, p. 24). This restructuring was a response to the crisis of the Keynesian welfare state and a means of enabling the growth and consolidation of the emerging flexible mode of accumulation.

Thatcherite policies constituted 'a real attempt to effect a radical transition from a flawed Fordist accumulation mode of growth and a defective Keynesian welfare state to an effective post-Fordist regime and a neo-liberal variant of the Schumperterian workfare state' (Jessop, 1994, p. 29). The strategy involved liberalisation (promoting free market forms of competition), deregulation, prudent economic/fiscal management involving the sale of public assets (privatisation), cutbacks in public expenditures and the reduction of taxes, recommodification of the public sector to promote the role of market forces and to improve the economic performance of public assets or service functions, the reduction of power of public sector unions, internationalisation, and the promotion of popular capitalism through the wider ownership of economic assets, and attempts to depoliticise economic decisions (Barnekov, Boyle and Rich, 1989; Jessop, 1991a, 1991b; Thornley, 1993). This strategy is particularly evident in the wage relation, the enterprise system, the money form, the consumption sphere, and the state form (Jessop, 1992; Peck and Tickell, 1995a).

During the 1980s urban policy became part of this broad political and economic programme. In particular, policy was used to restructure central–local government relations characterised by five basic processes: displacement involving the transfer of powers to non-elected agencies thereby by-passing the perceived bureaucracy and obstructiveness of local authorities (e.g. Urban Development Corporations); deregulation involving a reduction in local authorities' planning controls to encourage property-led regeneration (Enterprise Zones); the encouragement of bilateral partnerships between central government and the private sector; privatisation incorporating the contracting out of selected local government services, the development of service level agreements, tenure diversification and the provision for schools to opt out of local education authority control; and centralisation of powers through a range of quangos and initiatives such as the Urban Programme Management Initiative (DoE, 1987; Moore, 1990; Bailey, Barker and MacDonald, 1995).

This period of urban policy can be seen as part of a transitional regime that set about dismantling the conditions and structures of the Fordist mode of accumulation and creating the conditions for a new or transitional (post-Fordist) regime of accumulation. The institutional arrangements were dominated by privatism and a change in urban governance from a managerialist approach to an entrepreneurialist approach. The main emphasis in urban policy in the years from 1979 to 1991 was on property-led regeneration, which prevailed until the effects of the property slump at the end of the 1980s undermined this approach, which contributed to a reassessment of the form and nature of urban policy. When John Major took over from Margaret Thatcher there was no significant divergence from Thatcherite principles. The same long-term objectives were apparent, although the change in personality and style of leadership, in some areas, facilitated a change in the form of strategy pursued. Thornley (1993, p. 228) observes that 'there may be a softening of the image and a certain degree of decentralisation of power, but beneath this appearance of a new start lies the deepening of some of the Thatcherite policies'.

The emergence of the Challenge Fund approach: partnership, entrepreneurialism *and* competition

The government's approach to urban policy was reassessed in 1991. It was becoming clear that certain features of policy adopted during the 1980s were no longer appropriate in the changed circumstances of the early 1990s. The recession of 1989–91 leading to further rounds of job loss in the inner cities and a slump in the demand for property exposed the over-reliance on property-led regeneration. Whilst property development has potentially important economic consequences it 'is no panacea for economic regeneration and is deficient as the main focus of urban policy' (Turok, 1992, p. 376). Property

development lacked the scope, powers and resources to provide the holistic approach required to tackle urban decline. It could not guarantee a rise in the overall level of economic activity in a locality and ignored human resource issues such as education and training; the underlying competitiveness of production; and investment in essential basic infrastructure.

The dominant approach in urban policy of the 1980s did not appear to offer a neo-liberal solution to the Fordist crisis impacting on cities. Rather than helping to secure the conditions necessary for stable capital accumulation, the boom in property development, fuelled by a relaxation in planning regulations, public subsidies via Urban Development Grants, Urban Regeneration Grants, City Grants and the activities of UDCs, served only to channel private investment into the property sector and away from industrial sectors and to heighten the instabilities of the property cycle.

The property-based approach to regeneration did little to address the social polarisation and social exclusion in cities and in many cases exacerbated inequalities. Urban policy came under fire from a number of quarters (including the Confederation of British Industry) which testified to the weaknesses in the government's response to the problems of urban decline (Stewart, 1987; CBI, 1988; Darwin, 1988; Public Accounts Committee, 1989; Audit Commission, 1989; Brownill, 1990; CLES, 1990; National Audit Office, 1990; Harding, 1991; Lawless, 1991; Lewis, 1992; Imrie and Thomas, 1993; Oatley, 1995b).

By the early 1990s it was becoming apparent that the approach to urban policy pursued since 1979 had not reversed urban decline (Wilmott and Hutchinson, 1992, p. 3; Robinson and Shaw, 1994, p. 232; Robson *et al.*, 1994). The poor performance of urban policy can be seen as a reflection of the poor performance of the government's attempt at economic management generally. For example, Jessop (1994, p. 29) argued that Thatcherism failed to resolve the interlinked structural crises of British capitalism and its state inherited from a flawed Fordist past, and that the Major government was confronted with a more deep-seated structural economic crisis but had a much reduced and seriously weakened set of state capacities with which to address it.

It was apparent, even before the 1990s, that urban policy had to change. Policy experimentation had led to fragmentation and a lack of co-ordination. The Audit Commission (1991, p. 4) stated that 'fragmentation continues and the patchwork quilt which was the hallmark of policy and programmes two years ago remains only loosely sewn together'. New ways had to be found to address deep-seated economic problems and to improve the capacity of the state to respond to them. A DoE-commissioned study on local area economic development (DoE, 1988) stated that 'In all the study areas, a new pro-development and pro-business consensus has been emerging, with local authorities sharing much common ground with business interests. *The next step must be to find new and more appropriate ways of involving the private sector more fully in the broader process of local economic development*' (my italics).

On his return to the Department of the Environment as Minister of State in 1991, Heseltine instituted a wide-ranging review of urban policy 'to find out if

new initiatives are needed, to develop or replace the aid programmes which already exist' (DoE, 1991a, p. 2). This review consisted of commissioned studies (e.g. Victor Hausner and Associates, 1991) and a tour of cities to talk to key agencies involved in urban regeneration. On his visits, Heseltine was struck by the culture of dependency that existed in local authorities, particularly in relation to the Urban Programme. Working practices tended to reinforce traditional ways of working within set administrative boundaries undermining more innovative practices that might have linked initiatives and encouraged working across departmental and agency boundaries. An Audit Commission (1989, p. 23) report published two years earlier had also found that too often Urban Programme funding had been seen as a substitute for main programme expenditure.

In response to these findings and other less well-publicised findings (such as the moribund state of some UDCs, the ineffectiveness of Task Forces in co-ordinating policy at a local level, and the fragility of the private sector's role in urban regeneration), Heseltine announced a new approach to urban regeneration in a speech to members of Manchester's Chamber of Commerce (DoE, 1991d). In this speech, Heseltine set out ideas that would lead to changes in the representational regime of urban policy, the internal structure of the state in this area and the specific patterns of intervention. It involved the extension of competitive bidding for urban funds which he claimed would break the dependency culture that results from the distribution formula for regeneration funds. Heseltine stressed the need for a new sense of partnership combining competitive drive linked to social responsibility and the need to encourage 'local creativity'. Competition was central to his vision of releasing local creativity, arguing that '*competition is the vital catalyst for the new approach*' (my italics) (Heseltine, 1991, p. 7).

The application of competition to local authority practices had already been tested with positive effects in the area of Compulsory Competitive Tendering for service provision. The interim findings of research commissioned by the DoE on the effects of the 1988 Local Government Act, which required local authorities to seek competitive tenders for a range of services, found that, from the evidence of the first two rounds of tendering, competition had established a clearer and more uniform standard of service delivery; a more cost-conscious attitude among direct service organisations; improved teamwork and morale and work practices; and had created productivity improvements (DoE, 1990).

The application of market disciplines to the provision of services had brought about significant changes in the nature of service delivery and in the structures and working practices of the local state. Mr Heathcoat-Amory, the Junior Local Government Minister at the time, pointed out the significance of these changes:

> We have always been in no doubt that the extension of competition to a wide range of local authority services under the Local Government Act 1988 would prove a turning point in the development of local government in this country.

> INLOGOV's findings are clear evidence of the real impact that competition is having on local authorities up and down the country. The days of municipal complacency are gone. Local authorities are having to look more closely than ever before at the services they provide to their local communities, at the methods they use, and at the standards they achieve.
>
> (DoE, 1990, p. 2)

The introduction of City Challenge (May 1991) that followed soon after the speech at Manchester and subsequent initiatives based on competitive bidding was aimed directly at changing the practices of local authorities and other agencies in the locality involving a shift away from urban managerialism towards new more entrepreneurial forms of governance and a reorientation of policy towards encouraging competitive business and competitive localities.

State structures and processes in the Challenge Fund model of urban policy

Although it lasted for only two rounds of bidding (1992–93 and 1993–94), City Challenge was not just 'another piece of policy flotsam tossed up by the endless flux of inner city policies' (Edwards, 1995, p. 699). It was the prototype of a more significant restructuring of urban policy introduced in late 1993. The creation of the Single Regeneration Budget and the restructuring of the Government Offices for the Regions marked a radical reorientation of urban policy (proposals were contained in the Conservative Manifesto of 1992, although the full details can be found in the DoE (1993c) publication entitled 'Building on Success').

The significant areas of restructuring and reprioritisation that have taken place within urban policy in the 1990s can be identified using Jessop's six dimensions of state structure and activity (Jessop, 1989, 1991b) which focus our attention on interest representation, processes and patterns of state intervention and the philosophy underpinning policy. The first three dimensions are concerned with state structures (representational regime, internal structures of the state, and patterns of state intervention), the remaining three dimensions refer to wider social relations (social basis of the state, the state project, and the hegemonic project).

Representational regime

During the 1980s the institutional landscape associated with urban policy was confused and fragmented, resembling 'a cacophony of dissonance' (Stewart in Chapter 5 of this book). With the introduction of City Challenge and subsequent Challenge Funded initiatives, local authorities once again assumed a role, albeit an enabling one, in the urban policy sphere. These new initiatives shifted the patterns of interest representation and competition demanded new structures of local interest representation and leadership (Stewart, ibid.).

Whereas the urban policy approaches of the 1980s had relied on the liberalisation of market forces, the quasi-privatisation of state enterprises

(characteristic of neo-liberal strategies), and business representation on a range of national and local institutions, the approach to governance functions in the 1990s was to delegate to intermediary partnership organisations. Central government actively sought to involve local authorities in coalitions of multilateral partnerships with the private, voluntary and community sectors.

The institutional form that emerged to carry forward urban (and rural) regeneration in the 1990s was either an informal partnership, committee or steering group or a formally constituted company limited by guarantee. These new multi-sector partnerships were encouraged to adopt market principles to achieve efficiency (in the form of effective bids containing value for money), to engage community involvement for legitimacy and business representation to foster an entrepreneurial approach. The organisation is normally at arm's length from the local authority and, therefore, continues the trend established during the 1980s towards restructuring the role of local government, bypassing local representative democracy and replacing it with popular elitism. In this context, local partnerships are encouraged to develop local collaborative advantage in order to create competitive edge (Huxham, 1996).

However, although collaborative behaviour may be observed in localities leading to differing regimes, the competitive context and the marketisation of central–local government relations through the contract culture create the distinctive features of this aspect of the mode of social regulation. The establishment of competitive relations between arms of the local state and more generally between places is an important part of the neo-liberal attack on welfarism and recalcitrant local authorities. Local partnerships involved in bidding for funding find themselves 'engaged in a process of centrally articulated, local regulatory undercutting' (Peck and Jones, 1995, p. 1389).

This institutional form has been described as a return to 'local corporatism' by Bailey, Barker and MacDonald (1995), although significantly there is usually no trade union representation and the mix of partners is much broader and otherwise more inclusive than the tripartite corporatist arrangements within urban policy during the 1970s. It is, therefore, more accurate to describe the institutional arrangements that have emerged in the regeneration policy arena during the 1990s as coalitions of multi-sector interests set within the context of 'authoritarian decentralism' (Thornley, 1993, p. 228) or 'centralist localism' (Peck and Jones, 1995, p. 1386). The appeal of 'the local' has played an important part in providing an uncontentious and non-divisive focal point around which local coalitions have formed, as Peck and Jones (1995, p. 1387) point out for the shaping of Training and Enterprise Council ideologies.

Whereas the government tried to establish locally based business-driven regeneration agencies during the 1980s as a way of constructing an organisational basis for local neo-liberalism, in the 1990s neo-liberal objectives have been pursued through new institutional forms at the local level. There is some scope for local autonomy although this is strongly circumscribed by central executive power. Local priorities can be identified but initiatives which conform most closely to the national bidding guidelines and which present least

risk are more likely to be funded (Gray, 1997). This does not amount to a strengthening of local autonomy. It is a more sophisticated and subtle form of central control. As Peck and Jones (1995, p. 1390) observe, 'To interpret this in any other way is to run the risk of confusing the localist rhetoric of neo-liberalism with the reality of state restructuring.'

Internal structures of the state

The 1980s witnessed a radical centralisation of power. Central–local government relations were subjected to a combination of financial control and regulations, the establishment of new agencies which assimilated powers previously carried out by local authorities and even abolition of whole tiers of local government. Since 1991 there has been a number of changes to the internal structures of the state which continue the general trend towards 'undemocratic centralism'. Power continues to be centralised in Whitehall at the expense of elected local government, although the confrontational approach towards local authorities adopted during the 1980s has given way to a remote form of control achieved through the contractualisation of central–local relations based on the procurement model of policy.

This change of approach was precipitated by central government's realisation that although it had won a political victory over local government opposition through the rate capping and abolition legislation, this had not been achieved without damage to its own political standing and prospects for economic recovery in the cities. For instance, the Audit Commission (1989, p. 15) highlighted the problems associated with central government's confrontational stance towards local government:

> it is widely perceived that central and local government departments do not work together as closely or effectively as they might. It is argued that the complex nature of government support makes co-operation difficult and that restrictions simultaneously placed on local authority initiative work counter to the aim of involving them fully in regeneration initiatives. The CBI Inner Cities Report 'Initiatives Beyond Charity' published at the end of 1988, says: 'one of the clearest messages to emerge is that the efforts to turn around Britain's cities will be shackled so long as the present uneasy relations between central and local government persist'.

The government, under Major, and with Heseltine back as Minister of State for the Environment, decided on a more conciliatory approach to manage local government. Whereas the approach of the 1980s had been to clear away the old institutional rigidities associated with corporatism and burdensome bureaucracy, the approach of the 1990s was to encourage 'privatised partnerships' which required a change in the strategic orientation of the local state. This was to be reinforced by the extension of the contract culture and the application of the discipline of competition to influence the form and practice of local governance, leading to changes in the representational regime of the state discussed above.

Government's policies for restructuring the internal workings of the state closely mirror policies to restructure the economy (Urry, 1987; Hoggett, 1987, 1990, 1991, 1994; Pinch, 1989, 1994). In broad terms this has meant the introduction of new public sector management techniques which has involved the replacement of monolithic state services with numerous competing providers. The introduction of competition into the public sector has not only brought about management reform but is also part of the government's broader strategy of promoting competition and privatisation. The purchaser–provider split has become a central feature of this reorganisation of the delivery of public services and has given rise to the notion of the enabling authority (see Chapter 4 by Robin Hambleton).

In the urban policy sphere during the 1990s a quasi-market for urban funds has been established in which central government becomes the purchaser and the local partnerships take on the role of the provider. As Collinge and Hall (1996, pp. 3–4) observe,

> The government has created a quasi-market in regeneration funding and positioned itself as a monopsonistic 'client' of local bidding partnerships. In this monopsonistic market situation, the government can withhold support from local partnerships unless and until their performance meets its requirements. The ability of local partnerships to receive Challenge Fund support is, therefore, contingent upon their ability to deliver specified levels of output to the government. Thus the Delivery Plan for each successful bid must 'include as clear a statement as possible of *what the government is buying with SRB funding*, other public money, and at what cost' (DoE, 1995a, emphasis added).

An important part of the institutional restructuring of urban policy in the 1990s designed to support the new quasi-market has been the establishment of a new Cabinet Committee for Regeneration, known as EDR, and new integrated government regional offices. The Committee represents a new institutional form through which central executive power is exercised, whilst the new unified Government Offices for the Regions, bringing together Environment, Education and Employment, Transport and Trade and Industry (and Home Office representation), not only changed the internal structure of the state but also altered its strategic orientation. The Government Offices for the Regions perform a range of functions. In relation to the bidding process for Challenge Funds they act as 'tutors' and 'strategists' promoting good practice and seeking to raise the standard of bids and ensuring they contribute to national and local priorities. They attempt to co-ordinate other sources of matching funds such as the Housing Corporation, English Partnerships and the European Social Fund and European Regional Development Fund. They are the voice of the region in negotiation with central government and increasingly with the European Union. And finally, they act as 'gatekeepers', controlling access to public funds and supervising the bidding process, and 'auditors' of successful bids. The Offices, therefore, play ambivalent roles in acting as advocates for and advisers of local partnerships whilst at the same time enforcing national guidelines

established by Whitehall. Their role fluctuates between the voice of the region and local interests in Whitehall and the eyes and ears of Whitehall in the regions.

At the local level then, the role of elected local government is still being undermined and supplanted by unelected agencies, most notably multi-sector partnerships, in an effort to prevent the 'municipalisation' of local regeneration policy. This strategy involving the disaggregation of political structures below the nation-state has enabled the consolidation of power in the hands of central government and is the characteristic approach of the 1990s. In terms of the nature of control that is exerted over these unelected agencies, Hoggett (1994, p. 45) has suggested that 'it's not so much devolved control as "remote" control which appears to be superseding bureaucratic control as the preferred method of regulating institutional life'. In the urban policy sphere remote control is achieved, by the government setting out core values and central objectives through a framework of guidance and applying a competitive element to the funding allocation; and then by giving managers of partnerships control over resources, responsibilities for balancing the books and delivering on a range of contractually agreed performance targets. What this produces is a disaggregated, self-regulating form of control.

It is clear from this discussion that the simple centralisation of power thesis needs to be treated with caution when applied to the 1990s. Heavy-handed bureaucratic forms of control are being replaced with more subtle, self-regulating forms of control. Recent debates concerning the 'hollowing out' of the nation-state have shown the restructuring of the powers of central and local government to be a complex, contradictory process which combines the centralisation and concentration of some powers at the expense of elected local authorities and the devolution and fragmentation of others, in and through new non-elected, competitive single-function agencies or partnership bodies (Jessop, 1994, p. 33; Patterson and Pinch, 1995).

For example, Jessop (1994) has argued that although the nation-state retains central executive authority in a wide range of areas, one can observe a displacement of its functions and powers to supranational systems and international bodies, autonomous transnational alliances among local states with complementary interests and to restructured regional and local levels of government. Here, Jessop points to the growing activity at the local level encompassing economic regeneration and competitiveness and new forms of local partnership. However, Jessop (1994, p. 33) recognises that this process of hollowing out of the nation-state has occurred at the same time as a well-documented reduction in the role and autonomy of local government.

Patterns of intervention

The patterns of state intervention in the 1990s have been shaped by the evolving dynamic of the globalisation of economic activity and pressures of inter-urban competition. Competitive firms and competitive localities became key policy objectives of the Conservative government. Competition was one of the

central concepts of economic liberalism and it was given particular prominence by the publication of three White Papers on competitiveness (Cmnd 2563 (1994); Cmnd 2867 (1995); Cmnd 3200 (1996)). The White Papers acknowledged the significant transformations that are occurring in the world economy and the important role of cities and regions as new economic actors in the global economy. The promotion of a competitive economy came to pervade all policy areas. In the introduction to the first competitiveness White Paper, John Major, the then Prime Minister, stated that

> our companies face the most competitive environment they have ever seen. Change is relentless and swift. The global financial market never sleeps. Technology has shrunk the world. Free trade has opened new markets but it has also created new competitors. We cannot ignore these changes. To do so means certain decline. . . . All our policies – not just our economic policy – need to be focused on the future strength of the British economy.
> (at the CBI Annual Dinner 1993, quoted in the introduction to Cmnd 2563, 1994)

Tremendous growth has been witnessed in the economies of many non-OECD (Organisation for Economic Cooperation and Development) countries. For example, the Asian 'Tiger' economies of Taiwan, Korea, Singapore and Hong Kong have grown at nearly 10 per cent a year for over 30 years. Other countries in the Pacific Rim and beyond are also experiencing rapid growth. This economic growth together with the fall of communism and the economic liberalisation of Eastern Europe represents a major opportunity for increased trade for Britain and other OECD countries.

The continued relaxation of trade barriers, including the most recent GATT agreement and the creation of the Single European Market (1992) and its extension in 1994 to the European Economic Area (incorporating the countries of the European Free Trade Area (EFTA)) will continue to increase world trade. These changes present enormous opportunities but as the White Paper points out they also increase the pressure of competition: 'The rapid spread of capitalism, the opening of closed economies and the removal of rigid systems of central planning could bring a low cost labour force of 1.2 billion people on to world markets as producers as well as consumers' (Cmnd 2563, 1994, p. 7). Although it is acknowledged that many of the drivers of this change are beyond the control of governments, the UK government has responded by putting in place policies such as the SRB Challenge Fund and City Pride which are designed to improve the competitiveness of the British economy, in general, and specific localities in particular. The government sees regeneration contributing to the improvement of competitiveness of firms, the job prospects and quality of life of local people, and the social and physical environment (Cmnd 2563, 1994, chapter 12 on regeneration).

Competitiveness and the 'enterprise culture' have come to pervade urban policy in the 1990s. The single-purpose supply-side agencies and initiatives of the 1980s are being replaced with initiatives designed to encourage collaborative working in a competitive context. Initiatives such as City Challenge, the

SRB, Rural Challenge and City Pride, which are discussed in depth in later chapters, encourage a more integrated and strategic approach to regeneration. Typically, initiatives combine policy areas that cover economic development, employment training and education, housing and environmental renewal, and quality of life. Urban policy is no longer seen as concerned solely with supply-side blockages such as physical obsolescence and skills shortages. Rather, there is a realisation of the interconnectedness of urban problems and that to promote economic performance and competitiveness one also needs to address social disadvantage and exclusion and poor environmental quality. This more integrated pattern of intervention is in contrast to the more narrowly focused initiatives of the 1980s.

In relation to changes in the wider social relations of Thatcherism, the fracturing of the post-war (one-nation) consensus altered the *social basis of the state*. In an attempt to foster entrepreneurialism and to dismantle the dependency culture, Thatcherism pursued a 'two-nations' programme in which incentives and subsidies were combined with the ruthless application of market discipline. Major's declaration of wanting to work towards a classless society placing a new emphasis on active citizenship appeared to signal a return to one-nation Conservatism. However, this philosophy is based on a strand of thinking entirely consistent with the neo-liberal emphasis on the role and responsibility of the individual in a strong state.

Hence, the two-nation ethos was kept very much alive by campaigns to distinguish the deserving poor from the welfare-dependent 'scroungers' and 'spongers', reinforced by the extension of the workfare programme in February 1997. In urban policy the same ethic has been applied to winners and losers in the allocation of regeneration funds. The application of the market discipline of competition for funding enables central government to claim legitimately that some localities do not deserve funding (as much as other areas) because of flawed bids. Competition in this context is being used to manage the allocation of a scarce resource in a way that simultaneously deflects criticism of the lack of adequate funds devoted to regeneration and creates the impression of deserving and undeserving localities.

Thatcherism involved a fundamental reorientation of the value system underpinning the post-war political consensus. The *state project* and *hegemonic project* of Thatcherism were to restore the Conservative Party as the leading force in British politics and to revive market liberalism as the dominant political philosophy by creating the conditions for a free economy by limiting the scope of the state while restoring its authority and competence to act (Gamble, 1994). Major stuck to these principles during his term of office and sought to consolidate the 'entrepreneurial society' through conviction politics, policy experimentation and a process of 'institutional Darwinism' in which inter-institutional competition is fostered and the private sector is given an opportunity to influence the reorganisation of civil society (Jessop, 1991b; Peck and Tickell, 1995a).

Private sector interests and the business ethic are prominent in the

partnerships which have developed to respond to the challenge of urban funding. Urban regeneration has been opened up to market influences and the business ethos in a way that moves beyond the subsidy approach to private developers of the 1980s to a more pervasive role for private sector interests in influencing local regeneration strategies through the partnership approach to bidding for funds, in the creation of visions for localities under the City Pride initiative, and through representation on the management boards which steer the work of the Government Regional Offices (*Planning*, 1996, p. 1).

Under Major the process of rolling back the welfare state gave way to a recognition that a mode of social regulation not only manages the economy but itself needs managing. Therefore, in the 1990s there has been an emphasis on transforming the nature of the state from within rather than a dismantling of state structures and powers. The new public management and the contract culture now pervade Whitehall and local government. In urban policy, in particular, this has led to a shift away from the pure values and institutional forms pursued during the height of neo-liberalism in the 1980s towards new institutional forms in which the contract culture mediates the relations between central government and local partnerships. The marketisation of relations and an emphasis on the delivery of outputs is being used to secure a change in culture and practice at the local level.

Both Thatcher and Major governments were intent on sweeping away socialism, which did not just mean the Labour Party but collectivist and community socialisation in all its forms (Duncan and Goodwin, 1988, p. 273). The Conservative government was not only concerned with what local authorities spent their money on but how it was spent. The way money is spent can have a big influence on how people expect society to operate. The application of competitive bidding regimes to regeneration, and even to areas of statutory funding (e.g. Capital Challenge) was an important part of the Conservative's aim of constructing an hegemony that stresses the virtues of market processes over collectivist principles.

Section II

Creating Competitive Localities

3

Making Sameness: Place Marketing and the New Urban Entrepreneurialism

RON GRIFFITHS

Introduction: entrepreneurialism and the discourse of marketing

Widely regarded as emblematic of late twentieth-century urban policy and urban governance, place marketing is by no means a simple phenomenon. It embraces a diverse set of practices carried out by a wide array of agencies (business leadership groups, partnership organisations, local authorities and Urban Development Corporations, among others) for a number of quite different purposes. Indeed the term itself is, in an important sense, rather misleading. Marketing is a concept (some have gone so far as to call it a science) that belongs to the discourse of business. It refers to the process by which commodities are designed to correspond to the perceived needs or desires of specific targeted consumers. Applied to places, the language of marketing implies that places can take the form of (or be regarded as the equivalent of) commodities; that they are traded in a market-place and bought by consumers; and that they can be designed with those consumers in mind. It is undoubtedly the case that the increasingly globalised nature of contemporary power relations has led to urban areas being treated in more commodity-like ways. Nevertheless, there are points at which the marketing metaphor inevitably breaks down. The main purpose of this chapter is to trace out and critically examine what is involved in the marketing of place, and to highlight some of the tensions, ambiguities and paradoxes to which it gives rise.

The marketing of places, with its emphasis on the projection of deliberately crafted images to external audiences and local populations, has been one of the defining features of the entrepreneurial modes of urban governance that have come to prominence since the 1970s. Entrepreneurialism, as a mode of urban governance, came about as a response by individual cities to the collapse of the Fordist social democratic arrangements that had underpinned the quarter-century of economic expansion after the Second World War. The demand-side buoyancy of that era had made possible a steady expansion of state expenditures on social investment and collective consumption. This, in turn, had

facilitated the spread of 'managerial' forms of governance. The managerialist mode was defined by three main characteristics: an emphasis on the allocation of state surpluses (rather than on the attraction of private investment flows); the dominance of bureaucratic organisational forms in the delivery of services (rather than the more flexible, less formalised, organisational approaches that were being adopted in the leading parts of the business world); and the dominance of a social welfarist ideology (as distinct from the business values of wealth generation and competitive success).

As the recessions of the 1970s removed the economic basis of managerial governance, national governments came under pressure to cut urban social spending. At the same time, the rapid contraction of manufacturing industry in most of the older urban centres, and the decimation of full-time, male, blue collar employment, was bringing about a collapse of the 'structured coherence' (Harvey, 1985; Goodwin, 1993) in their local social relations of production, consumption and reproduction. As a result, expectations that had formerly been taken for granted (about lifetime employment, the relative durability of occupational skills, the division of roles within the family, the security of the support mechanisms provided by formal and informal social networks, and so on) gradually dissolved across large reaches of the social landscape. As part of the same process, the local political cultures (based often on a 'labourist' coupling of paternalism and universalism) that had bolstered and legitimised managerialist governance became weakened. Deprived of its economic and cultural foundations, managerialism gave way (unevenly, and often conflictually) to new approaches.

Entrepreneurialism, the mode of urban governance which has emerged from the crisis of managerialism, is predicated on a competitive quest for new sources of economic development, in response to a collapsing manufacturing base and a growing internationalisation of investment flows. It has also been distinguished by the emergence of different organisational forms and institutional processes from those characteristic of the managerialist era. Entrepreneurial regimes of urban governance have typically involved the formation of alliances and partnerships between private and public sector bodies, together with some degree of displacement of institutional processes based on democratic representation. Likewise, entrepreneurialism has usually been associated with an ideological shift, away from public service criteria and towards an acceptance of social and spatial inequalities.

Harvey (1989a), who has done most to give the term its academic currency and theoretical purchase, has identified four 'basic options' for urban entrepreneurialism. First, cities can seek to achieve a competitive advantage with respect to *production*. This can be done by, for example, stimulating the application of new production technologies, or making investments in the social and physical infrastructure that have the effect of strengthening the capacity of the locality to export goods and services. Second, they can seek to enhance their position in the competition for *consumption* expenditures. This might involve, for example, creating zones dedicated to upscale shopping,

entertainment and cultural tourism, or promoting the gentrification of selected neighbourhoods to attract high-income residents. Third, they can compete to acquire key functions in financial and governmental *command and control*, and in media and communications processing. This type of strategy might, for example, entail expensive investments in the communications infrastructure (such as airports), or creating support services and institutional mechanisms that will enhance the agglomeration economies to be derived from having specialist organisations and expertise in one place. Fourth, cities can attempt to strengthen their position in the competition for the *state surpluses* distributed by national and supranational governments. This can be directed towards funds attached to urban regeneration programmes (as in the case of the competitive bidding mechanisms discussed in several of the other chapters in this volume), but it can also be directed towards funding sources that have no specific urban objectives, such as the National Lottery grant distribution bodies, and towards high-value government contracts (for example for military equipment).

It is important to recognise, however, that cities do not have a free choice in selecting an entrepreneurial strategy. The strategic choices made by city leaders occur in conditions not of their own choosing. The options open to any individual city will depend crucially on the place it currently occupies in the new global urban system. There is, as many commentators have noted, a powerful dynamic towards greater unevenness in urban fortunes stemming in part from the interactions that can and do occur between different strategies. The quest for command and control functions, for example, will be facilitated if the city has already secured its place as an international centre for the arts and consumption. This is the thinking that has guided the growth strategies of Frankfurt, Paris, Barcelona, Berlin and many other leading European cities (Bianchini and Parkinson, 1993; Kearns and Philo, 1993; Harding *et al.*, 1994). Entrepreneurialism is founded on speculation and risk-taking; competition, by its very nature, throws up winners and losers. As was demonstrated by Sheffield's experience in staging the 1991 World Student Games, achieving only limited success in an expensive entrepreneurial venture can be costly psychologically as well as financially (Darke, 1991; Goodwin, 1993).

The displacement of managerial by entrepreneurial forms of governance, against the background of the growing power of global capital and the deindustrialisation of the former strongholds of manufacturing industry, has not just reinforced uneven development between cities. The recent period has also witnessed a sharpening of social inequalities and divisions within cities, as the stable middle income jobs lost through deindustrialisation are not replenished, and state action at all levels has been redirected away from social support, and towards economic priorities (Byrne, 1995; Hamnett, 1996). One major consequence of these processes is that place marketing strategies have usually been required to embrace two, not always easily compatible, objectives, corresponding to the two main groups of audiences to which they have been addressed. In relation to external audiences, place marketing has been concerned with

attracting a share of the increasingly volatile flows of capital investment, consumer spending and affluent or highly skilled migrants. In relation to local, internal, audiences, place marketing has had the equally significant role of creating legitimation for regeneration and redevelopment policies, cementing local solidarities, and fostering morale and social cohesion within the increasingly divided and segregated city. The relationship between these two objectives, or 'logics' (Kearns and Philo, 1993, chapter 1), is one of the major themes that will be discussed in this chapter.

Accounts of place marketing have frequently noted that it is rooted in a paradox. As the world becomes more subordinated to global flows, and differences in the functional qualities of individual places are flattened by communications technology, so greater effort is being placed on differentiating places symbolically. Places become engaged in a struggle to 'get noticed', to capture for themselves a semiotic advantage over rival places (Harvey, 1989a; Savage and Warde, 1993). A vital tool of this struggle has been what Davis (1990) terms the elaboration of 'city myths', and what others have described as 'reimaging' or 'visioning' strategies (Holcomb, 1993; Neill, Fitzsimmons and Murtagh, 1995). But studies of this process have revealed that it has had a very curious effect. Far from projecting distinctive identities, reimaging strategies have tended overwhelmingly to homogenise places, with an endless repetition of standard devices, from advertising slogans to building types. This tension between difference and uniformity is the second major theme of the chapter.

Although in the last two decades cities have been caught up in processes of place marketing to an extent, and with a vigour, that is unprecedented, it would be wrong to regard place marketing as an entirely recent invention. It has been suggested that the first recorded examples of civic boosterism occurred in the city states of medieval Europe. In the US the use of promotional devices to boost the economic fortunes of places also has a long history, reaching back to the earliest colonial settlements on the east coast and gathering force in the westward expansion of the nineteenth century (Holcomb, 1994). But, fuelled by the rise of entrepreneurial urban governance, place marketing repertoires and techniques have become more sophisticated, and place marketing practices more professionalised. An important aspect of this growing sophistication has been the attempt to appropriate marketing ideas developed in the private sector. Central to marketing discourse is the distinction between selling and marketing (see, for example, Ashworth and Voogd, 1990; Fretter, 1993). The distinguishing feature of the latter is its emphasis on what its exponents term 'product development', by which is meant the process of creating a product that customers will want to buy, and not just promoting a given product. Accordingly, marketing discourse has been closely bound up with the transition from the accumulation strategies of Fordism, based on mass production and mass consumption, to more recent strategies based on flexible production for more finely differentiated, 'niched', consumer segments. Yet, despite its apparently increased sophistication, place marketing has had very limited success in applying the marketing principle of product development

(Detroit being an extreme case of this kind of disjuncture, see Neill, Fitzsimmons and Murtagh, 1995, chapter 4). This issue – the tension between 'promoted image' and 'real identity' – constitutes the third major theme of the chapter.

To explore the above themes, it is useful to begin with an examination of the principal methods that make up the contemporary repertoire of urban place marketing. They can be considered under three main headings: publicity and advertising; festivals and other events; and urban design. In practice, of course, they will be woven together in the place marketing strategies pursued by individual cities, in an endeavour to reap synergistic benefits.

Promotional strategies: publicity and advertising

From the beginning of the present era of urban entrepreneurialism, publicity and advertising campaigns have been an important element in the repertoire of place marketing. However, advertising practices have received 'surprisingly little academic analysis' (Sadler, 1993, p. 179). What limited evidence exists suggests that, in comparison to the resources employed in the advertising of branded commodities such as soft drinks and sports clothing, publicity budgets for cities have usually been quite small. In relation to the US, where city marketing has been more vigorously pursued over a longer period than in Britain, evidence published by the American Economic Development Council in the late 1980s lent some support to the notion that cities remained 'undermarketed':

> Although advertising constitutes the largest share of the marketing budget, the largest current budget for advertising in [the] sample of 23 cities (for Atlanta and Cleveland) was only in the 0.6 million dollar range – miniscule by advertising standards and probably only marginally effective. In fact, all economic development advertising expenditures in all United States media total only about 46 million dollars, a little more than half the current annual budget for Miller Lite Beer alone.
>
> (Holcomb, 1994, p. 121)

It has also been pointed out that promotional spending on cities has tended to be managed by local planning, economic development and tourism development officers, rather than by nationally rated advertising agencies (Holcomb, 1994). Nevertheless, as the tools of marketing theory have been imported from the world of commerce, approaches have gradually become more sophisticated. One aspect of this growing sophistication has been the more systematic targeting of audiences, using carefully selected publicity materials and advertising media (such as national newspapers, in-flight magazines, and television) in order to adjust the advertising message more finely to the intended recipient. Another aspect has been a change of emphasis in the nature of the message being conveyed. Instead of being confined to profile-raising, and communicating information about what a place can provide (industrial units, hotel bed

spaces, and so on), materials have increasingly acquired higher levels of inventiveness and symbolic loading as they have been incorporated into more ambitious campaigns to construct entirely new images for individual cities.

These developments are particularly well illustrated by Glasgow's experience as a UK pioneer of city promotion. In common with many cities on both sides of the Atlantic, Glasgow found itself in the 1970s having to respond to a massive contraction of its traditional industries and exceptionally high levels of joblessness and welfare dependency, while also suffering the burden of a strongly adverse public image. In Glasgow's case this negative image was linked to a long-standing reputation for physical violence, trade union militancy and poor environmental quality, the result of which was that surveys regularly identified the city as the least attractive place to live of Britain's old industrial cities. In the early 1980s city leaders, including city and regional councillors, government development agencies and business representatives, embarked on a concerted marketing campaign, with the limited aim at that stage of lifting the city's visibility and reputation in the local and national public mind. To begin with, and in the absence of models of city marketing to draw on from other British cities, the process was opportunistic and incremental; it was very much a 'learning exercise' (Paddison, 1993, p. 346), relying to a large extent on the promotional device of a cartoon character and the 'Glasgow's Miles Better' campaign slogan. As the campaign progressed, however, the marketing approach took on a greater subtlety and refinement. Not only was a more rigorous process adopted of targeting specific markets, such as service industries and urban tourism; there was also a more fundamental reorientation of marketing philosophy, away from simple image-building and towards a more integrated strategy of image-reconstruction, involving the kinds of event-based and infrastructure-based elements which will be considered in more detail later.

Studies of the promotional imagery used in publicity materials highlight the extent to which a limited number of common themes have been deployed by markedly dissimilar places (Sadler, 1993; Barke and Harrop, 1994; Holcomb, 1994). One of the most common generic themes of place boosterism, for example, is that of movement: forward, upward, into the future. Places are repeatedly described as 'stepping towards tomorrow', 'undergoing a renaissance', 'shaping the future', or with a similar image of change and progress. Frequently this progressive, forward-looking imagery is combined with heritage themes, especially through allusions to a city's industrial traditions, as in Stoke-on-Trent's slogan 'The city that fires the imagination', and Burnley's 'Cotton on to Burnley'. Another perennial theme concerns the locational advantages which a place offers, primarily for business. It has become a commonplace for promotional materials to contain slogans and diagrams showing that the city is 'at the centre' of the nation, or the 'gateway' to important regional economies, or 'well connected' to motorway and rail networks or other elements of the physical communications infrastructure. Inevitably, perhaps, the claims made have often been geographically rather imaginative, at

times bordering on the fanciful: 'The exhortation to "be closer to Europe – come and grow in Ashford" is understandable, but Wallasey's appellation as "EuroWirral" is less so' (Barke and Harrop, 1994, p. 100). Other themes that recur in promotional materials concern the local quality of life (for example the leisure and recreational opportunities, or 'liveability'), the low cost of living, and the characteristics of local people (for example their dynamism, 'spirit of enterprise' or 'can do' culture).

Beside the recurrence of certain common themes in promotional materials, there are also a number of other associated promotional devices that have been repeatedly employed. The renaming of places, to incorporate allusions to literary figures or other positively valued images, has also, for example, been common. In the tourist map of Britain, the traditional place-signifiers, such as the historic county names, have slowly given way to a variety of other historical and cultural references: Captain Cook Country, Brontë Country and Lorna Doone Country being some of the more well-known examples. A similar process has also occurred within urban areas. As part of their bid to reinvent Pittsburgh as a post-industrial city of tourism, education and high-technology medicine following the collapse of its steel industry, Pittsburgh's city leaders decided that it would no longer be appropriate for the mineral-bearing ridge to the immediate south of the renovated downtown Golden Triangle district to be called Coal Hill; instead it was given the more grandiose title Mount Washington, thereby not only radically rescaling the concept of a mountain, but also concealing an important aspect of the city's past. Other cities have also found it impossible to resist the temptation to replace idiosyncratic, locally meaningful names with blander, supposedly more appealing and marketable, new ones. The land immediately adjoining Bristol's disused city centre docks, which has become the centre of a major arts, leisure and residential development project, has been packaged as the 'Bristol Harbourside' (alluding to the not dissimilar waterfront revitalisation scheme in Baltimore), discarding the area's historic, and undoubtedly far more intriguing, name of Canon's Marsh (Griffiths, 1995a).

Summarising their detailed examination of the promotional materials that have emanated from two decades of entrepreneurial marketing of industrial towns, Barke and Harrop (1994) confirm that the overwhelming tendency has been for uniformity and convergence to outweigh local variety and differentiation. What perhaps needs to be stressed, however, is that similarity has been evident not only in respect of what is included in promotional packages, but also in respect of what is excluded. Projected images systematically downplay problems, such as unemployment and social unrest, and typically portray highly selectively recreated versions of a place's past (Sadler, 1993). The suppression of place-identities that occurs in the process of creating new, supposedly more attractive, place-images can also be read as a manipulation of masculine and feminine codings: detaching a place from its associations with male-dominated manufacturing industry and the masculine virtues of sweaty manual labour, and attaching it to feminine values of home and neighbour-

hood (see, for example, the account of the 'feminisation' of Hartlepool's image, in Barke and Harrop, 1994, p. 103).

However, there are limits to the extent to which the representation of a place can be locally controlled. Images escape attempts to shape them. Propagandist texts and images devised within the context of a promotional strategy are always part of a wider 'representational process' that operates through a wide range of other cultural products, such as novels, travel books, films, and TV and newspaper reports (Gruffudd, 1994). These can have the effect of nullifying the effects of promotional campaigns. In some places, efforts have been made to engage with these other representational channels, for example by setting up film commissions in the hope that co-operation with film companies will lead to positive representations or at least generate interest and reinforce memorable symbols. But co-operation with the image-creating industries does not guarantee that the images created will be beneficial for economic development. Detroit's struggle to overcome its 'Murder City' tag was not assisted by its portrayal in Hollywood's high-earning *RoboCop* film series in the 1980s as a place of urban violence running out of control (Neill, Fitzsimmons and Murtagh, 1995, p. 148). It may well be the case for media celebrities that 'no publicity is bad publicity', but this formula is a very precarious one to subscribe to when it is the capacity to attract global investment flows to secure the economic fortunes of an urban region that is at stake.

Event-based strategies: festivals and urban spectacle

Cities have traditionally served as the settings for extravagant spectacle and ritualised ceremony, reflecting the importance which symbolism and the manipulation of cultural resources have historically played in consolidating the power of urban-based elites. Archaeological evidence indicates that this relationship, between city, ceremony and social power, reaches back to antiquity and beyond (Philo and Kearns, 1993, pp. 9–10). Whether in the form of the lavish princely and regal pageants and elaborate religious rituals of the premodern era, or the public spectacles staged by revolutionary regimes in the modern era, the ceremonial role of cities has continued to be central to the legitimation of power relations. The rise of entrepreneurial place marketing has without doubt ushered in a new era of urban spectacle, but the burgeoning urban festival economy has also been powerfully stimulated by the policies of national and supranational bodies, such as the Garden Festivals programme launched as an urban regeneration initiative by the UK government in the 1980s, the Arts Council's Arts 2000 programme, and the EU's Cities of Culture programme (Myerscough, 1994). One consequence of the proliferation of urban festivals is that they now include a multiplicity of types of event. In order to make sense of this variety, Schuster (1995) has suggested a very schematic typology of forms of festival, in which festivals are distinguished primarily by the degree of popular participation in their creation but also by a number of other characteristics: whether they are cyclical or one-off; whether they are

long-established or recently invented; whether they are orientated to a mass or selective audience; whether their emphasis is on community celebration and expression or on more instrumental goals such as attracting visitors or government support for upgrading infrastructure.

First there are what he terms *spectacles*, examples of which would be the Olympic Games of the recent era, the 1991 Expo in Seville and the 1989 Bicentennial celebrations in Paris (Kearns, 1993). Spectacles are large-scale, usually one-off, staged productions with a very limited participatory element. They are watched, directly or on television, by a mass audience of largely passive spectators. While they may be effective in attracting attention to the host city, they have comparatively little value in terms of giving expression to the shared life of the communities that make up the city. Second there are *rituals*, such as the holy week processions in Seville. Rituals are cyclical events centring on the performance of a prescribed sequence of formal acts which usually have their roots in a long-established tradition. Their main distinguishing feature, therefore, is that the elements which make them up are not created by the performers or participants themselves. A third form of festival is the *artistic events programme*, usually based on the media or performing arts, as in the case of the Edinburgh Festival. They may be large scale, in terms of the number of separate events in the programme or the level of attendances, but usually do not have the dramatic central event characteristic of a spectacle, and generally cater for a limited social range of local people and visitors. A fourth form is the *trade fair*, such as the Cannes Film Festival and the Frankfurt Book Fair. The trade fair's primary function is to act as a market, bringing together the makers, producers, publishers and distributors of commercial cultural products such as films, TV programmes and books. While showings and exhibitions may be open to the general public, the core audience is international and specialised, rather than local and inclusive. Fifth there are *popular fairs*, in the sense of concentrations of participatory activities such as kite flying, ballooning and board games. Like the artistic festival, the popular fair might start off as a one-off but, if it is successful, become an annual or biannual event. Finally, Schuster (1995) arrives at a sixth form of festival, *popular citizens' festivals*, which he sees as having particular value to cities, though primarily as means of promoting 'civil society' and social cohesion rather than as tools for marketing the city to outside audiences. Popular citizens' (or community) festivals consist of a series of co-ordinated events, such as processions and street performances, in which all members of a community can participate. Festivals of this kind therefore function primarily as community-building social occasions; they are 'collective phenomena and serve purposes rooted in group life, that display certain characteristic features: they occur at regular intervals in the calendar, they are public in nature, participatory in ethos, complex in structure, multiple in voice, multiple in scene, and multiple in purpose' (Stoeltje, 1992, quoted in Schuster, 1995, p. 174).

To an even greater extent than the other means of place marketing, festivals can entail high levels of risk. Major spectacles are very costly to stage,

especially if they require substantial new physical infrastructure such as sports stadiums, exhibition spaces and transport linkages. Consequently, unless they are underwritten by open-ended state subsidies, organisers will be dependent on income streams from other sources (sponsorships, sales of broadcasting and other commercial rights, ticket sales, and so on) which are likely to be highly unpredictable. Because commercial and political reputations are usually at stake, and ways can often be found for disguising financial losses, discovering accurate final balance sheets for such events is extremely difficult. It seems clear, nevertheless, that few if any major spectacles have achieved the optimistic financial outcomes forecast by their sponsors or organisers at their launch (the 1988 Los Angeles Olympics being probably the main exception to the general rule).

The risks associated with festivals are, of course, not only financial or confined to high profile spectacles. In an increasingly saturated festival market it becomes even more likely that the resources (time, energy, goodwill, etc., as well as money) that are invested in mounting an event will fail to produce the hoped-for result, whether that be measured in attendances, visitors, media profile or community participation. There are also risks that derive from the 'transgressive' quality of festivals. Intrinsic to the notion of festival is the suspension of the normal order of everyday life. Festivals are times when boundaries are crossed and behaviours that are normally prohibited or discouraged (from walking in the streets, playing loud music and eating and drinking to excess, through possibly to dressing and acting outrageously and doing things that involve physical danger) become temporarily acceptable. But, in this subversion of the normal codes, there always lies the possibility that the thresholds of tolerance will be breached: the situation can easily arise in which what some regard as an acceptable level of transgression is defined by others as an intolerable breakdown of social order. The likelihood of this eventuality is inevitably heightened in a context of mounting social anxieties stemming from social fragmentation and polarisation. So, while cities in increasing numbers have been drawn towards the festival route to place marketing, the balance of risk and reward has become an even more difficult one to strike.

Landscape strategies: urban design and place marking

Place marketing and 'reimaging' strategies have not been confined to promotional campaigns and the staging of spectacles and other events. They have also involved the creation of whole new urban landscapes. In a large number of cases this has taken the form of expensive investments in high-profile 'flagship' buildings, often using the services of one of a strikingly narrow range of 'superstar' architects considered capable of lending the requisite aura to such projects. Many flagship buildings have been for 'high culture' uses, such as museums, art galleries and opera houses, reflecting the underlying transformation of city economies into centres of pleasure and consumption, and the emphasis now placed on adjusting cities to the lifestyle preferences of higher-

income 'service class' employees. But city image-building through flagship architectural and engineering projects has also been pursued through the construction of airports (e.g. Osaka), bridges (e.g. Rotterdam) and communication towers (e.g. Barcelona). The development of skyscraper office towers has been another widely favoured image-building device, especially in the case of cities striving to achieve, or retain, a 'global city' status. It is in the major cities of South East Asia that office skyscrapers have figured most prominently in the search for the desired image of international business success (Haila, 1995). In Kuala Lumpur, Malaysia, the world's tallest building, Petronas Towers, has recently been completed. Designed by Cesar Pelli, it stands at 450 metres, a calculated 7 metres taller than the previous record holder, Chicago's Sears Tower. But its status as world's tallest promises to be short-lived. As it was being built a number of other cities in the region were working on plans to build even taller constructions in the competitive quest to derive symbolic advantage from architectural giantism.

While flagship building projects have often acted as the centrepieces in image-orientated urban landscape strategies, an important role has also been played by more subtle initiatives concerned with the labelling and repackaging of particular neighbourhoods and districts, especially where it has been possible to draw on a distinctive industrial heritage or ethnic identity. Thus in many cities, once-neglected workshop or warehouse districts have found themselves turned into Chinatowns, jewellery quarters or gentrified urban villages, and have become the focus of publicly funded beautification programmes involving public art works, mock-ceremonial arches, repaving schemes, the restoration of derelict open spaces and the like. This 'theming' of the urban landscape has received considerable attention in recent 'postmodernist' urban analysis. Michael Sorkin, for example, has linked it to the wider fragmentation of the city into a highly differentiated collection of tableaux, theatre sets and inward-looking lifestyle enclaves, in place of the universalism, easy legibility and shared spaces of the pre-existing modernist city (Sorkin, 1992, Introduction). Attention has also been drawn by several commentators to the marked tendency for contemporary ('postmodern') landscapes to be made up from an adding together of 'premixed design packages that reproduce preexisting urban forms' (Boyer, 1992, p. 184). Among the most widely copied devices is that of the 'festival market-place'. The festival shopping concept was pioneered in the US by the Rouse Company, and was envisaged primarily as an alternative to the large-scale, single-use suburban shopping mall. The first example was the Quincy Market in Boston, located adjacent to the historic Faneuil Hall in the downtown waterfront district. The Harborplace scheme in Baltimore's Inner Harbor followed soon afterwards, again developed by Rouse in partnership with a municipal growth coalition under the leadership of a dynamic mayor, Donald Schaeffer. The concept has since been extensively copied throughout North America, Europe (e.g. Liverpool's Albert Dock development) and beyond (e.g. Sydney's Darling Harbour). Festival market-places typically follow a highly standardised recipe: a location usually in historic

(often waterfront) areas, enabling them to capitalise on an increasingly influential 'urban' aesthetic sensibility; an emphasis on small mid-to-upscale retail shops, mostly selling items such as speciality clothing, tourist souvenirs and novelty foods, rather than mundane necessities; the provision of carefully managed programmes of street entertainment (clowns, bagpipes, mime artists, etc.) to generate an atmosphere of fun and excitement; and nearness to other popular tourist attractions (aquariums being especially common). The formula is designed to create a certain ambience, combining a regulated and sanitised version of the excitement and cultural richness of city life with the security and abundant spending opportunities of the suburban mall.

Another widely repeated formula has been that of the arts or cultural district, of which Pittsburgh, Cleveland and Boston contain perhaps the most well-known US examples, with Birmingham, Frankfurt and Stuttgart standing as the main European exemplars. Typically, they contain a number of new or refurbished 'high art' venues, such as theatres, opera houses, art galleries and museums, together with a selection of bars and high-price restaurants. Like festival shopping areas, cultural districts are usually situated in downtown locations, often in districts with a recent history of social marginality (prostitution, sex shops, 'adult' cinemas, etc.) which image-minded municipal authorities have been anxious to eradicate. Unlike festival market-places, however, cultural districts usually contain little by way of retail activity. Their purpose is to appeal to members of the professional and managerial strata rather than to cater for middle-income family tourism and leisure activity, and for this they have to be imbued with the cultural capital that will send appropriate messages to their target audience.

A prevalent theme in the orchestration of these new consumption-orientated 'front spaces' is the notion of the '24 hour city' (Montgomery, 1994; Bianchini, 1995; Lovatt and O'Connor, 1995). The arguments behind this again allude to the search for alternatives to the allegedly outdated modernist city: in the same way that the rigid spatial zonings of the modernist city are being replaced by a more finely grained, mixed-use, urban morphology, so the rigid time rhythms of urban life under modernism are being replaced by more flexible notions of the daily activity cycle. In the contemporary vision of the post-industrial city of fun and games, pleasure is a commodity that needs to be on tap around the clock. Accordingly, city planners and downtown commercial coalitions have been energetically pursuing measures to counter the so-called 'dead period' (the time between office closures at 5 p.m. or 6 p.m., and the start of night-time entertainment at 7 p.m. or 8 p.m.), and urging licensing authorities to allow bars and clubs to stay open into the early hours of the morning.

Taken together with the flourishing urban festival economy, these new urban landscapes of spectacle and round-the-clock pleasure are indicative of a profound revaluation of the potentialities of urban living that has occurred over the course of the last fifteen years. The widespread claims that cities have experienced a 'renaissance', 'rediscovery' or 're-enchantment' (Beauregard, 1993) indisputably rest on significant changes in the way cities look, work and

are perceived. Internationally recognised flagship buildings springing out of former industrial wastelands; crowds of people flowing through mixed-use enclaves dedicated to conviviality and fun; the civic energy and pride surrounding major sporting and cultural extravaganzas; the renewed sense of the city as the unrivalled place of excitement, creativity and experimentation. These are all a far cry from the images that dominated urban narratives in the not-so-distant past: of unrelieved poverty, decline and demoralisation. There is, in short, much that is attractive and beguiling about the way cities have been affected by the new urban entrepreneurialism. But it is also vital to look behind the gloss, and consider the wider implications of the strategies that have been outlined. It is towards these wider issues that we turn in the final section.

Place marketing in critical perspective

Critical discussion of place marketing strategies has turned around three major themes: their ideological effects; their socially regressive consequences; and their highly speculative nature. It is worth considering them each in turn.

Place marketing has an ideological content by virtue of the fact that it is predicated on the manipulation of meanings and perceptions. In this respect it closely resembles a dramaturgical exercise, bringing certain 'readings' of a city to the forefront (pre-eminently those which speak of its dynamism, its attractive business environment and the quality of life on offer) and allowing other readings to fade away into the background. Putting this another way, place marketing works by creating a selective relationship between (projected) image and (real) identity: in the process of reimaging a city, some aspects of its identity are ignored, denied or marginalised. For example, attention may be drawn to a city's industrial or mercantile heritage, while the practices of class exploitation or slavery that may have made this possible remain under a veil of silence. Strong local loyalties and civic pride may be highlighted, but not the traditions of trade union militancy or revolutionary politics. Great play may be made of a city's cultural diversity but not of the systematic racial discrimination that in all probability accompanied it.

While such ideological loadings and displacements are usually most apparent in the promotional materials used in advertising campaigns, it has been suggested that they can also operate through the medium of the new physical landscapes that are being constructed (Crilley, 1993; Hubbard, 1995). Harvey is one of a number of authors who have commented on the intimate link between urban entrepreneurialism and the postmodern styles of architecture and urban design favoured in contemporary urban remodelling:

> We can identify an albeit subterranean but nonetheless vital connection between the rise of urban entrepreneurialism and the postmodern penchant for the design of urban fragments rather than comprehensive planning, for ephemerality and eclecticism of fashion and style rather than the search for enduring values . . . and for image over substance.
>
> (Harvey, 1989a, p. 13)

Postmodern design emphasises spectacle, emotional warmth and stylistic variety, and makes explicit reference to local vernacular codes. These characteristics work symbolically, it is argued, by diverting the attention of local residents, as well as potential investors, away from the city's real social and economic problems; by fostering cohesion and local pride; and by generating support for entrepreneurial projects. It offers up a latter-day equivalent of the 'bread and circuses' formula, in which entertainment substitutes for effective social policy. However, as Hubbard (1995) (drawing on Bourdieu's theoretical work on the sociology of culture) has insisted, it is important to avoid the simplistic assumption that the desired ideological effects of new entrepreneurial landscapes are readily achieved. Local publics do not always absorb uncritically the meanings which have been encoded by urban elites into the new landscapes. The 'readings' which local publics make of flagship developments and other landscape transformations can include 'elements of resistance, as well as those of acceptance and compromise' (Hubbard, 1995, p. 15), as illustrated by the comment of one elderly resident about Birmingham's Broad Street redevelopment (ibid.) :

> 'I haven't been to the city centre for years, but I went to see this new stuff going up around Broad Street . . . it's definitely something that you can point to, show friends and family, say that it makes you proud to be a Brummie. Having said that, I'll probably never visit again – I don't really know who will, it's not really aimed at locals is it?'

The ideological, or symbolic, functioning of place marketing therefore needs to be recognised as a complex social process, in which the effects are neither predictable nor assured. The meanings promoted by local regeneration agencies, whether by means of landscape projects, publicity campaigns or spectacular events, are always subject to negotiation and challenge. Alternative meanings, critical of or otherwise damaging to official narratives of renaissance, may be advanced, deliberately or unwittingly, by disaffected local populations or by external forces. Elaborately and expensively orchestrated campaigns to manage the circulation of images of a city can easily be blown off course by unexpected events, unwelcome media stories and other eventualities, as has been shown by the problems surrounding the reimaging of 'pariah cities' such as Belfast and Detroit (Neill, Fitzsimmons and Murtagh, 1995).

Besides their ideological effects, entrepreneurial place marketing strategies can also have significant distributional consequences. Not only does place marketing divert attention away from social and economic inequalities, it can also exacerbate them. One way in which this can happen is through the reallocation of public spending necessary to secure high-profile flagship developments. Although the rise of urban entrepreneurialism has, in many parts of the world, coincided with the ascendancy of neo-liberal philosophies which stress the deregulation of markets and the withdrawal of state responsibility for collective provisions, this has not meant an inactive state. On the contrary, the entrepreneurial models of governance which have taken over from the former

social democratic welfarist models have been predicated on the readiness of the state to subsidise private investment ('leveraging', according to the popular euphemism). The case of Birmingham illustrates again how this can work out in practice. In a bid to accelerate the transformation of the city from being the heart of Britain's primary manufacturing metropolis to being a major 'post-industrial' corporate centre, over £380 million was invested between 1986 and 1992 to create a number of prestigious cultural and sporting venues, including the International Convention Centre and the National Indoor Arena. Both are located along the Broad Street corridor, a renovated arts and entertainment quarter that the city council has embellished with a dramatic array of new sculptural adornments. The ambitiousness of the overall project, at a time of general despondency in the world of British local government, led to Birmingham being widely cited as a glowing example of 'visionary' urban leadership. But independent studies soon began to reveal the wider financial implications of this commitment to flagship projects. For example, over the same period in which the major prestige projects were absorbing £380 million (30 per cent of the city's entire capital programme), £123 million less were being spent on housing than the average of local authorities nationally, and capital resources devoted to education were falling by 60 per cent. To these figures should be added the revenue expenditures diverted away from mainstream social programmes to cover interest charges. It has been estimated that in 1991–2, for example, £51 million were diverted from education revenue support (Loftman and Nevin, 1992, 1994).

In response to the criticism that public spending on flagship buildings, major events and other entrepreneurial projects tends to exacerbate social inequalities, three main arguments have commonly been deployed: first, that the general public are able to benefit directly, by visiting the new buildings and spaces and participating in the events; second, that local citizens benefit indirectly, particularly from the trickle-down effect of jobs created by the direct, indirect and induced spending resulting from the projects; third, that projects have made use of streams of funding, from national or supranational governments, that would not have been available for traditional welfare purposes (in other words, the local opportunity cost has been nil or negligible). It is, of course, difficult to assess such arguments with precision. They do, however, need to be considered in the context of other important factors: the severe financial, physical, psychological and other barriers that serve to exclude large sections of the population from visiting places and events that have typically been created with specific, higher-income, strata in mind; the tendency for employment projections to be funded by organisations that have an interest in presenting an optimistic picture; and the possibility that the expenditures (on research, administration, hospitality, and so on) needed to gain access to special funding sources will not all be transparent.

The third source of critique of place marketing concerns its intrinsically speculative nature. Investments in major entrepreneurial projects, such as flagship developments and large-scale spectacles, are gambles with immensely high

stakes. Whether directed primarily towards attracting investors or luring visitors, they are contingent, for their success, on a multitude of factors over which an individual city will usually have little if any control. Getting noticed by the intended audiences, and getting that attention translated into decisions to visit or invest, can involve a long sequence of steps which at any point may be susceptible to the vagaries of weather, favourable publicity and media exposure, fashion, the attractiveness of competing places and events, terrorism threats, exchange rate fluctuations and any number of other unpredictable conditions. Faced with the high levels of uncertainty attached to place marketing projects, it is understandable that cities have tended to avoid straying too far from what can be seen to have been already successful elsewhere.

It is this logic, of 'competitive caution' or 'entrepreneurial conservatism', that has spawned the repetition of tested formulas: of leisure market-places and cultural quarters, art festivals and convention centres, signature buildings and themed waterfront restorations. But, however understandable, it is a logic that is flawed by a deep internal contradiction. In the rootless world of globalised capitalism, city leaders understand that they need to enhance their cities' 'recognition factors'. This obliges them to highlight and enhance the qualities that make their cities different from other places, in order to stand out and be noticed: there is an *imperative of differentiation*. But the enormous uncertainties involved in place competition impose a countervailing obligation on places to steer clear of unnecessary risk and adhere to the tried and tested: there is a powerful *imperative of uniformity*. The tension here is one which, in its essentials, applies to the marketing of all commodities, not just cities. The elaboration of superficial distinctions between brands which are, to all intents and purposes, practically homogeneous is a familiar feature of the markets for washing powders, fast food, denim jeans, cars and many other products. But, for all the relentless commodification to which the globalisation of economic power has subjected them, cities are not like orthodox commodities in a number of important respects. A city is not the 'product' of a single producer; it cannot be taken out of production if it 'fails' in the market-place, nor can its characteristics be modified in the short term except in very limited ways; competition between rival products cannot be internalised by one producer taking over another; the effects of product failure have ramifications far beyond the balance sheet of any individual firm. The contradictory pulls, between differentiation and uniformity, are therefore much more difficult to reconcile in the arena of inter-city competition. The prospect is that not all cities will be able to negotiate the dilemma successfully. For every Barcelona Olympics that launches its host city on to a new level of international recognition there is likely to be a Sheffield World Student Games that leaves civic embarrassment and municipal debt in its wake. Beyond a certain point, which some commentators believe has already been reached, there ceases to be enough world class art to fill the world class art galleries that have been erected, just as there are no longer any genuinely distinctive celebratory themes to feed the expanding festival economy, not enough conventions to make full

use of the growing number of international-standard convention centres, insufficient corporate demand to occupy the premium space on offer in the signature office buildings, and too few tourist dollars, pounds and yen to sustain the proliferation of urban tourism venues. In short, the market in places appears to be liable to the same kinds of crisis, of over-investment and underconsumption, that have periodically afflicted the production of producer and consumer goods.

It seems, then, that entrepreneurial place marketing is an extremely fragile basis on which to seek to build the fortunes of a city. And yet, it is reasonable to ask, what choices do individual cities have in an era in which relations of economic power operate on an increasingly global scale? Is it not the case that, whatever the risks involved in speculative promotional ventures, and whatever the damage to traditional managerialist principles of universalism and social welfare, cities are confronted with no real alternatives but to compete with one another in the place marketing game? Since the early 1980s the steady procession of formerly 'radical' urban administrations turning, with greater or lesser degrees of enthusiasm, to the kinds of spectacle- and image-based promotional policies that they had previously mockingly rejected, testifies to the limited room for manoeuvre that exists. Even commentators who are highly critical of contemporary orthoxies of urban management, such as David Harvey, have felt obliged to acknowledge that local coalitions 'have no option, given the coercive laws of competition, except to keep ahead of the game' (Harvey, 1989a, p. 12).

However, other commentators, and indeed Harvey himself, have made an attempt to offset this gloomy picture by pointing out that power relations, even at the global scale, are not fixed laws of nature to which localised interests must passively submit. Like the power relations at work in families, schools and factories, those governing the flows of resources between localities are ultimately reflexive, social, constructions. They operate within institutional and policy frameworks that are susceptible to challenge, 'upwards' as well as 'downwards' (Lash and Urry, 1993; Lovering, 1995). It is important not to underestimate the difficulties – organisational, ideological and political – that would need to be overcome in forging inter-urban alliances capable of moving the force field beyond the present coercion of competition. But the signs are not entirely pessimistic. The grassroots opposition that entrepreneurial strategies have attracted in places such as Birmingham and Glasgow, and the emergence since the late 1980s of a plethora of transnational collaborative networks between localities (Dawson, 1992; Griffiths, 1995b), can all perhaps be considered 'positive seeds' (Lovering, 1995, p. 124) that could grow into a more coherent challenge to the power relations that underlie the commodification of places.

4

Competition and Contracting in UK Local Government

ROBIN HAMBLETON

Introduction

Competition affects local government in two main ways. On the one hand there is the competition with other areas for inward public and private investment. In this context local authorities have become increasingly sophisticated in the practice of place marketing. In many cities in the USA this approach has drifted into 'civic boosterism', that is, the aggressive marketing of the city and the promotion of economic growth at all costs (Feagin, 1988). In the UK few cities have become so obsessed with the commodification of space. But, as other chapters testify, this is not to suggest that marketing the city and promoting areas within the city are insignificant functions of local government. On the contrary, the importance of developing new forms of leadership, including directly elected mayors, has received fresh attention in recent years, partly because of the importance now attached to place marketing (Hambleton, 1996; Hambleton and Bullock, 1996). Thus, one of the key arguments put forward by those advocating elected mayors for local authorities is that visible, strong leaders can enable councils to develop effective partnerships, lift civic pride and win additional resources for the area. This aspect of the competitive local authority is discussed in more detail in Chapters 3 and 5.

In this chapter the focus is on the second main way in which competition affects local government – it discusses the impact of competition on the management of the local authority. In essence it will be suggested that local authorities are undergoing a fairly radical shift from management by hierarchy to management by contract. In contract models the roles of principal and agent are clearly separated. Thus, across a wide range of public services, and not just in local government, we see a split emerging between the purchaser and the provider (or the client and the contractor). Walsh (1995, p. 110) summarises the new pattern as follows:

> The responsibility of the purchaser is to define what is wanted, to let the contract and to monitor performance; the provider is responsible for the actual production and delivery of the service. In the extreme the public organisation may employ few, if any, staff, contracting for all the services that it needs.

This chapter discusses trends in public service management and examines the notion of contracting. It suggests that local authorities are involved in three kinds of contracting:

- contracting with the public;
- contracting with external providers (sometimes referred to as externalisation); and
- contracting within the public service.

These three arenas for contracting interrelate and in some discussions they are collapsed together under the rubric of the 'new public management'. This can have the effect of obscuring important distinctions. 'Contracting' can be used to pursue different ends in different arenas. The conclusion to the chapter questions the view that public service organisations are best managed as if they were 'a business'. This *may* be appropriate for some public services. But, and this is a crucial difference, the much more important agenda for public services is that they should be 'businesslike' *and* publicly accountable.

Trends in public service management

In Chapter 2 Nick Oatley refers to the growth in contracting in urban policy and local government management. In this section we step back from the detailed twists and turns in policy development to consider three main phases in the evolution of local government services – see Figure 4.1.[1] The first phase, described as unresponsive public service bureaucracies, refers to the build-up of large, highly professionalised departments structured to mass produce services in the period from the 1950s to the 1970s. These were the years when local authority services expanded dramatically and the dominant organisational form was bureaucratic. For each service there emerged a defined department or division; an administrative hierarchy of control; a set of procedures designed to ensure uniformity of treatment; and groups of professionals or specialists to perform the tasks. While, at their best, such departments provided an impartial and fair service to the population, they were often inflexible, insensitive and displayed a paternalistic, 'we know best' attitude in their dealings with the public.

During the late 1960s and the 1970s public dissatisfaction with this form of service management and delivery increased. This discontent rolled together concern about the remoteness of centralised decision-making, irritation with the insensitivity and lack of accountability of at least some officers, and frustration with the blinkered approach often associated with highly departmentalised organisations. The 1980s, the second phase in Figure 4.1, witnessed a crisis in these old solutions and the emergence of three sets of reactions.

The first broad alternative, usually associated with the radical right, seeks to challenge the very notion of collective and non-market provision for public need. Centring on the notion of privatisation it seeks to replace public provision with private provision. A central theme in the Conservative government's

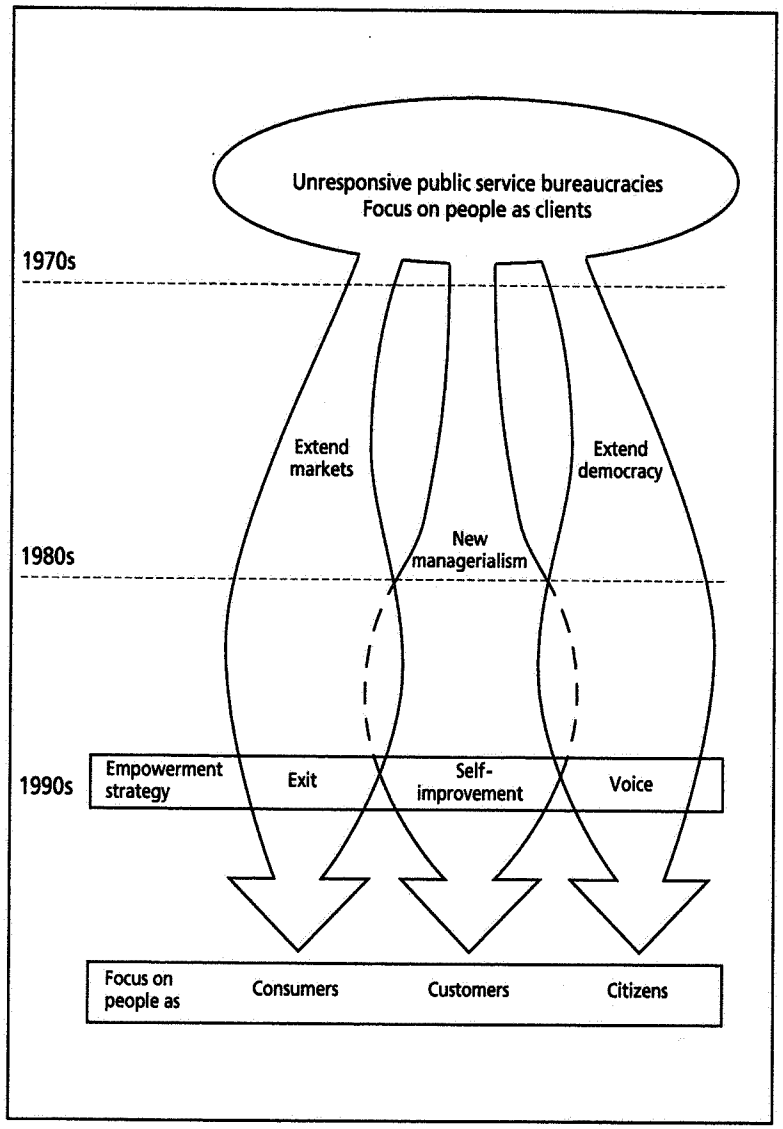


Figure 4.1 *Trends in public service management*

policies for local government was 'enabling, not providing'. The argument runs that the role of the local authority should no longer be that of universal provider. Rather, its role should be to encourage a diversity of alternatives, with elements of competition between the different providers (Ridley, 1988).

The key aim of this approach is to create a 'market', that is, replace monolithic state services with numerous competing providers. The Conservative

government's preferred approach to public service reform was to attempt to introduce competitive models of behaviour. The Education Reform Act 1988 attempted to create a market for schools, the Housing Act 1988 applied the idea to housing, and City Challenge, launched in 1991, introduced a high-profile bidding contest for urban funds.

The second alternative, shown on the right of Figure 4.1, aims to preserve the notion of public provision, but seeks a radical reform of the manner in which this provision is undertaken. Thus it seeks to replace the old bureaucratic paternalistic model with a much more democratic model. Advocates of the extension of local democracy are, for a variety of reasons, wary of the market models admired by exponents of the first alternative. They question whether the market model does, in fact, offer real choices to most people. For example, because levels of disposable income and personal mobility are crucial factors, the actual choices open to consumers who are unemployed, infirm or disabled are few and may even be non-existent. They also dispute the view that a system which relies on a myriad of privately made decisions will create an effective and accountable means of producing and allocating needed goods and services. Indeed, the research which has so far been undertaken on privatisation, deregulation and commercialisation of public services has found that the market model has delivered only a few of the benefits that have been claimed for it (Whitfield, 1992; J. Stewart, 1993; Walsh, 1995).

Interestingly, advocates of both the major change strategies of the 1980s agreed in many ways on what they saw as being wrong with the organisational forms of the 1970s. The shared perception was that the big bureaucracies had become remote and unaccountable – they needed shaking up, they needed to be stimulated into developing more cost-effective and responsive approaches and, above all, they needed to be exposed to countervailing pressures from *outside* the organisation. Both the political right and the left took the view that public service bureaucracies, whatever their stated intentions, were incapable of transforming themselves. New mechanisms needed to be created which would force the bureaucracies to become responsive to external pressures.

But, having agreed upon the nature of the problem, the solutions then prescribed differ dramatically. Whereas the new right offered markets, competition and individual choice, the new left offered strengthened democracy, participation and collective control. Whereas the right championed the individual consumer, the left advocated a new form of democratic collectivism built upon concepts of citizenship, consumer groups and communities.

The concepts of exit and voice developed by Hirschman (1970) are helpful in clarifying these distinctions. He argues that when the quality of the product or service provided by a private firm or other organisation deteriorates, management finds out about its failings via two alternative routes: customers exit (the market model) or they voice concerns directly to management (the democratic model). Hirschman is at pains to point out that while these two mechanisms are strongly contrasting, they are not mutually exclusive.

In the UK local government context we can now see clearly that the Thatcherite reforms of the 1980s were built largely around the exit option. In this model the consumer, dissatisfied with the product of one supplier of a service, can shift to that of another. In theory this switch sets in motion market forces which may induce recovery on the part of the service provider that has declined in comparative performance. This theory – that competition drives improvements – underlies the various moves towards competitive tendering for a range of council services as well as the introduction of quasi-markets into the welfare state.

Figure 4.1 suggests that an alternative to competitive models is the extension of democracy. In Hirschman's (1970) terminology this alternative is concerned with strengthening voice. It actually represents more than this because the democratic model is not just about creating the conditions under which management can rectify its own mistakes, but is also about direct control by communities. The democratic approach starts from the position that many services cannot be individualised – they relate to groups of consumers and citizens or society at large. Such collective interests can only be protected through appropriate forms of political accountability. Hence councils pursuing this strategy put their primary emphasis on the democratisation of local government service provision. This approach highlights the importance of local government as a vital element of the representative state. The focus is not so much on the individual recipient of services; rather, it is on the interaction between representative institutions and the communities they serve (Burns, Hambleton and Hoggett, 1994; J. Stewart, 1995, 1996).

The third broad strategy for public service reform identified in Figure 4.1 is 'new managerialism'. The politically led innovations based upon market or democratic-empowerment models were launched in the early 1980s and it was some time before a managerial response emerged. The response borrowed from the competing political models in a way which sought to imitate or simulate such radical methods but in a form which preserved existing power relations between producers and recipients of services.

In place of the sometimes violent and unpredictable signals of exit and voice a panoply of techniques (market research, user satisfaction surveys, complaints procedures, customer care programmes, etc.) was developed to provide more gentle and manageable 'feedback'. The key point about 'feedback' as opposed to 'pressure' is that it doesn't force the organisation to respond. Rather, if a consensus for change can be engineered from within the organisation, it provides the informational basis for self-improvement. This model has become extremely popular in local government – it is difficult now to find any local authority that does not claim to be trying to 'get closer to its customers'.

There are a number of strands of change associated with the 'new managerialism' strategy and some of these overlap with the 'extension of markets' strategy. Certainly there is a burgeoning literature and a variety of assessments have emerged (Flynn, 1990; Pollitt, 1990; Hood, 1991; Hoggett, 1991; Stewart and Walsh, 1992). In addition to the innovations with markets and quasi-markets referred to earlier, the following five related strands appear to be particularly significant:

1. Cost cutting – an approach involving ever tighter spending controls coupled with a continuing search for savings.
2. The introduction of more flexible production strategies and manpower strategies – for example, the shift from 'personnel management' to 'human resource management' (Farnham, 1993).
3. A move from centralised decision-making to devolved management – with managers exercising 'freedom within boundaries' (Hoggett, 1991; Hambleton, Hoggett and Razzaque, 1996).
4. The introduction of explicit standards and measures of performance – a strand which has been labelled 'neo-Taylorian' (Pollitt, 1990).
5. Culture shaping to develop a shared understanding and belief system among employees – drawing on Japanese experience where the organisation is often viewed as a collectivity to which employees belong, rather than just a place where separate individuals work (Morgan, 1986).

These various strands criss-cross and overlap. The emphasis on different strands will be shaped in different ways in different policy areas, at different levels of government, under different forms of political control. These variations may arise for sound reasons. A risk, however, is that politicians and public service managers may become 'fashion victims', switching the emphasis from one strand to another without thinking the implications through.

If we return to the general map provided by Figure 4.1 we can note that the empowerment mechanism underlying many of the 'new managerialist' approaches appears to be fragile. The mechanisms of exit and voice, as outlined earlier, expose the organisation to pressures from the people it is intended to serve. It is not at all clear that the new managerialist changes enjoy this advantage. On the contrary, these ideas are vulnerable to manipulation by various producer interests. As a result there is a risk that, by a form of organisational sleight of hand, the bureaucratic and professional paternalism of the past could be replaced by a new, more subtle form of managerial paternalism.

The contract in question

All the three strategies outlined in the previous section can be said to involve management by 'contract'. The 'contract' might be between a public service organisation and a private firm (or voluntary organisation) hired to deliver a service, or between the core of the organisation and a devolved unit, or between the organisation and the public it aims to serve. But what do we mean by 'contract'? The *Oxford English Dictionary* defines contract as 'A written or spoken agreement between two or more parties, intended to be enforceable by law'. This is certainly *one* definition of a contract but the last phrase – enforceable by law – narrows the nature of the contract considerably.

Charles Handy (1994) illustrates an entirely different definition with his

anecdote about a 'Chinese contract' – a form of contract he encountered when he was the manager in South Malaysia for an oil company. Handy reflects that in Western culture negotiation is often driven by a desire to win, often at the expense of the other party. A written document is viewed as essential to enforce your side of the deal, using the law or the threat of the law. The Chinese contract, on the other hand, requires both sides to concede for both to win – a good agreement is seen as self-enforcing.

The phrase 'Chinese contract' may be unfamiliar but, unacknowledged by Handy, the ideas have been explored by Western writers for some time. For example, Fox (1974) demonstrates that the resort to detailed and legalistic forms of contractual relationship corresponds to the breakdown of *trust* between parties engaged in social and economic transactions. An alternative, less legalistic approach to contracting assumes the existence of trust between parties – a trust built primarily upon a shared commitment to common values, familiarity, the exchange of information and personnel between parties, and so on. There are, in fact, many areas of public service where contracting is not legalistic at all. Rather, different individuals and organisations recognise the value of co-operation and simply get on with it. They pool resources, exchange information and develop trust.

The important point which emerges from this discussion is that *the meaning of 'contract' is contested.* Different interests, including political parties, are competing to capture the term and harness it to serve their own narrow interests. Interestingly the President of the Adam Smith Institute has claimed that contracting with the citizen was John Major's 'big idea':

> What gives the Major administration a stamp distinguishing it from its predecessor is its emphasis on *contract.* The citizen is seen not merely as a distant participant in government through the democratic process, but also as a consumer of it, entitled to consumer rights as well as democratic rights. These spell out a part of the unwritten contract between state and citizen, and emphasise that there are two sides to it. If citizens are obligated to pay taxes then government and its bureaucracy are obligated to provide good value, quality services in return.
>
> (Madsen, 1994, p. 72, emphasis in original)

This is an implausible claim on two counts. First, the idea of publishing clear public targets for service levels and quality standards is demonstrably not John Major's. It was advocated by the Labour Party several years ahead of central government's Citizen's Charter initiative of 1991 and was put into practice by Labour local authorities in 1989 – for example, York and Harlow (Hambleton, 1991). Taking other people's ideas is fair game in politics but claiming authorship is rather less defensible. Second, the Citizen's Charter is really a fairly flimsy 'public customer's charter' which does little to strengthen the rights of the citizen. In practice the 'entitlement' to democratic rights was seriously damaged in the 1980s and early 1990s by the spectacular growth of relatively unaccountable quangos (Weir and Hall, 1994).

There is now a growing body of evidence to suggest that the legalistic form

of contracting is damaging the public service ethos within both voluntary organisations and the public sector itself. For example, a study of the way US public sector organisations contract with voluntary organisations has raised concerns about the impact of the contract culture:

> Contracting in the US has become a vast bureaucratic paper chase, combining the worst aspects of the UK grants system with the worst fears of the contract culture. While contracting out of services suits the general distrust of government in the United States, it has failed to produce streamlined local government
>
> (Gutch, 1992, p. 73)

There is a real fear in the UK voluntary sector that the growth of formal contracting is leading to a loss of independence by voluntary groups. In particular, there is concern that lobbying and campaigning activities are being cut back.

Meanwhile, within the public sector itself, senior voices have been raised against the market model. For example, Roger Taylor, then Chief Executive of Birmingham City Council, claimed that the new market-driven approach to local government was a disaster because it lacked three crucial ingredients: the ideal of service; the championship of a whole community; and accountable democracy. He argued:

> While the search for efficiency and the respect for the citizen remains vital, there is a deeper meaning to public service: one which celebrates competence but rejoices in caring commitment. This is not captured in rail fare refunds nor in the speed with which we reply to letters. The quality of government is wholly more elusive.
>
> (Taylor, 1993, p. 13)

The three kinds of contracting referred to in the introduction are now considered in turn.

Contracting with the public

The debate about contracting with the public (or with service users) has been distinguished by a failure to bring out sharply the power relationships implied by the different so-called 'empowerment' mechanisms. It is important to focus on the language, or at least some of the key words, which have become common currency in these debates (Burns, Hambleton and Hoggett, 1994). The four Cs – clients, customers, consumers, citizens – are often used interchangeably and this has the effect of confusing discussion and masking power relationships. These four words deserve closer examination.

Treating people as clients

In the era of bureaucratic paternalism, referred to earlier, the traditional, professional model dominated the server–served relationship. Thus, local authority officers and members would commonly refer to service users or potential service users as clients. While there were important exceptions it was often the case that the authority had a 'we know best' attitude to the public. In an early

study of the impact of professional power on inner city communities, in this case the power of town planners and environmental health officers, Gower Davies (1974, p. 220) provided the following biting contrast between the concepts of client and customer:

> The *customer* is always right: he can choose, criticise and reject. The *client*, on the other hand, gives up these privileges and accepts the superior judgement of the professional. It is one of the aims of the would-be professions to convert its customers into clients and in so doing stake out an exclusive area of discourse in which those persons trained in the skills and inducted into the 'mysteries' of the trade can claim a monopoly of wisdom and proficiency [emphasis in original].

The key characteristic of the client relationship is that the client is, on the whole, dependent on the professional. This can create in people a feeling of impotence in relation to the particular service being provided. Not surprisingly, the term 'client', because of its connotations with closed and often paternalistic decision-making, is now used much less frequently in local government circles than it was – even in social services circles where it was well established. We can now see that the bureaucratic paternalistic model tended to treat people as clients and that, in terms of Hirschman's (1970) framework, the model appears to be doomed because it has extremely poor feedback mechanisms – both the exit and the voice routes are largely blocked.

The customer revolution

Many of those striving to reform public service bureaucracies have dropped terms such as 'client' and 'recipient', preferring instead to talk of the customer. Indeed, it is now possible to suggest that customer care is becoming the dominant public service management ideology in the UK and elsewhere. Developments within private sector management thinking have clearly been influential – for example, popular management books stress the link between quality and the customers' experience of an organisation (Peters, 1988). These ideas have been picked up by those concerned to improve public service management and there is widespread enthusiasm for the idea of customer-driven government – an approach which strives to meet the needs of the customer rather than the bureaucracy (Osborne and Gaebler, 1993, pp. 166–94).

Many customer care programmes are, however, dominated by the 'charm school' approach. In the absence of the power of exit customer care has often become an aerosol solution. Spraying on a coat of customer care may improve appearances but if the underlying power relationship is untouched, this strategy cannot be expected to have a lasting impact on service responsiveness.

A second dimension of the provider–customer relationship concerns the positive feelings the customers may have towards the providing organisation as a result of their experiences in using the service. Hirschman (1970), as well as developing the concepts of exit and voice, also stressed the importance of loyalty. He argued that the presence of loyalty to a product or organisation not only makes exit less likely, it also increases the likelihood of voice. This is

because a person with a considerable attachment to a service will often search for ways of trying to influence the organisation if it begins to move in what he or she believes to be the wrong direction.

The use of the word 'customer' is, then, a mixed blessing. On the one hand it implies that, by renaming clients as customers, they will enjoy the power exercised by purchasers in the market-place. This is nonsense because the seller–buyer relationship rarely exists in the public sector. On the other hand, an inventive approach to customer relations can win loyalty and, in certain situations, strong support for public services.

Consumer power

It can be argued that the concepts of 'consumer' and 'citizen' have more to offer public service reformers than 'client' and 'customer'. This is because, in different ways, they focus more sharply on empowering people. The word 'consumer' describes the relationship of a person to a product or service. In terms of Hirschman's (1970) framework, then, consumerism, which is grounded in economic theory, draws on the power of exit. If consumers do not like what they are receiving from one service provider they can take their business elsewhere – they can, in theory at least, exercise choice between competing providers. Clearly this is very much an individualistic model. Consumers are not that interested in taking account of the preferences of other consumers; rather, they seek to maximise their own advantage.

There are three main sets of reasons why consumerism has serious limitations in a public service context. First, if the consumer is to exercise power by virtue of personal choice, there has to be a market-place within which a wide range of choice is available. In relation to public services this is normally not the case. Second, the server–served relationship in the public sector is often very different from the private sector. For example, many public services are concerned with social control. If a service is compulsory it is clear that the consumer cannot go (as it were) to the next supplier. Such situations are not confined to the work of the police and prison services (Pollitt, 1990). Professionals from a range of local authority departments have powers to regulate the behaviour of the local population – for example, social workers, environmental health officers and town planners. Equally there are situations where the public may want to use a particular service, but is not allowed to. For much of the time public service professionals have the difficult task of rationing limited public services to disappointed citizens – take, for example, the rationing of access to council housing, to community care services and to nursery school places.

The third major problem with the consumerist model is that it has great difficulty coping with the needs of *groups* of consumers. Many public services provide a collective rather than an individual benefit. Clean air, roads, street lighting, environmental quality and schooling are just some of the services provided and consumed on a collective basis. In a democracy collective needs of this kind need to be addressed collectively. Conflicts of view need to be

expressed, and choices which take account of other people's preferences have to be made.

Citizens and citizenship

The theory and practice of citizenship are continually changing in response to particular economic, social and political circumstances – citizenship is an unfolding concept (Marshall, 1950). While it is a simplification we can say that Marshall argues that there has been a historical progression in the development of citizenship through three main phases:

1. The fight for *civil* rights in the seventeenth and eighteenth centuries created a limited amount of legal equality.
2. The growth of *political* rights in the nineteenth and early twentieth centuries involved conflict with capitalist interests because these struggles gained citizens' rights to participate in the exercise of political power without limitation by economic status or gender.
3. *Social* rights – the right to the prevailing standard of life and the social heritage of the society – were advanced through developments in the social services and the education system in the twentieth century.

The egalitarian thrust of social citizenship presents a more powerful challenge to the status quo than the earlier extensions of civil and political rights. Indeed, Marshall (1950) argues that this third phase of citizenship, because it is predicated upon the principle of equality, represents a direct challenge to the hierarchical class structure of British society.

How can we relate these ideas about citizenship to our discussion of empowerment? One way is to suggest that the citizen and the consumer can be regarded as political and economic creatures respectively: '. . . the citizen debating public issues in the agora of ancient Greece could be seen as the historical symbol of political democracy. The consumer making judgements on price and quality in the shopping centre would be the contemporary symbol of economic democracy' (Gyford, 1991, p. 18). Such an image suggests that citizens engage in public debates about shared concerns which lead to collective political decisions, whereas consumers engage in comparison shopping which leads to individual economic decisions.

It is possible to argue that the citizen is able, at least some of the time, to put aside immediate and personal interests and consider the wider impact of decisions on other people. On this argument the citizen is concerned with the welfare of the community as a whole and accepts the primacy of the common good.

The four Cs

This discussion has attempted to tease out how the different terms – client, customer, consumer, citizen – send out different messages about the nature of the 'contract' between those providing and those receiving public services. Table 4.1 attempts to crystallise the main distinctions that have been made.

Table 4.1 The four Cs

Description of member of the public	The relationship is strongly shaped by:
Client	The dominance of the client by the *professional*
Customer	The experience of the customer in using the *organisation*
Consumer	The interest of the consumer in the *product* or service provided
Citizen	The concern of the citizen to influence *public decisions* which affect the local quality of life

It is now possible to relate this discussion back to the public reform strategies set out in Figure 4.1. The bottom of the chart shows how market models tend to focus on people viewed as consumers; the new managerialism tends to view people as customers; and democratising strategies focus on people viewed as citizens. It should be stressed that these distinctions are not watertight. For example, the new managerialism may also seek to empower consumers and democratisation strategies may include elements of customer care. However, the distinctions are helpful particularly when it is recognised that advocates of different strategies may misuse words to disguise their real intentions. Putting the spotlight on the power relationships underlying different strategies provides a way of penetrating the confusion.

The community consultation processes which have been introduced in some of the City Challenge areas suggest that policy makers are attempting to relate their efforts to the needs of local citizens and this is to be welcomed. The review of experience with City Challenge set out in Chapter 7 suggests, however, that there is more to do if local citizens are to be able to exercise voice effectively.

Contracting with external providers

Much of the debate about contracting in the UK has been dominated by the idea of contracting out the delivery of services to other organisations, sometimes voluntary organisations but more often, private firms. As Ascher (1987) notes, for years in-house provision was accepted and preferred as the most effective mode of delivery for a great many public services throughout the world. The term 'contracting out' describes the situation where one organisation contracts with another for the provision of a particular good or service. In the UK context compulsory competitive tendering (CCT) has been used by central government to impose this approach on local authorities (and other public services) (Walsh, 1995; Kane, 1996). The reasoning behind this policy has been set out as follows:

> A whiff of competition can have a greater effect than years of time-consuming and often fruitless negotiations between employers and employees. What underlies these policies is the concept that it is for the local authority to organise, secure and monitor the provision of services, without necessarily providing them themselves.
>
> (Ridley, 1988, p. 22)

Few managers in UK local government, even those who have been strongly opposed to competitive models for the reasons outlined by Taylor (1993), would now argue that CCT has produced no gains whatsoever. Ascher (1987) identifies two kinds of benefit. First, while a number of councils experienced difficulties in making the switch to private contractors (primarily as a result of trade union action), many have reported improvements in the standards of some services. Second, competition (or the threat of it) has led to improvements in the efficiency of in-house services. Many are now in a much better position to compete with outside contractors than they were, say, ten years ago.

Unfortunately, contracting out in the UK has been inextricably linked with the Thatcherite dogma of 'public bad, private good'. This means that there are few dispassionate evaluations of the performance of the contracting-out mechanism in practice. Some of the problems associated with contracting out that have been identified by practitioners are as follows:

- In some areas there may be no competitors willing to tender – where does this leave the value of competition?
- There can be difficulties in spelling out performance standards for even seemingly straightforward services (e.g. cleaning), let alone complex professional services.
- There is a risk that contracts will focus attention on what can be measured and this may not be what matters.
- There is a presumption that the needs of the service can be fully specified before the contract is let and will remain the same for the duration of the contract.
- Getting locked into contracts for years ahead denies opportunities for learning and adaptation during the course of the contract.
- A centralised approach to contract management diminishes the scope for area variation in service performance and works against user involvement in contract specification.
- The costs of contract management can be very high and are rarely exposed.

All these concerns are, in a sense, technical obstacles to contracting out. They are substantial, but there are two further arguments against the method. Reference has already been made to the damage competitive behaviour can do to the public service ethos – the caring commitment referred to by Roger Taylor (1993). Second, there are serious problems in the way some contractors treat their employees. Whitfield (1992) identifies numerous causes of contract failure, including:

- employing too few people to do all the required work;
- poor wages and working conditions leading to high staff turnover;
- poor supervision and management by contractors;
- 'hire-and-fire' management practices reducing experienced staff; and
- loss-leader bids, after which the contractor tries to claw back losses by cutting corners.

Study of US experience provides evidence to suggest that many of these

concerns are well founded.[2] Lakewood, California, the ultimate contract city, has a population of around 80,000 and virtually all of its services are provided by external agencies. However, the bracing wind of competition is so soft and gentle it offers little more than a fond caress. A single contract for refuse collection has been operating for the last 20 years. The contract has been renegotiated every five years with the *same* contractor and there has been no re-tendering. Street sweeping has been carried out by the same contractor since 1968, with no re-tendering for ten years.

It would be quite wrong, however, to suggest that contracting out has been unsuccessful in the USA. In many local authorities competition has had a beneficial impact. For example, the city of Phoenix won an international prize for being the best-run city in the world partly because of its effective use of contracting.[3] The approach is pragmatic. Thus the city does not contract out refuse collection throughout the city – central east and central west have remained in-house. Officials explain that there are two main reasons for this: first, to stop a private sector company gaining a monopoly; and, second, to retain public service competence and skills. Under CCT regulations local authorities are not allowed to adopt a selective approach – here, then, is a clear lesson for the UK.

Some of the reasons why US city councils have favoured contracting out are as follows:

- to achieve economies of scale;
- to tap expertise not available to the authority;
- to transfer liability to contractors; and
- to reduce industrial relations difficulties.

The key strengths of US approaches to contracting out derive from flexibility. There is no cumbersome legislation getting in the way. Thus, in many areas councils choose the 'lowest responsible bidder' rather than the lowest bidder because of the concern for quality. In the UK the lowest bidder approach has led to problems. The Labour government is committed to replacing CCT with a requirement to obtain 'best value'. Speeches and announcements by ministers have been met by enthusiasm in local government circles. This is because the new regime heralds a release from CCT with its attendant inflexibility, bureaucracy and confrontation. More work is needed on what best value means – the government recognises this and pilot authorities will test out alternative approaches. The proposed role of the Audit Commission in determining whether best value has been achieved in individual authorities is, however, rather worrying. Judgements about value involve political judgements and there is a risk that auditors will be drawn into waters which they cannot navigate.

Contracting within the public service

A third form of contracting is contracting within the public service. The internal organisation and management of public services have, aided by advances in

information technology, emulated developments taking place within the private sector. The shift away from a hierarchical to a core–periphery form of organisation was identified many years ago by Schon (1971, p. 66): 'In response to new technologies, industrial invasions and diversification away from saturated markets, the firm has tended to evolve from a pyramid, built around a single relatively static product line, to a constellation of semi-autonomous divisions.'

In more recent years various management writers have contributed to the development of the core–periphery theme. For example, Peters and Waterman (1982) described the 'loose–tight' principle whereby organisations control certain policies rigidly while at the same time encouraging autonomy and entrepreneurship from the rank and file. Handy describes the emergence of what he calls the federal organisation. In such organisations the centre does not direct or control so much as co-ordinate, advise, influence and suggest: 'Federal organisations, therefore, are reverse thrust organisations; the initiative, the drive and the energy come mostly from the bits, with the centre an influencing force, relatively low in profile' (Handy, 1990, p. 94). The centre does, however, keep a tight grip on some decisions – usually, and crucially, decisions on new spending and where and when to appoint new people. It will endeavour to promulgate shared values to keep all employees heading in the same direction.

Hoggett (1991) has discussed how these ideas have penetrated the public sector and has outlined how restructuring has led to a decentralisation of operations coupled with a centralisation of strategic control. The emerging forms of post-bureaucratic control rely heavily on information technology to monitor the performance of the devolved units. He notes that the processes of decentralised centralisation are occurring at all levels within UK public services.

At central government level the 'Next steps' strategy of the Thatcher government was designed to scale down the size of the British Civil Service and to improve management by devolving numerous functions to executive agencies within government. A White Paper on the Civil Service noted:

> The creation of agencies has been one means to the end of improved management, recognising that management change is more easily brought about within discrete identified units, headed by a manager with clear responsibilities, than in a larger, more diverse organisation.
>
> (HM Government, 1994, p. 13)

There are now 97 executive agencies within government. In the Home Civil Service more than 340,000 civil servants, 64 per cent of the total, are now working on 'Next steps' lines. 'Next steps' principles – maximum clarity about objectives and targets, delegation of management responsibility, a clear focus on outputs and outcomes – are now firmly built into the Civil Service. In this arena the core is central government and the executive agencies are the periphery.

Aspects of the core–periphery form of contracting have also been introduced into national urban policy in recent years. City Challenge and the Single Regeneration Budget (SRB) do not only involve a competition for central government funds – the winners are required to engage in a form of contract with Whitehall. In this policy arena it is possible to view central government as the core and local authorities (and their local partnerships) as the periphery. The words of the SRB bidding guidance tie in with the purchaser–provider split as the measured outputs and outcomes 'are what the Government is buying with public money' (Department of the Environment, 1995b).

On the plus side it can be claimed that the contract model provides for a considerable improvement on previous approaches. For example, it was not always that clear how the Urban Programme initiatives of the 1980s ensured that needs were tackled and that public investment was bringing about the desired results. There are, however, problems with the way core–periphery contracting has worked in practice in urban policy. Gray (1997) argues that a heavy reliance on quantitative indicators as the basis for funding arrangements has distorted urban policy in two main ways. First, they distort policy formulation – SRB bid writers have to ensure that their 'core outputs' indicate the right numbers. Less measurable qualitative objectives such as business confidence and community development are downgraded. Second, the indicators may distort policy implementation – for example, projects which have a quick payoff will tend to receive preferential treatment. There may also, the Nolan Committee on probity notwithstanding, be a temptation to overcount the outputs of delivery agencies.

These concerns resonate with those found in the wider literature on performance indicators. There is a danger, however, that academic analysis has, on the one hand, underplayed the genuine conceptual and technical difficulties of measuring performance and, on the other, underestimated the extent to which organisations are using reasonable measures of effectiveness (Carter, 1991). The guidance available has certainly improved in recent years (Lawrie, 1994; Audit Commission, 1995).

The core–periphery form of contracting is now commonly used within local authorities. The organisational changes seek to replace hierarchical management control with simulated market control and the 'cult of the customer'. This model can have drawbacks: 'Defining internal organisational relations "as if" they were customer/supplier relations means replacing bureaucratic regulation and stability with the constant uncertainties of the market, and thus requiring enterprise from employees' (Du Gay and Salaman, 1992, p. 615). On this analysis the notion of the customer is fundamental to numerous current management developments including just-in-time, total quality management and culture change programmes. The pressure to perform derives from the 'constant uncertainties of the market'. There is, then, little room for trust in core–periphery contracts of this kind.

Contrary to the suggestion made by Du Gay and Salaman (1992) there is a rival to the enterprise culture. It is built around the ideal of service and caring commitment referred to earlier (Taylor, 1993). These are not new ideas but what *is* new is the way a growing number of local authorities are using modern

core–periphery contracts not to foster fruitless competition between service delivery units, but to achieve improvements in the quality of service and the democratic accountability of public service institutions.

Recent research on management innovations in local government suggests that a growing number of councils are attempting to combine a public service ethos with a public innovation ethos (Hambleton, Hoggett and Razzaque, 1996). This research on devolved management suggests that new forms of core–periphery contracting can free the centre from decision-making on detailed matters and empower stakeholders in devolved units. Some of these new approaches emphasise the potential of neighbourhood decentralisation. This is not a panacea but there is growing evidence to show that there are many ways of strengthening public services if neighbourhoods are given 'freedom to operate within boundaries'. Some of these improvements relate to enhancing service accessibility, responsiveness and cost effectiveness. Others relate to the strengthening of representative and participatory democracy in particular localities.

Conclusions

This discussion of competition and contracting in UK local government suggests that 'contracting' is nothing more than a means to an end. Different political leaders will choose to use contracting to further different values. It follows that it is crucial, when evaluating contracting, to establish who is shaping the contracting regime – to establish where the core is and who is in control of it. Pro-market ideologues have endeavoured to push the public service management agenda in a particular consumerist direction. By centralising power in Whitehall they have attempted to impose a particular approach to contracting on many public services. But, as Figure 4.1 implies, it is also possible to develop forms of contracting which strengthen the voices of citizens in collective decision-making. In the examples where contracting has been used to strengthen local democracy the core has resided with the political leadership of particular local authorities. The key values they espouse have been rather different from those held by the last government. This goes a good way to explaining why the Conservative government passed over 100 Acts of Parliament in the period 1979–97 either interfering with or weakening local government. Local authorities were attacked partly because they provided a rival source of ideas on the nature of public services and good government.

But there is a wider ideology which needs to be questioned and it is one that is so deeply ingrained in management thinking that it goes almost unnoticed – this is the ideology of 'business'. Thus, even Charles Handy, one of the most perceptive writers on modern management, has recently claimed (1994, p. 129):

> We are all 'in business' these days. . . . *Every* organisation is, in practice, a business, because it is judged by its effectiveness in turning inputs into outputs for its customers or clients, and is judged in competition against its peers. The only difference is that the 'social businesses' do not distribute their surpluses [emphasis in original].

This chapter has mapped out some reasons why this is a peculiarly narrow view of modern organisations, at least when viewed from the perspective of public service management. There are several problems with this statement.

First, many public service managers work in situations where they are *not* in competition with their peers. Take all the public service managers concerned with different kinds of regulation – for example, social workers, health visitors, environmental health officers, planning officers and police officers. These people are not competing with one another. On the contrary, they are often working in close collaboration. Second, effectiveness is only one measure of performance. In a public service context there are other important measures relating to, for example, democratic accountability. There are important process requirements relating to, for example, public consultation and participation which are independent of the outputs of the organisation. Third, it is not enough to refer just to 'customers' and 'clients'. Indeed, the discussion of the four Cs in this chapter has suggested that, in a public service context, these words may, in themselves, be less than helpful. It was argued that empowerment mechanisms are critical and that the words 'consumer' and 'citizen' hold more promise because they speak more directly to power relationships. Public services *should* be 'businesslike' – in the sense of efficient, systematic, practical. But this does not mean that they are best managed as if they were a business.

In looking to the future it is helpful to revisit Figure 4.1. The three driving forces for change outlined there – exit, self-improvement and voice – will all continue to play a significant role. This chapter has suggested that all three involve forms of contracting. We may conclude that contracting is here to stay. However, from the point of view of the future of public service management and the future of urban policy the more interesting question is: What are the values which will guide this growth in contracting? It is a matter of political argument whether the dominant form of contracting should stem from a competitive and legalistic approach. Other forms of contracting are possible and, in a public service context, may prove to be superior. Such contracts, built around trust and caring commitment, may yet come into their own as the concern for communities and their welfare rise up the public policy agenda.

Notes

1. The origins of this figure can be traced to Hambleton and Hoggett (1987). The version here is as it appeared in Burns, Hambleton and Hoggett (1994). I would

like to acknowledge the important contributions of both Paul Hoggett and Danny Burns in developing this framework.

2. The author was involved in a study tour of US cities for senior UK local authority managers in 1993 run by the Local Government Management Network. This included an examination of service management in Lakewood.
3. The city of Phoenix won the accolade, jointly with Christchurch, New Zealand, from the Carl Bertelsmann Foundation in 1993 (Pröhl, 1993). See also Hambleton (1994).

5

Partnership, Leadership and Competition in Urban Policy

MURRAY STEWART

Introduction

The shifting nature of urban regeneration policy in England is a central theme of this volume. In Chapter 1 Oatley points to partnership as a key structural requirement for local participation in national regeneration programmes, and to success in institutionalised inter-locality competition as a further condition for achieving access to regeneration resources. Thus the new localism promised by government in 1993 has in practice after three rounds of regeneration funding under the Single Regeneration Budget been seen to involve the predictable processes of multi-stakeholder collaboration and coalition building. As Oatley observes, one implication has been the emergence of a new pattern of local leadership with private sector and community representatives alongside city councillors in boards and companies at arm's length from the municipal council.

In Chapter 2 Oatley interprets these shifts in urban policy in terms of regulation theory. He seeks to illustrate in a post-Fordist era the restructuring of the relation between state and civil society and the emergence of new forms of management and control which underpin the redefinition of and continuity in capitalist accumulation. Central to regulation theory is the mode of regulation – the ensemble of norms, institutions, organisational forms, social networks and patterns of conduct which will sustain and guide post-Fordist accumulation regimes. One interpretation might be the emergence of a revived local corporatism involving the traditional interests of government, private sector and organised labour but with the policy community also including representative umbrella voluntary interests. But in the 1980s the 'ensemble' of regulatory practice was replaced by a cacophony of dissonance as the proliferation of new agencies – Urban Development Corporations, Training and Enterprise Councils, Task Forces, Housing Trusts, English Partnerships, for example, as well as a range of non-statutory organisations – confused and diluted local corporate structures. The resulting inter-institutional competition drained organisational energy and, more significantly, diverted attention and scarce

resources from the task of regeneration and economic development. By the 1990s more harmonious relations were re-established between local and central government, and local authorities were once more able to lay claim to the role of community leader and local orchestrator. The patterns of interest representation had shifted, however, and competition (through City Challenge and later the SRB Challenge Fund) demanded the creation of new structures of local interest representation and leadership.

This chapter is concerned with leadership. It is based on the premise that the existence of urban partnerships is largely explicable in terms of a new mode of regulation – the 'authoritarian decentralism' of Thornley (1993) or the 'centralist localism' of Peck and Jones (1995). The operation of such partnerships is circumscribed by central government and is controlled by a set of procedures, rules and regulations which determine the specifics of competitive bidding and contractual delivery. The culture and performance of partnerships, however, are also significantly influenced by the stances adopted and decisions taken by local leaders. It is the organisational leaders who decide whether advantage can or cannot be extracted from collaboration; it is they who commit (or withhold) the resources necessary for joint working; it is they who decide the 'rules of engagement' for partnership working; it is they who decide on withdrawal or continuation of collaborative effort.

From Joseph Chamberlain in Birmingham onwards, strong leadership has been recognised as one of the attributes of the competitive city. There is a growing literature which suggests that urban and/or locality leadership matters – that cities retain some autonomy which can be shaped to local ends, the forces of globalism notwithstanding (Judd and Parkinson, 1990; Warren, Rosentraub and Weschler, 1992; Stone, 1995). Leadership, therefore, is a central feature in the adaptive capacity of cities, but research on leadership has been limited. Many leadership studies, for example, have tended not to focus closely on the individual as leader. Judd and Parkinson (1990), for example, defined leadership capacity primarily in institutional terms, and many references to enhancing city leadership discuss capacity building and/or leadership qualities as collective rather than individual qualities. Indeed they largely ignored the role of key individuals in the private or non-statutory sectors in offering civic leadership. Much of the recent UK literature concentrates on the role of the local authority as community leader (Clarke and Stewart, 1991; Stewart and Taylor, 1993), emphasising the importance of democratic legitimacy and highlighting the new role of influence of the active enabling council. Again this scarcely touches the role of the individual.

This chapter starts from a brief discussion of the experience of urban partnership and moves to an exploration of the role of leadership in partnership (based largely on empirical work in Bristol). The emergence of a new elite of partnership leaders (regulators) allows for reconsideration of a more traditional literature on leadership which makes links with community power and regime theory, with political leadership and the debate about city mayors, and with the role of style and culture in the exercise of urban leadership.

Urban partnership

There is of course a flourishing literature on both the principles and practice of partnership in urban policy, but there are no agreed definitions of partnership, nor is there a clear theoretical framework within which to analyse partnerships. Mackintosh (1992) identified three models. First was a 'synergy' model, where the partnership of separate but mutually reinforcing interests combines to produce added value through collaborative action and the deployment of complementary skills, powers and resources. Second, there was a 'transformation' model, within which the partners hold (explicitly or implicitly) differing views and in which the nature of the partnership is not to bury these differences in consensual strategies but, rather, to seek to shift the other partners towards one's own position (i.e. to transform the collective interest structure). Third was the 'budget enlargement' model, which assumes that the maximisation of resources (particularly through the extraction of such resources from a third party which is not a partner) is sufficient glue to hold many partnerships together.

Bailey (1994; Bailey, Barker and MacDonald, 1995) drew on these models but added others, including partnerships which focus on place marketing, confidence building, co-ordination and the realisation of development opportunities, and also identified features of the partnership process which may explain which model best explains which local situation. The latter include the process of mobilisation of partners, the range of balance of power between partners, the nature and extent of the remit of the partnership and the area of coverage. Hutchinson (1994) reintroduced Jacobs's distinction between partnerships which are *exclusive* (closed to all but national or local elite interests) and those which are pluralistic (open to a variety of local, sectional and political interests) and so *inclusive*. Additionally, she pointed to structure, decision-making, legitimacy, accountability, agenda setting, priorities, the status of individuals and organisational culture as defining characteristics of different partnerships.

Clearly theoretical concepts about partnership remain vague. In addition, there have been relatively few empirical evaluations of partnership. Discussions of City Challenge are as yet thin on the ground (De Groot, 1992; Davoudi and Healey, 1995a) and do not provide enough evidence either about which City Challenges are most effective or which factors explain greater or lesser success. Indeed there has been more about the impact in failed City Challenge areas (Hutchinson, 1994) and notably Bristol itself (Malpass, 1994; Oatley and Lambert, 1995) than about implementation in successful Challenge areas.

The Scottish Office has published evaluation studies of the four major Urban Partnerships in Edinburgh, Dundee, Glasgow and Paisley, and these provide indications of the obstacles to, and opportunities for, inter-organisational collaboration (Gaster, Smart and Stewart, 1995; Kintrea *et al.*, 1995; MacGregor *et al.*, 1995; O'Toole, Snape and Stewart, 1995; Central Research Unit,

1996). These evaluations point to the importance of political and professional commitment, of new resources as the oil for making partnership work, of a 'core' individual or group around which partnership functions, of establishing clear objectives at the outset, and of allowing extended time scales for the difficult task of mobilising and sustaining the interest of a variety of players. The difficulties of the Scottish Urban Partnerships revolved around finding a clear role for the private sector, avoiding excessive bureaucratic structures for innovative programmes, developing partnership approaches to health, welfare and community safety issues, disseminating best practice within and between partnerships, sustaining the initial enthusiasm and momentum of partnership, and involving the community in partnership as a step towards ensuring sustainability.

English experience is best reflected in the Local Government Management Board report on public/private/voluntary sector partnerships (Roberts *et al.*, 1995). That work also emphasises the diversity of partnerships and the range of organisational structures used to implement partnership principles. The LGMB argues that the characteristics of good partnership include high visibility within and beyond the partnership, resource sharing between partners, a strong institutional base for partnership initiatives, a culture within which partner behaviour can change, and a commitment to long-term involvement in sustained collaboration. A range of lessons for successful partnership are set out, echoing the recommendations presented in the LGMB's earlier advice on community leadership (Stewart and Taylor, 1993), and reinforcing the views of the local authority associations (ACC/ADC/AMA, 1995).

Leadership in partnership

There remains, however, little research which focuses on the role of the individual leaders or, perhaps more importantly, examines the function of leadership in collaborative partnership working. Whilst networking, reticulism and negotiation have been established themes in the management and organisational studies literature, leadership studies have tended to focus on the role of leaders in shaping internal organisational culture. In the formal policy documentation on partnership (DoE, 1997a, pp. 4–5) there is reference to the 'lead partner' but this is in large part a facilitative, even administrative, role ensuring that 'other partners to a Challenge Fund bid share a view of the bid's priorities, have been involved in its preparation, and will participate in its implementation'. Only limited research attention has been given to the inter-organisational settings which typify urban partnership and here again the formal guidance (DoE, 1997b) is procedural rather than substantive. Other writers, however, have emphasised that the differences between collaborating organisations in terms of aims, organisational culture, structures, procedures, language, accountabilities and power, together with the sheer time required to manage the logistics of communication, all militate against success (Hambleton *et al.*, 1996; Huxham, 1996; Huxham and Vangen, 1996). Under these conditions

effective leadership is essential, but with only a few exceptions (Bryson and Crosby, 1992; Chrislip and Larson, 1994) there has been little management research directed towards gaining an understanding of what 'effective leadership' means in the circumstances of inter-organisational partnership.

Research in Bristol undertaken for the Bristol Chamber of Commerce and Initiative (BCCI) and observing ten local public/private partnerships began, however, to expose some of the differing roles and tensions inherent in partnership leadership (Snape and Stewart, 1995). Leadership was conceptualised at two levels. First, there were those who 'led' the partnerships on a day-to-day basis by virtue of co-ordinating the groundwork and providing the glue which held the partnership together. Such leaders (referred to as 'managers') had titles such as 'chief executive', 'director' or indeed 'manager'. Second, there were those who by virtue of their active involvement in the establishment of the partnerships or their position of power (organisational, financial, political, human resource, etc.) also carried a leadership role. Such leaders (referred to as 'power brokers') included the chairperson, key partners and major stakeholders and were often drawn from elected members and/or officers of the City Council or the Chamber of Commerce and Initiative.

Managers

The daily managers of the partnerships described their role as requiring sensitivity, diplomacy and a blend of substantive expertise and sales skills. Many found their positions stressful in a number of ways. This related both to the nature of their work as brokers between partners with potentially differing agendas and approaches, and to the conditions of the work itself. Some described themselves as 'juggling' a range of responsibilities with few support staff and restricted budgets.

The employment status of the managers of the partnerships fell into three categories. First, there were those (the majority) who were employed by the partnership, who undertook the job as part of a longer-term career plan and for whom the job was seen as part of their career progression. There were others who did it as part of an existing job or on secondment from an existing job and were employed by an organisation other than the partnership, whilst a third category had undertaken the job avocationally and not as part of their main career.

Some partnership managers said that their employment conditions were an added source of stress. This was particularly so for those in the first category, who were employed by the partnerships and considered this job part of their career progression. Some expressed a degree of insecurity related to the short-term nature of the employment contracts (or working without a contract at all). Others alleged low pay (compared with what they might expect to earn elsewhere), limited or no pension entitlement, the absence of a clear job description, and the absence of (clear) line management supervision.

Stress and insecurity created additional tensions exemplified by the difficulties of carrying out strategic forward-planning whilst being unclear whether and for how long their contract might be extended. Furthermore in some cases

these managers carried out their work with minimal support staff input (both in terms of secretarial or technical support and in terms of colleagues capable of helping to manage the partnership). While this might have been necessary because of the restricted budgets of the partnerships, it posed potential problems for the future if key figures leave a partnership without having passed on their expertise, information about contacts and other specialist knowledge. This was not an insignificant issue. In six of the ten partnerships researched the 'manager' had resigned or been replaced within a three-year period.

The conditional nature of some of the partnerships, with many needing to identify external sources of funding to ensure their longer-term sustainability, brought a further degree of insecurity which is perhaps inevitable in the early years of any partnership. These 'managerial leaders' face a dilemma. On the one hand is the need to build a sustainable partnership involving mutual trust and collaboration between multiple partners. This task requires patience, caution, and the commitment to long-term relationship building. On the other hand is the need for the partnership to deliver to a short and probably time-limited programme. The task requires action planning, streamlined administration, and minimisation of meetings and unnecessary contact. In practice the reconciliation of these aims is difficult. The aim of building longer-term relationships in sustainable partnership may conflict with the aim of delivering a specified output in the short term. In the Bristol partnerships the tensions were manifest.

Power brokers

In relation to leadership at the other level, that of the 'power brokers', both private and public sector 'political' leaders fully supported the partnership movement. The flourishing of partnership in Bristol bears testimony to this fundamental level of support. It was argued by others, however, that in order to remove past stereotypes and to reconstruct the external image of the city there should be more visible and public support from the leadership of the City Council. It was suggested that the perceived ambivalence of senior local authority political leaders to partnership, an ambivalence previously observed in relation to City Challenge (Malpass, 1994), was unhelpful to the development of partnerships and served only to reinforce the prejudices of those who argued that the local Labour party either could not or would not change an alleged long-term cultural opposition to partnership with the private sector. This criticism of local political leadership became more significant in the context of recognition that in the period after local government reorganisation partnership with other local authorities at the regional or sub-regional level would be highly dependent upon the lead given by politicians from all authorities and from all parties.

Senior political leaders denied such assertions of weak commitment to partnership:

> there has been a recognition on the part of Labour members, much more definitely perhaps than was the case four or five years ago, that there are other people out there who are just as public spirited as we are, and want to see Bristol as a better place to live in and are prepared to contribute energy and time as well as money . . . so it is more than cash, I think it's also that concept of community leadership, of pulling different groups and different people's efforts together into some sort of common strategy.

> if we are going to be perceived by the private sector as being honest in wanting a fair partnership, in which we are all equal partners, then quite frankly we cannot choose always to be out in front beating the big drum and carrying the flag.

A quite different, and perhaps contradictory observation about leadership in the private sector was that partnership relied strongly on the efforts of very few people and that there was insufficient visible diffusion of the leadership role within the BCCI or within individual private sector organisations. The Chamber 'selected' who would be on the partnerships in many cases and this reportedly left representatives of other organisations and partnership managers with the sense that they had very little control over that process. A large part of the work load was carried by a few people in the BCCI, and some argued that, in the absence of these key individuals from important meetings, very little happened.

There was, therefore, an apparent contradiction over the leadership issue. The City Council was criticised for its perceived lack of commitment and for the invisibility of senior political leadership in partnership work. Leaders responded with the comment that leadership is being 'spread around'. The private sector was criticised precisely on opposite grounds because of its reliance upon the very strong commitment of a few senior people. The inability of the private sector to spread responsibilities around was seen as failure.

The observations made above raise interesting questions about the nature of over- or under-commitment, and about the merits of leading from the front or leading from the rear. What is not in question, however, is that there has emerged a new elite of partnership leaders (managers and power brokers) whose interlocking roles and overlapping networks command the agenda of partnership in Bristol.

It would be wrong, however, to focus exclusively upon individual leadership. 'Leaders' exercise their influence and power over 'followers' and their relationship with supporters, parties, electorates or administrations is crucial. So also is their relationship with other leaders, whether colleagues or opponents, and increasingly leadership is exercised in coalition or alliance. Thus individual leadership and collective leadership are interdependent. In addition, many urban leaders will hold dual leadership roles. They may be the leader of a municipal authority, the president of a company, the executive of a major agency, or hold the chair in a community organisation, and in that capacity they are accountable to those organisations.

In relation to partnership processes and leadership, accountability was a central issue. To whom were the partnerships and those actively participating in them accountable? Varying concepts of 'accountability' emerged. Individual accountability was recognised primarily in relation to the brokerage role at the

'head' of the partnerships. Leaders were sometimes accountable to the 'employing' organisation, sometimes to a funding body, always to the board or trustees, sometimes to personal contacts who had been persuaded to help. Leaders served the partnerships not only on an individual basis, but as a member of another organisation whose interests they were representing and organisational accountability was also crucial. Partnership leaders had to grapple with the task of reconciling the rights and responsibilities of partnership board membership with their roles as delegates of other organisations. Political accountability arose as an issue primarily among public sector partners. It related to their role as the only 'elected' representatives serving the needs of the partnerships, their own organisations, and sometimes a wider constituency. They stressed the need to be aware of the larger interests of the city and of how partnership issues relate to other plans for the area. Other questions which concerned them related to the extent to which roles played traditionally by local government can be delegated to others and the extent to which decisions can be taken by single individuals as nominated delegates or must be decided in consultation with the wider elected body.

> I'm a Director of [this partnership] when I'm there and when I'm in there I'm totally committed to that project, which has surprised me how attached to the notion of it I've become. But, after all, I'm *only* there because I am a councillor and I am there as, sounds grand, but the sort of steward of the City Council's policy and no, I don't forget that.

Mentioned less frequently than other forms of accountability was an ill-defined but important moral accountability. This dealt with an implicit 'code of conduct' about acceptable behaviour within the sensitive and sometimes charged environment of the partnership. There is of course financial accountability with one of the partners being the formal 'accountable body' but the partnership as a whole bearing financial responsibility for expenditures and income.

Partnerships thus involved political, financial and professional accountabilities, many of which, in a partnership culture of companies and directors, are carried out individually as well as collectively. All interviewees acknowledged the tension between accountability within a specific partnership (e.g. as director or trustee) and accountability to the organisation from which a partner came. The potential dilution of the democratic accountability of the City Council was an issue which all parties recognised as important, but there was little indication that in practice the proper role of the Council had been subverted. Preparatory work before partnership meetings, papers circulated in good time, and above all the right to consult with individual organisations on resource issues if necessary, all protect the accountabilities of particular partners.

Additionally, there is evidence of overlapping leadership roles as key local figures are present at ever more local meetings of separate but interlocking partnerships. Partnerships are not autonomous institutions, but are part of a multi-organisational set within a particular city. As in the private sector many of the 'power broking' leaders hold interlocking directorships. This

interdependence can be beneficial since the success of one partnership is in part dependent on the success of others. Partnerships exercise leverage on one another and – on occasions in concert – on external third parties (Mackintosh's budget acquisition model). Pluralism in partnership involves a kind of mutual buttressing and, with co-funding and leverage a central feature of the competitive systems of bidding, the capacity to build inter-partnership alliances is crucial to successful competition with other cities.

Less beneficial are the emerging overlaps and even potentially unhealthy competition between partnerships as particular interests see the opportunity for furtherance of their own agendas. In a number of substantive areas, therefore, there is an absence of communication and/or strategic decision-making over which partnership will deal with which issues, who will bid for which resources, and so on. To a large extent these difficulties are addressed by shared information, both between partnership managers and between the power brokers whose leadership involves interlocking memberships. This imposition of integrated coherence and co-ordination reinforces the trends towards a regulatory consensualism in local governance.

Research on the actual structure, membership, behaviour and activities of partnerships such as those in Bristol, together with recognition of the interdependence and interlocking leadership of partnerships, reminds us of the importance of organisational and inter-organisational process. The interpenetration between partnerships dilutes local politics, but provides the cement of local consensus. The proliferation of partnerships may engender the variety, flux, innovation and competition inherent in a rich pluralist institutional thickness (Amin and Thrift, 1995). It also produces, however, a homogenising effect, clustering local interests around the common need to compete with other cities, to bury internal divisions, and to sign up to the consensus needed to jump through the hoops of competitive urban policy.

The new localism encouraged by the SRB Challenge Fund, the National Lottery, Capital Challenge and other competitive systems, is a localism which must be acceptable to all the interests represented in the partnership structures. Like the vertically integrated central/local Inner City Partnerships of the early 1980s, the horizontal local partnerships of the mid-1990s effectively depoliticise regeneration strategy building. Increased inter-urban competition and the proliferation of partnerships combine to emphasise the consensual nature of much of contemporary urban politics and the diminished potential for partnerships to act as the vehicle for the expression of local political aspirations (Stewart, 1996a). A new 'positional elite', identifiable as a consequence of their leadership status in one or more partnerships, acts as the medium for articulating local strategic aims.

Conceptual frameworks

In conceptualising this new leadership elite, links can be made with three closely interrelated strands in the literature of urban political sociology. The

first is orientated to the emergence of the elite groups, coalitions and regimes which draw together private interests but increasingly also involve public/private partnership. The second addresses more directly the role of formal municipal leadership and is concerned with the mayor/executive and his or her relationship with politicians, officials and electorate. The third strand, which to an extent integrates the other two, reflects less on who are the urban leaders and more on how they perceive their task and how they operate.

Elites, coalitions and regimes

The discussion of urban elite leadership has its roots in the community power research of the 1930s in which community leaders were identified by virtue of their position or reputation. Widely criticised for its methodological inadequacies (although never for its lack of transparency) both reputational and positional power have experienced conceptual rehabilitation (Dowding *et al.*, 1995; Harding, 1996). The appointment by central government – as opposed to direct election – of board members, directors and governors of local organisations begins to create a new positional elite akin to that found by the community researchers 50 years ago (Stewart, 1996b). There is, for example, considerable continuity between Miller's classic comparative analysis of Bristol and Seattle (Miller, 1958a, 1958b) and discussion of the Bristol of the 1990s (Stewart, 1996b). Community power evolved via growth machines into regime theory and there is now widespread interest both in the contribution which comparative analysis can make to regime theory (Stoker and Mossberger, 1994; Harding, 1994), and in the linkages which might be made to the broader perspectives on socio-economic and spatial change emerging through, for example, regulation theory and more location-specific and empirically based explorations of urban governance which extend regime theory (Lauria, 1997).

Bristol, the leadership of which has already been discussed in this chapter, has attracted particular attention. The fluctuating and vacillating nature of the incipient Bristol regime was noted by DiGaetano (1996) whilst Bassett (1996) found it hard to place the city within existing frameworks. For him, Bristol's 'network of partnership initiatives sprawls across the symbolic and instrumental categories' (p. 549) of Stoker and Mossberger (1994). Stewart (1996b) also argues that the Bristol regime differs from its US counterparts in being more strongly dependent on the rules and regulation of central government – an institutionalised and imposed partnership structure. Bristol exemplifies the extent to which a set of local leadership interests can coalesce to form not simply a loose collection of *ad hoc* local do-gooders but a relatively coherent and integrated network of linked interests. This is the horizontal integration which characterises much local coalition building. That such a coalition reflects a broadly based economic and cultural coalition, the language of which at least also reflects social and redistributional concerns, suggests that UK regimes have a wider motivational base than many of the US equivalents (Ramsay, 1996). Certainly they do not resemble the land and property-based

development-driven growth machines of early regime theory (Logan and Molotch, 1987) and as with Stone's caretaker, progressive and instrumental types, there is now recognition of a wider range of regime typologies which can be designed in a cross-national context reflecting differing constellations of private, public and non-statutory interests and actors. Haughton and Williams in Leeds (1996), Peck and Tickell in Manchester (1995b), Valler in Norwich (1995) all contribute to a growing list of UK examples. Elsewhere in Europe Strom (1996) examines coalition building in Berlin whilst Owen (1994) considers the potential of regime analysis as applied to Eastern Europe with a study of the Polish town of Plock. Amsterdam, Copenhagen, Edinburgh, Hamburg and Manchester were the subjects of research within the UK Economic and Social Research Council Local Governance programme (Harding, 1966).

Urban regimes and coalitions in Europe in general, and in Britain in particular, however, are far more susceptible to the influence of central government than are comparable US regimes. Thus, rather than being expressed through an autonomous regime, leadership is regimented from the centre. Partnerships reflect not only the horizontal integration which binds local actors together, but also a strong vertical integration which stems from the strength of central/local hierarchical linkage and the force of a regulatory mode of control.

Mayors and executives

Research on formal political leadership focuses on the role of the mayor/leader. The US literature places more emphasis upon the relationship between mayor and electorates. Wolman *et al.*, (1990), for example, addresses the question of the differences in background between mayors as elected elites and the mass public they represent. In the UK context the debate has been more closely linked to the internal management of local authorities, to the need to enhance local democracy as a whole (DoE, 1991c; CLD, 1995), and latterly to the question of the 'core executive' (Elcock, 1995, 1996). This latter issue, significant at national as well as local government level (Dunleavy and Rhodes, 1990), is amplified by research which examines the role and function of the local government chief executive (Norton, 1991; Morphet, 1993). The most recent research on chief executives shows that 19 out of 20 are spending more of their time in 'nurturing partnerships' and that their level of commitment to local governance is strong (Travers, Jones and Burnham, 1997). If elected mayors were introduced some existing chief executives would stand for election – reinforcing evidence of the local leadership role of some chief executives.

Located within a Europe-wide context of shifting councillor roles in general and political leadership in particular (Batley and Campbell, 1992; Borraz *et al.*, 1994) as well as in the context of the lessons to be drawn from US experience (Svara, 1990; Stoker and Wolman, 1992; Lavery, 1993), the arguments have concentrated on whether the elected mayor in Britain would offer a stronger channel for local democratic voice and whether the failure of recent civic leadership to offer that voice is a function of the loss of power and resources experienced by local government in the last decade in the UK (Beecham, 1996;

Doyle, 1996) or is related to the structure of leadership which elected mayors might correct (Hambleton and Bullock, 1996). This discussion has been in part about the extent to which mayors can provide a focal point for dynamism, invigoration and innovation but the management (or indeed the winning) of inter-urban competition has not yet featured high on the list of attributes of prospective UK mayors. More visible in relation to growth coalition building have been some of the private sector leaders who have identified themselves with localities – John Hall, Ernest Hall, Bob Scott (Mr Newcastle, Bradford and Manchester respectively). Nevertheless as LeGales (1994) and Donzel (1994) point out in relation to Lyon (Michel Noir) and Montpellier (Georges Freche) respectively, the mayor lies at the heart of urban boosterism in France whilst there is also evidence of Polish mayors standing at the heart of the reconstruction of local democracy in Poland (Kisiel and Tabel, 1994).

Leadership style

Stone (1995), examining urban political leadership in the early 1990s, adapted Burn's (1978) definitions of leadership as being concerned with interaction, what Burns referred to as 'collectively purposeful causation'. Stone moved from the simple leader/follower relationship which Burns posited to a more explicit discussion of power relations and the ability to initiate change, his distinction between power 'over' and power 'to' reflecting a new awareness of the importance of influence in the exercise of leadership. Gray (1996) also focuses on those who 'entice others to participate' in joint action, and develops the role of the 'convenor' of collaborative action. She argues that different modes of convening collaborative action derive from differing attributes among those who exert influence over others. Some gain leadership legitimacy by being perceived to be fair (the honest broker convenor role); others possess a formal mandate; others deploy their access to information, networks and contacts to facilitate interaction and are trusted because they possess such knowledge, whilst others again survive by virtue of their skills in persuasion. This emphasis upon the capacity of the leader to mobilise collaborative advantage echoes the interpretations of Svara (1990), who points to the tendency for many US mayors to move towards a more facilitative style of leadership, and of those who emphasise facilitative leadership as the basis for transformational collaboration (Chrislip and Larson, 1994; Himmelman, 1996).

Gray (1966) also identifies the significance of differing perceptions of risk as an incentive for collaborative action. In relation to competition, risk management is increasingly important. The investment of time and money in civic ventures that may not come to fruition if resources are not won involves risk and uncertainty. The entry of risk into what have traditionally been areas of non-risk public administration represents a further shift in the culture of urban policy management. Under conditions of uncertainty organisations will look to joint activity in order to spread risk or indeed in order to take risks. Thus partnerships can be likened to new business ventures, in that they require risk-taking among the partners who come together, each contributing something

and hoping for greater individual and collective profit as a return on their investment.

Conclusions

This chapter explores an evolving theme of leadership in the context of competitive partnerships. That urban partnership is a requirement of contemporary – and probably continuing – urban policy is not at issue. That partnership is more complex and in some ways more attritional than many partners acknowledge is also clear. There is also evidence of an emerging elite – managers and power brokers – who lie at the heart of an interlocking network of partnership leaders. The nature of this leadership can be explained in terms of differing strands of urban theory but it is closely linked to the application of regime theory to European urban policy and to the possibilities that urban partnerships are not simply a variation on a transatlantic theme but are manifestations of a new form of regulation within competitive global competition.

Leadership is therefore constrained but nevertheless open to localised exploitation. Leadership style is not totally open to the choice by the leader as to what style he or she wishes to adopt. It is, rather, mediated by a range of influences which impose constraints on the scope for the exercise of leadership. Four such influences can be identified. First there is the external environment of central/local relations, national policies and external economic forces, all of which set limits to the scope of local leaders. Second, there are the institutional arrangements of local structures, networks, partnerships and collaborative arrangements together with the formal legal powers of leaders and the resources available to them. Third come specific situational factors relating to economic, social or environmental issues and problems which the particular city is perceived to face and/or the 'critical incidents' which demand local action. Finally, there are the personal characteristics reflecting the degree of charisma, commitment, persuasion, ambition, etc., which rest within an individual aspirant leader.

The emergence of competition is reflected in these environmental features. The competitive culture derives from global economic forces in combination with central governmental policy. Competition is an inherent element in current institutional form. Economic development and regeneration demand a competitive localism. What is unclear so far is whether the forces of competition are breeding new leadership styles. Leadership can be seen in a number of ways. Strong leadership may involve a role in handling critical incidents (leadership as crisis management), in the executive management of bureaucracy such as the preparation of competitive bids (leadership as taking an administrative 'lead'), in developing long-term strategic development (leadership as vision building), in the management of inter-organisational relations (leadership as integration), in the management or minimisation of the risks inherent in inter-urban competitive bidding (leadership as risk management), in the place marketing of localities (leadership as salesmanship), as well as in

the traditional democratic task of relaying community or locality concerns and priorities to wider settings (leadership as representation). All these roles take on new significance in the world of competitive localism. Local leadership may be the instrument of localised centralism but may at the same time be the channel for empowered localism.

Section III

Competitive Bidding Initiatives

6

The Rules of the Game: Competition for Housing Investment

CHRISTINE LAMBERT AND PETER MALPASS

Introduction

Despite the neo-liberal rhetoric of de-regulation, markets and privatisation, most aspects of the welfare state escaped fundamental reform during the early part of the 1980s. Thatcher's third term however marked something of a turning point, characterised by Le Grand (1990, p. 1) as 'a major offensive against the basic structures of welfare provision . . . that in retrospect will be seen as critical in the history of British social policy'. Housing policy is something of an exception in this analysis of benign neglect of welfare in the early 1980s. The 'right to buy', introduced in 1980 as the flagship of the Thatcherite revolution, saw over a million council dwellings transferred from local authority ownership into owner occupation, and a series of very major public expenditure cuts substantially reduced the role of local government as providers of new social housing. Since then, and following legislation in the 1988 Housing Act and the 1989 Housing and Local Government Act and associated guidance, the state's role in the provision and future management of social housing has been radically restructured and redirected. In the mid-1990s we have a more fragmented structure of social housing provision, characterised by a plurality of housing providers, competing with one another for government funding and subject to commercial pressures to reduce costs in order to limit calls on a declining level of state financial support.

As the Introduction to this book points out the period since 1991 has seen the introduction of a distinct phase of urban policy, characterised by changes in the way that money is allocated (away from need and towards measures of performance), changes in the process of policy formulation and implementation (with a more significant role for the private and voluntary sectors) and changes in the substance of initiatives (an assertion that economic competitiveness may be heavily influenced by welfare structures and provision). For Michael Heseltine, the architect of the urban policy changes, competitive bidding for urban funding was a way of breaking the dependency culture said to be fostered by the formula-based approach to expenditure allocation. In fact the

first initiative to be subject to the new competitive bidding regime was the Estate Action Programme directed at the physical and social improvement of run-down council estates, and in a number of other ways housing policy changes to allocate funds in new ways and shift the governance of housing policy pre-figure the innovations introduced in the urban policy field.

The restructuring of the welfare state and social policy have been captured in broad terms by the notion of a transition from Fordism to post-Fordism (discussed in Chapter 2). More specifically, what is proposed is a series of changes which see a diminishing role for the state in welfare provision, a more selective and market-orientated approach with an emphasis on reducing costs, and a new emphasis on private and voluntary provision to replace or supplement state provision. In practice institutional change has been effected via a series of reforms advocated under the banner of a 'New Right' philosophy and critique of traditional welfare. An important strand of thinking underpinning the New Right critique has been the 'public choice' school which puts forward a number of propositions about the biases and shortcomings of collective politics and bureaucratic decision-making (Buchanan and Tullock, 1962; Niskanen, 1971). The main thrust of these arguments is that bureaucrats act in their own interests, engaging in budget-maximisation and empire building, leading to systematic overproduction of public services and inefficiencies. Bureaucratic interests, allied to professionalism, lead to uniform provision and little choice for the consumer in a system driven by the interests of the service producers. The prescriptions include an extension of privatisation and market mechanisms, or some surrogate for them (quasi-markets), which can be used to influence the behaviour of bureaucrats and increase the range of choice available to consumers.

The New Right is also associated with macro-economic prescriptions which have challenged and displaced the Keynesian orthodoxy of the post-war period. Reductions in taxation and public expenditure are promoted on the grounds of efficiency and incentives. In an increasingly competitive global market countries are forced to compete in a downward auction on tax rates. The most obvious effect of the macro-economics of the New Right has been strong downward pressure on public expenditure with a particular emphasis on borrowing and public investment. Last but not least the New Right has been associated with a particular attack on local government (Walker, 1983), deeply suspect due to critical views of the democratic process, professional domination and susceptibility to political control by oppositional interests.

Where quasi-markets are advocated to replace traditional bureaucratic forms, the state remains as the funder of services, but services are provided 'by a variety of private, voluntary and public suppliers, all operating in competition with one another'. Methods of financing welfare services also change, with 'resources no longer allocated directly to providers through a bureaucratic machinery' (Le Grand, 1990, p. 2). Instead resources are allocated through bidding processes or via funds or 'vouchers' given directly to potential users or agents acting on their behalf. The benefits of such a system are said to include

reduced costs and better value for money, partly because public sector bureaucracies are inherently wasteful, partly because competition provides incentives for greater efficiency. More importantly the introduction of competing suppliers means that service users have greater choice and can take their custom to alternative providers, encouraging providers to be more responsive to users' needs. In presenting this rather optimistic picture proponents of quasi-markets echo advocates of 'welfare pluralism' who support change in the organisation of welfare provision, through a more decentralised and participatory welfare structure operating through small local voluntary organisations (Warrington, 1995). Critics, however, point to the dangers of voluntary bodies being transformed into a 'shadow state' (Wolch, 1989), reliant on state funding and susceptible to state influence with regard to organisation, objectives and management. Welfare pluralism may therefore fail to deliver innovation and responsiveness to clients without even the benefits of accountability provided by traditional forms of democratic control, and apparent decentralisation of service provision may mask greater levels of state control of both resources and activities (Warrington, 1995).

This chapter examines developments in housing policy which illustrate the emergence of a more competitive and market-based approach to the delivery of housing policy objectives. The main initiatives are changes in local authority housing finance, which has moved substantially away from need as the criterion for the allocation of resources to a discretionary judgement of performance, and attempts to encourage the diversification of social housing supply, with a key role for housing associations and other 'registered social landlords' as the main providers of new social housing, competing with one another for government funding. These changes have had major impacts on the supply, quality, cost and affordability of social housing, as well as on the nature and governance of the organisations supplying new social housing. We do not discuss competition as illustrated by the extension of CCT to local authority housing management, though this is clearly another area where significant changes are taking place (the development of a contract culture more generally in local government is discussed further in Chapter 4). The chapter will first review the major changes in housing finance, diversification of supply and the role of housing associations. It will then go on to discuss the implications of this more competitive environment for the provision of social housing.

State and market in housing policy

For much of the post-war period housing policy objectives have been delivered through the distinct and mostly separate mechanisms of owner-occupied housing provided by the speculative house-building industry and council housing provided by local authorities. Both sectors benefited from state support in the form of fiscal advantages (to owner-occupation) and subsidies (to council housing), but throughout most of the period the public and private sectors operated quite separately: the public sector concerned itself with housing need,

while the private sector responded to demand in the market. The voluntary, non-profit housing associations contributed a negligible amount of housing and remained on the margins of housing policy (Best, 1997).

During the 1970s and 1980s the strong decline of council housing and the increasing dominance of private provision stemmed primarily from efforts to restrict public expenditure. In negotiations over public expenditure housing has always been a soft target, partly as evidence of crude shortage of housing declined, but also because the already dominant private sector provided an alternative source of supply, buttressed by a long-standing ideological preference for owner-occupation. For much of the 1980s government policy was based on the assumption that housing provision could be left to the market, with a minimal and residual role for the public sector. However, by the late 1980s growing evidence of affordability problems in the booming private market and the onset of recession and higher unemployment, together with growth in homelessness and in the number of households with mortgage arrears, subject to repossession by building societies, led to some reconsideration of government policy on rented housing. It was recognised that owner-occupation alone would not meet the housing needs of all of the population, though hostility to local government and council housing meant they were not to be agents of any future expansion of rented housing. In the 1987 White Paper on Housing the government declared an intention to bring about a revival in the 'independent rented sector'. This was to include private landlords and housing associations. The need for state support and subsidy for housing remained, but this would increasingly be channelled through agencies other than local authorities.

Reducing public expenditure on housing

The public expenditure consequences of state-provided housing for the mass of households have been problematic for governments over a long period of time. Early attempts to restrict council housing to a residual role can be traced back to the mid-1950s, and government statements have consistently promoted owner occupation as a socially desirable tenure. However, until the mid-1970s there were no explicit central government controls on local authority housing investment. In general, if local authorities proposed schemes which met approved standards and were within established cost limits then the Ministry would give loans sanction and subsidy.

The stance of central government began to change from the early 1970s onwards. Mounting economic difficulties and the requirement to reduce public expenditure led to the introduction of cash limits on capital expenditure by local authorities. Council housing was increasingly seen as a supplementary form of provision, to be targeted at deprived groups and areas where lower income housing shortages remained (Harloe, 1995, p. 426). With the introduction of the Housing Investment Programme (HIP) system in 1977/78 explicit needs-based mechanisms for distributing expenditure were introduced, along with stronger central control of total spending.

At one level HIP increased the freedom of local authorities to spend within

an agreed total, by removing detailed project by project control and distributing expenditure allocations in blocks. A key aspect of the new system was the submission of Local Housing Needs and Strategy Statements along with bids for expenditure. However, from early on local authorities were sceptical about the use that was made of these statements and bids. As expenditure cuts were imposed, often at short notice, it became apparent that 'evidence of serious housing problems would not secure additional expenditure or even safeguard existing programmes' (Leather, 1983, p. 225). The allocations in practice used a mixture of independent needs information (the Generalised Needs Index developed by the DoE), local authorities' own bids and DoE judgements. Meetings were held between DoE regional offices and individual local authorities and decisions emerged from these negotiations. The tight expenditure context in which HIP was introduced limited the extent to which redistribution on the basis of needs could be achieved and DoE allocated up to 40 per cent of resources on the basis of 'discretionary factors'. These, it has been suggested (Leather, 1983, p. 227), included past spending performance and the responsiveness of the authority to policies favoured by the government. This latter factor has come strongly into focus as HIP has evolved.

The period immediately following the introduction of this new resource allocation system was characterised by very severe cuts in housing capital expenditure. HIP was being used increasingly to control expenditure and to impose national housing policy objectives. Increasingly these reflected the government's strong commitment to increasing the proportion of owner-occupation via the right to buy and other low-cost home ownership initiatives. However, as the 1980s progressed HIP allocations became less significant in the overall total of expenditure as a result of the growth of capital receipts from the sale of council houses. Capital receipts were regarded as an addition to spending and a prescribed proportion of forecast receipts was taken into account when setting the overall HIP total. But difficulties arose in forecasting receipts at the local level and in dealing with the so-called 'cascade effect', which meant that authorities could accumulate unused receipts to use in future years. Authorities were also exploiting loopholes in the legislation, using accumulated receipts to fund repairs and improvements to the existing council stock, which research showed was deteriorating rapidly (Audit Commission, 1986). This device allowed them to escape the increasingly tight controls being imposed on revenue expenditure. The outcome of this was a level of expenditure which failed to match public expenditure plans and a pattern of expenditure that failed to match patterns of need. Because of the distribution of council house sales, capital receipts tended to be highest in the more affluent areas with lower housing needs.

These failures in turn led to a new system of capital expenditure controls introduced in the Housing and Local Government Act 1989, which instituted much tougher controls over borrowing, imposed further restrictions on the use of capital receipts and tightened the definition of capital expenditure. Authorities now receive a 'basic credit approval', which places a limit on borrowing.

Three-quarters of capital receipts must be set aside for debt redemption. Within the new system HIP lived on, distributed in a similar way according to a mixture of discretion and a revised Generalised Needs Index.

In the context of the expenditure cuts that affected public sector housing the level of local authority building declined rapidly. Output from the council building programme declined from 130,000 in 1975 to less than 10,000 in 1990. Since 1987 government policy has emphasised an enabling role for local authorities, and the effective ending of any new council building. Enabling implies facilitating and supporting provision of housing by private developers and housing associations, as well as measures to support the expansion of the private rented sector (Goodlad, 1993). In relation to the local authorities' own expenditure DoE statements suggest:

> the HIP submission will be about expenditure needed to provide for people who cannot afford housing at market prices or cannot maintain their homes without public sector support. Need should be justified however by reference to the extent to which the private sector is able and willing to make provision for low cost housing and the steps the authority is taking to maximise the private sector contribution and to make the best use of its own stock.
>
> (quoted in Bramley, 1993, p. 128)

The enthusiasm with which authorities engage in the enabling role is scrutinised by central government each year in the annual HIP assessment. The effective implementation of the enabling role has therefore become one of the discretionary factors taken into account by government in its decision-making on the resources it makes available. There is therefore a clear incentive for local authorities to demonstrate that they are pursuing partnership approaches, disposing of land, sharing their financial resources and developing appropriate planning policies.

Guidance to local authorities on the preparation of local housing strategies has evolved to provide increasingly prescriptive advice on the process of preparing strategies and on the criteria that government will take into account in making allocations. According to one assessment, 'the preparation of housing strategies is now, more than ever, governed by tactical considerations designed to please, or appease, the Department of the Environment and to demonstrate awareness of current political priorities at central government level' (Cole and Goodchild, 1995, p. 56). Liaison with the Housing Corporation and housing associations and with the private sector is an explicit requirement, in an attempt to maximise the contribution of other agencies. Government also continues to place emphasis on extending owner-occupation, through campaigns to promote further sales under the right to buy and working with the private sector to develop low-cost and shared-ownership housing, in spite of evidence that low income home owners have faced considerable hardship during the recession.

In allocating resources the status of independent information on housing needs has been progressively reduced, and that of ministerial discretion in

decision-making has been increased. Up to 1991 government allocated capital resources to regions on the basis of the Generalised Needs Index (GNI), and subsequent allocation to local authorities used the GNI for 50 per cent of the allocation. This was reduced to 40 per cent in 1992, with a new emphasis on a qualitative assessment of local authorities' performance of the enabling role. Authorities were to move towards open competition for credit approvals, with allocations based on criteria set by the centre. The primary criterion became: the relative efficiency and effectiveness of authorities in capital investment, including the extent to which the local authority is likely to use its allocation to develop its enabling role in co-operation with housing associations and other parts of the private sector.

In a letter to the Local Authority Associations the Housing Minister gave further guidance:

> We will place greater emphasis on the quality of HIP proposals and on the available evidence of authorities' performance, and rather less emphasis than hitherto on assessment of relative need. We will be looking for: evidence of private sector involvement; of proposals to diversify tenure among council stock; and that tenants have been consulted over proposals and that there are plans to involve them in management of estates.
>
> (quoted in Warburton, 1992, p. 8)

At this stage ministerial discretion applied to the distribution of 60 per cent of the total available resources, but there was evidence that the use of discretion was being used to move money between authorities in ways unrelated to need, and for reasons that remained obscure to many of the authorities affected (Warburton, 1992). However, it is important to appreciate the extent to which the competition was shaped and driven by central government and that it was about tenure, rather than the more traditional quantitative and qualitative measures of success.

A Consultation Paper in 1992 proposed to look at the case for dispensing entirely with the GNI for distribution within regions in subsequent years, and to also make adjustments to the distribution of resources to regions to reflect inter-regional differences in performance. Echoing the arguments used to support the introduction of City Challenge, the Consultation Paper saw advantages in untying the process of resource distribution . . . from the constraints of a statistical formula. This increases the incentives to authorities to seek or maintain the highest standards, enhances the rewards to those that succeed, and removes the sense of a guaranteed level of support (DoE, 1992c). From April 1997 the distribution of credit approvals was entirely competitive and discretionary, and by this stage there was also speculation about the possibility of breaking the link between housing need and the allocation of housing association capital resources to local districts.

Alongside these changes a number of aspects of housing capital expenditure have been brought within the competitive framework of the Single Regeneration Budget (see Chapter 9). The Estate Action Programme, aimed at

improving local authority estates which suffer from physical, social and economic problems, came to prominence after 1985, with monies top-sliced from the declining Housing Investment Programme and accounting for an increasing proportion of the total budget. Aiming at a programme of wider estate regeneration, the need for programmes such as Estate Action is in part a result of the narrowing of the socio-economic profile of council tenants, consequent on the residualisation of local authority housing and growing segregation within the sector. Estate Action and Housing Action Trusts have been incorporated within the SRB from 1994, and as existing commitments under these programmes come to an end, an increasing proportion of the SRB will be allocated to provide flexible support for competitive bids submitted by local partnerships. The SRB puts considerable emphasis on projects that will contribute to the economic competitiveness of localities, and the danger is that social objectives will be marginalised.

Research evidence confirms that the most prominent projects within the SRB are aimed at economic development and employment initiatives (72 per cent of bids prioritise economic initiatives) while social welfare receives much lower priority (12 per cent of bids prioritise housing) (Oatley, 1996). Only 14 per cent of successful round one SRB bids included resources for housing regeneration, which Hall *et al.* (1996) suggest reflects advice to local authorities from Government Offices to remove or scale back housing bids. Consequently, some authorities have seen 'a dramatic fall in the resources available for refurbishment of council estates. Overall resources compare unfavourably with Estate Action' (Hall *et al.*, 1996, p. 27). The latest innovation in competitive bidding, launched as a pilot in 1996, Capital Challenge proposes to use challenge mechanisms for a greater proportion of mainstream local government capital expenditure, and is likely to reinforce this trend.

We have therefore moved from a situation where housing resources were distributed primarily on the basis of evidence about the condition of the local authority and private sector stock and indicators of housing stress to one where discretionary judgements of relative performance are the key factor. This has been accompanied by a shift from control of the volume of expenditure, to control of what money is spent on, and the way in which it is spent. As with other competitive bidding systems government is seeking both a shift in the content of policy, emphasising an expanded private and voluntary sector role and a diminishing local authority role, and a shift in the process of making and implementing policy, emphasising the involvement of the private and voluntary sectors. This therefore focuses attention on the sorts of factors that are likely to enable local authorities to perform successfully according to the government's criteria. Inherited land holdings have been an important resource in underpinning the enabling role, but this is clearly finite given other restrictions on housing expenditure, and the evidence is that local authority land banks are now running out. Spending to improve and upgrade the remaining local authority stock is the main other call on capital expenditure, and areas with a concentration of poor quality council housing will have fewer resources

Table 6.1 Local authority capital provision in England (£ million)

	90–91	91–92	92–93	93–94	94–95	95–96	96–97 plans	97–98 plans	98–99 plans
Credit approvals	1,384	1,441	1,194	1,020	872	822	789	752	717
Capital grants	311	352	425	416	346	342	295	279	272
Estate action	180	268	348	357	373	314	256	178	115
Total	1,875	2,061	1,967	1,793	1,591	1,478	1,340	1,209	1,104

Source: Wilcox (1996)

to share with other providers. The ability to release resources by disposing of the remaining council stock to other agencies is likely therefore to become increasingly necessary (see Table 6.1).

It is also important to remember that local authorities are required to compete with one another for a rapidly diminishing supply of credit approval. Credit approvals were reduced for the fifth successive year in 1996/97, and further reductions are planned. By 1998/99 resources will be 55 per cent less in real terms compared to 1991/92, as well as the run-down of the Estate Action programme (Wilcox, 1996). In addition, central government is increasingly dictatorial about what local authorities must do to 'win' the competition. While the rhetoric of competitiveness suggests local choice and a free market, the competition is in fact tightly controlled and utterly unlike a free market.

Diversifying the supply of rented housing

Governments over a long period have acknowledged an important role for the private sector in the provision of new housing, in practice provision by the speculative building industry for owner-occupation. From 1979 initiatives to shift housing provision away from local authorities have taken a number of forms. In the first half of the 1980s the right to buy for tenants of local authority housing was the major initiative and resulted in sales of more than half a million houses in the Conservative government's first term of office. Since 1979 around a fifth of the total local authority stock has been sold to tenants at discounts of up to 70 per cent of market value. In the latter part of the 1980s the government introduced a series of proposals to revive what became known as the 'independent rented sector'. This new housing strategy consisted of a number of elements: measures to increase investment in private renting; provisions for change of landlords for local authority housing; and a new financial regime for housing associations.

Efforts to revive private renting involved legislation to de-regulate rents and reduce security of tenure for tenants of privately rented housing, together with the introduction of financial incentives to investors through extension of the Business Expansion Scheme to housing in 1988. The provisions for change of landlord for local authority housing involved tenants' choice and Housing Action Trusts (HATs). The former gave council tenants the option of choosing another landlord, based on the belief that many tenants were dissatisfied with

the record of local authorities as landlords. HATs were an initiative similar to Urban Development Corporations, and involved setting up central government appointed bodies to improve run-down council estates and pass ownership of the stock to other landlords. Both measures were designed to privatise parts of the stock that would be unlikely to attract many right to buy sales. The new financial regime for housing associations is discussed in more detail in the next section, but the main aim here was to expand the flow of private finance into new housing association building. A mixed public/private funding regime was introduced in which public expenditure (in the form of HAG) would comprise a reducing proportion of development costs.

These initiatives have had mixed success. The supply of privately rented housing has expanded marginally, reversing the long-term decline, but the results have not been dramatic. And the long-term sustainability of this recovery must be questioned as this expansion has coincided with extreme problems in the housing market; many home owners unable to sell have been renting temporarily. The BES scheme has been withdrawn, partly because of the costs in terms of public expenditure. HATs and tenants' choice have both failed to take off. Tenants of public housing have been reluctant either to opt for other landlords or to accept HATs. Only six HATs have been established, and further HATs are unlikely. There have, however, been some major transfers of local authority housing to housing associations, but this emerged as a local response to the governments continuing restrictions on local authority capital expenditure. Up to the end of 1996 more than 50 local authorities had transferred their stock to specially created housing associations, with an enhanced ability to spend on improvement and modernisation of the stock.

A further round of policy change was signalled in the 1995 White Paper, Our Future Homes, and introduced in the Housing Act 1996. The White Paper contained further proposals to diversify provision and ownership of social housing through what the Act refers to as 'registered social landlords'. HAG is to be made available to organisations other than housing associations, opening the way for commercial developers to register non-profit social housing divisions in order to receive subsidy for providing and managing social housing. Ironically competition for HAG is being opened up at the same time that budget cuts have taken almost 40 per cent of the total Housing Corporation budget (see Table 6.2). The BES scheme is replaced by the Housing Investment Trusts, set up to attract funds to companies developing rented housing on a commercial basis with tax concessions. The legislation also endorses local housing companies as an alternative to voluntary transfers, provided that local authority representation on these is in the minority. This would take council housing outside of the constraints of the public sector borrowing requirement, a policy idea initially put forward by the Labour Party. Transfers of council-owned stock are also being promoted through the SRB and the newly established Estate Renewal Challenge Fund, introduced from 1996/97 to cover some pre-transfer investment and to give 'dowries' where high improvement costs are likely to deter private investors.

In January 1997 the DoE issued a Consultation Paper signalling both a wish to see a much higher rate of stock transfers and a determination to use the HIP system to steer local housing strategies in this direction. The Consultation Paper envisaged more than one million, or 30 per cent of dwellings being removed from local authority ownership by a combination of the right to buy and large-scale transfers. It indicated that councils 'should focus on the feasibility of transfer as a central plank of their housing strategy' (DoE, 1997c). In order to ensure that this objective was taken seriously at local level the paper went on to explain that the primary criterion for setting levels of approved capital expenditure would be the effectiveness of transfer strategies.

The previous Conservative government, therefore, gave strong support to diversifying ownership of social housing, and specifically removing social housing from local authority ownership. The logic was that greater efficiency can be achieved in this more diversified market, and also that changing institutional mechanisms could expand the flow of private resources into housing, but hostility to local authority ownership has been a strong theme. The price tag of this strategy has been a much higher housing benefit bill. As private finance has been attracted into social housing so costs, and hence rents, have risen rapidly, which have increasingly been picked up by the government through housing benefits. Together housing benefit costs in the housing association and private rented sectors have grown fivefold over the last eight years. Even in real terms costs have grown by 350 per cent (Wilcox, 1996). Consistent with the quasi-market philosophy, public expenditure has been increasingly redirected from direct support for social housing provision to indirect support via payments to consumers. The logic here is that better targeting of support occurs, only to those who need it. But in the context of wider changes in the economy and the labour market, an increasingly large proportion of tenants of rented housing are dependent on the state for their housing costs. In an attempt to manage this tension government has introduced 'rent capping' in the local authority sector and limits on allowable rents in the private sector.

A new financial regime for housing associations

A new, much more competitive environment for housing associations was introduced in the 1988 Housing Act, which changed the basis on which new housing association development was financed. Housing associations are increasingly encouraged to compete with one another for development opportunities and grant funding, with implications for the nature, type and cost of new social housing provision, and for the shape of the whole sector.

Before 1988 housing associations operated in a largely risk-free and uncompetitive environment. The reforms to the financial regime implemented in 1989 involved five key changes that have the effect of exposing housing associations to greater risk and increased competition. First, Housing Association Grant (HAG) (from April 1997 Social Housing Grant) is now paid as a fixed amount calculated at the start of a development; responsibility for any cost over-runs

therefore now falls on the association. Second, grant rates have fallen during the 1990s, from a headline rate of 80 per cent in 1990/91 to 56 per cent in 1997/98. Third, associations now raise private finance to fund the difference between the grant and the cost of the scheme, and associations have had to accommodate the demands of the financial institutions, building up reserves and placing more emphasis on financial management. The intention of these arrangements is to increase the output of new social housing from a given amount of public expenditure. Fourth, rents have been de-regulated and associations are now free to fix rents to cover loan repayments and other costs. Fifth, housing associations now compete with one another in their annual bids for HAG, with the key indicator being the amount of HAG per unit. Those associations who can demonstrate the greatest 'value for money' are rewarded with the largest allocations.

These changes have had important effects on the nature and location of new housing association development. There has been a major shift away from rehabilitation, where unpredictable cost over-runs are more common, and towards new build on greenfield sites (Randolph, 1993; Karn and Sheridan, 1994; Crook and Moroney, 1995), accompanied by a shift of development activity away from the most needy urban authorities. Associations have also tried to reduce risk by using different procurement methods, such as design and build contracts with private developers, rather than traditional competitive tendering. There is some suggestion that space and quality standards have suffered as a result of this change (Farthing, Lambert and Malpass, 1996); certainly space standards in new social housing declined in the early 1990s (NFHA, 1992), though the general pressures to reduce costs and maximise 'value for money' also push in this direction. Perhaps the most significant impact has been the upward pressure on rents in order to meet the costs of private finance and respond to the pressures of fierce competiton for HAG, which led to actual grant rates of 47 per cent in 1995/96. Rents of new housing association properties doubled between 1989 and 1995 (Wilcox, 1996). That new housing association accommodation is affordable only by those receiving benefit, with consequent 'benefit trap' problems, is a common complaint. Concern about the rapid increase in rents (and knock-on effects on housing benefit expenditure) led the government to introduce an element of competition in terms of rent levels as well as grants from 1997.

The changes are also beginning to affect the shape and nature of the housing association sector itself. Larger and longer established regional and national housing associations are better placed in this more competitive environment. Larger associations with more substantial development programmes can negotiate better contract prices, provide greater security to lenders and draw on reserves or internal funds to subsidise new development and win in the HAG competition. The larger associations have undergone rapid geographical expansion, in some cases with the explicit encouragement of the Housing Corporation, widening their areas of operation, and stiffening the competition faced by smaller locally based associations. Larger associations are also growing as a

Table 6.2 Housing Corporation Approved Development Programme (£ million)

	90–91	91–92	92–93	93–94	94–95	95–96 plans	96–97 plans	97–98 plans
Housing for rent	1,006	1,525	2,199	1,539	1,246	921	793	693
Housing for sale	65	87	124	290	280	245	259	253
Deferred interest	158	118	45	14	3	1	1	0
Other capital	3	2	1	1	1	7	17	4
Gross capital expenditure	1,232	1,732	2,369	1,844	1,530	1,174	1,070	950

Source: Wilcox (1996)

result of take-overs, mergers and transfers of local authority stock (Bazlington, 1992; Malpass, 1997). The increasing dominance and geographical spread of the larger national associations raise serious concerns about accountability. As new social housing is increasingly provided by associations operating on a national scale, so the rhetoric of housing associations as locally accountable and responsive organisations (Cope, 1990) begins to sound rather hollow. Accountability to central government (via the Housing Corporation) is a much stronger feature of the post-1988 regime.

Many housing associations were historically set up to meet specific local needs, often with money raised privately or through charitable donations. In many cases the needs housing associations responded to were those which local authorities tended to neglect. The new ethos of competition therefore threatens the diversity of the sector and housing provision for groups outside the 'mainstream'. Further tendencies to a more uniform pattern of provision reflect the interdependence of housing associations and local authorities. Housing associations are highly dependent on local authorities for support in their bids for HAG, and have also benefited from free or discounted land from surplus local authority land banks. In return for their support local authorities will expect their priorities to be taken into account and, in exchange for land, the right to nominate tenants. As the priority of many local authorities has been to re-house families accepted as statutorily homeless, so there is greater emphasis on building 'family' housing and a shift in the balance of lettings towards households with children (Warrington, 1995). The options open to other (single or childless) households may therefore be declining.

Initially the introduction of the new financial regime was accompanied by an expansion in the amount of public expenditure allocated to housing associations. The Approved Development Programme (ADP) grew from £568m in 1988/89 to £2,369m in 1992/93. Since then there have been a series of severe cuts and by 1996/97 the ADP was less than half the level achieved in 1992/93 (see Table 6.2).

Conclusions

The overall conclusion emerging from this discussion is that policies designed to increase competition for resources for social housing are about much more than mimicking the market and improving efficiency. The abandonment of need as the basis for capital allocations to local authorities was both a centralising measure, a way of allowing the government to steer local strategies in new directions, and a rationale for those new directions. It is important to reiterate that what has been created is a competitive environment where the rules of the game are all determined by the centre. In this situation local housing strategies have ceased to be detailed descriptions of local housing problems and how they can be met; instead they are shaped by the government's agenda, becoming prospectives of local performance in relation to centrally determined priorities. These priorities are increasingly tenure-based, motivated by ideological commitment to reducing still further the amount of local authority housing by forced stock transfers.

With respect to housing associations competition has had far-reaching effects, the consequences of which go beyond increasing efficiency and bringing in additional resources. The significance of these changes has become apparent only in the course of the last few years and was not widely (or at all) appreciated in advance. First, the ability of associations to compete effectively for allocations of grant is partly a reflection of their success in raising private finance, and so they have had to respond to the strictures imposed by lenders. They have had to ensure that their boards are made up of people who have the skills and experience required by lenders, and that their accounts are presented in a way that is familiar and acceptable to lenders. Associations that aspire to substantial development programmes have had to pay far more attention to financial matters, especially to what is now termed treasury management. Whereas before 1988 the role of finance staff was largely confined to routine accounting and cash flow management, now there is a much higher profile for finance departments and more emphasis on issues such as long-term financial strategy and tax planning.

Second, an important feature of the new financial regime was that it promoted competition among associations, but created a virtually risk-free lending environment. Although initially there was much debate about whether the financial institutions would be willing to lend to housing associations, in practice there has been no difficulty for the movement as a whole in raising large amounts of cash. This has been due to two key factors: the way in which housing benefit has underpinned associations' cash flows; and the fact that associations are monitored and regulated by the Housing Corporation. These two factors have maintained a considerable degree of reassurance for lenders, but concern about rising rents, and growing consensus that the present housing benefit system is unsustainable, raise questions about continued lender support.

Third, competition and associated pressure on associations to behave in more business-like ways have had an impact on the pattern of investment expenditure – specifically in the form of reductions in rehabilitation and pressure to develop in locations which offer the best chances of capital appreciation. In this context it is appropriate to point out that in the 1970s some associations were drawn into inner city rehabilitation, in areas where the reasons for involvement were social and political; indeed it was precisely to deal with the failure of housing market forces in such neighbourhoods that area-based renewal policies were introduced. However, now that housing associations are being pushed towards a more business-orientated approach they could be forgiven for reviewing their continued involvement in the inner city. Strictly commercial considerations might suggest disposing of aging inner city houses with substantial long-term management and maintenance problems. At the very least there is growing tension between the social concerns of housing associations and the pressure on them to behave like businesses. A related point is that there is a further tension between the demands of market forces and associations' social objectives. Government requires that housing associations raise increasing amounts of private finance and at the same time take responsibility for accommodating the least well off, including vulnerable people discharged into the community as a result of hospital closures. As responsible social landlords and providers of the last resort, associations constantly struggle with the problem of having to remain financially viable whilst wanting to continue to house people with very low incomes. Housing benefit is by no means a guarantee against rent arrears and associations face difficult choices because of the need to maintain rental income.

Fourth, housing associations were in the 1980s valued for their small-scale operations and for their localness. However, growth and competition have resulted in geographical expansion. The Housing Corporation encouraged expansion into new areas as a way of increasing competition, and commercial logic pointed in the same direction, although it is inevitable that widely dispersed stocks are more expensive to manage.

Housing associations occupy a very difficult position in which they are simultaneously under pressure to compete and be businesslike, while being constrained by regulations and capital allocation systems which deny flexibility and leave them unable to plan even a year ahead with any confidence. The post-1988 regime represents a very uneasy combination of quasi-market and centrally planned economy.

Many within the housing policy community remain deeply concerned about the level of resources available in relation to estimates of the need for new social housing. Local authorities and housing associations are competing for a rapidly diminishing pool of resources. The pressures thus created on the available supply of social rented housing preclude almost entirely any choice among tenants. A major conclusion must therefore be that the rhetoric of choice, responsiveness and market freedom is an unconvincing mask for a process of increasing central government control, a

continuing ideological obsession with eliminating the housing role of local government and an overriding objective of reducing public expenditure on housing. It is also apparent that the increasing reliance on private finance to meet the costs of the social housing programme is fraught with tension and contradiction. Not only have social security costs escalated due to increasing rent levels, but social housing providers are presented with serious dilemmas concerning their primary objectives.

7

Catalyst for Change: the City Challenge Initiative

NICK OATLEY AND CHRISTINE LAMBERT

Introduction

Announced in May 1991 by the (then) Secretary of State for the Environment Michael Heseltine, City Challenge was heralded as a significant innovation in the government's approach to urban regeneration. It was the first in a new wave of initiatives based on a process of competitive bidding for urban funding. In a number of ways it signalled significant changes in the British government's approach to problems of urban decline and deprivation, and could be seen as a further example of the new institutional framework that was emerging in local governance (Malpass, 1994; Davoudi and Healey, 1995b), with an emphasis on building institutional capacity in order that cities might compete more effectively for investment in an increasingly internationalised economy. Government claimed that City Challenge marked a 'revolution in urban policy' and that the stimulus of competition, driven by highly prescriptive bidding guidance, would transform the way in which local authorities and their partners approach the task of urban regeneration (DoE, 1992a). It is important to realise that City Challenge was a mechanism to alter both the substantive aims of urban policy and the processes of policy formulation and delivery.

While a short-lived experiment to seek out more effective ways to deal with the ongoing crisis in cities, the significance of City Challenge was its use as a model for the comprehensive restructuring of urban policy introduced in late 1993 via the Single Regeneration Budget. City Challenge can be seen as a prototype, to test ideas of competition for funding urban regeneration, undertaken by multi-sector partnerships in the context of a contractual model of urban policy (Lawless, 1996, p. 27). This competitive paradigm has since come to dominate British public policy, in relation to specific urban funding and beyond.

The origins of City Challenge

The origins of City Challenge reflect a number of pressures that led government in the early 1990s to change its urban policy focus. These included political changes brought about by the demise of Margaret Thatcher and replacement by John Major as Prime Minister and leader of the Conservative Party, a return to conditions of recession in the economy and a wide-ranging review of urban policy in response to mounting criticism of the thrust of urban policy in the 1980s.

Britain in the early 1990s experienced a set of economic, social and political crises which had a profound effect on urban policy. Internal factions in the Conservative Party and the perceived electoral liability of Thatcher led to a change of leadership and new cabinet appointments, including the return of Michael Heseltine to the Department of the Environment. Meanwhile, the economic recession that followed the boom of the mid to late 1980s signalled the end of the Thatcher economic miracle and the return of familiar economic problems in the form of high inflation, rising interest rates, economic contraction, bankruptcies and high unemployment. The property sector, on which the Thatcher government had relied heavily as the catalyst for urban regeneration, experienced a severe and sustained recession. The announcement in May 1992 that Canary Wharf was in the hands of administrators simultaneously symbolised the seriousness of the property market slump and the crisis of an approach to regeneration that relied so heavily on private property development via the flagship Urban Development Corporations. Moreover, there was a rising tide of criticism of urban policy as a wide range of professional bodies, academics and organisations with an interest in urban areas expressed concern over the direction and impact of Thatcherite policy for the cities (Archbishop of Canterbury's Commission on Urban Priority Areas, 1985; TCPA, 1986; CBI, 1988; Audit Commission, 1989; Stewart, 1990). There was significant overlap, if not consensus, contained in these critiques of urban policy. They included: the persistence of serious urban problems; the definition of the problem and the scale of the response; the fragmentation of policy and lack of co-ordination; the lack of a long-term strategic approach; the over-reliance on property-led regeneration; and the burden of bureaucracy (Oatley, 1995b). After a decade in which the local authority role in regeneration had been sidelined, local authorities were being promoted as having 'an important leading and coordinating role' to play (Audit Commission, 1989, p. 2).

Pressure therefore mounted on the government to introduce a new approach to tackle the persistent economic and social problems found in cities. A review initiated by Heseltine revealed the difficulties being experienced by some UDCs and the poor prospects for the continuation of a property-led strategy. On the other hand, there was also concern over the operation of the other main urban initiative, the Urban Programme. Ministers were critical of the failure of the Urban Programme to secure any significant degree of private sector and/or community involvement and the tendency to 'pepper pot' resources throughout areas, diluting its impact in turning areas around. Moreover, the needs-based flavour of the Urban Programme was thought to be responsible for encouraging a dependency culture, stifling innovation and, in the words of Heseltine, making urban areas 'slaves to the distribution formula' (DoE, 1991d).

The new approach to urban regeneration was announced by Heseltine in an address to the Manchester Chamber of Commerce in March 1991. Particular emphasis was placed on competition as a catalyst for unleashing local creativity. Schemes showing enterprise and vision would be rewarded. Resources for inner city regeneration would be shifted towards opportunity and incentive, and resources concentrated on a smaller number of larger projects. The new approach would reward plans that addressed both need and opportunity and had the imagination to link the two. Partnerships were seen as an essential vehicle in this process, 'combining the Victorian sense of competitive drive linked to social obligation', indicating Heseltine's continuing commitment to greater involvement by the private sector in urban regeneration. A new emphasis on community involvement and greater sensitivity to the needs of people living in urban areas was also signalled as an important dimension of more sustained regeneration (Heseltine, 1991).

City Challenge was officially announced in May 1991. Those bidding, selected from the 57 most deprived Urban Priority Areas, were invited to outline a five-year strategy for the regeneration of an identified area, to involve public and community partners, to demonstrate leverage of private sector funds and to propose a mechanism for implementing the programme at arm's length from the local authority. Initially 15 authorities were invited to bid for funding to tackle the regeneration of deprived areas, and 11 'pacemaker' partnerships were selected through a competitive process. A second round of City Challenge was announced in April 1992 in which all 57 urban priority authorities were invited to bid and 20 were successful. Each successful bid received the same level of funding, £37.5 million divided into five annual payments of £7.5 million per year. Table 7.1 indicates the outcome of the competition for both rounds 1 and 2. There were no new resources for City Challenge; all of the money was top-sliced from other DoE funding programmes, including the Urban Programme and local authority Housing Investment Programmes. In 1993/94 City Challenge accounted for over a quarter of public expenditure in inner cities (M. Stewart, 1993), and over the five years it amounts to over £1 billion of public expenditure.

The characteristics of City Challenge

In terms of British urban policy since 1979 City Challenge represents a marked shift away from the principles that underpinned initiatives such as Urban Development Corporations, Task Forces, City Grant and Training and Enterprise Councils. In many ways City Challenge (and the subsequent introduction of the Single Regeneration Budget) can be seen as a response to

Table 7.1 City Challenge – outcomes rounds 1 and 2

City Challenge – 1991

Winning councils
1. Dearne Valley
2. Bradford
3. Lewisham
4. Liverpool
5. Manchester
6. Middlesbrough
7. Newcastle
8. Nottingham
9. Tower Hamlets
10. Wirral
11. Wolverhampton

Rejected councils
1. Birmingham
2. Bristol
3. Salford
4. Sheffield

Uninvited bidders
1. Coventry
2. Newham
3. Sandwell
4. St Helens
5. Stockton
6. Sunderland

Dearne Valley was a joint venture between Doncaster, Barnsley and Rotherham.

All winning councils were Labour controlled

City Challenge – 1992

Winning councils
1. Barnsley
2. Birmingham
3. Blackburn
4. Bolton
5. Brent
6. Derby
7. Hackney
8. Hartlepool
9. Kensington & Chelsea
10. Kirklees
11. Lambeth
12. Leicester
13. Newham
14. North Tyneside
15. Sandwell
16. Sefton
17. Stockton
18. Sunderland
19. Walsall
20. Wigan

Rejected councils
1. Bradford
2. Bristol
3. Burnley
4. Coventry
5. Doncaster
6. Dudley
7. Gateshead
8. Greenwich
9. Halton
10. Hammersmith and Fulham
11. Haringey
12. Hull
13. Islington
14. Knowsley
15. Langbaurgh
16. Leeds
17. Liverpool
18. Middlesbrough
19. Newcastle
20. Nottingham
21. Oldham
22. Plymouth
23. Preston
24. Rochdale
25. Rotherham
26. St Helens
27. Salford
28. Sheffield
29. South Tyneside
30. Southwark
31. Tower Hamlets
32. Wandsworth
33. Wolverhampton
34. The Wrekin

Non-bidders in 1992: Lewisham, Manchester, Wirral.

the criticisms levelled at government urban policy discussed above. A number of innovative features distinguish City Challenge from the initiatives that preceded it. These include: emphasis on the development of a local vision and strategy for regeneration and a leading role for local authorities in strategy development; a strong emphasis on partnership with business and the community; the establishment of committees, trusts or companies at arm's length from the local authorities to carry forward programmes at a local level; an emphasis on outputs established via a contract with central government; a new concern with sectoral and spatial integration; the promise of greater continuity with commitment of funding to multi-year regeneration programmes; and the introduction of a highly politicised competitive bidding process.

After 12 years of anti-local authority rhetoric and the promotion of single purpose organisations driven by business to manage regeneration, City Challenge advocated a key role for local authorities in assuming civic leadership in forming partnerships, harnessing existing talent, energy and resources, and developing imaginative and innovative solutions to the problems of urban decay. In a DoE press release (DoE, 1992b) Michael Heseltine stated that City Challenge was 'about the vision of the local authority and its ability to bring about the regeneration of its area. Above all it's about involving local people, with councils forging partnerships with community organisations, voluntary groups, and the private sector.'

The guidance given to local authorities explicitly required multi-sector partnerships which would be involved in policy formulation and implementation:

> The development and implementation of plans should involve practical partnerships between local authorities and businesses, the voluntary sector, local communities, TECs, local universities, housing associations and other statutory agencies. Effective plans will include organisational arrangements which facilitate these local partnerships, collaboration with central government and integration of various functional programmes.
>
> (DoE, 1991b, p. 2)

The bidding guidance in 1992 reinforced the importance of the involvement of the private sector as a key requirement for successful bids:

> A premium will be placed on proposals which are well thought through and feasible, involving local delivery mechanisms with devolved responsibility which effectively coordinates the inputs of the main participants and gives them a clear and influential role discrete from the local authority. All the major parties involved must show commitment to the initiative at an executive level. The private sector must be involved to the maximum degree possible.
>
> (DoE, 1992d, p. 8)

The formation of a delivery mechanism that embodied these interests was one of the basic principles of City Challenge. Following the diversity of local delivery mechanisms in the pacemaker (round 1) areas, the DoE issued detailed guidance on the expectations and requirements of partnership and delivery mechanism arrangements (DoE, 1992e). Implementing agencies were expected

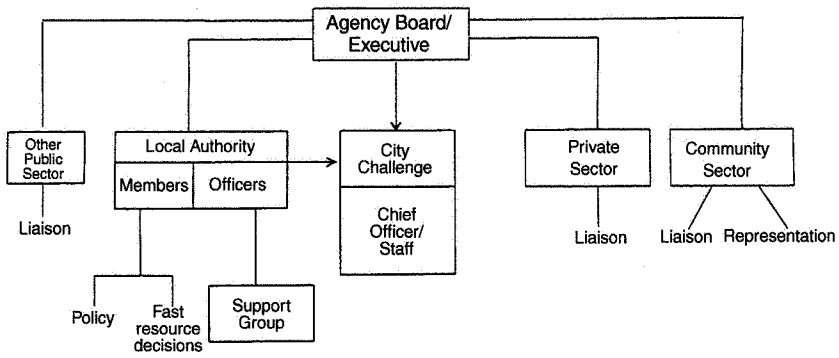


Figure 7.1 *City Challenge implementing agency – a typical structure*
Source: DoE (1992e, p.10)

to be independent from the local authority, ensure rapid and effective decision-making, demonstrate full and active partnership involving the private sector and the community and enable the main partners to endorse the key decisions. The structures adopted had a number of common elements, which are shown in Figure 7.1.

The key variable factors in this structure include responsibility for chairing the board (a member of the local authority or a senior figure from the private sector); composition of the board, which ranges from an equal share between the local authority, private and community sectors to others that are predominantly local authority and other public sector; the methods used by the local authority for fast-track decision-making; and the use of multi-sector forums and the level and nature of private and community sector involvement.

One important distinction in the design of implementing agencies is where partnerships decided that the management of City Challenge required a separately incorporated company, and those which felt that such separate corporate bodies raised problems of accountability, or that flexibility and independence could be secured through less formal arrangements. However, this distinction may be more apparent than real. For example, there may be important differences between the form of proposed delivery vehicles and the practical realities. What appears to be an independent structure may still offer the prospect of a high degree of domination by the local authority – or indeed one of the other partners. Figure 7.2 shows two examples of delivery mechanisms from the first round of City Challenge which illustrate these two organisational forms. Hulme Regeneration Ltd is a company limited by guarantee, whereas Liverpool's structure is not separately incorporated.

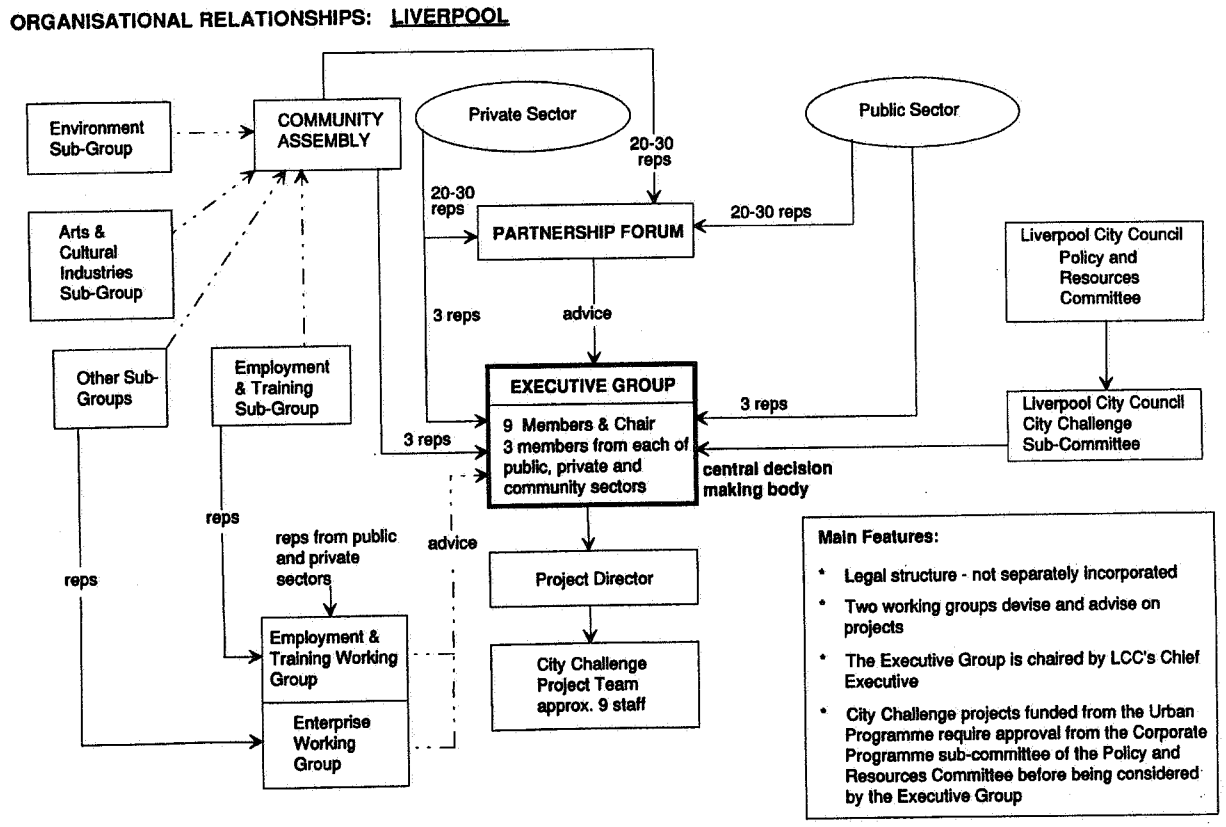
Therefore, the leading role of the local authority was intended to be tempered by the distancing of the City Challenge delivery mechanism from the elected local councils. In this way City Challenge can be seen as a further development of the encouragement to local authorities to adopt an enabling

role, contracting with other bodies to provide services, or otherwise facilitating service provision by others, requiring important organisational changes (Stoker, 1991). In City Challenge local authorities were again encouraged to change their modes of operation, establishing fast-track decision procedures and special sub-committees to expedite City Challenge matters and to facilitate the shared responsibility and corporate approach required by the programme. Moreover, central government would approve the organisational arrangements and detailed action plans which specified clear targets and authorise the release of money.

As well as promoting a change in the way that local authorities relate to their business and resident communities, City Challenge also encouraged strategies to tackle problems in an integrated fashion, dealing with employment and training, childcare, housing issues, environmental concerns and crime and safety. It also attempts to reintegrate disadvantaged areas into the mainstream economy of cities by linking the area identified for regeneration with the rest of the city. Competition here was meant to stimulate a new approach to regeneration, in particular, shifting urban funding away from routine voluntary sector support or the topping up of main programmes that had come to dominate Urban Programme spending. The commitment of a five-year programme of funding was meant to provide a degree of consistency and continuity, responding to criticisms of the problems caused by the annual allocation of funds under previous urban initiatives. The longer time scale of City Challenge provided a basis for greater confidence, investment and participation among business and community interests.

The competitive element of City Challenge included both the presentation of the bid itself and the quality of the proposals in terms of the specific projects, the leverage of outside funding and the details of partnerships with business and other organisations. Authorities were required to submit written bids and also to make a presentation of their proposals to central government ministers, who were very openly involved in the allocation decisions. Again it should be stressed that the reassertion by central government of the importance of local initiative and ownership was in the context of continuing strong central government control of rules and resources, and close government scrutiny of the nature of the proposals being put forward.

The key features of City Challenge were therefore competition between areas and collaboration within areas between representatives of the public, private, voluntary and community sectors. Local authorities were given an important role in leading regeneration activities, albeit under tight supervision from central government. The initiative involved a greater degree of concentration in the allocation of urban funding, with rejected authorities standing to lose out twice as a result of the top-slicing of funds from other programmes. Moreover, City Challenge also provided the opportunity to tap into other sources of matching funding, such as European funds, as well as levering in private sector contributions: 'it can open doors and make possible new matches and new linkages with funding sources' (de Groot, 1992, p. 201).



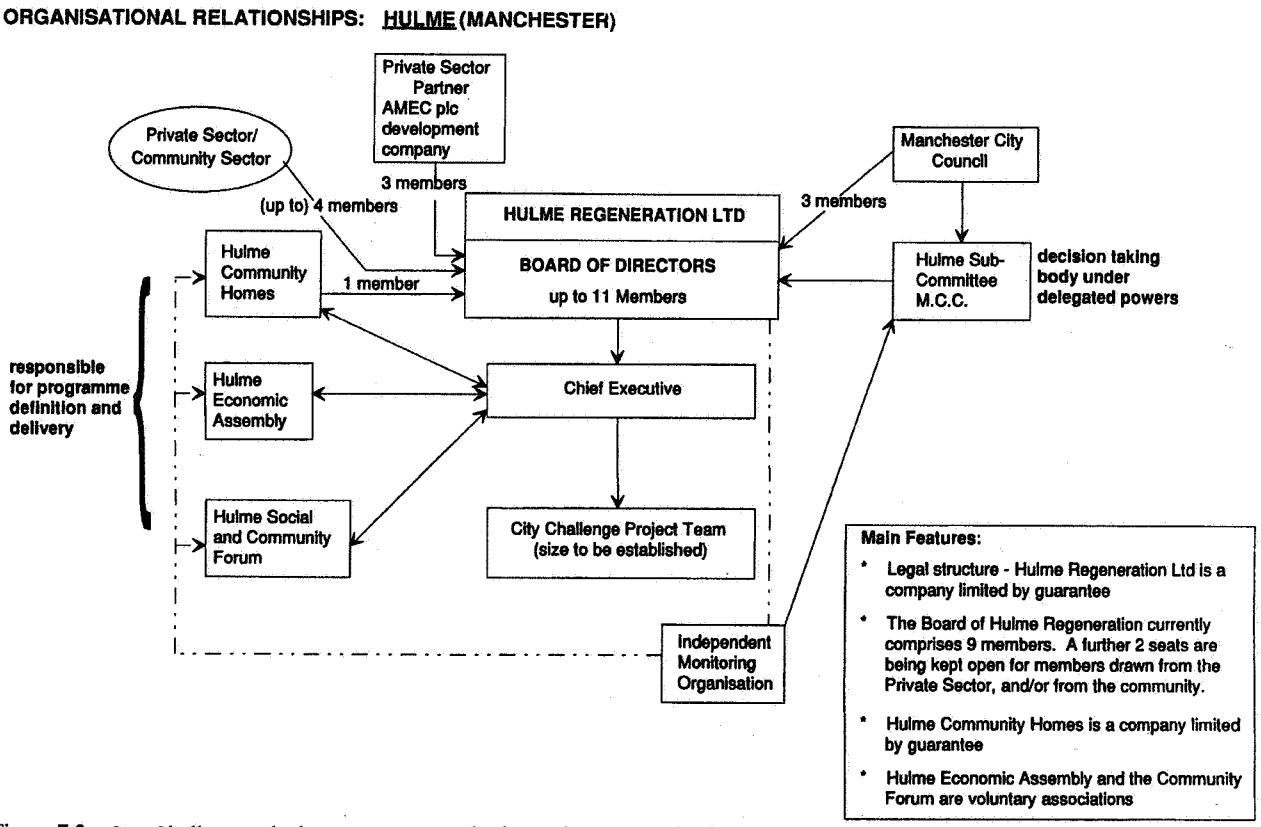


Figure 7.2 *City Challenge vehicles – organisational relationships: examples from round 1*
Source: *DoE (1992e)*

Perhaps most significantly the initiative promoted a transformation of local authority policy-making processes, opening up the process to other actors and institutions at local level, requiring the establishment of separate companies or boards to carry forward implementation of programmes. Its objectives therefore embrace both substance, a more integrated approach to economic and social development, and process, the establishment of acceptable partnership arrangements with business and community interests which institutionalises the direct influence of a wider set of actors.

The experience of City Challenge

Initially City Challenge was viewed with some suspicion. In particular the local authority associations regarded inter-authority competition for funding as divisive and unfair and the Labour Party in its City 2020 report advocated the abandonment of explicit competition and the return to a more needs-based approach. Academics criticised the 'winners take all' approach, the lack of transparency of the decision-making process, the strong possibility that uneven institutional capacity to compete among localities would deepen social and spatial inequalities between cities and the lack of democratic accountability of the new collaborative structures (Malpass, 1994; Bailey, Barker and MacDonald, 1995; Oatley, 1995a; Mawson *et al.*, 1995). However, other comment and evidence, particularly from the evaluation of the initiative launched by the DoE, emphasised the more positive features of the initiative, overcoming to some extent the weaknesses identified in previous urban policy initiatives.

Several aspects of the design of City Challenge have been met with approval. Giving responsibility to local partners to identify local needs and to come up with a strategy for meeting them was thought likely to produce more appropriate regeneration programmes than the more overtly central government imposed initiatives of the 1980s. 'Above all there has been a sense of purpose introduced at a time of reducing resources, high unemployment and low morale in the inner city and within the local government world' (de Groot, 1992, p. 208).

The flexibility to operate across policy and departmental boundaries provided a mechanism for achieving a long sought after co-ordination in the delivery of urban regeneration. The explicit community involvement was welcomed as offering a better prospect of more sustained regeneration through building local community capacity (MacFarlane, 1993; Davoudi and Healey, 1995b). The combining of physical redevelopment strategies with those aimed at social and community needs met the clearest shortcoming of the 1980s property-led approach exemplified by the UDCs. The commitment of a five-year programme of funding linked to detailed action plans and implemented by a dedicated agency offered the prospect of greater certainty and a counter to the administrative complexity of previous initiatives.

The interim evaluation conducted on behalf of the DoE concluded:

> City Challenge is the most promising regeneration programme so far attempted. There is widespread support from players across a range of sectors for most aspects of City Challenge. They see it as an advance on previous regeneration initiatives particularly because of its partnership basis, community and private sector involvement, strategic targeted approach, and its implementation by dedicated, multi-disciplinary teams.
>
> (DoE 1996, p. 1)

The DoE evaluation goes on to suggest that City Challenge represents something of a breakthrough in the approach to urban regeneration. Despite its perceived limitations as an allocation mechanism, competition had galvanised local interests to form effective cross-sectoral partnerships and to sign up to explicit resource commitments. The entry rules of the competition clearly required a collaborative approach to urban regeneration and the lure of a substantial prize was a strong incentive to the local authorities to motivate and involve people from all sectors. In a number of localities where public–private partnerships were hitherto little developed the competition fostered new relationships and alliances, particularly with local business. The competitive element also gave added impetus to inter-departmental working within authorities. Corporate teams emerged in authorities which had previously operated in traditional departmental fashion; in some authorities City Challenge was the catalyst for across the board reorganisation within the council (Russell *et al.*, 1996, p. 43). Therefore the impact of City Challenge in terms of new institutional arrangements and relations should not be underestimated. Beyond the need to present a collaborative front in order to win the competition, there is also evidence that partnership experience extended levels of trust and understanding between sectors offering the 'transformative' potential that partnership is said to bring to public and private sectors (Mackintosh, 1992).

City Challenge also sought new approaches to urban regeneration in terms of more innovative and imaginative proposals. Here the evidence is more mixed. The Department's evaluation suggests that a more strategic approach has been fostered and that genuine attempts to integrate across policy areas have been encouraged. The potential exists, for example, to link redevelopment proposals to training and employment in construction, with attention to overcoming labour market barriers through, for example, quotas for ethnic minority participation or childcare provision for mothers. Housing renewal activity can also provide local training and employment linked to energy efficiency and crime prevention programmes. Policy integration has presented real management challenges, but the evidence is that co-operation from the partners has led to genuine 'value added' (Russell *et al.*, 1996, p. 181).

However, other evaluations point to the failure in many cases to realise the potential for innovation and integration. Social objectives have often clashed with the free and fair competition objectives advocated by the private sector, undermining the potential for integrating social and economic objectives. Innovative projects seeking to achieve multiple objectives are also more risky than traditional projects focused on redevelopment and construction activities

(of housing or retail centres) which have been an important feature of most City Challenge programmes. The interim DoE evaluation confirms that projects to improve physical conditions – housing and commercial development and environmental improvements – were judged as successful, while enterprise development, employment and training were perceived as not coming up to expectations. Redevelopment and construction projects have the advantage of delivering visible benefits in a short period of time and fit well with an important programme requirement, to predict results in advance and produce tangible outcomes. However, opportunities were not always taken to link these projects with *local* training, enterprise creation or job creation. While valuable, housing or commercial development and redevelopment 'does not necessarily equal economic development, in the sense of a consistent strategy to build local enterprise and create employment for local people' (OECD, 1996, p. 7). The danger is that City Challenge and the successor SRB Challenge Fund 'remake the UDC approach on a smaller scale' (ibid.).

Furthermore, doubts have been cast on how genuinely innovative many City Challenge projects are. In a context of severe restraint on local authority spending, there is a great temptation to view additional money available through special programmes as an opportunity to overcome deficiencies in public services:

> Many of the activities being undertaken . . . are in reality part of the normal service provision you would expect the local authority to be providing on a regular basis. From the maintenance of public housing to child care facilities and adult education courses, the projects initiated by Challenge partnerships appear to be engaged in filling gaps left by national and local governments in their provision of services to individuals, enterprise and neighbourhoods . . . The programmes could be viewed not as experiments in urban policy but as experiments in Treasury policy.
>
> (Ibid., p. 14)

In addition, questions have been raised about the areas targeted in those authorities that were successful in gaining City Challenge funding. The emphasis on leverage encouraged the inclusion of areas and projects that provided some opportunities for commercial redevelopment offering a return to private investors. These areas tend not to be those with the worst problems of decline and deprivation and the greatest need. The need to generate private sector investment seems to have resulted in the inclusion in many bids of town centre shopping areas, which became the focus for redevelopment initiatives led by the Challenge partnerships (ibid., p. 5). While contributing to an improvement in the town centre environment and creating some new jobs in the retail sector such schemes are unlikely to make a significant impact on levels of male unemployment, which is a key concern in many urban areas. Also the single-minded and narrow spatially targeted City Challenge does not always enable a constructive engagement with city-wide strategies, especially where resources are being cut elsewhere.

Participants have also been critical of the 'red tape' and bureaucracy of project assessment and reporting requirements and the excessive scrutiny being exercised by central government. The insistence that the annual grant of £7.5 million must be spent within the year, with no provision for money to be carried over, takes little account of the difficulties of achieving an even pattern of spending in complex regeneration schemes (A. Stewart, 1993). City Challenge teams have faced difficult choices between alleviating immediate and obvious need (through housing and social programmes, for example) and taking advantage of major economic development potential (through flagship-type physical redevelopment). And different partners may well have different priorities, short or long term, social need versus economic development.

Finally, involving the community in the partnership process has not been easy. Aspirations for democratic participation and extensive consultation and involvement have clashed with the streamlining and efficiency objectives inherent in the structure of the programme. Lead times for bid preparation generally precluded extensive community consultation, and the inclusiveness of decision-making is easily compromised by the technocratic nature of the processes in practice (Davoudi and Healey, 1995b). Difficult questions have arisen about the representativeness of those community representatives co-opted on to City Challenge boards or consultative forums, and in defining what community empowerment means in practice. Experience varies, but the pre-existing level of community activism and organisation in different City Challenge areas made a significant difference to real, as opposed to symbolic, community participation (Russell *et al.*, 1996).

While offering a five-year funding commitment, it is still the case that the City Challenge programmes are time limited. Given the scale, complexity and fundamental nature of physical, social and economic problems in the most deprived areas of cities, a five-year programme of funding may contribute valuable improvements, but it is unlikely to 'turn areas around' in the way envisaged. Maintaining the momentum of regeneration will probably require a continued injection of public funds. With the demise of City Challenge the attention of the regeneration partnerships has turned to alternative funding sources through the SRB Challenge Fund or other national and European funding regimes, but there is a danger that 'bidding fatigue' will set in as regeneration teams engage in the now endless rounds of competitive bidding.

Competition also means that some areas lose, often after a significant expenditure of time and resources in putting bids together (Oatley, 1995a). Only 31 of the 57 Urban Priority Areas secured funding under City Challenge. Unsuccessful authorities are doubly disadvantaged because not only is the money for City Challenge top-sliced from other urban policy areas, but these authorities must also count the cost of failure in terms of the lost opportunities that £37.5 million over five years would have brought and the actual costs of putting the bid together. The costs to unsuccessful authorities include the direct costs of bid preparation, including officer time within the authorities and other organisations and fees paid to consultants engaged to help in the preparation of bids.

It has been estimated that the average cost of bid preparation for these authorities was in the region of £114,000, suggesting a total of just over £5 million spent on City Challenge by unsuccessful local authorities (Oatley, 1995a, p. 5). Beyond the direct costs there is the loss of money from other spending programmes, such as the Urban Programme and HIP, redirected into the City Challenge initiative.

The government would argue that money spent on bid preparation was not wasted, claiming that the benefits of City Challenge extend beyond the formal winners: 'it is not only the winners that have benefited . . . Everyone taking part will have gained from the new relationships they have forged with their partners' (*Planning*, 25 September 1992, p. 8). To what extent is this claim valid?

The evidence is that new partnerships formed in the context of bid preparation have proved 'remarkably resilient' (Hutchinson, 1995). In the majority of areas which failed in the City Challenge competition partnerships with the private sector survived, at least in the period immediately following decisions, and most successfully completed some projects, drawing on alternative urban funding sources. However, these comprise a set of fairly piecemeal physical redevelopment and housing renewal schemes and represent only a tiny part of the total package envisaged as necessary to achieve regeneration in the areas concerned. Some sort of public subsidy remained important to the completion of these schemes, and where alternative funding was not available it was reported that private sector interest quickly faded (Oatley, 1995a).

There is evidence that the introduction of City Challenge affected the attitudes and behaviour of local authorities in more fundamental ways. In a number of areas bidding for City Challenge was a contributory factor leading to internal organisational changes, though other pressures clearly push in this direction, imminent local government reorganisation, the extension of compulsory competitive tendering and promotion of an 'enabling role' across a number of policy areas. Where the Challenge mechanism was seen as an indication of things to come, failure in City Challenge could lead to some fairly fundamental rethinking of public–private relationships and roles. Our own evidence of the experience in an area (Bristol) which failed in both rounds of City Challenge suggests that both the process of bidding and the impact of failure were significant factors in shifting local political attitudes to the central government imposed agenda of partnership with the private sector and the accommodation of outside interests in the policy-making process (Oatley and Lambert, 1995). One of the Bristol participants concluded: 'I believe that the City Challenge exercise cemented many of the burgeoning relationships with the private sector that had begun rather tentatively during the previous few years. The nurturing of these relationships has led to a better understanding of the objectives, methods and values of each others' organisations' (Hooton, 1996, p. 125).

The reasons for failure in Bristol were concerned with the difficulty of putting together credible partnerships in a city traditionally characterised by

public–private sector conflict and distrust and the evidently ambivalent attitude of the local political leadership. Ambivalence stemmed from a number of factors: distaste for the competitive element; resistance to transferring control of regeneration to a separate body, with minority councillor representation; disagreement with the strong messages from central government that the bid should prioritise specific proposals for housing tenure diversification and road infrastructure improvements running counter to local priorities. However, in the period since 1993 the city council's stance in relation to the central government agenda of partnership and joint ventures in urban regeneration has taken on a more co-operative and pragmatic flavour. Partnerships in the city have proliferated (Snape and Stewart, 1995) and some success achieved in winning SRB and Lottery funds for regeneration projects. Failure (twice) in the City Challenge competition is widely regarded as something of a turning point in local institutional relations and arrangements.

The wider significance of City Challenge

The significance of City Challenge lies in its use as a test-bed for the comprehensive restructuring of urban policy that followed with the introduction of the SRB. Indeed the principle of competitive bidding, with success dependent on criteria similar to those included in City Challenge, has since been extended to more areas of public finance allocation, including mainstream local authority capital expenditure through Capital Challenge.

More fundamentally, City Challenge marked the beginning of a move away from earlier variants of neo-liberal policies and institutional arrangements in urban policy developed during the 1980s. Initiatives such as Urban Development Corporations, Task Forces and City Grant side-lined the local authorities, passing control to appointed bodies, and were driven by a property-led approach to regeneration, linked to the subsequently discredited notion of 'trickle-down'. Multi-sectoral partnerships have now become the new orthodoxy with wider goals, attempting to integrate economic, social and human capital development. The role of local authorities in the regeneration process has been explicitly acknowledged. The City Challenge approach addressed many of the limitations of previous urban policy initiatives that were identified in the evaluation of the Action for Cities programme commissioned by the DoE (Robson *et al.*, 1994), including the need for local authorities to play a significant part in enabling and facilitating the formation and operation of local coalitions.

However, behind this espousal of a 'new localism' in urban policy central government controls and influence remain significant. The government saw the introduction of competition into the allocation of funds as a way of stimulating local authorities to adopt a different approach to their urban problems both in terms of the substance of their proposals and the process by which proposals were produced and regeneration programmes managed. Competition was seen as the vehicle by which the philosophy of privatism would be

achieved, with control of regeneration programmes passed to agencies on which local authorities have minority representation and the role of local business interests in urban policy is institutionalised. Resources are conditional on the delivery of agreed outputs established through annual action plans, representing a form of 'contractualisation' of policy implementation (Stewart, 1996a). In these respects City Challenge can be seen as a more subtle attempt by central government to achieve its political aims for local government, namely, the continued dilution of local government powers; the promotion of a more commercial culture in local government via competitive bidding; and the explicit involvement of the private sector. Despite the change of government in May 1997 there are as yet few indications that the ethic of competition is being rejected, or that the role of the private sector will be diminished.

It appears that City Challenge added significantly to the impetus for institutional changes already in progress in many areas, and forced some recalcitrant local authorities to reconsider the agenda of partnership, opening up the policy-making process to outside interests. The requirement to build local coalitions was a crucial entry condition of City Challenge, as was the need to give such coalitions institutional expression in the form of companies, boards or trusts. Local elected councillors have seen their role diminish and a new set of partnership leaders, often from outside of the local authority, have emerged in many localities (see Stewart in Chapter 5 of this book). As an initiative that was partly intended to reorientate the priorities, working practices and political culture of local government City Challenge has had a good deal of success. It also conveyed a powerful message to areas not well placed to demonstrate the appropriate institutional capacity at the beginning of the 1990s that the penalties of recalcitrance were real and significant.

Interpreting the significance of the new local governance structures that have emerged in parallel with the new competitive culture is, however, problematic. The government clearly views them as a means of enhancing institutional capacity, gearing up individuals and organisations so that they can more effectively compete for private sector investment or for public funding programmes. More critical comment sees it as a process of marginalising local elected democracy and imposition of a central government driven agenda to ensure the accommodation of business, as opposed to social welfare interests, in the direction and content of regeneration strategies (Malpass, 1994). On some interpretations institutional changes of the kind associated with City Challenge represent a new inclusiveness in local governance, on others they represent a new form of closure.

It is also apparent that policy integration remains an elusive and complex objective in urban regeneration. As local government's own resources, powers and organisational capacities to deliver economic and social development to localities have diminished in the face of resource cuts and the shift of responsibilities to other agencies, so the construction of new alliances and coalitions has become necessary. However, whether this will deliver the kind of flexible and adaptive capacity needed to compete successfully is perhaps open to question. An alternative interpretation is that the fragmentation of local governance that accompanies the setting up of regeneration partnerships and consultative forums may actually undermine, rather than enhance, strategic capacity.

Much will depend on the extent to which the momentum of regeneration is continued beyond the funding period. Guidance has been issued to City Challenge partnerships on the preparation of 'forward strategies', with an emphasis on managing the transition from funding to self-sufficiency. However, questions remain about the sustainability of the new structures and working practices in initiatives that are time limited and geared to delivering measurable outputs in a fairly short time scale. As Mackintosh (1992) observes, public funding is frequently the 'glue' which holds partnerships together, and partnerships, particularly with the private sector, may be quite opportunistic in their formation and choice of projects. Sustained commitment is therefore likely to be dependent on the ability of localities to continue to attract funds through success in subsequent rounds of competitive bidding for urban regeneration funding. Community commitment to participation in urban regeneration is likewise vulnerable to funding sources being cut off in the future.

As a response to deep-seated and serious problems of economic and social stress in parts of cities, City Challenge has many strengths compared to the failed 1980s experience of property-led 'trickle down'. However, alongside the launch of the new initiatives there has been a marked decline in the resources available for urban regeneration. As Parkinson (1996) points out, the resources which are allocated to cities via special programmes are small compared with the resources which flow in or out through mainstream programmes. As the Robson *et al.* (1994) evaluation of urban policy indicates, cuts in mainstream spending on housing, education, social services and transport have far outweighed the resources channelled through the urban spending head. In addition, the money allocated to the special urban initiatives has been cut back; the bringing together of the different urban initiatives as part of the Single Regeneration Budget in 1994–95 was accompanied by a reduction in the total resources devoted to the constituent programmes of some £300m. And in subsequent years the SRB is projected to decline further. In this sense competition has created feelings of success for some, but also provides a new justification for rationing a declining amount of government support for the cities.

There are also questions concerned with the principle of competition as a way of allocating funds and as an alternative to one based on an assessment of needs. These include the dangers of 'bidding fatigue' and disillusionment setting in, especially in areas which lose out in the competitive process, with destructive consequences for local partnerships. As a process which relies substantially on discretion and judgement by central government on the quality of bids, competition is also vulnerable to accusations of, if not the actual exercise of, political patronage. In the Bristol case, where two successive City Challenge bids were unsuccessful, the cynical view locally was that the city was being punished for its previously conflictual stance in relation to central government

urban policies. The rather 'black box' process of bid selection, with open ministerial intervention, also fuelled rumours of last-minute substitutions of bids from more government-friendly local authority areas.

Finally, the introduction of market principles into the allocation of urban funding reinforced the process of competition among communities for jobs and public and private investment. This process is likely to exacerbate the inequalities that exist between and within localities through the redistribution of resources away from projects which tackle social deprivation and social exclusion, and through a syphoning of resources away from those areas with the greatest concentrations of social and economic problems that have little market appeal or command little political power (Lucas and Nevin, 1994). This problem has been aggravated by the SRB Challenge Fund and, in terms of looking forward to changes in urban policy under the new Labour government, poses important issues that need to be resolved concerning the scale of resources and the relationship of regeneration programmes to mainstream programmes, and the balance between need and opportunity in the allocation of urban funds.

8

Rural Challenge and the Changing Culture of Rural Regeneration Policy

JO LITTLE, JOHN CLEMENTS AND OWAIN JONES

Introduction

In 1994 the Rural Development Commission (RDC)[1] introduced Rural Challenge, an initiative aimed at addressing problems of economic and social decline in the countryside through the promotion of rural regeneration. The initiative comprises an annual competition in which six prizes of up to £1 million each are made to projects within designated Rural Development Areas.[2] Rural Challenge represents, in some senses, the introduction of a new style of funding for rural regeneration policy. Not only does it rest on the notion of direct competition between projects but it also requires the formation of partnerships for the preparation and implementation of schemes. In addition, the awards are dependent on the schemes bringing forward funding from other public, private or voluntary sources.

Although three annual 'rounds' of competition have now been held and 18 projects allocated funding, relatively little is known about the existence or working of Rural Challenge as a mechanism for rural regeneration within either policy-making or academic circles or in the wider rural community. Still less is known about the success of the initiative in tackling the problems it addressed. The aim of this chapter, therefore, is to provide some information about the background and operation of the Rural Challenge initiative. It will examine the intentions and expectations behind the initiative as perceived and articulated by policy makers. It will then go on to consider the experiences of project bidders at the local level in terms of the process of allocation and the direction of project funding.

The chapter provides an opportunity to discuss some of the more theoretical debates raised in earlier chapters of this book within a rural context. So, although the primary aim here is not the development of new theoretical arguments, the particular experience of the rural economy and society provides an important additional perspective on those debates. A focus on the detail of rural areas is useful in drawing attention to the different local patterns of

regulation that may emerge from particular forms of restructuring. Rural economies, as Goodwin, Cloke and Milbourne (1995) point out, do not fit into the neat shift from Fordism to post-Fordism commonly identified elsewhere. Nor, however, are they isolated from the rest of society to the extent that they have developed unique responses to global change. Consequently it is important that we think carefully about how both the principles and detail of regulation theory may be applied to rural areas and, similarly, how rural areas may inform the broad ideas behind the theory of regulation. Attempting to demonstrate *direct* links between theory and practice is always difficult and this case is no exception. At times it is more helpful to demonstrate theoretical discussion in relation to tendencies and patterns in the direction of the policy process rather than to specific moments or events in policy making and implementation. Such difficulties should not, however, dissuade us from attempting to identify and articulate the links where possible.

The chapter will start by locating rural regeneration briefly within a wider economic and policy framework. In so doing it will consider how understanding of recent economic and social change in rural areas has been informed by the application of regulation theory. The chapter will then move to an examination of the Rural Challenge initiative as an example of rural regeneration policy. This will demonstrate how many of the theoretical issues discussed in the context of regulation theory generally are relevant to the specific case of Rural Challenge. While the chapter does consider some of the more detailed experiences of projects generated within the Rural Challenge scheme, the main focus is on the broader direction and form of the policy.

Rural restructuring and the regulation debate

A common criticism levelled at those conducting research into the economy and society of rural areas has long been a perceived reluctance to take up and respond to new theoretical debates as they have been developed by urban geographers, planners and social scientists. Such a criticism can readily be applied to debates around regulation theory. Until very recently little had been written to suggest that our understanding of the economic and social changes taking place within rural areas might benefit from (and indeed contribute to) the application of some of the theoretical lines of approach that have been adopted within the framework of regulation theory. This reluctance stems partly from a belief that the sorts of major changes taking place within the political economy of urban areas – most specifically the broad shift from Fordism to post-Fordism – are difficult to identify within rural areas.

Recent work, especially (though not exclusively) that relating to the agricultural economy, has, however, sought to demonstrate the relevance of the shift from a Fordist to a post-Fordist regime to debates around the patterns and processes of capital accumulation at the local scale in rural areas. So, for example, the transformation of agricultural production, the domination of global food systems and the modernisation of family farming have been seen to represent the application of a Fordist regime of accumulation to the rural economy and society. Similarly, the subsequent 'crisis' that has been witnessed in agriculture is seen to represent the move to a post-Fordist regime of flexible production.

More importantly, beyond this direct relevance to the conditions of production in rural areas seen in the parallels drawn between agriculture and other 'urban-based' industry, it has been recognised that aspects of regulation theory can be very relevant in the analysis and understanding of wider patterns of social, cultural and economic reconstitution in rural areas – even where these do not fit neatly into the Fordism/post-Fordism model. According to Cloke and Goodwin (1992), this is particularly true in respect of certain 'middle-range' concepts linking political economy, social relations and cultural representation in some parts of the countryside. These authors suggest that the concepts of mode of regulation, 'societalization' and 'structured coherence' as used in the regulationalist literature, can offer new insights into the types of change taking place in the countryside and enable such change to be theorised in a 'more satisfactory manner than that allowed by the rather abstract and over-arching notions of Fordism and post-Fordism' – in relation not only to changes in production but in 'the living and thinking and feeling of life in rural areas' (1992, p. 324).

The use of these concepts is based on the notion that particular spatial forms of social relations and processes gain local coherence, hence enabling and sustaining social reproduction. Such local coherence, is achieved, according to various theorists (see, for example, Harvey, 1989c; Peck and Tickell, 1992; Jessop, 1995b; Goodwin and Painter, 1996), through the operation of local modes of regulation and societalisation – the local power structures and institutional practices and norms, for example, that are part of the process of regulation at a societal level.

Recent economic and social change in rural areas has had, as Cloke and Goodwin (1992) point out, major implications for the 'structured coherence' of different localities. The opening up of rural areas as new spaces of consumption and the consequent inmigration of large numbers of middle-class, often ex-urban, residents (referred to variously in the literature as 'newcomers', 'members of the service class', commuters, etc.) has served to break down existing historic and hegemonic blocs. The transformation of capitalist agriculture and the reconstitution of rural spaces from sites of production to sites of consumption have drastically altered existing power bases in rural communities, reshaping social relations and reordering political allegiances.

This profound shift in the 'coherence' of rural areas has been partly rooted in cultural change. The emergence of rural areas as places of (and for) consumption has involved those areas in the process of commodification – in other words (some) rural areas have become increasingly culturally valued spaces to which access is (largely) dependent on wealth. The appropriation of rural culture by the middle class, and the accompanying preferencing of supposedly rural social, cultural and environmental attributes in the construction and

reproduction of some form of 'rural idyll', underlies the commodification of rural spaces whether for recreation or residence.

Social, economic and cultural change in rural areas is inextricably bound up in the changes that have taken place in the formal political structures of power that exist in such areas and in the associated regulatory mechanisms. The sorts of social and cultural transformations that have shaped contemporary rural communities have brought with them a profound shift in local systems of power and influence. Such realignment of community power may be affected by broader changes in the nature of rural society but derives partly from internal changes that have their own history and dynamics. Alongside, or interacting with, these internal shifts in power are a series of externally imposed changes in the nature and direction of control in line with changing central–local state relations and political priorities.

The role of the state in shaping rural change is crucial to a regulatory analysis. National shifts in the direction of central activity, such as the promotion of the private sector and the reshaping of regulatory mechanisms to 'free up' the market under Thatcherism, have clearly had a major effect on the way change has occurred in rural areas. The ability of certain sections of society to take advantage of a 'rural' lifestyle is self-evidently largely dependent upon wealth – and consequently most accessible to those most advantaged by the dominant direction of economic activity. The state has thus had a major role in determining access to rural areas as residential, productive and consumptive spaces and, consequently, whose view of rurality is reproduced. The state has also, more directly, been responsible for the introduction of particular regulatory mechanisms – in the form of policy initiatives or institutional change – to rural areas. Clearly, such mechanisms, both individually and in combination, contribute to the overall mode of regulation.

While some limited progress has been made, then, in linking prevailing social and economic conditions in rural areas with broad shifts in the mode of accumulation and the mechanisms of regulation, this has tended to be at the conceptual level. Increasingly, however, we are witnessing calls for evidence of how the various aspects of regulation are played out at the local level. In this chapter we seek to add to this understanding of local forms of regulation through the analysis of a particular regulatory mechanism, Rural Challenge. Central to this analysis is the contention that in the local implementation of policy initiatives we can identify both the filtering through of particular centrally imposed forms and directions of regulation and the operation of local social, political and cultural characteristics as they inscribe and are inscribed by the policy process.

The first part of the discussion which follows will concentrate on the national basis of the Rural Challenge programme – drawing out key themes and issues in the formulation and operation of the policy. The chapter then moves on to consider examples from the implementation of the policy at the local level. Both sections make use of material gathered from policy documentation (RDC documentation and individual project statements) and interviews

with key actors from the RDC, local organisations and specific projects. As well as focusing on the experiences of the successful (i.e. funded) projects, the discussion also incorporates evidence from some initiatives which bid for, but were not allocated, awards under the Rural Challenge scheme. Such projects, it was felt, could potentially offer an important insight into the broader impact of *competition* in this style of funding and consequently very useful in the context of the particular form of regulation that is emerging in rural areas.[3]

Rural Challenge policy

Even a fairly cursory glance at the RDC policy documentation for Rural Challenge reveals the prominence of three themes which are central to regulation theory (as discussed in the literature by, for example, Mayer, 1994); namely; competition, partnership and private sector involvement. These themes have been picked up on here and form the basis of the analysis. They are not the only themes that could have been selected but they are themes that help to show the links between the broad theoretical debates referred to above and the detail of local policy direction. These themes demonstrate very clearly, we feel, how central ideas in the overall direction of regulation can be traced through to local circumstance and be seen to play an active role in policy formulation and implementation in specific places.

The whole notion of Rural Challenge revolves around the idea of competition and the general policy documentation and publicity material is saturated with the discourse of competitiveness. A key policy statement, the Bidding Guidance (RDC, 1995b), directed at potential entrants, talks consistently about 'winners' and 'prizes' in relation to Rural Challenge funds. In selecting these 'winning bids' ministers and commissioners (those making final decisions about Rural Challenge allocation) will be looking, so the guidance goes on to explain, for the *'six best proposals'* (RDC, 1995b, p. 1, emphasis added). These proposals will have already been judged at the local level where an initial round of competition will be held to ensure that only the 'best' bids go forward to represent the county at the national level. Clearly, the understanding of what constitutes 'best' in this context is a central issue to the allocation of awards – and one illuminated in the discussion of Rural Challenge bids as well as of the winners and losers, below. Identifying what the RDC and other local and national officers value in this context demonstrates the ways in which particular trends within the policy process (such as the focus on 'flagship' projects, for example) become translated into action in terms of the allocation of resources and the mechanisms of policy.

The unique feature of an overt competition was perceived by the RDC Rural Challenge programme manager to be one of the most positive attributes of the scheme. In discussion he reiterated the emphasis on competition that formed a main thrust of the policy documentation, explaining its relevance in the case of Rural Challenge. Such competition would, it was suggested, help to sharpen up the approach to rural regeneration and enhance the quality of the projects

coming forward for funding. The view put forward by the RDC was that only through a competition such as Rural Challenge would large, visionary schemes (by implication the 'best' projects) be formulated and advanced, and only through competition would a major impression be made on rural issues over a short period of time.

As with 'competition' so the notion of 'partnership' is centrally placed within Rural Challenge policy. The scheme itself is specifically designed to 'create new partnerships' in addressing rural economic and social problems and money is only allocated to projects which demonstrate the involvement of different partners. The partnerships, so the Bidding Guidance (RDC, 1995b) states, should be comprised of local organisations with a direct interest in the proposed scheme. The RDC does not, it claims, seek to stipulate which groups should be included in local partnerships, or who should be the lead partner (this is an issue which is pertinent to later discussion in this chapter). 'The partnership will reflect the nature of the bid and the key partners involved. The Commission (RDC) does not intend to prescribe a particular partnership model' (RDC, 1995b, p. 6).

Emphasis is placed on the suitability of the partnership and on its ability to deliver. The RDC also stresses that in constructing project partnerships there is an expectation of additionality. Bidding partnerships are asked to make clear in their proposals 'the benefits to be obtained through the partnership approach as opposed to partners acting separately' (ibid., p. 4).

The perceived benefits of a 'partnership approach' and its centrality to the operation of the Rural Challenge programme were also echoed clearly by RDC policy makers in discussion. According to the RDC Rural Challenge programme manager, the Rural Challenge competition has encouraged people with shared interests to come together:

> it would be a bit rash to claim that purely because of Rural Challenge people have started working together. What I would say, though, is that there is a groundswell of evidence of people being prepared to work together in a way that they haven't in the past and new partners showing interest in rural development. For example, at a local level the privatised utilities having been encouraged to talk to district councils about what they can be involved with: 'What can we do? Where do our priorities and your priorities match?' There's clearly evidence of that.
>
> (RDC Rural Challenge programme manager, 1995)[4]

There was a strongly articulated belief that the process of partnership formation was, in itself, positive – likely to lead to better working relationships between groups and individuals and, ultimately, to more successful initiatives coming forward. Again, from policy makers, there was a recognition of the different forms of partnership that were emerging and that no particular recipe for a 'successful partnership' could be uncovered. The form of the partnerships coming together was seen to vary from place to place – in Cornwall, for example, the lack of larger employers and private sector interests means that

partnerships are composed mainly of public sector interests while in the North West they are much more varied in membership.

The third major theme emphasised in the rationale and content of Rural Challenge policy is that of private sector involvement. The central aims of Rural Challenge include securing private sector investment with priority in project selection being given to bids which 'lever in the highest proportion of private sector investment' (RDC, 1995b, p. 2):

> Schemes will be expected to attract financial and other support from as wide a range of possible public, private and voluntary sources. Winning bids will normally be expected to generate at least an additional £500,000 investment from other sources. In general, those producing a better gearing than 1:0.5 will have a stronger case especially where the leverage includes a significant proportion of private sector investment. The degree of commitment given by other funding sources must be made clear by the bid.
>
> (ibid., p. 4)

This emphasis on private sector investment is recognised by policy makers as a new direction for rural areas – unlike in inner city policy where the concept of multi-sector partnership is seen as 'tried and tested' and recognised as the way forward. The wisdom or appropriateness of promoting such a direction in rural areas is, however, not apparently contested at the national RDC level. The emphasis is on getting rural areas to recognise the potential contribution of private sector investment and in its future importance. As the Rural Challenge programme manager stressed:

> Of course . . . the priorities (of private investment) are still quite alien to a lot of small rural district councils whereas the metropolitan councils recognise it's just the game they have to play to get resources. So I think we're way behind in terms of that cultural change, which means that it's not going to achieve its objectives overnight . . . Local people (in rural areas) need to recognise that there is some point in talking to the private sector.

The themes of competition, partnership and private sector involvement stand out, in both the documentation and in the views of policy makers, as essentially new areas for rural policy. At the same time they are seen as directions that have been developed in urban-based initiatives. There is a sense in which Rural Challenge is seen as rural policy attempting to 'catch up' with the urban. While this may be tempered by a recognition of the need to tailor individual initiatives to suit the particular characteristics of rural places, it does demonstrate a commitment to the themes outlined and a belief that the basic tenets of recent urban regeneration policy have been appropriate (at least to the political and economic climate). As well as reflecting these trends in urban-based policy, Rural Challenge is also a response to current concerns surrounding rural areas and societies – concerns that emerge from the sorts of changes taking place in rural areas as mentioned above (and interpreted in the context of the shift from Fordism to post-Fordism). The Rural White Paper (DoE, 1995) has highlighted some of the key issues and provided, in some ways, a stimulus for

action – particularly where that action is seen to be innovative. It may be possible, indeed, to interpret the introduction of Rural Challenge as an attempt by the state to ensure that the social mode of regulation continues to reaffirm current strategies of accumulation.

As mentioned above, other themes can be traced through the aims and directions of Rural Challenge policy; the role of the voluntary sector, for example, is clearly inscribed within the documentation. The policy also specifies a fundamental requirement among bidding partnerships for the delivery of 'match funding'.[5] It was felt, however, that the three themes identified above, as well as being the most dominant, provide a useful hook on which to hang a regulationist analysis of rural policy. They are themes that have been recognised within the analysis of urban-based modes of policy making in discussions of regulation and provide an important way of linking the development of rural policy with such debates.

The chapter now turns to an examination of the implementation of Rural Challenge through the initiatives themselves. Discussion in this section will draw on documentation and interviews relating to specific Rural Challenge projects. It will provide some background information about the projects themselves although in so doing it is not intended to be a comprehensive account of the 18 Rural Challenge initiatives funded thus far.

Rural Challenge projects

The range of initiatives funded under the Rural Challenge programme

Table 8.1 provides brief details of the Rural Challenge projects that have been successful in winning funding at the time of writing (late 1996). The table contains information not only on the subject of the projects but also on the make-up of the partnerships and on the other funding acquired.

In the view of the Rural Challenge programme manager the winning projects had been selected because they were the *best* projects. He felt that from the RDC's point of view there was 'some disappointment' following the selection of the first six winners that there was not a 'thematic bid' among them. He did agree, however, that the emphasis in the scheme on the demonstration of specific actions and definable outcomes tended to favour a 'bricks and mortar type project'. Other policy makers interviewed at the local scale suggested that the selection of projects was highly political (especially in terms of spatial distribution) and that it reflected the conflation of 'regeneration' and economic circumstance.

We now return to the three main themes identified above in the context of the different projects. Again it should be stressed that this analysis is illustrative rather than comprehensive – it draws on examples of the experience of different actors in the Rural Challenge policy process in relation to particular key points but cannot include a full discussion of each project.

Competition

There appeared to be a general belief among the project officers interviewed that Rural Challenge did represent a different form of policy in rural areas –

Table 8.1 Projects funded under the Rural Challenge programme, 1994–96

Location of project	Project proposal	Partners (lead partner first)	Total Value
Boughton Pumping Station, Nottinghamshire	Restoration and revitalisation of Boughton Pumping Station	Newark and Sherwood DC, Nottingham CC, Severn/Trent Water, Ollerton & District Economic Forum, Ollerton Town Council, Boughton Parish Council, Friends & Users of Boughton Brake	£2.5 million
Middleham, North Yorkshire	Development of the town's main industry of racehorse training to provide employment and training and to encourage tourism	Richmondshire DC, Middleham Trainers Assn, Askham Bryan College, English Heritage, Middleham TC, DTI, N. Yorkshire CC, N. Yorkshire TEC	£2.7 million
Bishop's Castle, Shropshire	Conversion of factory into business starter units and expansion of existing businesses	South Shropshire DC, Shropshire CC, Housing Corporation, Ransfords Ltd, A. Jones Ltd, Bishop's Castle Meat, Cox Homes, Severn/Trent Water	£5.5 million
Brookenby, Lincolnshire	Redevelopment and marketing of a technical park. Improvement of infrastructure, roads and street lighting to open up development opportunities	Community Council of Lincolnshire, Lincolnshire CC, West Lindsey DC, Sun-Binbrook Ad, Brookenby Management Co, Stainton-le-Vale Parish Council	£2.5 million
Miora, Leicestershire	The provision of craft workshops, retail units and commercial/office development. Establishment of a National Forest training centre	NW Leicestershire DC, English Partnerships, British Coal Enterprises, National Forest, Leicestershire CC, Leics TEC, East Midlands Tourist Board	£3 million
Watchet, Somerset	The development of a marina facility. The establishment of the harbour, esplanade and wharf as the centre of activity and focal point of the town	West Somerset DC, Somerset CC, Somerset TEC, Watchet Boatowners' Assoc., Watchet Town Council, Watchet Association of Commerce	£3.9 million
Stainforth, South Yorkshire	Town centre redevelopment including new work spaces. A package of training and education facilities. Sports and recreation provision	Stainforth TC, Doncaster BC, Stainforth Community Forum, Doncaster College, English Partnerships, Keepmoat Holdings Ltd	£3.6 million

Location of project	Project proposal	Partners (lead partner first)	Value and other funding
Jaywick, Essex	Infrastructural improvements including transport. The provision of workshops and training	Tendring DC, Essex CC, Essex Police, Essex TEC, Tendring Adult Community College, Jaywick Sands Freeholders Assoc., Capitalise Ltd, The Community Forum	£2.8 million
East Sussex	A programme of measures to regenerate the woodlands of East Sussex RDA	East Sussex CC, Forestry Authority, Timber Growers Assoc. Ltd, Timber Management Ltd	£3.2 million
Swaffham, Norfolk	Development of a business park and Eco Tech centre	Brekland DC, Norfolk CC, Norfolk TEC, Norwich City Council, UEA, Easton College, LRZ Bio Energy Systems, Real Architecture, City and County Developments Ltd, Fyfield Estates	£8.3 million
Cornwall and Isles of Scilly	Creation of 40 'Signpost' points at village locations to provide information for local people and tourists	REP Ltd, British Telecom, Devon & Cornwall TEC, ICL, Carrick DC, Penwith DC, Cornwall CC, West Country Tourist Board, Isles of Scilly Tourism, Kerrier DC	£2.8 million
Bakewell, Derbyshire	Development of new livestock market and rural enterprise centre	Dales DC, North Derbyshire TEC, Peak Park Joint Planning Board, N. Derbyshire Business Link, Nordeer Ltd, Medway Centre Community Assoc.	£5.2 million
Somerset	Provision of training and business advice and of recreation and sporting facilities for young people across Somerset	*	*
Rochdale Canal, West Yorkshire	A set of regeneration schemes based on the recently reopened Rochdale canal including a market area, interpretation centre and cycle way	*	*

Location of project	Project proposal	Partners (lead partner first)	Value and other funding
Great Torrington, Devon	Restoration of Victorian market to provide work space and visitor attractions. Improvement to local transport	*	*
Suffolk	Provision of housing, employment and training for young people in seven market towns in Suffolk	*	*
Ashby canal, Measham, Leics	Restoration of Ashby canal and provision of a new terminus	*	*
Saltburn by the Sea, Cleveland	Series of projects aimed at improving the tourism potential	*	*

* No information available at the time of writing.
This information is correct (as far as we know) at the time of writing but partnerships and levels of overall funding may have changed since then.

one that required new approaches and new skills among, in particular, public sector policy makers. A number of officers saw this as part of a changing culture of rural policy making to which the competition style of resource allocation is central. They talked of local authorities and other public sector agencies in rural areas gearing up for this culture of competition; developing expertise in the production of bidding documents and in some cases assigning a team to produce 'off the shelf bids' which could be tailored in terms of detail to specific forms of competition as they emerged (though this was to some extent in tension with the notion of particular competitions generating projects and partnerships). It was recognized that such an approach required local authority policy makers to alter their past practices and to adjust to different criteria of resource allocation. There was also a feeling that success in terms of bidding for Rural Challenge depended very firmly on the ability of local authorities and other partners to adapt to this changing culture. This perhaps indicates a degree of success of the policy in achieving its implied aim of achieving a reorientation of local authority economic development activity.

While project officers[6] interviewed were quick to note the existence of this new 'competition culture' as reflected in Rural Challenge, they were more sceptical about its appropriateness. As has been noted above, the use of competitions as a means of resource allocation in rural areas is seen as very positive by those involved in the central management of the Rural Challenge policy at the RDC. Some of the project officers echoed this view in discussing their own experiences and success in the scheme. In the case of the Watchet initiative in Somerset, for example, the project officer believed that the added 'pressure' of

the competition helped to galvanise the various interests and to promote a feeling of community among the partners. A better bid resulted from the extra energy, enthusiasm and commitment. He also felt that even the projects that were unsuccessful in the Rural Challenge competition gained from being in a competitive situation – their projects were more likely to survive and search for alternative funding having been 'geared up' to the process (this may later be tested as the Watchet partnership subsequently lost its Rural Challenge funding when the time scale involved in obtaining a critical harbour revision order delayed the start of works beyond the final date for take-up of that funding).

This view on the benefits of competition was not, understandably, shared by the Rural Challenge 'losers' that we visited. Those involved in these projects remained more sceptical about the whole process. One representative of an unsuccessful project from Devon reflected on the time, energy and resources that had gone into the preparation of the bid. She argued that most rural communities do not have the necessary range of expertise and experience or the resources available to produce the required bids. Moreover, the competitive process, she argued, was becoming increasingly 'professional' – dominated by flashy bidding documentation and novel ideas. This is a criticism that has been levelled at City Challenge in its time (Oatley, 1994; Davoudi and Healey, 1995b), but perhaps has a particular resonance in rural areas given the ascendancy of the middle class referred to above. There was also a feeling among unsuccessful bidders that while winners might see the process as intrinsically positive and rewarding, for those who did not succeed in gaining money the competition may serve to intensify the feeling of failure and prompt a very negative reaction.

The fear of failure was seen as particularly problematic in relation to the involvement of the local community. The scheme requires community participation in some form – a requirement which is generally considered by national policy makers to enhance the potential of individual initiatives, providing a more direct link between local needs and resource allocation. In terms of the competitive element of Rural Challenge, however, the involvement of the community can lead to disillusionment, particularly if effort and resources have been diverted from activity that would have produced results. Again, the smallness of the rural community means that considerable effort is often borne by few individuals. The major personal commitment by these individuals makes failure more difficult to accept. Project officers talked about communities having their expectations raised by Rural Challenge and the opportunities it might bring, spending months working up bids only to have their hopes dashed when the scheme was not selected.

Another area of concern expressed by project officers was that competition meant an inevitable departure from a needs-based approach to resource allocation. It was suggested that in awarding the Rural Challenge 'prizes', the competition was 'taking over' the process and obscuring need. Projects were being selected on the quality of the bid itself rather than on objective assessment of relative need. Project officers acknowledged the importance of appropriate and

robust initiatives together with the dangers of throwing money at needy communities without the necessary structures in place, but at the same time some were concerned that competitions such as Rural Challenge encouraged policy makers to think more about the rules and specifications of the awards and less about the real problems and needs of the communities. One project officer spoke of the tendency for bidding partnerships to get so immersed in the competition element of Rural Challenge that they forget what the purpose of the application was all about.

Others were concerned that rural areas most in need were perhaps least likely to be able to mount successful bids because of the relative absence and thin spread of potential voluntary sector and business partners, and of sources of match funding. Typically rural areas will have few firms which are not very small, and those of a significant size will often be managed from elsewhere. This limits the ability to form effective partnerships and to source private sector match funding (the Rural Challenge as a whole is in fact heavily dependent on the European Community for match funding). With a small population thinly spread it is often the case that a very small number of committed and capable voluntary sector leaders will be available. These may well be widely geographically dispersed and, particularly if the area is deprived, heavily committed with a multiplicity of responsibilities. One project officer described an area suffering from the closure of a local works trying to assemble a bid when the potential community leaders could be counted on one hand, and the remaining firms of any size on one finger.

Some of the policy makers discussed the ways in which projects had been tailored to the specifications of the competition, particularly in terms of partnership constitution. They talked of attempting to anticipate what judges were looking for in successful projects and adjusting their submissions accordingly. One of the losers put the failure of their project down largely not to the inadequacies of the proposal itself or, indeed, to the level of need in the community but to a lack of experience in this kind of competition and a failure to fine-tune their bid to fit in with the expectations of the Rural Challenge programme. None of the project officers of winning bids expressed any doubts in the worthiness of their own schemes. All those that we spoke to did, however, recognise that their success was based as much on their ability to compete on the terms of the Rural Challenge programme as on the relative needs of the community or area.

While aware of the tensions inherent in the funding of rural regeneration through challenge-style competition as compared to a needs-based approach, the project officers interviewed were resigned to this style of resource allocation as a model for the future. Some suggested that it is the only way of distributing finite resources in a climate of increasing demand. Others linked it more overtly to current radical Conservative political philosophy. They also believed, however, that even a new government further to the left would not change the present funding mechanisms in rural areas. As one regional RDC officer put it:

> Some parts of the country are much more switched on to the bidding process than others but it's much more a way of life now. There is a recognition that even if the government changes this form of competitive bidding is likely to remain as the way resources are allocated because resources are scarce. . . . People will actually become more expert at putting together these bids for the various challenges. There is a learning process for everybody, it's a relatively new process for everybody and people will learn year by year.

The view that competition is here to stay seemed firmly entrenched at both local and national levels. There is little to be gained from 'opting out' of the process and much to be lost. Any reservations among both winners and losers certainly had not resulted in an abandonment of the process itself, although some in both camps had retreated to the extent that they were more circumspect about the amount of resources they were willing to commit to the bidding process. Generally there is a commitment to try to understand how to succeed under the terms set out. 'The temptation is to say . . . oh, competitions . . . you get regulations and guidelines and hoops to jump through . . . [but] at the end of the day, what would have happened if it hadn't been there? And I can't imagine that we would be so far advanced as we are now' (North Somerset District Council Economic Development Officer).

There is a lot more that could be discussed here about the 'competition culture' that has emerged with (and as part of) the introduction of the Rural Challenge programme. From the documentation produced, the terminology used and the values and ambitions expressed, it is apparent that rural policy making and resource allocation have undergone something of a sea change. This change is, as argued above, both an influence on and a product of the contemporary social mode of regulation occurring in rural areas and, as such, critical to our understanding of not only rural policy making but also the broader economy and society of rural areas. Clearly it is not a change that has appeared out of the blue with the adoption of Rural Challenge. Rural Challenge can be seen as one part of a shifting culture of policy making but one with a significant and timely role in the process of change, that shift in the 'coherence' of rural areas referred to earlier.

The chapter now turns to the other themes marked out as important to the discussion of Rural Challenge and rural regeneration policy, namely partnership and private sector involvement.

Partnership

The very positive promotion of the benefits of 'partnerships' identified within the Rural Challenge documentation and the views of the national managers was tempered at the level of the individual projects. Different project officers talked about the particular local difficulties in establishing and maintaining partnerships – often under rather unnatural circumstances. While the benefits of 'joint working' were often recognised, these seemed largely surpassed in the eyes of those we spoke to by the complications of bringing together people with very different backgrounds, expectations and experiences.

The Rural Challenge 'rules' require 'partnerships' to be made of public, private and voluntary (usually referred to in terms of 'community') organisations in any scheme wishing to bid for funding. In reality, as most project officers stressed, the preparation of the bids normally depended on the public sector element of the partnership. As Table 8.1 shows, in only one case is a non-public sector agency the lead partner. In most cases, while private sector interest might be forthcoming, it rarely extended to carrying a major load of the preparation of bids – in most cases the resource costs were too heavy for any private sector agency to commit itself to on a speculative basis. The voluntary sector, one Rural Community Council member suggested, was too small and diffuse in rural areas to provide the necessary expertise, time and money to front a Rural Challenge proposal. For the projects that we talked to, then, a bid *led* by an agency other than a public agency was unlikely to be feasible. An additional factor here was the way in which the Rural Challenge funding is actually dispensed once an award is won. These monies are paid retrospectively and are contingent on the completion of staged works and the 'partnership' providing satisfactory documentation to the RDC. This almost inevitably means the partnership will have to enter into contracts committing itself to payments in advance of receipts from the RDC, for which in turn one or more partners (usually the public sector) will have to provide bridging funding, and if the worst occurred pay the contracted sums if Rural Challenge funding were not forthcoming for any reason. Again, because of such requirements, only in exceptional circumstances will a private sector agency take the risk of being the lead figure in any bidding partnership.

On the organisational side, some of the winning and losing project officers spoke of the time-consuming nature of establishing partnerships. There was a widespread feeling that the most successful working arrangements were most likely to be achieved where some sort of previous joint practice had existed. This would reduce the time and confusion of establishing completely new partnerships and leave groups free to concentrate on putting bids together. One local government economic development officer who had been involved in a losing bid in Dorset stressed that when the Rural Challenge scheme was first introduced local agencies, public and private alike, had been very much at sea over the formation of local partnerships. She spoke of the confusion that had characterised meetings and the problems of trying to mediate the various interests of the different 'partners'. To some extent this was due to the lack of previous experience of this kind of working, she believed, and in future years the fact that agencies knew what was expected of them would help to ease the formation of successful teams. In a similar vein the successful Somerset bid from Watchet was put forward by a team of public and private sector agencies that had been established prior to the introduction of Rural Challenge. A group of people comprised of local authority economic development officers and members of the community committed to trying to instigate some form of economic regeneration in the town had already been working together. The programme and the possibility of making a bid encouraged them to formalise

the partnership and to look for further involvement. The fact that the basis of a working relationship had already been established between groups was seen as critical to the scheme's subsequent success in the Rural Challenge competition.

The problem of partnerships collapsing after they had been set up was voiced by a number of the project officers interviewed. There was concern that in some cases partnerships had been formed rapidly and without a great deal of thought about how they would work together if the Rural Challenge bid was actually successful. Some talked of 'paper partnerships' put together on paper but with little idea of what joint working would actually mean. One local government officer put this down again to the lack of experience in this kind of working in rural areas and also to the sheer number of disparate agencies operating in the rural sphere. There was a definite sense that putting together successful and lasting partnerships was *at present* problematic for rural communities. Urban communities, it was felt, had a greater range of experience to call on and a much more finely tuned system of initiating partnerships.

As with the whole notion of competition, project officers (even those who perceived fundamental tensions between the sectors) seemed ready to accept that 'partnerships' were now an expected way of working and that future resource allocation in rural areas would (at least in the short to medium term) inevitably require the joint working of public, private and voluntary sectors. Again it was a case of 'accepting the inevitable' and recognising that the requirement for partnerships was becoming so much a part of resource allocation in rural communities that to resist it was not an option. Those we spoke to saw the issue, then, as one of honing their ability to create effective partnerships within the terms required by the various funding programmes.

As noted above, there were positive as well as negative experiences and expectations associated with joint working. Some optimistic views were expressed about the possibilities that co-operation and shared aims could offer to the process of regeneration. It was also argued that the work of putting together a partnership was beneficial to rural policy makers even where that partnership failed in its bid for funding. Unsurprisingly, however, this view of partnerships as somehow character forming and likely to endure whatever the results of competition for funding was expressed by the successful projects and the Rural Challenge central managers rather than by the losers.

Private investment

The experiences of the individual initiatives in respect to the involvement of the private sector in many ways mirrored that of partnership formation; a recognition of the potential advantages of incorporating the private sector was accompanied by reservations about setting up and maintaining relationships. As noted in the discussion of partnerships, the risks of projects failing to attract funding is a problem in terms of securing private sector investment – especially at the early stages of a bid. Table 8.1 lists all the partners involved in each bid (at the time of the award) and it is clear that the public agencies substantially outnumber the private in all bids. One project officer we spoke to suggested

that the emphasis on large capital projects noted earlier is encouraged by the need to involve the private sector in bids. She felt that it would be very difficult to generate private sector interest in some of the local-level community projects that were coming forward from rural people themselves.

Several of the project officers drew attention to the size of the private sector in rural areas, arguing that successful private–public partnerships were difficult to generate as there are just too few private companies and agencies operating within the rural sphere. What organisations did exist were too small and diffuse to make a major impact. It was recognised that this was also a function of local history, with some areas having a much more active and buoyant private sector than others. For example, the RDC Rural Challenge programme manager spoke of the problems of involving the private sector in Cornwall, of a 'culture gap' existing between Cornwall and the rest of England, and a prevailing belief that there *is* no Cornish private sector other than English China Clays.

The belief that private sector involvement would create dynamic new partnerships committed to original solutions appeared to be receiving a mixed response. Certainly the introduction of Rural Challenge had stimulated some new working partnerships in some areas. The assessment of the value of the contribution of the private sector to such partnerships remains, however, uncertain. In the majority of cases it seemed that private agencies/businesses were more likely to get involved in projects once they were up and running, and only then with limited interest. The effort of trying to generate private interest in general was felt to be very time consuming and almost invariably seemed to end up with the public sector initiating schemes and co-ordinating the various contributions. Cynicism was expressed by particular projects where the perception was that the private sector flitted in and out of the project as they felt necessary. One project officer talked of the way in which at one particular time in the bid preparation private investment 'went cold' with 'people want[ing] to sit on the fence until they know it will be a success and then they will join in – only then will we get private investment'.

The case of Watchet illustrates some of the problems in maintaining private sector support generally in Rural Challenge schemes:

> we were approached by a consortium of businessmen who had experience of (a) marina at Plymouth and they said they felt they could help us regarding establishing a marina. That was very timely because they were able to help us with the Somerset selection process – they provided that missing 'bit'. We got the impetus going . . . subsequently, somewhat ironically, they are no longer in the picture because as the thing evolved they were talking about a commercially run marina with shares and everything – that would be their interest – whereas what came out was a proposal for a community berthing based on the existing Watchet boat owners who were one of the partner groups.
>
> (Economic Development Officer, West Somerset DC)

Such views and experiences may reflect to some extent inexperience among the public and voluntary sectors of the nature of deal-making in the private

sector rather than, or in addition to, any underlying divergence of interests or values between the sectors. The bringing together of these disparate worlds may be common to rural and urban policy, but the types of local power structures on which these policies operate may be seen to differ.

Conclusion

This discussion of Rural Challenge has focused on three specific themes that stand out as highly significant to both the operation of the initiative and the concept of rural regulation. Through these themes of competition, partnership and private sector involvement we have shown the emergence of new directions in rural policy making – directions which link very closely to some of the pervading practices of urban policy making and which have been formative within the broader process of regulation.

As the chapter has illustrated, questions do need to be asked, however, about the workings of the policy and how far specific initiatives at the local level actually reflect the directions and assumptions of the documentation. The issue of competition has been identified as central in both national policy directions and local action. The themes of partnership and private investment, however, while important tenets of the Rural Challenge policy itself, appear less convincing in terms of the local initiatives. The project analyses here have shown, for example, how the formation of partnerships remains strongly underwritten in many cases, practically and financially, by the public sector. In addition, the wish for private sector involvement, articulated in the discussion and negotiation of policy at the central level, is not easily initiated or sustained in rural localities.

In drawing on these key aspects of regulation, some similarities between trends in rural and urban policy making have been identified. One of these concerns the discourse of policy making and the changing culture of resource allocation. As with City Challenge in its day, Rural Challenge is very much about the development of 'flagship' projects. The documentation connected with the scheme talks of innovation and originality – ideas that are picked up in the themes discussed in terms of the creation of new partnerships, exciting and unique solutions and entrepreneurial activity. The changes initiated in the name of Rural Challenge are not seen as limited only to this scheme and while policy makers and project officers alike recognised the likely limited lifespan of Rural Challenge in its current state, they believed the form of the policy and its surrounding discourse and culture to be more enduring.

Within the discussion of the main themes and in the selection of examples, an emphasis has been placed on the extent to which Rural Challenge initiatives demonstrate similar trends, priorities and principles in policy making. Such similarities relate to the underlying mode of regulation within which current policy is formulated and implemented. Despite uniformity of documentation, the policy becomes uneven through interactions with local situations and local processes of application. This is particularly so within the Rural Challenge process because the policy claims deliberately to leave space for local characteristics and then enacts a process of competition between them (though that is not to deny the centralised decision-making process and its ability to promote or stifle particular local features or aspirations).

This chapter has concentrated on several themes as relevant to the role of Rural Challenge policy as a regulatory mechanism within the rural environment. It has tried to show how our understanding of rural regeneration and policy making can benefit from the application of a range of theoretical debates highlighted throughout this book. It has also demonstrated the dangers of reading too much from the broad theoretical debates and emphasised the importance of local level analysis to explore the relevance and appropriateness of current theoretical and conceptual fashions to the detail of local situations.

Notes

1. The Rural Development Commission is a quango charged with the development and implementation of policy for the economic and social development of rural areas of England.
2. Defined on the basis of indices of relative deprivation.
3. Interviews were held with the Rural Challenge project manager (i.e. the manager of the scheme overall) and with project officers from the various Rural Challenge initiatives in operation. Some personel involved with 'losing' bids were also interviewed.
4. It is interesting to consider, in relation to these comments, that one of the criticisms of the public utilities put forward to justify privatisation was that they were insufficiently focused on the delivery of their product, having accumulated over time interests and practices which detracted from efficiency.
5. That is, the scheme would bring in funding from other parties which would otherwise be unavailable and which would complement that from Rural Challenge grant (the relative proportions of these two elements, or leverage, being a key criterion against which bids are assessed).
6. By which we mean members of staff of individual bidding or successful partnerships.

9

Restructuring Urban Policy: the Single Regeneration Budget and the Challenge Fund

NICK OATLEY

Introduction

On 4 November 1993 the British government announced it was to establish a new Single Regeneration Budget (SRB) and (integrated) Government Offices for the Regions with effect from 1 April 1994. This announcement heralded the most significant reorganisation of urban policy and government regional office structure since the 1978 Inner Urban Areas Act. The SRB brought together under one budget 20 existing programmes for regeneration and economic development totalling £1.4 billion in 1994/95 (for projected spend on the constituent elements of SRB in 1994/95 see Table 9.1). Whilst the SRB honoured ongoing commitments from the 20 previously separate programmes, a proportion of the total annual SRB budget was made available for new regeneration schemes designated under 'the Challenge Fund'. The new Government Offices for the Regions have integrated a range of government functions at the regional level including Environment, Transport, Trade and Industry, Employment and Training. Most regions also have representatives from the Home Office and the Department for Education. The role of the new Government Offices is to manage the SRB and Challenge Fund element and provide a more comprehensive and accessible service. The measures were presented as part of new arrangements to simplify the way government supports regeneration, economic development and industrial competitiveness (DoE, 1993b).

The Challenge Fund consolidated the shift away from earlier phases of regeneration initiatives by building on new practices and procedures first introduced by City Challenge. The Challenge Fund allocated limited resources through a competitive process and introduced integrated multi-departmental funding and Training and Enterprise Council/local authority/business leadership co-sponsorship. There was a new emphasis on initiatives that encouraged competitiveness (of industry and localities) and which attempted to link the mainstream economy and deprived communities. A distinct feature of the Challenge Fund was its recognition of problems of poverty, isolation and

Table 9.1 Programmes contributing to the Single Regeneration Budget (1994/95 spend)

Single Regeneration Budget Programmes	£m
From the Department of the Environment	
Estate Action	373
English Partnership	181
Housing Action Trusts	88
City Challenge	213
Urban Programme	83
Urban Development Corporations	286
Inner City Task Forces	16
City Action Teams	1
From the Employment Department	
Programme Development Fund	3
Education Business Partnerships	2
Teacher Placement Service	3
Compacts/Inner City Compacts	6
Business Start-Up Scheme	70
Local Initiative Fund	29
TEC Challenge	4
From the Home Office	
Safer Cities	4
Section 11 Grants (part)	60
Ethnic Minority Grant/Business Initiative	6
From the Department of Trade and Industry	
Regional Enterprise Grants (plus English Estates, to be subsumed into English Partnerships)	9
From the Department for Education	
Grants for Education Support and Training (part)	5
Total: Single Regeneration Budget	**1,442**

community breakdown in rural areas and of industrial decline in non-urban areas affected by iron and steel and coalfield closures and the vulnerability of small towns dependent on one or two major employers. The Challenge Fund offered the opportunity of tackling problems in such areas not previously eligible for urban programme assistance. The abolition of targeting of urban regeneration resources on priority urban areas based on levels of need, and the introduction of an open competition was a radical departure from previous methods of resource allocation and has effectively 'de-urbanised' urban policy.

The context for this bold shake-up of regeneration policy in the early 1990s was the dual economic and political crisis stemming from the transition from Fordism. The former government had been searching for the elusive local 'fix' to the urban crisis, involving fundamental changes in the institutional and policy frameworks of the Keynesian welfare state. The Single Regeneration Budget was the last attempt by the former government to establish an 'institutional fix' in response to persistent problems of urban decline and social disadvantage.

The Single Regeneration Budget Challenge Fund and the Government Offices for the Regions: a radical reorientation of urban policy?

Although the SRB has been heralded as a radical new approach to regeneration in this country some of the claims over the nature and extent of this transformation are contested. For example, the government claimed that the SRB would introduce a 'new localism' into the way local problems were addressed, although some commentators argue that it has extended central government control through an authoritarian decentralism executed through the contract culture. A new enabling role for local authorities has been introduced, which has been welcomed, but at the same time it has been pointed out that a 'new magistracy' has been created which has continued the trend towards the privatisation of the process of urban policy formulation and implementation through arm's-length bodies established to deliver Challenge Fund schemes. Some point to the creation of multi-sector partnerships as a distinct feature of the SRB although others argue that partnerships were widespread prior to the SRB and that the requirements for bidding for funds merely formalised the situation. There is also dispute over whether the initiative has achieved an integrated approach to the multidimensional problems of decline and disadvantage or whether it has shifted policy further in the direction of economic aims.

Some have even gone so far as to say that the SRB is reminiscent of policies introduced over twenty years ago, describing the changes introduced by the SRB as '1970s Revivalism' (Wilks-Heeg, 1996, p. 1271). The basis of this claim is that both the 1977 White Paper on the Inner Cities and the SRB can be seen as attempts to impose managerial order on urban policy following a period of controversial, and largely failed, experiments. Second, the changes in policy in the 1990s have revived earlier ideas about both principles of policy and how inter-governmental and inter-agency relationships should be managed in seeking to regenerate areas.

The following sections will explore the extent to which, in principle and practice, the changes introduced through the SRB represent a major realignment of policy. The analysis focuses on socio-institutional structures and processes and deals with the patterns of interest representation in policy or the representational regime; changes in the internal structures of the state and processes governing relations both between central and local government and both levels of government and other agencies; and the patterns of state intervention including both the aims and substance of policy and practice.

Has the SRB brought about a shift in the patterns of interest representation in urban regeneration?

It is widely acknowledged that governance practice and structures have been shifting since the mid-1970s and have accelerated during the last ten years (Cochrane, 1993). The restructuring of local governance involving the reduction in the role and power of local authorities and the increased involvement of business in the process of urban governance has been a specific aim of government since 1979. Peck (1995) has demonstrated how, under successive Conservative governments, the private sector has been working through and with agencies deliberately established by central government in order to co-opt and empower 'business interests'. The range of such bodies has increased markedly since 1979, contributing to a reconstitution of business politics and the institutional apparatus through which these politics are articulated. Consequently, the influence of business on policy agendas has increased over this period through local business leadership on bodies such as UDCs, TECs, local boosterist alliances and business elites and, more recently, regeneration partnerships developed in response to Challenge Fund initiatives rather than through long-established employers' associations such as the chambers of commerce and the Confederation of British Industry. By the end of the 1980s, then, many of the welfare state forms of the 1970s had been dismantled (e.g. the National Economic Development Office (NEDO) and the Manpower Services Commission (MSC)) and replaced with structures supportive of a new enterprise state (Cochrane, 1993; Peck, 1995).

The SRB Challenge Fund contributed to these changes by demanding the creation of new structures of local interest representation and forms of leadership. The institutional arrangements that have emerged have been likened to bargaining systems characterised by more co-operative styles of policy making in which the local authority moderates and initiates co-operation between a wide range of functional interests at the local level. This non-hierarchical style is appropriate for dealing with the intersecting areas of interest of the different actors involved. Importantly, the process of bargaining and decision-making takes place outside of traditional local government structures (Mayer, 1994). The 1990s can, therefore, be characterised as a period of multilateral partnerships in regeneration based on negotiated transactions in contrast to the bilateral partnerships of the 1980s and the old style corporatist forms of the 1970s (Lowndes *et al.*,1997).

Although it was clearly the government's intention to open up the political process and to create institutional structures in which the power and influence of private sector interests would increase through the Challenge Fund, there has been a remarkable resilience in the old structures and patterns of (municipal) domination. Steps were taken by central government in the second round to prevent the municipalisation of the bidding process by strengthening the need to demonstrate that other relevant interests in the private and public sectors, and in local voluntary and community organisations, including ethnic minority and faith communities, have been fully involved in the preparation of bids and would participate in their implementation if successful. An attempt to strengthen the role of business interests in the Challenge Fund was made by noting the opportunities presented by the Private Finance Initiative and joint venture companies in round 2 bidding guidance (DoE, 1995a, p. 4; Environment Committee of the House of Commons, 1995a, p. 128).

The new urban corporatist literature draws our attention to issues of continuity and discontinuity in political structures and practices (Dunleavy and King, 1990). For example, Shaw's (1993) analysis of the North East presents a region with a long history of corporatist political structures, dominated by a local elite drawn from the labour movement, local and regional private sector interests and government agencies. Many of these can now be found on the boards of partnerships established in connection with the SRB. Shaw (1993, p. 253) argues that local corporatist institutions run by business, professional and public sector elites have dominated the local political scene more or less continuously for at least 30 years, leading him to observe that 'it is the continuity in structures, personalities and policies that needs to be explained as well as the changes'.

It is clear that, on the surface, there are threads of continuity with past forms of partnership but significant changes have occurred in the remit and composition of local institutions and the extent to which different sectoral interests have been able to maintain or expand their influence (Bailey, Barker and MacDonald, 1995, p. 24). Notwithstanding Shaw's point about the composition of local elites, even in cases where the membership of local elites has not changed significantly, the balance of power between these elites is likely to have altered (Cochrane, 1993, p. 103).

For example, Stewart's (1996a, p. 123) analysis of the urban regime of Bristol demonstrates that although there has been a remarkable continuity in the local elite in Bristol one can observe a number of significant changes in the composition of the elite and 'there is now a more complex and structured set of interactions between public, private, and non-statutory actors, interactions characterised by greater public visibility, larger numbers of participants, and clearer structures for "formalising the informal" '. There is widespread support for the view that the Challenge Fund has acted as the catalyst for co-ordinating and formalising previously *ad hoc* arrangements between different agencies (Mawson *et al.*, 1995, Table A12; Hutchinson, 1997).

In practice, although local authorities have played an important role in the leadership of bids, their influence has been diluted by the widespread involvement of TECs, the private sector and other organisations. Training and Enterprise Councils were represented in 76 per cent of all bids and the private sector in 83 per cent of all bids. A significant proportion of bids were led by organisations other than local authorities (20 per cent in round 1 and 25 per cent in round 2) and a substantial proportion of funds have been distributed to partnerships where the local authority is not the lead or joint bidder (see Tables 9.2 and 9.3).

Although concerns have been expressed over the quality of the involvement of certain groups (Mawson *et al.*, 1995; National Council for Voluntary Organisations, 1995; Black Training and Enterprise Group, 1995; Association of British Chambers of Commerce (Torquati, 1995); Hall *et al.*, 1996, p. 57; Chartered Institute of Housing, 1996), the range and number of organisations represented on SRB partnership bodies are nevertheless unprecedented and impressive.

Table 9.2 Bid leadership in rounds 1 and 2 of the Challenge Fund

Lead	Successful bids R1 (%)	Successful bids R2 (%)
LA	53.2	54.1
TEC	22.9	8.7
Joint	5.5	12.8
Voluntary sector	4.9	8.1
Private	7.4	4.1
Other	6.4	12.2
Total	100.00	100.00

Source: DoE Database, 1994, 1995, quoted in Hall *et al.* (1996)

Table 9.3 Allocation of total Challenge Fund by lead bidder

Lead	% of total allocation R1	% of total allocation R2
LA	60.0	67.2
TEC	11.1	4.3
Joint	15.3	17.7
Voluntary sector	3.1	1.7
Private	8.1	1.4
Other	2.4	7.7
Total	100.00	100.00

Source: DoE Database, 1994, 1995, quoted in Hall *et al.* (1996). *Note:* Totals are subject to small errors due to rounding

In the first round of bidding for SRB Challenge Funds 469 bids were submitted from local partnership bodies, and (outside of London) 2,300 organisations were listed as main partners by the GORs (Mawson *et al.*, 1995, p. 90). There is no standard SRB model of this coalition of interests as the composition of the partnership will reflect the content of the bid and characteristics of the area or groups at which it is aimed. However, most partnerships achieve multilateral representation with roughly one-third representation between the public, private and community/voluntary sector. The second round had seen greater consultation, in general, and a greater emphasis placed upon private sector and TEC involvement in partnership formation, reflecting the importance of economic development and employment objectives within the Challenge Fund and the guidance of the DoE to more actively involve partners in the bid preparation process (Hall *et al.*, 1996, p. 63).

There is some debate over whether these new partnerships have provided the opportunity for a new inclusive or pluralistic form of politics, formalising the role of the community and voluntary sectors in debates that previously they would have been excluded from or whether these arrangements have led to a new form of closure with the emergence of new elites lacking accountability in any democratic sense.

Although formal representation of interests on boards and local partnerships can be important in influencing the nature of bids and subsequent practice there are also other processes at work that influence the balance of

interests. One important process that has effected a much more subtle, but no less significant, change in local governance has been the adoption of the business model of organisation and practice, including management-orientated language and attitudes in local government (Cochrane, 1993, pp. 106–10). Since 1991 we have witnessed the transformation of the public sector through the incorporation of many of the practices and procedures of the enterprise culture. Arm's-length bodies responsible for implementing the Challenge Fund Delivery Plan and the contractualisation of regeneration activity have contributed to this shift in the balance of power and representation of interests.

In summary, urban governance has undergone significant changes during the 1980s and 1990s in terms of institutional structures, patterns of interest representation and the ethos of practice which have affected the way in which power and influence have been exercised at the local level. Particularly important in urban policy in the 1990s has been the way in which the competitive Challenge Funded initiatives have required the formation of multilateral partnerships, which has reinforced the tendencies towards marketisation within the public sector and reduced the strength and autonomy of local political forces (Stewart, 1996a, p. 134). In analytical terms this trend might be described as the emergence of 'private interest government' (Streeck and Schmitter, 1985), the construction of a 'postcorporatist' state, the development of a new 'associative order' (Schmitter, 1985) or a shift in the 'mode of political rationality' (Offe, 1985). These new institutional forms, born out of the imposition of a competitive form of urban governance, with their ensemble of norms, social networks and patterns of conduct have contributed to the reorientation of the local mode of regulation in the mid-1990s.

In practice, the balance of power between sectors will often reflect the origins of the establishment of the partnership (top-down or bottom-up) and will be determined by the outcome of the bargaining between the membership, which in turn will be influenced by the benefits, and access to resources and influence, that each stakeholder brings. The pattern of interest representatation and the sites of local regulation are likely to be developing unevenly across the country, reflecting local traditions and former institutional arrangements and practices.

Internal structures of the state – a 'new localism' and a 'new regionalism'?

The reorganisation of urban policy in 1993/94 introduced two significant measures in relation to central–local government relations. First, there was the commitment to devolve some power down to the local and regional level in relation to the development of regeneration programmes and, second, a commitment to the establishment of integrated regional offices. The creation of the Government Offices for the Regions (GORs) was officially intended to simplify the way government supports regeneration and to deliver an integrated approach to local problems, promoting a coherent approach to competitiveness, sustainable economic development and regeneration, where local priorities are

emphasised and where local needs rather than departmental interests are the prime consideration. John Gummer, the Environment Secretary at the time, announced that these 'sweeping measures' would introduce a 'new localism' into regeneration activities, shifting power from Whitehall to local communities and making government more responsive to local priorities (DoE, 1993b). An incipient regionalism was also detected in the new strategic and co-ordinating functions of the GORs.

The emergence of this 'new localism' and 'new regionalism' has been driven by the economic, social, political and organisational processes reviewed in Chapters 1 and 2. Two factors in particular can be highlighted. First, inter-urban and inter-regional competition has become the norm throughout the European Union and beyond. This competition has created an awareness of the need and opportunity for actors within regions and localities to take a more active role in the determination of their economic and social futures within an increasingly integrated global economy. Second, the importance of the regional factor in the European political economy is central to the philosophy of the European Union and has grudgingly been recognised by the British government. The breaking down of national political boundaries due to economic and political integration has redefined the relationship between the state and market and 'effectively undermined traditional national regional policy and promoted the region to "player status" in the global market game' (Mawson, 1995, p. 7).

However, while the trend in Western Europe has been to respond to these pressures by a process of devolution through the establishment of elected regional structures, this is in stark contrast to the tendencies of the British state, which has continued to centralise power while engaging in administrative decentralisation and marketisation (ibid., p. 8). This is set to change under the Labour government (see Chapter 12). This is the context, then, for the emerging practices of local and regional development heralded as a 'new localism' and a 'new regionalism'.

Attempts to forge new institutional structures at the local and regional level have occurred within the New Public Management paradigm involving purchaser–provider splits, contracting out, internal markets and competition. The SRB is very much a product of New Public Management. The government has created a quasi-market in regeneration funding and positioned itself as a monopsonistic 'client' of local bidding partnerships. In this market situation the government can withhold support from local partnerships unless and until its performance meets its requirements. The ability of local partnerships to receive and continue to receive support is contingent upon their ability to deliver a specified level of output to the government. Thus, the delivery plan for each successful bid must 'include as clear a statement as possible of what the government is buying with SRB funding, other public money, and at what cost' (DoE, 1995a).

Although ministers, the DoE and the GORs have continually emphasised that it is the bidders and not the government that set the policy priorities for the SRB

Challenge Fund, claims for a 'new localism' must be qualified by the 'contractual' nature of these new relationships and the degree of control exerted by central government through documents containing detailed bidding guidance, which are referred to as 'compliance guidance' in some regional offices, and scrutiny of outputs of Challenge Funded initiatives. The dynamics of the SRB Challenge Fund and the competitive process more generally tend to undermine the expressed objective of empowering local communities. Whilst bids do reflect local issues, local priorities are tested against the priorities of central government in order to comply with real or perceived government requirements. From the perspective of the bidders there is a trade-off between local autonomy and the need to secure success in the competitive process (Gray, 1997).

Stewart (1994, p. 142) notes that claims of a 'new localism' ring hollow to many local politicians who have witnessed the systematic reduction in powers and functions of local authorities. Collinge and Hall (1996) also observe that, as a powerful purchaser in the new competitive market for regeneration resources, the government's rhetoric on local empowerment and ownership of strategy is unconvincing. Stewart (1994, p. 144) feels that the 'new localism' is full of ambiguities and contradictions and relies less upon representative democracy and more upon a consensual corporatism. Local interests, organisations and institutions can play a major part, but whether the measures represent a genuine realignment between centre and periphery remains to be demonstrated.

In summary, the Challenge Fund and the new Government Offices for the Regions consolidate changes in the institutional arrangements governing urban policy started by City Challenge. These changes have reinforced certain trends apparent in Conservative urban policy during the 1980s, namely, marketisation and the greater involvement of central government in 'local' policies. It represents less a renewed localism than a realigned centralism (Stewart, 1994) reflecting a resource shift towards centrally controlled institutional forms of regeneration and tighter expenditure management systems (M. Stewart, 1995, p. 63). In spite of the inherent centralism of the Challenge Fund bidding and decision-making process, attempts to strengthen local organisational capacity and develop a shared agenda among all the key actors have occurred but with uneven results (Hogwood, 1995). The Challenge Fund has carried forward the restructuring of the state in which 'the boundaries of the state in the urban policy sphere are not simply being rolled back. Rather, the ideological context of state action is being redefined, policy objectives are being recast and the interface of the public and private sector restructured' (Peck, 1995, p. 35).

Patterns of intervention – redefining the focus of urban regeneration

The prime aim of regeneration policy in the early 1990s was to promote economic development, defined in terms of the competitive success of enterprise and localities. This approach did not exclude social problems (deprivation, the needs of the long-term unemployed, physical decay of neighbourhoods, the need for childcare), as had been the tendency of policies

pursued during the 1980s. Policy relied on integrated approaches to economic and social development and a redefinition of the notion of welfare. Welfare came to be defined not in terms of the needs of those dependent on welfare but in terms of its value to business. This redefinition of welfare is part of the view that economic growth in local areas 'can follow only from the development of a new capacity to respond to global economic change' (Bennett and Krebs, 1991, p. 6). Cochrane (1993, p. 95) summarises the arguments of those who support this view:

> local government needs to become more business-like, literally more like a business, and not only in the field of economic development. They want to see a change in focus – what they call a move beyond welfare – in which local well-being becomes defined as economic success, based on close liaison (or partnership) between council and business: 'to work it requires the whole of the council's approach to be planned to achieve the required economic objectives and to balance these with wider service demands' (Bennett and Krebs, 1991, p. 177).

This shift has been described as a shift from Keynesian welfare state policies to Schumperterian workfare state policies (Jessop, 1993) or, as Cochrane (1993) puts it, a shift from a welfare to an enterprise state (see Chapter 2 for a fuller discussion). The SRB Challenge Fund epitomises this new policy focus.

The pressures of inter-urban competition have led local partnerships to concentrate on economic investment at the expense of social expenditure. Even where social problems are dealt with, the language used and the policy approach tend to subordinate the social dimension of the problem to the need to create competitiveness and economic success. An example of this approach can be found in a first round Challenge Fund initiative proposed by CENTEC (Central London TEC) in partnership with Westminster City Council called 'Off the Streets and into Work'. Concerned to ensure that London retains its 'World City' status, the partners in this bid sought to link businesses with hostels for the homeless to improve employment prospects, thereby breaking the cycle of homelessness and economic dependency. The very first paragraph of the SRB bid (CENTEC, 1994, p. 2) provides the rationale for the bid and defines the essential focus of the policy:

> Street homelessness is bad for London. People in shop doorways represent a barrier to business confidence and tarnish London's image – they also represent a hugh waste in human resources. Current strategies addressing the needs of London as a world city, including the developing London Pride prospectus, have highlighted the importance of tackling this problem.

An analysis of the priorities contained in the bids of the first and second rounds demonstrates that the majority of initiatives are aimed at encouraging sustainable economic growth and wealth by improving the competitiveness of the local economy, and enhancing the employment prospects, education and skills of local people (just over 70 per cent of partnerships prioritised economic growth and employment/education initiatives as having top priority) (Mawson *et al.*, 1995; Hall *et al.*, 1996).

Several aspects of the Challenge Fund promoted an emphasis on economic development outcomes. First, the prominence of the objectives of stimulating wealth creation and enhancing competitiveness in the bidding guidance. Second, the need to secure leverage strongly encourages projects lucrative to the private sector located in commercially attractive locations and which have a promising rate of return (e.g. housing development or redevelopment). The third aspect is the monitoring procedures of the DoE, which have led to a clear bias towards capital projects involving construction of new buildings or refurbishing old buildings. These projects produce quick visible signs of activity and boost the prestige of an area (or local actors). Investment of seed money for longer-term projects to improve, for example, human resources in deprived areas is considered more risky with less manifest and measurable outcomes. Fourth, the prominence given to TEC involvement in bids is seen as an important vehicle in achieving economic regeneration through SRB.

Whilst economic development/employment creation projects have been prioritised, integration has been strongly encouraged on a number of levels. There has been a strong emphasis on creating integrated strategies that link economic, social and environmental aims. Bidders were also encouraged to ensure that proposals were consistent with and where possible could be integrated with national policies and programmes, such as the government's White Papers on Competitiveness; the national Strategy for Sustainable Development and Local Agenda 21 initiatives; strategies at regional or local level, such as Single Programming Documents for EU Structural Funds and Community Initiatives; local economic development, competitiveness and regeneration strategies; frameworks agreed between local authorities, TECs, voluntary and other organisations; and City Pride Prospectuses. In the allocation of funding, integration was also sought through initiatives which contributed to a strategy for a city, town or other area, complementing other public and private expenditure delivering that strategy or initiatives which focused on small area regeneration and development, involving intensive activity to improve a specific geographical area, such as a city centre or housing estate.

In spite of the clear intention to prioritise economic development objectives, a report based on an Organisation for Economic Co-operation (OECD) study tour of Manchester and Teeside observed that many Challenge initiatives seemed to be more directed towards social regeneration, with little emphasis on enterprise creation. Many of the activities appeared to be part of the normal service provision that one would expect the local authority to be providing on a regular basis, rather than as a special grant-funded strategy. The report of the study tour concluded that Challenge Fund initiatives appeared to be filling in gaps left by the national and local governments in their provision of services to individuals, enterprises and neighbourhoods (OECD, 1996, p. 14).

One could argue that there are, at least, two processes at work here. First, there is an implementation gap that relates to the rhetoric of central government's intention and guidance and the reality of practice on the ground. The implementation gap exists due to the institutional inertia at different levels in

the system. For example, regional government office staff who were either used to administering the Urban Programme or who have little or no regeneration experience; local authority staff, who in the face of cutbacks, have been finding ways of continuing the funding of mainstream provision as well as ongoing Urban Programme-type initiatives whose funding had been cut; officers in non-Urban Programme authorities who were completely new to the process of regeneration and who saw the Challenge Fund as a way of bolstering areas of declining main programme spending.

The policy message may have been clear to ministers who had established the SRB Challenge Fund, but there are many opportunities for this message to be diluted in the bureaucracy of implementation. Evidence is found for this inertia in the first report of the Environment Committee into the SRB (Environment Committee of the House of Commons, 1995b, para. 30). It was observed that in round 1 Regional Offices varied in the type of bids which they approved: 'Some favoured bids with an economic, employment and training focus, while others appear to have achieved some continuity with the old, needs based programmes which have been subsumed within the SRB.'

The second process relates to the diverse and wide-ranging set of strategic goals covered by the programme and the existence of conflicts and contested values and visions at a local level which could give rise to a fragmented set of projects. The SRB could simply be seen as a funding channel for projects, with the multilateral decision-making process providing legitimacy and accountability, rather than a strategic framework directed at a concerted effort at furthering economic development and increased competitive advantage. In some areas the projects seem to derive from individual partners, rather than being arrived at after a process of strategic analysis by the partnership board. In such cases the partnership could be little more than a cover for a continuation of municipal expenditures by a different name (OECD, 1996).

This demonstrates that the Challenge Fund cannot necessarily guarantee a strategic, integrated approach to policy within a locality, or indeed that the more subtle process employed by central government through the SRB to achieve its political and economic aims will succeed. This is borne out by the lack of strategic approaches in many bids, the tokenistic nature of many partnerships and the fact that many initiatives appear to be repackaged old-style Urban Programme initiatives, or ways of continuing funding of mainstream programmes that have experienced a decline or withdrawal of resources.

Assessment of the SRB Challenge Fund

The Challenge Fund approach to urban regeneration has stimulated a great deal of debate which has focused attention on the strengths and weaknesses of competitive bidding as a policy strategy and on the impacts of the initiative. This debate has highlighted issues that are a direct result of the competitive approach adopted by central government and those linked to the challenges of partnership-building and community empowerment.

Many of these issues were examined in the Environment Committee's report on the SRB, which covered the conduct and outcome of round 1 and the guidance issued for round 2. The Committee's (Environment Committee, 1995b, p. xxxi) main conclusion was (notwithstanding the many criticisms that were aired at the Committee) that

> the SRB Challenge Fund has already demonstrated its potential to achieve excellent value for taxpayer's money. It is supporting not only the regeneration of cities, towns and smaller communities across England, but increasingly genuine community and private sector involvement, integration of different government programmes and a new sense of partnership between local authorities, TECs and others.

It has been widely acknowledged that the SRB Challenge Fund has introduced a number of operational improvements in regeneration policy, and although there are a number of concerns and reservations, practitioners and professional bodies have welcomed aspects of the programme. In particular, the comprehensive national coverage of the scheme acknowledges that there are regeneration issues in both the urban and rural context. In 'de-urbanising' regeneration policy the government has ignored what it sees as the procrustean structure of the 57 Urban Priority Areas; in its place is an open invitation to localities which can demonstrate their needs – based partly on deprivation and partly on 'opportunity' – and which can put together partnerships to tackle them (Robson, 1994b). The Challenge Fund encourages an integrated approach at both national and local levels, offering the prospect of a framework for giving equal footing to the economic and social elements of regeneration. SRB funding is acknowledged to be relatively flexible and linked to the scale and nature of the problem rather than based on a common annual sum as was the case with City Challenge. The SRB also provides funding over a five- to seven-year period, which is an improvement over the annual round of allocation associated with the Urban Programme. The SRB encourages a wider geographical perspective which can address problems and opportunities across geographical and administrative boundaries. Additionally, the policy framework can include a thematic as well as a geographical focus. The SRB has the potential for a quicker response to emerging problems than traditional programmes linked to indices of need reviewed only periodically. And lastly, the SRB has opened up the possibility of a new inclusive form of politics at the local level, including the reintroduction of a role for local authorities, the community and the voluntary sector (Mawson *et al.*, 1995, p. 125).

However, a number of criticisms have been levelled at the SRB Challenge Fund, involving both operational and more fundamental issues of principle. Similar criticisms have been made of the Scottish equivalent Challenge Fund (Slaven, 1997, p. 13). These are briefly summarised below.

Finance

The planning, management and, above all, control of public expenditure have been key features of government policy over the past 20 years. The Challenge Fund has not escaped this imperative. However, the Challenge Fund has been used by civil servants to create the impression that additional money is being committed to distressed urban areas in spite of the reality of an overall decline in urban regeneration funding, in particular, and the retrenchment in public sector investment in general.

Mawson *et al.* (1995, p. 30) noted that the resources that were brought together in the SRB peaked in 1992/93 at £1.695bn and had declined by 15 per cent (£252m) in real terms by the time of its introduction in 1994. Analysis of the impact of the 1994 and 1995 Budgets on the SRB and other urban regeneration programmes up to the financial year 1998/99 shows a decline of 29 per cent in real terms between 1994/95 and 1998/99 (see Table 9.4). The cumulative real reduction in public expenditure under the Housing, Construction and Cities and Countryside headings will reach almost £7bn, 40 per cent greater than the private sector investment projections for the 373 SRB schemes approved in rounds 1 and 2 of the Challenge Fund competition (Hall *et al.*, 1996, p. 9).

Over the period 1994–99 there was intended to be a shift in resources away from UDCs, City Challenge and Estate Action towards funding successful bids under the Challenge Fund initiative. Whilst there is an overall real reduction in resources available for regeneration this was meant to be partly offset by the projected increase in SRB Challenge Funds from £125m in 1995 to £543m in 1998/99 (ibid.). However, these projections are under review with the new Labour government. It is widely perceived that the scale of resources currently devoted to the Challenge Fund undermines its credibility and potential impact. The small scale of SRB resources has resulted in considerable over-bidding, involving significant scaling down of successful bids and a spreading of resources too thinly (see Table 9.5).

Table 9.4 Provision for Department of the Environment Programme: Cities and Countryside sub-heading 1994/95 to 1998/99

				Baseline 1994/95 prices			
Cities & Countryside	1994/95 outturn cash	1995 estimate outturn cash	95/96	96/97	97/98	98/99	% change 1994/95–98/99
UDCs/DLR	287	254	237	192	173	81	–71.7
English Partnerships	192	210	205	198	194	189	–1.5
Housing Action Trusts	92	90	88	84	82	80	–13.0
SRB residual programmes	872	660	642	518	332	131	–85.0
SRB Challenge Programmes	0	125	122	251	446	543	n/a
Subtotal SRB	1,443	1,340	1,293	1,244	1,227	1,024	–29.0

Note: In 1996/97 £19m has been transferred from the Housing Corporation to SRB residual programmes, for City Challenge projects. Subtotals are subject to small errors caused by rounding.
Source: DoE (1995c)

Table 9.5 A profile of Challenge Fund proposals (rounds 1 and 2)

Round	No. of final bids (total number; successful bids in brackets)	Total value of SRB bids (£000)	Total funding (£000)	% of total amount bid for over the lifetime of the project
1	457* (201)	2,325,771	1,120,072	48
2	329 (172)	1,830,000	1,119,784	61

* 469 bids had been submitted to the GORs, which produced a summary of 457.
Source: Public Sector Information Ltd (1996, p. 110) and Mawson *et al.* (1995)

The reductions contained within SRB mean that the problems of concentrations of socially excluded groups in urban areas must worsen (Shiner, 1995). Partnerships will be operating in an environment where both SRB and other urban regeneration programmes are being substantially reduced. The former government's strategy for funding urban regeneration, therefore, increasingly relied on private finance (particularly through leverage and initiatives such as the Private Finance Initiative), the extension of the principle of competition as a mechanism for allocating scarce public sector resources, and the bending of main programme expenditure.

Social equity

The abolition of Urban Priority Areas and the downgrading of deprivation as a criterion for the allocation of resources have served to redistribute resources away from those areas most in need. Although SRB Challenge Fund tends to follow the pattern of government spending priorities towards regeneration established in previous programmes, and evidence suggests a correlation between funding received and levels of deprivation, a redistribution of public resources *is* occurring in which funds are allocated to relatively affluent areas, leaving some areas with high concentrations of deprivation with little or no resources from the SRB. For example, relatively deprived urban areas such as Bolton, Walsall, Leicester and Nottingham received nothing from the first round bidding but Bedford, Hertfordshire and Eastbourne benefited from nearly £7m. The Northampton Partnership was awarded £9.9m compared to £7.8m for Bristol. The City of Lincoln received £5.6m whilst Telford, a former Urban Priority Area, received less than £900,000 (Nevin and Shiner, 1995, p. 2).

The introduction of market principles into the allocation of urban funding provides added impetus to the process of competition among communities for jobs and investment. The outcome is likely to increase inequalities between and within localities through the redistribution of resources away from projects which tackle social deprivation and social exclusion in areas of greatest need but which have little market appeal or command little political power (Oatley, 1995a, p. 12). The former government's decision to terminate the financial assistance available under the Urban Programme, and to bring over half of

Section 11 funding and all funds available for Ethnic Minority Grants and the Ethnic Minority Business Initiative into the SRB Challenge Fund, reinforces this trend and will significantly impact on the poorest areas and groups in Britain. So for Bradford, Leicester and Nottingham, with relatively high ethnic minority populations to receive no support for Section 11-type projects in the first round of SRB bidding raises questions about equity and the former government's commitment to equal opportunities within its regeneration strategies (Nevin and Shiner, 1995, p. 3). Housing refurbishment is another area of activity which has seen a decline in resources. In 1995/96 it has been estimated that only £15m was made available from the Challenge Fund for housing refurbishment compared to £80m from Estate Action Funds in 1993/94 (Cullen, 1994).

The cost of competition

A number of consequences of formalised competitive bidding have been observed. Competitions have losers as well as winners and, in spite of claims to the contrary (*Planning*, 1992), partnerships and localities have been adversely affected by unsuccessful bids (Malpass, 1994; Hutchinson, 1995; Oatley and Lambert, 1995; Oatley, 1995a). Rounds 1 and 2 of the Challenge Fund produced 256 and 157 losing partnerships respectively. In contrast to previous funding regimes in which the funding line was more reliable, competitive bidding regimes require partnerships to invest resources in activities which may not come to fruition if a bid is unsuccessful. This element of risk and uncertainty has produced a shift in the culture of urban policy management and led to criticisms of inefficiency (Stewart, 1996a, p. 22).

The SRB Challenge Fund has been heavily oversubscribed and a process of scaling down, rescheduling and elimination of bids has taken place. For example, in the first round more than 600 outline bids were submitted. A total of 469 final bids were submitted and of these only 201 were funded. Table 9.5 shows the number of final bids submitted and funded in rounds 1 and 2, the value of the bids for each round, and the total allocation of funds available compared with the total amount bid for.

It has been estimated from a very limited sample of ten unsuccessful Challenge Fund partnerships that the cost of bid preparation in terms of staff time ranged from 16–40 person weeks (which might be valued at £10,000–£20,000) (Department of Land Economy, University of Cambridge, 1996, p. 28). This means that for rounds 1 and 2 alone the direct staff cost of preparing unsuccessful bids was in the region of £4.1–9.5m.

Operational issues

The experience of the early rounds of the SRB Challenge Fund has raised a number of key operational issues. One important issue has revolved around regional strategies/statements. In draft bidding guidance, the DoE (1994) indicated that the GORs would prepare a Regeneration Statement which would aim to promote a coherent approach to competitiveness, sustainable economic

development and regeneration within a regional context, by setting out the priorities for the region for using public and private resources. These did not materialise in the first three rounds although they have made a late appearance in the fourth round as part of the supplementary guidance issued by the Labour government. Local authority associations and others argued that the Challenge Fund process would be more coherent and focused, and there would be less abortive work by bidders, if some form of regional framework were developed indicating policy priorities by region. A related concern was the lack of clear criteria for assessing SRB bids in the absence of regeneration statements (Environment Committee of the House of Commons, 1995a, p. 55). In the Environment Committee's inquiry the minister admitted that the criteria in the bidding guidance have acted as a quality threshold in the context of scarce resources. The reliance on subjective, qualitative judgement undermines the bid assessment process and further reinforces the impression that the selection process is a black box situation and the competition is a way of managing scarce resources in spite of the quality of the bids. Other operational problems include the consistency of Government Offices, the involvement of the voluntary sector and local communities, monitoring of schemes aimed at ethnic minorities, and the timetable. These were all discussed at length in the Environment Committee inquiry and subsequent government response (Environment Committee of the House of Commons, 1995a, 1995b; Cmnd 3178, 1996 (DoE)).

Whilst the SRB offered the potential for administrative radicalism and a shift in the culture of policy development and implementation, as with so many innovations in urban policy the ambition exceeded the political will, the administrative capacity and financial resources needed to deliver it (Stewart, 1994). As a response to the deep-seated processes of economic and social change that have led to problems of urban decline and patterns of uneven development the Challenge Fund can be seen as a partial and flawed strategy. The scale of resources available under the SRB has been insufficient to address the magnitude of the problem and does not provide the elusive local fix to the urban crisis. As the latest neo-liberal institutional response to deprivation and decline, the introduction of competition into the allocation of urban funding has been perceived as a mechanism for masking cuts in resources and furthering ideological goals rather than ensuring that scarce resources are deployed in a more effective and responsive way. The current scale of resources and the process for allocation under the Challenge Fund can never be a viable alternative to a more substantial and rational resource allocation based on an assessment of need on a national basis and a reassessment of the role of such initiatives in relation to main spending programmes.

10

City Vision and Strategic Regeneration – the Role of City Pride

GWYNDAF WILLIAMS

The recent realignment of urban policy has led to the promotion of a diversity of local partnerships, a commitment to 'localism' in the relationship between corporate development strategies and local communities, and an increasing importance being ascribed to the competitive position of cities. This has been accompanied by a move from a formula-driven allocation of urban resources to increasingly competitive regimes. The outcome of the 1997 General Election is likely to result in more progressive policies at the local level, requiring a transition from policy pragmatism to strategic approaches based on greater stability and persistence, and with more integrated regeneration audits underpinning implementation. This will need, Lawless (1996) argues, to be accompanied by the move from central control to the local determination of policy, with pluralism based on the diversity of local initiative, civic leadership and administrative decentralisation replacing privatism in the search for co-ordinated strategic responses.

It is within such a context that the current chapter attempts to look at the capacity of City Pride to deliver a holistic vision of the city, accommodating local coalitions with a mutuality of interest in addressing strategic priorities over issues of resource procurement. Following an initial discussion of the framework surrounding the launch of City Pride, the chapter proceeds to focus on the ways in which the process of prospectus preparation has been managed. Highlighting the experience of Manchester and Birmingham in particular, the discussion considers the implementation of the vision, and attempts to evaluate the benefits of such an approach for improving the competitive position of urban areas. The extent to which it is more responsive to local needs than existing approaches to urban governance, and facilitates sustainable and stable urban policy will then be considered in a brief conclusion.

The policy framework for City Pride

During the 1980s the government devoted more attention to the governance of

cities than virtually any other policy concerns, involving a significant redistribution of political power to the centre, and the use of private markets and the enterprise culture to provide a climate of ideological change. Whilst local authorities experienced tightening financial controls and a dilution of their influence, central government also experienced difficulties in institutionally addressing the co-ordination of territorial policies in the face of continually changing policy aims and delivery mechanisms (AMA, 1994). As a consequence the 1990s were perceived to require a *change in priorities* in the face of a hostile investment environment, the energising of *coalitions of local players* in order to facilitate *long-term collaboration*, and to provide greater *coherence*, *co-ordination* and *targeting* of resources (Robson *et al.*, 1994).

It has become increasingly apparent therefore that the critical challenge facing policy makers for the millennium is to build up a capacity for governance and for capturing opportunities in the face of changing internal structures of the state and patterns of intervention, with the promotion of 'public–private partnership' favouring local co-operation where it can lever in additional private investment, effective co-ordination of service provision, and enhance mutuality and understanding (Bailey, 1995). However, sceptics of this ideology note that such co-operation is often short term, fragile and locally unaccountable, with a local elite of 'movers and shakers' able to present pro-growth business interests as equating with the broader interests of localities (Peck and Tickell, 1995b). In reflecting the new urban entrepreneurialism, urban marketing and the promotion of place is being increasingly used by cities to rebuild and redefine their image within the context of the accelerating spatial mobility of capital and the need to attract inward investment (Gold and Ward, 1994; Loftman and Nevin, 1996). The reality of such an agenda has given a boost to the importance of local policy networks, and a preoccupation with competitive bidding frameworks between cities (Stewart, 1996a). It has been argued that the facilitation and regulation of competition and bidding for resources have helped to concentrate minds and galvanise different partners, and have stimulated the formulation of higher quality strategies and projects. Spatial targeting has discouraged the diffusion of effort, enhanced corporate working and facilitated tighter management. Finally, the use of targets and outputs has encouraged prioritising and the development of an output and evaluation culture (Parkinson, 1996). Critics, however, have commented on the notion of using competition as a way of choosing between equally needy areas and as a means of rationing scarce resources.

The Conservative Party's 1992 election manifesto viewed successful urban regeneration as requiring 'a spirit of co-operation, of partnership between all those involved; a commitment to shift the balance of power away from Whitehall and towards the regions; and the need to reduce policy fragmentation and poor local co-ordination'. This approach implied a reframing of urban policy and was to be articulated through the restructuring of government regional offices, ministerial 'sponsorship' of individual cities, the extension of competitively allocated Challenge funding, and a search for greater strategic

Table 10.1 City Pride and established local strategies: Birmingham

City prospectus and vision	*Existing special initiatives*
Corporate, strategic partnership of stakeholders, building upon the strategic objectives of existing strategies.	Castle Vale HAT Heartlands UDC City Challenge SRB Projects
Existing sectoral strategies	
European Development Strategy	City Strategy Report
Economic Development Strategy	Strategic Guidance/UDP
Housing Strategy (HIPs)	Environmental Strategy
Transport Strategy (TPP)	Local Area Strategies
TEC Corporate Plan	Community Care Plans
Wragg Commission – Education	Health Plans
Community Safety Strategy	Equal Opportunities Policy
Anti-Poverty Strategy	Race Equality Strategy

Source: Birmingham City Pride (1995b)

coherence and vision in promoting corporate approaches to urban regeneration. As part of this new agenda City Pride was launched on 4 November 1993, as part of a wider manifesto commitment to 'shift power from Whitehall to local communities and to make government more responsive to local priorities'. It envisaged 'a challenge to the civic and business leaders of our three great cities to prepare a prospectus detailing a vision of their city's strategic development over the next decade' (DoE, 1993). This initiative, not being based on targeted and short-term resources but on a strategic vision of the urban future, was expected to involve a plurality of locally determined interests in securing the vision and mission statement.

City Pride partnerships in Birmingham, London and Manchester were expected to define necessary action and to establish priorities for resource procurement. Each mission statement was expected to identify the geographical areas where City Pride partners should focus their activities; actions that the partners believed to be necessary; expected targets and outputs, and the responsibility for delivering each element; a timetable for these achievements, and key milestones; and the contribution each partner would make. Such coalitions were encouraged to build upon existing partnerships, to provide a corporate framework sitting alongside established sectoral strategies (Table 10.1), and to give a greater strategic focus for resource targeting. Immediate questions were raised, however, as to whether an initiative lacking clear policy guidance or specific grant regime would be restrictive or a liberating influence in galvanising local co-operation, with the prospect of future funding being expected to sustain the motivation of partners.

It has been argued that the rationale for the launch of the initiative was to maintain the momentum of mutuality within Manchester arising from its spirited Olympic bid (Cochrane, Peck and Tickell, 1996). Since this would be perceived as partiality, however, Birmingham would be included since it had long experience of innovative partnerships in urban regeneration. London, long the butt of criticism over a strategic policy vacuum seen to threaten its international competitiveness,

was clearly of electoral concern in any such initiative but lacked a political framework within which such agenda-setting could emerge.

Despite the lack of specific resource commitment, it was inevitable that the City Pride approach would have a broader appeal for locally emerging elites and regimes, with cities such as Sheffield and Leeds and towns such as Bolton and Wigan subsequently adapting this policy approach to provide a strategic regeneration framework for their own urban areas. A further round of City Pride designations were announced on 6 November 1996, with civic and business leaders in seven new areas expected to produce a prospectus and a delivery plan within a year. The new areas included consist of Bristol, Plymouth, Newcastle, Leeds, Sheffield, and composite areas in Nottinghamshire (Nottingham/Ashfield/Broxtowe/Gedling/Rushcliffe) and Merseyside (Liverpool/Birkenhead/Bootle/Wallasey). The City Pride framework has thus to be accommodated within the working remit of eight government offices, which are expected to participate in this programme, and to facilitate and respond to the process of producing a strategic urban vision. The capacity of composite local interests to work together has been questioned, with recent experience in Liverpool not being particularly positive in this regard. To achieve an illusory 'city pride status' these new areas are expected to satisfy a number of conditions:

- show that partnerships have the capacity to deliver what they promise to local people, including a clear understanding of what each partner is prepared to contribute;
- reveal a clear vision and planned targets, with an emphasis on achieving results and effective arrangements for tracking progress;
- define a geographical area and population which City Pride is intended to cover which should be appropriate for the vision;
- establish arrangements for involving and accounting to local people in achieving City Pride goals.

Whilst a further expansion of the initiative is not ruled out at this stage, government statements recognise the amount of concentrated effort required to produce such vision and mission statements, and it is unlikely that further areas will be formally announced, even if many authorities adopt this approach in practice in an attempt to provide a strategic framework to inform bidding practices. The current chapter thus attempts to consider the experience of developing and implementing the City Pride initiative within the local regulatory context, paying particular regard to the preparation of the prospectus, the main focus of the vision and key themes developed, and delivery and monitoring aspects of strategy realisation.

City Pride preparation: managing the process

In the absence of formal guidance, approaching prospectus preparation varied between cities, this being centrally influenced by existing experience of collaborative working. Whilst Birmingham's area was restricted to the local authority's boundary, the benefits of recent collaboration in Manchester enabled the partnership to take in the inner areas of Trafford and Salford as well. Questions arose at the outset concerning London's response, and whether to choose the 'international' city or the entire conurbation. In the end no part of London desired its chance of preferment to be dashed, resulting in a debilitating de-politicisation of prospectus preparation.

In both provincial cities City Pride gave direction and status to existing collaborative and partnership endeavours. The success of major regeneration programmes within Manchester's metropolitan core, infrastructural investments, creative and cultural industries proposals, and a range of international initiatives all demonstrated a commitment to the process of rebuilding for the millennium, and a new confidence in the ability of the conurbation to reposition itself within a wider setting (Williams, 1996; Struthers, 1996). Its increasingly pragmatic Labour leadership vigorously pursued an ambitious regeneration strategy and displayed a positive and confident mood in its dealings with government, stressing that it 'had a strong tradition of partnership founded upon a private sector which has acknowledged its civic responsibilities, and a public sector which has always looked beyond its statutory obligations' (Manchester City Council, 1994b, p. 1). Critics, however, noted that local democracy was increasingly being subordinated to a local elite – 'city councillors practise the policy of "talking up" Manchester as an exciting go ahead city . . . a development led vision with overtones of "trickle down" . . . [that] justified unbridled entrepreneurialism' (Randall, 1995, p. 46) – with boosterism being characterised by the city's change of logo from 'defending jobs, improving services' to 'making it happen' (Cochrane *et al.*, 1996).

Birmingham had already adopted a high profile corporatist approach to urban regeneration in the late 1980s, with work on the 'Birmingham 2010' initiative attempting to position the city as 'Europe's meeting place'. This experience had been extensively documented through work on the relationship between business and local economic development (Carley, 1991), and more critically on the financing and implementing of pro-growth strategies and their distributional consequences (Loftman and Nevin, 1994, 1995). London, criticised for its policy vacuum since the demise of the GLC, lacked a democratically accountable framework within which a strategic agenda could emerge (Hebbert, 1995). It was widely felt that if the conurbation was to sustain and develop its position, greater account would need to be taken of its role as a capital and world city, and its scale and complexity as Europe's largest urban concentration. The search for ways of obviating the fragmentation of its existing strategies and the lack of a single focus for implementation were, however, made more difficult by sweeping Labour gains in local elections.

Tooling up to deliver the prospectus

The approaches of various City Pride areas in responding to the call to produce a vision were inevitably different, with the most focused approach being adopted by Birmingham and the most diffuse by London. Additionally, in both

Birmingham's and Manchester's cases the City Pride process was fully integrated into each city's resource procurement activities from the outset, with City Pride expected to give their cities greater control over their own destiny and strengthen bidding capacity for regeneration funds, provide a flexible framework for enhancing partnership working and a political statement of their aspirations. Whilst active leadership for the initiative in both Birmingham and London were provided by business interests, in Manchester's case the public sector took the leadership role (Newman, 1995; Williams, 1995a; Hall, Mawson and Nicholson, 1995). Following the issue of consultative documents by the various local partnerships Manchester's prospectus was the first to be published (September 1994), this being followed by London's (February 1995) and Birmingham's (May 1995).

In Birmingham's case, the preparation of the prospectus was built largely around pre-existing partnerships and networks (Prior, 1996), being formally embedded in a City Pride Board charged with the responsibility of preparing and presenting a vision for Birmingham, and the management, co-ordination, updating and monitoring of strategy. Chaired by a businessman, the Board comprises members from the business, voluntary and community sectors within the city (institutional 11, business 5, sector groups 8, local authority 6) and meets quarterly. A separate management group comprising representatives from the initiative's core partners (City Council, Voluntary Services Council, TEC, City 2000 business lobby, Chamber of Commerce) was established to enable the Board to function effectively, to advise on relevant developments, and to assist in the formulation of plans. Initially an executive committee was established to provide advice to the Board and to ensure implementation of its decisions, but with the establishment of a City Pride Team (November 1995), this is now largely an advisory body. This unit aims to provide greater coherence and consistency in managing the Board's business, help to keep on track the various working group deliberations, and to develop and refine targets.

Arising from the committment by Manchester's business and political elite to work together the City Pride partnership has involved three local authorities, two Urban Development Corporations and active participation by around 150 business, public and voluntary bodies. An advisory panel of around 90 members, chaired by the Manchester City Council Leader, meets quarterly, in an attempt to pool expertise and experience, this being 'filtered' through a management team consisting of the chief executives of the five main partners. This team provides the driving force for developing the prospectus and for positioning the major projects, with a system of convenors being established to ensure co-ordination between the various working groups. Private sector inputs were particularly reflected in the work of the industry and commerce, and in the arts, sports and culture working groups, whilst they also showed keen interest in the discussions on training, health and crime.

The Chairman of London First (a business lobby) was invited to lead a London Pride Partnership which consisted of representatives from the business community (London's CBI and Chamber of Commerce, nine TECs, and

London First), London government (ALA, LBA, LPAC, Corporation of London, Westminster), and the voluntary sector (Voluntary Services Council). Many other organisations additionally got involved in the working groups established to examine priorities within specified themes. The partnership worked through an officers' group consisting of representatives from each of its members, this being supported by a small secretariat. It decided to depend on established strategic frameworks set by its own members rather than initiate further research (e.g. CBI Business Plan for London, LPAC Strategic Planning Guidance, TECs Economic Development Prospectus), but with topic papers being produced in areas perceived to be deficient. Tensions within the partnership were evident throughout the process of producing the prospectus, with Labour boroughs being strongly committed to establishing a new democratically elected London-wide body, despite the fact that – 'the quality of democratic life in London was not part of the City Pride brief' (Newman, 1995, p. 122). It is not surprising therefore that prospectus drafts gave alternating priority to 'wealth creation' and 'social cohesion', with conflicts being skilfully managed and avoided in the final text, and with many 'sensitive' topics expunged from the final report.

The vision and key themes

Lacking executive responsibilities, and specifically ruled out as a vehicle for prioritised challenge funding, City Pride was nevertheless perceived to have influence in the debate over urban resources, to facilitate reimaging and enhance competitiveness, and was politically managed with that in mind (Table 10.2).

Within the Manchester context the key themes that provide the focus for the prospectus are to be realised through a series of area-based initiatives and projects best felt to build upon distinctive opportunities. Central to the progress of such strategic developments were perceived to be the requirement for new institutional arrangements and operational partnerships, and a clearer focus for the delivery of public and private sector investment. Priorities are perceived in terms of the need to repopulate the city centre, reduce physical dereliction, provide an internationally acceptable infrastructural framework, and attract key decision-makers, thereby enabling the city to compete effectively with other European regional capitals. This is to be reinforced by the broadening of the city's economic base, achieving higher levels of employment, and the reduction of poverty.

In Birmingham the resource ambiguity of the City Pride process enabled a consensual 'one city, many peoples' message to be projected since decisions over budgetary priorities did not have to be faced, and the city (like London) was able to advocate simultaneously the rebuilding of competitive economic advantage with combating social disadvantage, without explicitly addressing how these twin goals might be reconciled or be mutually supportive. It also makes a general assumption that the city will secure no less resources in real terms over the next decade than it has had in the last. Key priorities are

Table 10.2 City Pride – vision and mission statements

London
Our vision for London is that it will head the league of world cities in the 21st Century, not just by remaining at the leading edge of economic developments worldwide, but by combining economic success with greater social cohesion, equality of opportunity and a high quality of life for all its citizens.
- to create a robust and sustainable economy and world class resident workforce, generating wealth and prosperity for all,
- work towards greater social cohesion by creating equality of opportunity, valuing diversity, and achieving a high quality of life which can be enjoyed by all,
- to provide high quality infrastructural services and environment needed to support London's economic and social aspirations.

Birmingham
Building upon Birmingham's proud economic and municipal traditions, the modern vision is to develop a thriving, innovative, multi-racial, international city, offering an attractive standard of living and quality of life for all its people.
- to rebuild its competitive advantage in the national and international economy,
- to overcome the extreme social deprivation which damages the lives of large numbers of the city's population.

Manchester
The vision rests on the marrying of an enhanced international prestige in terms of its outstanding commercial, cultural and creative potential, with local quality of life and enjoyment of lifestyle by its residents.
- enhance the city's role as a European regional capital, as a centre for investment and growth, and to improve its performance as compared with peer cities in Europe,
- maintain the momentum for an international city of outstanding commercial, cultural and creative potential, with the aim to sustain investment and strengthen its economic and cultural base,
- facilitate an area distinguished by quality of life, sense of well being, and the reduction of poverty.

Source: London Pride Partnership (1995, pp. 9–10); Birmingham City Pride (1994, p. 5); Manchester City Council (1994b, p. 8)

perceived to be the building of a better regional centre and a stronger economic capacity, stem the tide of net outward migration from the city, create housing choice and develop opportunities for young people. This is to be reinforced by attempting to integrate the social economy into the mainstream, and to facilitate community development and empowerment.

The position of the capital is the dominant theme of London's prospectus, with a mission statement premised on the interdependence of strategic concerns, the capacity to work in cross-sector partnerships at all levels ranging from London-wide alliances to sub-regional co-operation, and to provide an enhanced role for marketing and promotion. It has proved difficult to prioritise such themes, with inevitable tensions over likely implementation bodies and the lack of institutional clarity, with the problem of London government emerging when attempts were made to produce specific targets, with some deemed possible by the millennium whilst others have a time scale of up to 25 years.

Benchmarks and targets

The benchmarking of strategic themes is common, being generally based on baseline figures for 1995 and with targets to be generally realised by 2005 (sometimes 2000). Many of the longer-term targets are essentially seen as directional and aspirational, with no contractual expectation of their being hard measures of achievement. In the case of Manchester, the initial prospectus focuses on the major outputs expected to emerge from the range of strategic projects identified and the milestones already achieved – 'it will be important to produce not just those economic indicators that are capable of measurement, but to identify social and environmental indicators and to discuss the contribution of City Pride beyond the boundaries of the area' (Manchester City Council, 1994b, p. 61). The first monitoring report included the results of an international benchmarking study which assessed Manchester alongside a group of comparator European cities (e.g. Barcelona, Stuttgart, Milan), aiming to track Manchester's development and progress into the future. The conclusion of this study was that Manchester's ranking on the basis of investor perceptions was significantly poorer than those based on factual indicators, raising the concerns over the effectiveness of its existing marketing.

In Birmingham's case the fundamental test was perceived to be the ending of the net outward migration of skilled and professional workers and businesses, reinforced by positive impressions gained from core indicators on the city's quality of life. Whilst the prospectus accepts the difficulty of generating standardised indicators that are robust in evaluating progress towards future targets, it attempts a range of initial benchmarks and targets, a process being continued by the City Pride team. For instance, in relation to the performance of the economy it is intended that manufacturing investment should be above the national average by 2000, that investment in R&D should increase to the national level, and that unemployment should be reduced to the national average. Very ambitious increases in skill qualifications and commercial investment are also aspired to, without a clear vision as to how such aspirations can be realised. In the regional capital debate, a disappointing lack of feel for the wider issues is implicit in indicators concerned with doubling throughput at Birmingham airport, an increase of tourist visitors, and in arresting the increase in car usage. Many of the prospectus's initial targets concerning increased private sector investment are extremely ambitious, whilst those with social dimensions set aspirational targets rather than a costed programme for action, with even the notion of 'year on year improvement' having major ramifications.

In London a set of ten initial target measures have been adopted against which to measure progress, with the capital expected to double per capita GDP by 2020, increase manufacturing employment and output, sharply increase skill levels and significantly reduce peak journey times on congested routes. Targets for the millennium are focused on increasing growth rates from tourism, enhancing the qualification levels and higher education participation of school leavers, a reduction of unemployment to below the national level, and

on tackling the need for a substantial increase in affordable housing. There is a large degree of aspirational thinking implicit in such targets, with little evidence that these have been considered in relation to the extent to which current policies would need to change, or the commitment to economic and social action that would have to materialise.

Local ownership of the prospectus

Whilst consultation was expected to feature centrally in prospectus preparation, there is little evidence overall of the initiative's capacity to involve the wider community much beyond the established partnership structures. This was undoubtedly due to the time scale and working structures adopted and the strategic and therefore relatively abstract debate, with the most ambitious attempts being undertaken in Birmingham: 'For the vision to be effective and meaningful, it must be developed by everyone who has a stake in the secure and prosperous future it foretells – a vision developed in this way is owned by those who have invested or contributed to its development' (Birmingham City Council, 1995a, p. 3).

In Manchester the working group findings were incorporated into a consultative document which was summarised in a newsletter distributed to every household, and issued in full to the main stakeholder bodies. These arrangements were not perceived to have been particularly effective in stimulating responses from participants not already involved in the process, and little has been done to stimulate such involvement beyond the prospectus's publication. In London's case it proved difficult to initiate and target consultation given the uncertainty over the orientation and form of the eventual prospectus, and the priority given to the search for consensus amongst a disparate partnership. Additionally, London's peer group is a very limited clutch of world financial centres and cosmopolitan and innovative capital cities, encouraging the partnership to look outwards rather than inwards to its diverse constituencies.

The main partners involved their own constituencies in presentations and seminars, but attempts to obtain market research and media interest in the future of the capital were politically resisted, and the process was hijacked by the issue of a government report – 'London: Making the Best Better' (November 1993) – a free celebratory document of the capital's diversity, with respondents invited to present their views on London through a set of predetermined questions: 'Your views do matter; they will be taken into account by government, and will also be available to the team producing London Pride' (GOL, 1995). The findings confirmed strong interest in improving the quality of their local environment and enhanced amenity and accessibility, but did not address issues of institutional structures or the scope for alternative costed priorities.

Prior to the production of the draft prospectus consultation activity in Birmingham was predominantly internalised within the various sector working groups (business, statutory, voluntary), but in the run up to the final prospectus workshops were organised to encourage the cross-fertilisation of ideas.

To accompany such activity a two-pronged market research exercise was undertaken in relation to citizen perception and aspirations, this consisting of a sample household survey and a series of targeted focus groups. The household survey revealed a strong attachment to neighbourhoods, and an expression of the need to balance priorities between the city's infrastructure and a more locality-based approach focusing on quality of life and employment issues. Focus groups' views, involving a sample of office workers, socialisers and rare users of the city centre, were ascertained, as were target group investigations of the views of ethnic minorities, lone parents, women and young people. As part of the process of producing the final prospectus, a group of front line staff within the city council were briefed to convey the City Pride message. In reality, however, the use of such 'consultation brokers' threw up a range of problems which collectively were extremely debilitating and frustrating, focusing on the relationship between the grand strategic vision of City Pride and day-to-day departmental service-delivery issues: 'workers faced a constant challenge to translate the City Pride vision into tangible local benefits, particularly when mainstream and UP programmes were being cut back, and City Pride in the short term was not considered a viable alternative' (Birmingham City Council, 1995a, p. 21).

As well as local consultation, all the City Pride partnerships have sought government support for their vision: 'we now look to Government to provide a full response to our proposals, to agree an agenda for future discussion with the Birmingham partners, and to identify with us joint priorities for action' (Birmingham City Council, 1995, p. 61). Manchester was even more specific, seeking sustained commitment from government to the overall strategy, an integrated approach by various government departments to regeneration, a facilitating role by government to the attraction of both government offices and an international political institution to the city centre, and the ascertaining of the extent to which the PFI (Private Finance Initiative) may maximise private investment in key projects. So far, however, whilst broadly supportive of the action of various local partners, and enthusiastic as to the continuation of such working arrangements, tangible central and regional office commitment has been difficult to identify at levels above strategic project concerns.

The focus of the prospectus

Each prospectus sets out the long-term aims and ambitions for its area, and provides frameworks for the formulation and implementation of medium-term regeneration strategies (Table 10.3). Whilst such concerns are set out thematically many implementation isues concerning such prioritised strategies require bodies both within and beyond each partnership arrangement to facilitate. Difficult decisions are still to be made concerning project priorities in the face of increasing budgetary restraints on mainstream programmes.

Table 10.3 Strategic focus of City Pride

London	*Manchester*	*Birmingham*
Business growth	Regional centre	Regional capital
Raising skills	Economic base	The economy
Unemployment	Living city	Environment and housing
Transport	Culture and sport	Social conditions
Housing	Marketing	Young people
Environmental quality	On the move	Community regeneration

Strategic intentions

Increasing the competitiveness of capitals

London's perceived national and global roles were seen to justify its commitment to doubling its per capita GDP by 2020, with a central vision being to promote financial and business services in the face of increasing international competition. This is to be accomplished by encouraging international joint ventures, further enhancing its tourism potential, and to promote targeted marketing of inward investment. The two regional capitals recognise the interdependence of their cities with their regions, and the need to expand their core areas, both features requiring active city centre management policies. They additionally envisage the enhancement of professional and financial services, more specialised central area retailing, a strengthening of their cultural significance, and a general commitment to making their centres a destination for business tourism and entertainment. Manchester, concerned at the need to change investor perceptions, aims to focus its marketing and reimaging strategy on physical improvements to its main gateways, and the attraction of an international political institution to the city to enable it to 'compete on an equal footing with other European regional capitals' (Manchester City Council, 1994a, p. 10).

Great play is made of the critical mass of facilities already available for arts and leisure, and the documents advocate the further promotion and coordination of a clustering of artistic and cultural opportunities, with both the regional capitals actively promoting the notion of the '24 hour city'. Whilst all are concerned with the international dimensions of such a focus, London identifies the need to undertake international profiling of sporting activities.

Economic progress

This is focused on the competitiveness of business and the strength and diversity of economic prospects. London's vision envisages the need to attract major manufacturing operations, support SME development, and safeguard strategic development sites. Birmingham, concerned at relative underinvestment in its economy and the need to develop further the service sector, foresees the need to stimulate the growth of new enterprises and sectors with growth potential. All the published strategies argue for the expansion of R & D capacities, enhanced linkages with higher education, and an improvement in the quality of business management support and advice. In both London's and Manchester's cases the aim is to promote initiatives which enhance each city's existing telecommunications infrastructure.

A concern with the dual problems of an inadequately skilled labour force and the persistence of high unemployment in particular areas is dealt with by the promotion of initiatives relating to access to skills and training, with proposals for specific programmes of customised training and retraining for disadvantaged groups and areas. London Pride, in particular, talks of the need for both greater discretion and enhanced resources for training purposes, in an attempt to develop a strategic skills agenda to meet the needs of major cities.

Social and community development

All the strategies are preoccupied with the urgent need for improvements to housing, health, educational facilities and community safety, in order to develop the confidence of those who live and work in such areas. These are expected to be underpinned by physical improvements felt to provide the key in any debate on the quality of life within cities. Central to such debates is the urgent need to promote more integrated, accessible and sustainable public transport, with London advocating the need to establish a 'transport infrastructure fund' based on a levy of business rates. Manchester is preoccupied with the extension of Metrolink and the completion of the inner relief road, whilst within the wider context both regional capitals are concerned at delays in upgrading the West Coast main line rail route. In the housing field, an urgent need for improvements to housing stock conditions, the promotion of neighbourhood renewal and estate improvement, and improving energy efficiency are all key themes. London's prospectus additionally focuses on the need for increased investment in private renting and affordable housing, in an attempt to reduce homelessness and meet low-income housing needs.

The social dimensions of Birmingham's strategy are particularly distinctive in that it seeks to integrate issues of social cohesion with economic policy by developing specific programmes to tackle poverty, healthcare and community safety, all involving the development of local partnerships. The strategy attempts to address the need to secure opportunities for the city's young people, focusing on the care and support of children, educational and personal development, and the promotion of active citizenship. Finally, recognition is given to the need to build up community confidence, the strengthening of the role of non-governmental organisations, and the promotion of community partnerships and enterprise.

Environmental quality

The physical environment is viewed as a key feature of people's perceptions, and a main instrument both for improving quality of life and tackling social polarisation. Each prospectus has a distinct contribution to make, with Manchester promoting the preparation of an urban development guide and a concern with energy efficiency in housing; Birmingham attempting to enhance environmental quality by integrating environmental improvements with

economic opportunities; and London promoting energy conservation alongside improvements to air quality and waste management. In addition, both Birmingham and London seek to address issues of open space quality and the enhancement of greening initiatives.

The focus on projects

In Manchester's case the specific objectives of City Pride focus on the delivery of 42 tangible projects felt to address pereceived comparative disadvantages and to build on the city's opportunities – the needs of the regional centre (Convention Centre, Piccadilly Gateway, Lowry Arts Centre); reinforcing the economic base (MIDAS, airport expansion); social and community development (targeted youth programmes and drugs project); promotion of culture and sport (national stadium and sports development trust); transport investment (Metrolink expansion, inner relief road); marketing strategy (Marketing Manchester). These are intended to complement and extend existing operational programmes, and the prospectus attempts to distinguish between projects where there is a need to reduce private sector uncertainty; where public sector leverage may be necessary to secure private sector investment; and where public sector commitment and leadership are required to ensure success.

Birmingham's plan identifies a series of six infrastructural projects predating City Pride that are seen to be crucial for the initiative's realisation (e.g. refurbishment of the Bull Ring, new coach station). In addition, the action plan identifies a set of 41 key projects that attempt to achieve a balance between City Pride's twin economic and social goals, a number of which have formed the basis for successful competitive bidding resources (e.g. innovation centre, Aston Reinvestment Trust, Eurocities Telecities Programme, Centre for Performing Arts). The action plan identifies a further 33 possible projects requiring development work and the championing of their case, these focusing in particular on strengthening the social fabric of the city and its infrastructure (e.g. crime prevention initiative, community childcare, urban village proposal, nurturing cultural diversity, further development of the European business centre). Finally, the plan recognises that a key factor in achieving the City Pride vision must be the development of new management arrangements, and it sets out 20 projects concerned with such issues as the expansion of the neighbourhood forum network, establishing a city-wide arts forum, and the development of a strategy for promoting community-based education.

Delivering the vision: implementation and monitoring

Whilst City Pride is not intrinsically concerned with project delivery, each prospectus has set out an action plan framework so as to ensure that strategic proposals complement and enhance mainstream funding regimes and existing investment. In Manchester's case the prospectus notes the intention of producing an annual monitoring report and a three-yearly evaluation report. This is expected to identify performance against a set of key indicators, evaluate

overall performance and the process of implementation, and make recommendations for modifications to strategic objectives.

Birmingham's action plan presents a three-year rolling programme for City Pride through which the Board expects to establish a set of core activities capable of delivering long-term change and of demonstrating measurable progress, and to have constructed effective institutional arrangements for programme implementation. Further explanation is proposed of how private finance can be attracted, how improved communication and marketing of opportunities can be facilitated, and how the targeted use of financial instruments and leverage of public investment may be pursued in a co-ordinated way. This is essentially a pre-emptive position in anticipation of financial constraints, and has raised critical comment: 'given the economic and fiscal background, one must question whether the resource assumptions of the Birmingham City Pride Prospectus are commensurate to the task it identifies' (Hall, Mawson and Nicholson, 1995, p. 114).

Following the publication of the prospectus and the commitment to action, Birmingham and Manchester have both produced their initial annual reports to monitor progress. Birmingham's document (Birmingham City Pride, 1996) notes that the annual report provides a focus for both reflecting on progress and helping to sustain commitment from the partners involved. In order to undertake this role, however, the report acknowledges that further work is needed on developing relevant indicators to enable monitoring to be carried out effectively. It commends the support of government and discusses the dialogue currently ensuing with ministers in taking ideas forward. It records the success of the vision in supporting successful SRB and Millennium Commission bids, reviews progress on action plan projects, and highlights the need to identify core priorities for the year ahead. A particular innovation during the first year was the establishment of a Youth Board to advise on issues affecting young people in the city, and this has been particularly innovative in its capacity to influence the wider debtate through its City Pride Board representation, and in meetings with ministers and authority chief officers. The City Pride Board has identified four key priorities that require a commitment for action. It recognises the urgent need to narrow the gap between job opportunities and workforce skills, particularly among young people, and to establish an integrated transport strategy for the city that can be resourced. Further action is required to help ensure people experience the city in safety and security, and to enable local communities to shape the outcomes of local regeneration strategies in their local neighbourhoods.

Manchester's experience has been more variable in management terms, although at strategic project level a great deal of achievement has been secured on the ground. The loss of key staff and departmental restructuring, the success of the Commonwealth Games 2002 bid, and the upheaval caused by the bombing of the city centre have all had major consequences for management operations within the city. However, a city centre manager has been appointed, a task force (Millennium Manchester Ltd) has been established to

deliver the rebuilding strategy for the regional centre, and a new version of the prospectus is expected to be published imminently. This new momentum arises from the rapid progress being made in implementing the strategic projects outlined originally, dynamic changes taking place in the conurbation core, and the opportunistic intention of responding to political realities. The original nine working groups have been reconfigurated to take forward this new sense of urgency, resulting in groups being relaunched, covering the regional capital, sports and culture, transport, enterprise, marketing and the establishment of a social strategy forum. The benefits of such positive collaboration are clearly evident in the inclusion of Tameside within the grouping of authorities for City Pride purposes (enabling it to coincide with TEC, Chamber of Commerce, and Business Link boundaries), and joint authority bidding for challenge funds (Cheetham-Broughton SRB) and co-ordinated TPP submissions.

The management team retains the overall responsibility for monitoring and evaluating progress with strategic project implementation, overseeing the production of the first monitoring report (KPMG, 1996), and identifying key themes for City Pride roll-forward – competitiveness, particularly in relation to strengthening of economic base; renewal of the city centre; the role and performance of the regional capital; the Commonwealth Games; integration of social and economic programmes, and the promotion of sustainable neighbourhoods. The first monitoring report adopted a twin-track approach to its work, namely to review progress on strategic projects in consultation with lead officers, and to benchmark the City Pride area with comparator European cities. It concluded that the prospectus provided an important 'leadership' framework within which to place and prioritise projects, strengthen competitively allocated funding bids, and for responding creatively to unexpected situations (e.g. city centre bombing). It concludes, however, that there is a need to broaden the partnership base by involving more private sector partners, a need to provide a more singular focus and 'broadening' of the City Pride area, and to ensure that the potential of Manchester City Council to dominate the strategic process doesn't undermine the breadth of support.

The benchmarking study attempted to set the themes of the prospectus within the context of the experience of comparator European cities, with this tentative study supporting Manchester's claim to be a significant European centre in commercial and cultural terms, whilst suffering economic and social difficulties. However, the area's ranking on perceptual indicators was seen to be significantly poorer than its ranking on factual indicators, implying that 'despite recent efforts . . . Manchester has not been fully successful in raising its public profile' (KPMG, 1996, p. 43). A clear attempt to address such concerns is clear from the recent establishment of Marketing Manchester (1996) as a promotional agency for the conurbation, and the launch of Manchester Investment and Development Agency Service (MIDAS 1997) with a mission 'to attract the highest possible level of inward and indigenous investment into the Manchester economy, and to maximise the benefit of that investment to both the local economy and the local community' (Manchester City Council, 1997a). This has inevitably created some tensions with INWARD, the North West's inward investment agency, as to the duplication of promotional and marketing activities at the expense of a coherent regional voice.

Conclusions

The launch of City Pride has undoubtedly provided a new dimension for evolving regulatory frameworks for local governance, with the synergy arising from partnership working by separate but mutually reinforcing interests providing the backbone for the new political economy of cities. It has undoubtedly helped to facilitate agenda transformation and is intended to provide the key for future budget enlargement in an increasingly competitive environment. City Pride management bodies will thus need to continue the development, monitoring and review of strategic projects, and ensure their integration with the planning and investment decisions of constituent partners. It is clear, however, that the effective delivery of such strategic visions will centrally depend on the continuing support of government in stimulating a positive investment framework, the emerging institutional flexibility of Government Regional Offices, and the extent of fiscal and legislative autonomy for urban local governance. The targeting on more provincial settings in the current 'round' of City Pride will focus increasing attention on such issues. It is clear that the emergence of corporate strategies and operational plans by Government Regional Offices may facilitate closer working relationships with main partners in an attempt to deliver individual visions, but this will necessitate closer discussions on the effectiveness of existing spending programmes, and the scope for experimentation with new measures and instruments in targeted areas.

In essence each prospectus is concerned implicitly with resource procurement, and fundamentally with resource allocation, and City Pride may stimulate initiatives in institutional competence to address the future development of such areas. However, there is obviously a danger that the language of recent policy debate concerning commitments, to reduced levels of prescription by central government, and the scope for enhanced local discretion, is effectively concealing a real lack of substance. This may result from the lack of clarity on resource commitments, and the scope for further progress on integration in established mainstream programmes. Thus, if it is to reflect an important distinction in urban management, it has to be assessed in terms of how it begins to perform against stated and measurable objectives. This will require a clear articulation of delivery mechanisms, the development of realistic outcome targets and cost estimates, and refining of the nature and working relationships of partnership arrangements. Furthermore, the internationalisation of such cities to increase competitiveness may require a detailed review of existing local institutional mechanisms, increasing flexibility over access to private finance, and may require considerable bilateral discussions beyond the confines of City Pride.

There is an urgent need for a clearer feel for the perceptions of the key participants concerning the potential and future direction of the initiative, and serious discussion concerning the transfer of leadership roles to major cities. Central to this is the evolving role of the Government Regional Offices in the co-ordination of urban policy at the regional level, and their capacity for strategic leverage and discretion. Equally critical will be the robustness of local partnership arrangements in attempting to retain a coherent agenda as difficult implementation decisions over priorities have to be made. Finally, the successful implementation of the City Pride approach will require a much clearer articulation of the benefits for the community at large. If there is to be some real transfer of leadership roles to major cities in the form of development partnerships, policy makers will have to be assured that this will lead to a more effective targeting of resources, and that projects will tackle problems primarily for the benefit of local people. The seven new City Pride areas currently attempting to think through a response will need to have this centrally in mind. The change of government has not had major consequences for the thrust of this initiative, however, since such collaborative approaches fit broadly within their thinking. However proposals to establish regional development agencies may require institutional realignment and reform and increase the tension between a traditional concern with the problems of Britain's main cities and a new focus on regional dynamics.

11

The National Lottery and Competitive Cities

RON GRIFFITHS

Introduction

At the time of its launch in 1994, it was estimated that the National Lottery would be likely to generate some £1.6bn by the end of the year 2000 for each of the five 'good causes' earmarked to receive the proceeds: arts, sports, national heritage, charities, and commemorating the millennium. With the prospect of funds on such an enormous scale, and with an obligation on most of the distributing bodies to direct grants towards capital projects rather than subsidies towards recurrent costs, it is not surprising that the lottery was soon being seen in local government circles as 'the single most important development as far as some aspects of regeneration in the UK are concerned' (Pinto, 1995, p. 32). The lottery has undoubtedly become the pivotal force in the funding of major arts, sports and heritage conservation projects, and in shaping the destinies of all manner of urban revitalisation initiatives, ranging from the refurbishment of community halls and neighbourhood parks through to flagship urban redevelopment schemes. But the lottery's significance for cities does not lie simply in the fact of the scale of lottery funding. As will be seen, the lottery displays many of the features shared by other urban policy initiatives of the current era which are the subject of other chapters in this volume. The distribution of lottery proceeds is a *competitive mechanism*, in which grants are made to applications deemed to be of high quality, rather than by reference to a formula based on indices of need. Structured into the lottery mechanism is a strong emphasis on the *promotion of partnership*. The competition for lottery funds is open to all, with only *limited targeting* on social disadvantage; in fact the lottery can be viewed as a new 'informal tax' whose overall impact is decidedly regressive. The lottery thus stands as one of the elements of a new institutional landscape in which urban initiatives are being played out. However, despite the great significance of lottery funds for urban regeneration, this aspect of the lottery has so far received little systematic attention. The aim of this chapter, therefore, is twofold: to give an overview of the lottery funding structure and the terms of reference of the distributing bodies, and to discuss some of the main issues concerning the impact of the lottery on cities.

From its inception the lottery has been surrounded by controversy. At the outset there were four main issues which dominated discussion. One concerned its possible effects on public morals. By glorifying greed and unearned financial gain, would it have an enfeebling effect on the national culture and encourage an attitude of escapism and passive fatalism? The second concerned its likely distributional consequences. Would it work as a massive mechanism of regressive redistribution, indirectly taxing the gullible poor to fund the pleasures of the rich? The third concerned its impact on charitable donations. Would it divert household spending away from donations, thereby eroding the independence of charities and voluntary organisations and creating in its place an unhealthy level of dependence among them on the lottery distributors? The fourth concerned its longer-term fiscal implications. Would it, despite government promises to the contrary, end up as a substitute for public spending, and perhaps act as the thin end of a wedge in which state funding for education, health and other public services would be gradually replaced by dedicated lotteries? These controversies did not, however, prevent the lottery from winning wide public support, with weekly spending in the first year outstripping expectations. This was undoubtedly due in large measure to the extensive advertising campaign to promote the lottery, coupled with the fact that, from the outset, the main weekly draw has been televised live by the BBC during Saturday evening prime viewing time, receiving an average audience of around 12 million. Within a few months of its commencement the lottery was being spoken of as a new national institution, and even its fiercest critics were obliged to admit that it had found its way into the heart of popular culture. Despite the lottery's undoubted commercial success, its promoters have not been complacent about its position in the national leisure market. After the drop in sales of the Lottery Instants scratchcard, a midweek draw was introduced in February 1997, in the hope that it would boost takings by a further 20 per cent (taking the average weekly bet total from £69 million to £82 million). In their quest to identify more lottery 'products', the promoters have also been exploring the possibility of overseas expansion.

But behind the lottery's undoubted popularity with the ticket-buying public, many questions remain regarding the nature and scale of the public benefits achieved from the lottery proceeds. By the end of 1996 many millions of pounds had been channelled to 'good causes', with many millions more waiting to be allocated. But a number of major concerns had also become apparent, concerning both the projects chosen for funding and the rules and procedures surrounding the distribution of lottery funds. Before examining these concerns, the structure for distributing the proceeds of the lottery, as it stood at the beginning of 1997, will be outlined.[1]

The lottery structure

Although commonly referred to as though it were a single entity, the National Lottery in fact operates through a complex organisational structure, with a

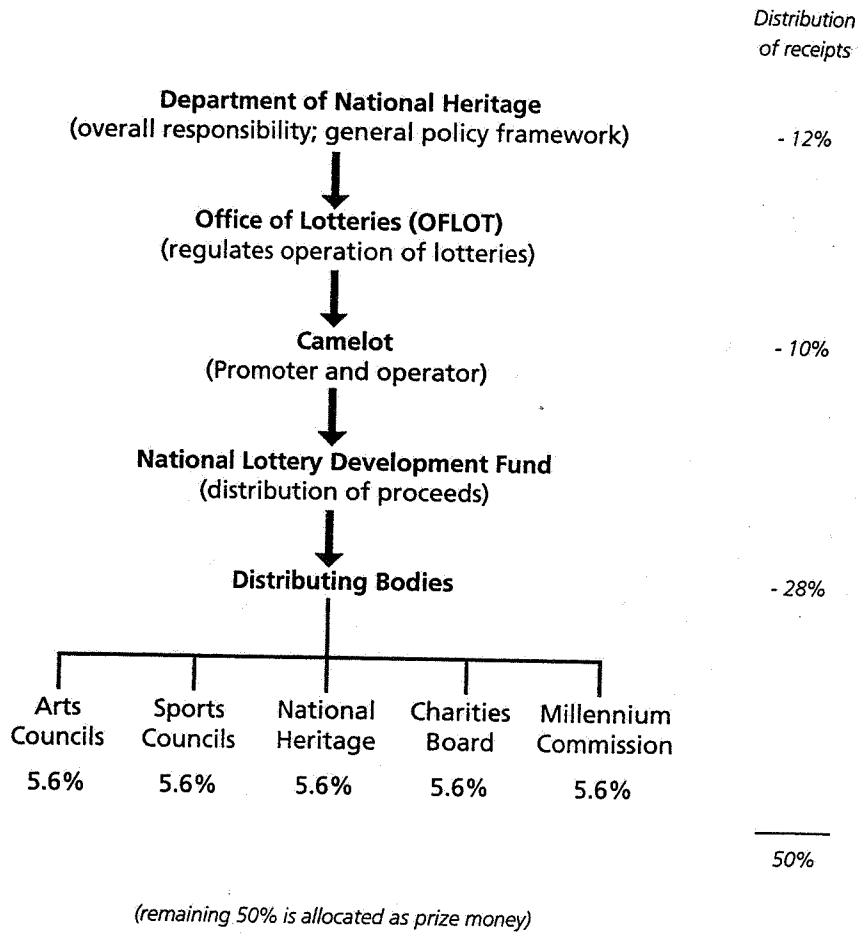


Figure 11.1 *The National Lottery structure*

sharply defined division of roles and responsibilities between a number of bodies responsible variously for policy, regulation, operations and distributing the proceeds (Figure 11.1). A government department, the Department of National Heritage[2] has overall responsibility for the lottery and determines the general policy framework governing the distribution of lottery funds. The government's regulatory function is carried out by the Office of Lotteries (Oflot). The operator of the lottery is a commercial company, Camelot, which won a seven-year operating licence in 1994 after submitting the lowest bid from eight competing consortia. In common with its competitors, Camelot is a consortium of giant multinational companies, including Cadbury Schweppes, the computer company ICL, the

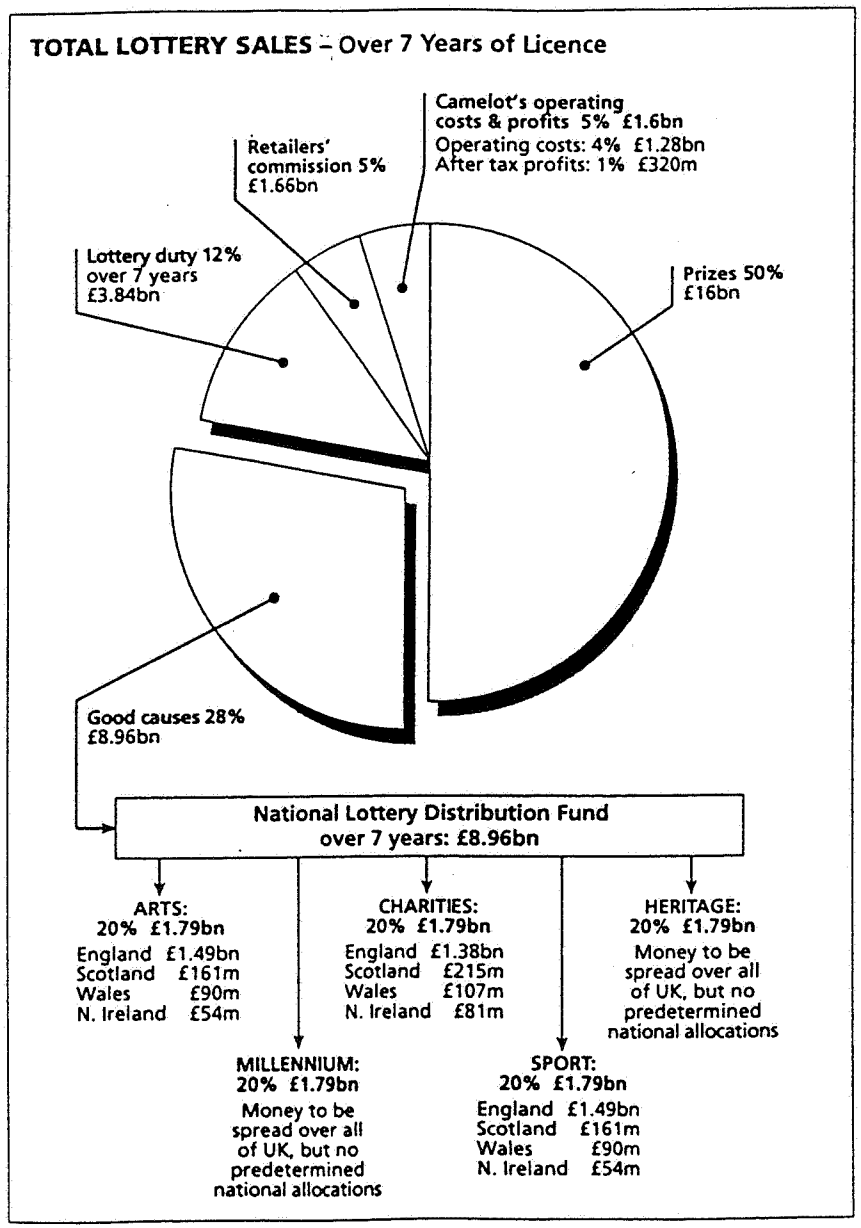


Figure 11.2 *Lottery financial profile*
Source: FitzHerbert, Giussani and Hurd (1996)

American lottery computer company GTECH, the banknote printer De La Rue, and the communications group Racal. According to the terms of the licence, Camelot retains 5 per cent of lottery takings to cover operating costs and profits. A further 5 per cent is retained as commission by retailers of tickets and scratch cards. The government receives 12 per cent of takings in the form of a lottery duty. Of the 78 per cent remaining, 50 per cent is allocated as prize money, leaving 28 per cent to be distributed to the designated 'good causes' through the National Lottery Development Fund. This means that for every pound spent on lottery tickets, roughly five pence goes to each of the five causes. Figure 11.2 gives an indication of the scale of funds to each of these categories for the seven-year licence period, as estimated at the commencement of the lottery. On the basis of predicted total takings over the period of £32bn, the National Lottery Development Fund stood to have almost £9bn to pass on to the distributing bodies by the end of 2001.

There are 11 distributing bodies through which lottery funds are channelled to the five designated good causes:

- the Millennium Commission;
- the Arts Councils for England, Wales, Scotland and Northern Ireland;
- the Sports Councils for England, Wales, Scotland and Northern Ireland;
- the National Heritage Memorial Fund (through the Heritage Lottery Fund);
- the National Lottery Charities Board.

The distributing bodies are all obliged to take into account a number of general policy guidelines issued by the Secretary of State for National Heritage (the Home Secretary in the case of the Charities Board). The most important ones from the standpoint of urban regeneration are the following:

- They cannot solicit particular applications from specific organisations, although they can encourage or promote applications of particular kinds. In other words, there is a limit to the extent to which distributing bodies can be pro-active in bringing forward projects.
- Projects must be supported by a significant element of partnership funding from non-lottery sources, which may include gifts in kind. (This does not apply to the Charities Board.)
- Funds should be used for capital expenditure on new and improved facilities, and not for running costs except in very closely circumscribed circumstances. (The rules for the Charities Board and the Millennium Commission give greater scope for revenue grants and endowments.)
- Money should only be distributed to projects which are of benefit to the general public or which are charitable. Lottery funds cannot be used for projects where private gain is the primary purpose.

Since lottery-supported projects under any of the five good causes might involve the reuse or redevelopment of significant urban sites, or make a contribution to local economic development, or assist with social and

community development, each of the good causes is potentially of relevance to urban regeneration. This section therefore gives a brief outline of all five good causes.

Millennium Commission

The Millennium Commission was set up in 1994 with a brief to support projects to mark the passing of the old millennium, or celebrate the coming of the new one. It was the only one of the lottery distributors to have a termination date specified in its charter. At the end of 2000 the Commission was to be terminated, with its share of the lottery proceeds reallocated to the other funding bodies. Given the nature of its brief, early decisions needed to be made on which capital projects would be supported. As a consequence, more had been earmarked for distribution by the end of 1995 through millennium funding than for any of the other good causes: £328 million, compared to £255 million for the next biggest, the arts bodies. During 1996 a further £432 million was committed to millennium projects, with only the arts bodies making more awards (£451 million). As well as those noted above, there are several additional general criteria that the Commission is obliged to take into account in the making of awards. Among them is the need to demonstrate the level of public support and the extent of the 'contribution to the community'. According to many commentators, however, the vagueness of the Commission's brief has been problematic, making some bidders 'bemoan an application process that is truly a lottery' (FitzHerbert, Giussani and Hurd, 1996, p. 124).

The Commission has identified four main categories of project into which its resources will be distributed. The first consists of a number of national landmark projects to provide a series of lasting large-scale monuments to the passing of the millennium. These were to account for approximately half of the funds. About 12 such projects were envisaged, each receiving up to £50 million. During 1995 five were announced: the Earth Centre (environmental research) project in Doncaster (£50 million grant); the conversion of London's Bankside power station into the Tate Gallery of Modern Art (£50 million); the redevelopment of Portsmouth Harbour for leisure and tourism (£40 million); the rebuilding of Hampden Park stadium in Glasgow to provide a new National Stadium for Scotland (£23 million); and the Millennium Seed Bank at Wakehurst, Sussex (£21.5 million). In 1996 decisions were made to support a further five: the International Centre for Life in Newcastle (£27 million grant); the Bristol 2000 project, consisting of an interactive science centre (Science World) and an electronic wildlife and environment centre (Wildscreen World) surrounded by new squares and public spaces (£41 million); the Lowry Centre in Salford (£15.6 million millennium grant, with £48.7 million of further funding from the arts and heritage funds); the redevelopment of Cardiff Arms Park to create a new Millennium Stadium (£46 million); and the Millennium Point project to create a centre of technology and learning in Digbeth, Birmingham (£50 million).

In the second category are a large number of projects of local and regional significance. In 1995 over 50 projects in this category were awarded grants, ranging from £42.5 million for a scheme by the civil engineering charity SUSTRANS to establish a nationwide cycle route, through to 14 projects awarded between £30,000 and £300,000. Because the Commission has been prepared to award grants to umbrella schemes embracing projects smaller than the £100,000 notional minimum grant, more than 300 projects in fact received support in 1995. Nevertheless, very large schemes dominated, with nearly 80 per cent of the funds awarded in 1995 going to just eight projects receiving over £10 million each, including the five landmark projects. The bias towards very large projects was again evident in the awards made in 1996. Of the 60 new awards, 18 were for grants of £5 million or more, accounting for 85 per cent of all the money awarded by the Commission during the year (FitzHerbert and Rhoades, 1997, p. 140).

The third category comprises the national millennium exhibition, due to open at the start of the year 2000. The purpose of the national exhibition is to provide the focus for a year-long nationwide celebration of the arrival of the third millennium. The Millennium Commission's contribution to the exhibition was not fixed in advance, but was anticipated to be in the region of £300 million. Submissions to stage the main national festival were made from over 50 sites, involving several potential operators, with the Birmingham National Exhibition Centre and London's Greenwich peninsula proposal eventually emerging as the main contenders. The Commission finally announced in 1996 that the operators of the Birmingham bid, Imagination Ltd, had been chosen as the preferred organisation to run the festival. However, Greenwich was selected as the preferred location, fuelling suspicions that the decision had been strongly, if not unduly, influenced by the desire of the then Deputy Prime Minister Michael Heseltine (a Commission member) to use the exhibition to give a boost to his long-standing project of revitalising the East London corridor. Further details of the exhibition emerged in October 1996, when the plans for an exhibition dome, capable of accommodating 50,000 people and costing an estimated £500 million to construct and fit out, were revealed. However, continuing uncertainties over the likely final cost of the exhibition, coupled with major difficulties in securing the required backing from commercial sponsors and a continuing reluctance by the Labour Party to commit itself to underwriting the project, were casting serious doubts over whether it would eventually go ahead.

The final category is a millennium awards scheme. Unusually (though not uniquely) for lottery spending, this is a scheme by which funds are directed towards individuals rather than projects. Awards are made to 'enable individuals to fulfil aspirations and achieve their potential' and to 'ensure a community benefit from the Award made, individually or cumulatively' (Millennium Commission undated). The intention was to set up a £100 million endowment, the interest from which would enable grants to be made indefinitely into the future. By the end of 1996, grants totalling £20 million had been

awarded to 13 awards bodies who were then responsible for making awards to individual applicants. It was expected that approximately 8,000 individuals would eventually receive awards through this round of grants.

Given the openness of the Commission's brief, and the lack of specificity as to what might count as 'millennial', it is not surprising that an extremely wide range of projects have received support. Many of them, in fact, might equally have been eligible for support from other distributing bodies: sports (e.g. the new national stadium in Glasgow), arts (e.g. the Bankside conversion for the Tate Gallery), heritage (e.g. many of the landscape conservation schemes proposed under the umbrella 'Changing Places' initiative by Groundwork) and charities (e.g. the various community halls). As to the 'millennial' content of the chosen projects, some critics have argued that there has been little sign of the boldness and imagination that might have been expected of schemes designed to herald the new millennium. In the words of one:

> Overwhelmingly greenish, the winning projects appeared to have come from the junk room that is the traditional repository of British middle-class pastoralism. Nowhere could I find any sense of ambition and risk. Asked what they wanted, the British people had plumped not for the future but for their tried method of erecting pleasant fences against uncertainty.
>
> (Fraser, 1996)

Whatever the merits of this criticism, it was becoming clear by the beginning of 1997 that many of the major millennium schemes were facing an uphill struggle to be completed on time, owing to a variety of problems including planning disputes, unresolved difficulties between partner organisations, and problems with raising the matched funding required to release the lottery funds (Bellos, 1997). However lacking in risk the projects may have been in their conception, the tightness of the millennium timetable was giving their implementation a decidedly risky look. How far the problems were attributable also to more general characteristics of the lottery funding mechanism is an issue we will return to in the final section.

Arts Councils

In contrast to the budgets for millennium celebrations, national heritage and charities, for which new distributing bodies were established, responsibility for the administration of the lottery arts budget was inserted into the existing Arts Council apparatus. There are separate Arts Councils for England, Wales, Scotland and Northern Ireland, each receiving a fixed proportion of the lottery money. Of the available annual lottery arts budget of over £250 million, the lion's share (over 80 per cent) has been allocated to the Arts Council of England. By the end of 1995, it had received around £230 million in lottery money. By the end of 1996 it had received £471 million, but had entered into capital commitments of £628 million. Some idea of the impact of this level of funding on the arts world can be gained by setting it alongside the Council's

annual government grant: £191 million in 1995/6. The lottery has therefore had the effect of more than doubling arts funding from national sources.

The main aim of lottery arts funding is stated as being to support projects which make 'an important and lasting difference to the quality of life' of people throughout the country. The Arts Councils have also been specifically charged with promoting artistic life across the whole spectrum, in the sense of giving support to voluntary as well as professional organisations, and in the sense of embracing the whole range of art forms, including architecture, circus, crafts, dance, drama, film, literature, mime, music, photography, video and visual arts (Arts Council of England, 1996, p. 2).

The awards made in the first year, however, provoked severe criticism that this explicitly inclusive brief was not being adhered to. By the end of 1995, the four largest grants in England (accounting for more than half of the total awarded) had been made to London-based bodies, each sitting firmly within the professional high-arts end of the spectrum: the Royal Opera House rebuilding programme in Covent Garden (£55 million, with an extra £23.5 million subject to further work on its application), the Sadler's Wells dance and ballet theatre redevelopment (£30 million), the Royal Court Theatre renovation (£15.8 million) and Shakespeare's Globe Theatre reconstruction (£12.4 million).

In response to the accusations of it having a south-east, high-art bias, the Arts Council of England pointed to the fact that, since its terms of reference disallowed it from soliciting bids, it had no option but to make its decisions on the basis of the bids submitted. In the Council's view, it was the capacity of large well-funded professional organisations to employ consultants to assemble applications quickly that had determined the pattern of the early rounds of awards, not a disinclination on its part to entertain bids from organisations representing other arts forms and other parts of the country. Any apparent bias in the first year was to be compensated for in later rounds. In the event, however, the grants announced in 1996 maintained the earlier pattern, of very large grants, disproportionately awarded to London-based organisations. Whereas the average grant size for the Arts Council of England in 1996 was £537,000, the corresponding figure for Scotland was £187,000, for Wales £62,000 and for Northern Ireland £53,000 (FitzHerbert and Rhoades, 1997, p. 60). While the greatest number of English grants announced in 1996 were for awards of under £100,000 (549 out of 736 grants overall), these accounted for only 7 per cent of the total money. In contrast, the nine awards of over £10 million accounted for 50 per cent. Of this nine, five were for London-based organisations, including the Royal National Theatre (£31.6 million), the Royal Academy of Dramatic Art (£22.7 million) and the Royal Albert Hall (£20 million). Calculations showed that the value per head of Arts Council of England grants up to the end of 1996 was £40 per person in London, compared to only £8 for the rest of England, though this figure does not convey the extent of the concentration of projects within London on institutions in the centre of the city.

Sports Councils

As with lottery arts funding, distribution of the lottery sports fund has been placed in the hands of the existing organisations through which national support is channelled, namely the Sports Councils for England, Wales, Scotland and Northern Ireland. The effect of the lottery money has been to increase by a factor of 20 the grant money which the Sports Councils have available, though even an injection of funds on this scale has barely compensated for the decline in sports funding from other mainstream sources, such as local authorities and the Foundation for Sport and the Arts.

Sports lottery funding is intended to fund projects that aim to increase participation, and projects concerned with promoting excellence. In 1995 there was a strong emphasis on participation-orientated projects, reflecting a concern to spread the benefits of lottery funding to as many communities as possible. In line with this philosophy, the Sports Councils went noticeably further than most other lottery distributing bodies to adopt a pro-active role in bringing lottery funding to the attention of local amateur clubs and societies, and to tackle the obstacles standing in the way of submissions from poorly funded local organisations, notably regarding matched funding. For example, in 1996 it adopted a policy of giving up to 90 per cent of capital costs (in contrast to the usual 50–65 per cent) for projects in targeted areas identified on the basis of a government index of deprivation. Evidence on the average level of grant to the priority areas identified by the English Sports Council, compared to those for the rest of the country, indicates that positive action of this kind can be successful, especially when it includes strong marketing initiatives directed towards local authorities in the designated areas (FitzHerbert and Rhoades, 1997, p. 160).

While the Sports Councils have increasingly taken steps to make lottery funding accessible, substantial barriers undoubtedly remain. These stem partly from problems surrounding partnership funding, to which we will return in the final section. But they also relate to the way the Sports Councils have chosen to pursue their goal of using lottery funds to maximise participation in sport. To be eligible for a lottery grant, an organisation must have a remit that explicitly embraces sports provision. The effect of this has been to debar many types of club (e.g. religious, youth, homeless, elderly people) for whom sporting provision is incidental, but which could play a bigger role in introducing people to sport in a non-sporting context.

The Sports Council for England receives over 80 per cent of sports lottery funding. In 1995 it made grants totalling £138 million, benefiting 749 projects covering 46 sports. In 1996 a further 981 awards, worth £213 million, were made. In marked contrast to the Arts Council of England, its approach was one of gradually building up its lottery spending, rather than staking large sums on a few very large flagship projects. Accordingly, the single largest grant in the first year was £5.8 million to redevelop Smith's Park in North Tyneside, in the Tyne and Wear conurbation in the North East. Another 19 grants were made in the £1–5 million range, including awards for sports centres, swimming

pools, training villages and an athletics stadium. While several of these major facilities were located in large urban areas (a sports hall in Hackney, a swimming pool in Newcastle and a multi-sports village in Wolverhampton, for example), most were in smaller towns not notable for high levels of social disadvantage (e.g. Stourport, Leominster, Windsor, Berwick on Tweed), indicative perhaps of differential capacities to secure matched funding. The 1996 awards included 41 grants of £1 million or more, amounting to £124 million or 58 per cent of the total, in addition to which commitments were made to set aside £120 million for a new national sports and athletics stadium at Wembley, and £80 for a sports stadium and associated swimming pool in Manchester (FitzHerbert and Rhoades, 1997, pp. 158–61). As in 1995, the major urban areas (especially in the Yorkshire/Humberside region) were strongly represented among the large awards, though many large awards were also made to smaller cities and non-urban areas, reflecting the strenuous efforts which the Sports Council (unlike the Arts Council) has made to address geographical disparities and respond to social need.

Like a number of other lottery funding bodies, the Sports Councils have also introduced a programme to channel some of the resources to individuals, to offset to some degree the dominance of capital projects. The revenue programme has been set up to support talented individuals and teams, with the overall goal of fostering success at world level. The funds are being made available through UK-wide governing bodies for individual sports, and can cover training expenses, subsistence, the staging of major international events, and programmes to support coaching, leadership and talent identification.

National Heritage Memorial Fund

The National Heritage Memorial Fund (NHMF) was originally set up in 1980 to give financial assistance towards the acquisition, preservation and maintenance of land, buildings, works of art and other objects considered by the Fund's trustees to be of outstanding importance to the national heritage. It tended to operate as a fund of last resort. This changed in January 1995 when the NHMF became responsible for the Heritage Lottery Fund, through which lottery funding for heritage projects was to be distributed. Like the other lottery funds, its annual value was estimated to be around £250 million. The NHMF was empowered to use the lottery funding to assist projects within its existing remit, and also to extend its work into a number of new areas. For example, it gained the power to give grants for the construction of buildings and facilities designed to house or enhance public access to heritage assets. While the NHMF confines itself to 'tangible heritage assets', it nevertheless considers projects across a very wide range. Five broad fields have been identified: ancient monuments, historic buildings and their contents and settings; land of scenic, scientific or historic importance; printed books, manuscripts, archives and other records; museum and gallery collections of all kinds; and industrial, transport and maritime heritage (NHMF, u/d, p. 12). Given the specialist knowledge required to make judgements about projects in each of

these fields, the Fund makes extensive use of advice from a range of offical bodies, such as English Heritage, the Countryside Commission and the British Library.

The Fund considers projects of all sizes, but has stated that it would not normally expect to award grants to projects with a total cost of less than £10,000. Applicants are expected to provide a 'significant element' of partnership funding from non-lottery sources, which is taken to be at least 25 per cent if the grant cost is over £100,000. In its own literature the Fund has made it clear that applications need not demonstrate *outstanding* heritage importance to qualify for support; projects can be eligible if they are are of importance to the local or regional heritage. The reality, however, is that the bulk of the Fund's resources have been directed towards 'national treasures' in major museums, rather than locally important heritage assets, and have been heavily London-centred. By the end of 1995 it had handed out the smallest amount (£96 million, in 170 separate grants) of any lottery distributor. Over 80 per cent of this total was accounted for by 14 grants of over £1 million. The largest single award, £13.25 million for Cambridge University to acquire the Churchill archive from the Churchill family, provoked considerable public controversy, not about the heritage importance of the archive but about whether it should have been necessary to use public funds to purchase what, in the view of many, was already a public asset.

The reason given by the Fund for the relatively low level of awards in the first year was its concern to take time to establish clear views on future policy. One outcome of this that is of relevance to urban regeneration was the decision to launch an initiative on urban parks. A MORI poll commissioned by the Fund had shown that safe parks for children were one of the most popular heritage causes, second only to disabled access to heritage sites. A major programme was therefore initiated in 1996 aimed at using lottery funding to reverse the decline of the nineteenth-century heritage of Victorian parks. However, because the Fund's trustees' reading of their remit led them to insist that parks needed to possess 'historic interest' in order to qualify as part of the heritage, parks in most parts of the country were excluded from consideration, whatever their value to local communities.

During 1996 almost 80 per cent of the Fund's awards were accounted for by 37 grants of over £1 million, with the largest going to British Waterways for restoration work on the Kennet and Avon canal (£25 million), and the Science Museum in London for the building of a new wing (£23 million). The total number of projects supported by the Fund was the smallest of any of the lottery distributors, leaving more than half the local authority areas in Britain, including several large cities such as Bristol, without any grants from the Heritage Fund at all.

Charities Board

Among the most vociferous critics of the government's decision to introduce a national lottery were the many thousands of charities and voluntary organisations which anticipated that the charitable donations on which they depended would suffer. The prospects of further criticism were not lessened by the Board's early decision to interpret its brief in an explicitly ambitious and progressive manner. Its initial terms of reference had given only the most broad statement of aims, namely to support 'charitable expenditure' by any organisation established for 'charitable, benevolent or philanthropic purposes'. This potentially placed hundreds of thousands of organisations within the frame for Charities Board funding. The Board therefore came to the view that a more focused statement of its purpose would be necessary for it to be able to make consistent judgements on the large number of applications likely to come before it. Its decision was to give a clear priority to the direct alleviation of poverty and disadvantage, believing this to reflect 'the heart of charity'. Since this definition of its purpose seemed to exclude many organisations with charitable status in law, such as academic, religious and medical research institutions, the hostile reaction which its decision initially provoked was not unexpected. The Board's selectivity and independence have also been apparent in other ways, such as its decision not to fund schemes previously in receipt of support from public funds, and its policy of making its own assessments of applications without reference to the policies and plans of the official welfare agencies and social service departments. An important consequence of the Board's emphasis on tackling disadvantage is that it is not essential for projects to have partnership funding, and very small schemes can be eligible. It is also possible for projects to include a revenue element, and support can be given for overseas projects.

Motivated in part by a desire to defuse its critics, the Charities Board took time to consult carefully with the voluntary sector before issuing application criteria, and to try to convince them that the lottery mechanism had advantages over the annual 'hand-to-mouth' on which the sector has traditionally relied. By the end of its first year of operation it was widely accepted that the Board had succeeded in earning considerable respect for the way it had interpreted and carried out its brief. Having started out in 1994 as an entirely new organisation, with responsibility for managing an annual budget of up to £300 million, it had, by the end of 1995, received some 15,000 applications and made grants of more than £160 million to nearly 2,500 applicants. In marked contrast to the multi-million-pound arts, millennium and heritage projects, the largest grant was for £680,000 (for a family resource centre in Tyne and Wear), with a median value of £32,000. Among the recipients were a large number of local community groups, reflecting the philosophy of supporting self-help in disadvantaged communities, to which the Board has openly committed itself. A small grants scheme was introduced in 1996 with the intention of encouraging even greater take-up by small, local groups. Examination of the geographical spread of Charities Board grants shows a marked emphasis in favour of areas of social disadvantage, at both regional and urban levels. In London, for example, the borough indicated by the official Index of Local Conditions as being the most disadvantaged (Newham) received £10.61 per

head of population in 1995, compared to £0.16 and £0.33 respectively to the two least disadvantaged (Harrow and Bromley) (FitzHerbert, Giussani and Hurd, 1996, p. 74). The places with the highest levels of grant per head have overwhelmingly corresponded to the socially stressed districts located in the major urban areas, and the lowest levels have been recorded by the relatively affluent suburban districts.

The urban benefits of the lottery

As we have seen, urban regeneration is not in itself an explicit objective of any of the lottery distributing bodies. Whether defined primarily in social terms (overcoming low income, restricted life prospects and social disintegration in urban communities) or in physical terms (removing dereliction and securing the development of under-used land), urban regeneration gains are for the most part likely to be achieved from the lottery only as incidental benefits to the primary purpose (millennium celebrations, support for the arts, etc.) of lottery-funded projects. Nevertheless, it is clear that the lottery represents a major source of funding for initiatives that can play a part in furthering urban regeneration goals. While it is the high profile Millennium Commission and Arts Council schemes that have attracted most attention for their likely impact on urban economic and physical revitalisation, each of the five distribution channels has a potential to make a contribution to urban revitalisation.

How far such wider social gains have featured in decisions by lottery distributors is not, at present, a question that can be answered with any degree of confidence on the basis of currently available research into the lottery mechanism. Given the overwhelming emphasis on capital projects that is built in to the lottery structure, it is clear that any wider social gains in cities will be derived in the main from improvements in the physical infrastructure of urban life, ranging from the major landmark projects (e.g. the harbourside schemes in Portsmouth and Bristol, and London's Bankside conversion) through to the hundreds of relatively small-scale restoration projects (parks, playing fields, community centres, etc.) across the country. It will be surprising, therefore, if the lottery does not succeed in making a substantial contribution to the upgrading of the urban landscape.

But any assessment of the urban impacts of the lottery needs to look beyond the immediate physical manifestations of lottery largesse. The limitations of a purely property-orientated approach to urban revitalisation have, after all, been the subject of extensive research and commentary over the last decade (Turok, 1992; Healey *et al.*, 1992; Loftman and Nevin, 1995). The emphasis of the lottery on capital projects has in fact served to exacerbate a number of major problems in urban policy that were already evident before the lottery funds came on stream. One of the most important concerns the steadily growing imbalance between capital grants and revenue support. At the same time that opportunities to secure capital grants for favoured kinds of capital project (cultural buildings but not social housing, for example) have been expanding,

the availability of support for running costs from the Arts Councils, the Sports Councils, local authorities and other mainstream sources has been declining. Increasingly, therefore, cities (or, rather, arts bodies and other organisations within cities) have been facing the prospect of insufficient revenue funding to operate new or renovated buildings, or to mount programmes and collections of sufficient quality to match the aspirations created by the new venues. One of the paradoxical and depressing consequences of this dilemma is that it has become commonplace to come across reports in the national and local press announcing progress on ambitious projects to create new cultural and leisure spaces, only to turn the page and find a report on the threat to the survival of a regional orchestra or theatre company stemming from the national revenue funding crisis. In response to this dilemma many organisations have had to consider introducing, or raising significantly the level of, entry charges, knowing that this will have the effect of erecting higher barriers to participation, and further reinforcing the exclusion of people on low incomes. Responding to criticisms about the overemphasis on prestige capital projects, the Heritage Secretary in 1996 changed the rules for lottery grants to provide greater leeway for money to be spent on revenue projects, such as the commissioning and staging of new plays. Eligibility criteria for these initiatives are tight, however, and the sums involved are relatively modest. The rule change has also prompted criticism that it has largely been an exercise in diverting attention away from further reductions in core government funding.

Another major problem that has been exacerbated by lottery funding relates to the partnership funding conditions which each of the distributing bodies (except for the Charities Board) operates, albeit at varying levels. The main justification for partnership funding is that it is supposed to provide an extra check on the local support for a project, and an extra guarantee of its viability. The distributors have gradually moved towards a more flexible attitude over the proportion of matched funds required, and over what can be counted as partnership funding, such as the labour supplied by volunteers. Despite this, the sheer scale of lottery funding has meant that the resources available for partnership funding, from private and public sources, have been stretched to the limit, especially when the calls for partnership funding on capital projects are added to the requests for funds to help compensate for the shortfalls of mainstream revenue funding. Even proportionally very low levels of partnership funding have therefore proved to be beyond the capabilities of some organisations with otherwise worthwhile and popular projects. In general it has been small applications in disadvantaged areas, rather than the high profile prestige projects, that have experienced greatest difficulty in finding the matched funding needed to unlock lottery funds. Concerns have also been expressed about local council spending being skewed towards providing partnership funding for projects that might capture lottery money, even though they might not be the most socially beneficial for the locality in general.

A further issue to enter into the assessment of the lottery's urban benefits concerns the scale of the administrative work, and in many cases the political

energy, that have to be devoted to making a credible lottery bid. Although some distributing bodies have taken steps to produce concise user-friendly information packs for prospective bidders, and in some cases to adopt proactive outreach initiatives to make contact with organisations that might otherwise not have considered bidding, it remains the case that lottery bids involve grappling with complex criteria and facing the prospect of strong competition (even though 'success rates' may in practice be quite high for certain categories of project). For organisations with limited resources, therefore, the process of lottery bidding can represent a major drain. Richer organisations, in contrast, are generally far better placed to engage in the bidding process, because of better access to skilled advice from consultants, and a better capacity to find sources of partnership funding. This inequality was revealed starkly in the distribution of major awards, notably by the Arts Council, as noted above.

Beyond these issues about revenue support, partnership funding and opportunity costs there lies a question about the role of the lottery in urban regeneration that is in some ways even more fundamental. It arises from the requirement that the government has imposed on the distributing bodies to judge individual bids on their own merits, against the criteria embodied in each distributor's terms of reference, and not actively to 'solicit' applications. The official rationale behind distributing bodies adopting a largely reactive role is that it stimulates, or at least avoids discouraging, innovation and creativity in the submission of projects for lottery support. An important consequence, however, is that it undermines the capacity of lottery money to be used in a strategic manner, to work towards public goals that transcend the specific briefs of individual bodies. To a certain extent, distributing bodies have made moves to incorporate a strategic dimension into their practices. For example, they have sought to stimulate projects on selected themes (such as urban parks in the case of the Heritage Fund and youth issues in the case of the Charities Board), and to attract applications from disadvantaged areas (as in the case of the target areas identified by the Sports Council). They have also been encouraged to 'take into account' local and regional regeneration strategies when considering lottery funding applications. The primary emphasis of lottery distribution, however, remains the (reactive) assessment of submitted projects against the particular sets of criteria operated by the individual distributing bodies. The vital question, from an urban regeneration standpoint, is whether this represents an enormous missed opportunity to secure the maximum possible public benefit of lottery funds by fusing together lottery and non-lottery funding sources, in a strategically directed way, to achieve the greatest gain for local areas.

The example of the Millennium Festival reveals both the potential and the problems of drawing lottery funding into wider strategies of urban regeneration. It is a matter of public knowledge that Michael Heseltine has long cherished the idea of revitalising London's eastern corridor along the Thames. As a member of the Millennium Commission until May 1997 he was in a strong position to champion the Greenwich bid, which would result in major in-

frastructure investments in a strategically important Thames-side site, despite the superiority of the Birmingham bid in conceptual terms, and despite the view expressed in some quarters that an event of such significance should be staged in a central London location. The point, however, is that, according to the strict terms of lottery distribution, such urban regeneration gains can only be introduced by the back door. They cannot be treated as an explicit and integral part of the evaluation process, since to do so would entail drawing on criteria that lie beyond the circumscribed remit of the distributing body. There is also the issue of whether Londoners, and indeed the nation more generally, might have been better served by celebrating the start of the new millennium by using lottery money to fund a major refurbishment and extension of the capital city's underground system, or a similar large-scale public works project. As it stands such an approach, based as it is on an inclusive politics of universal needs rather than a narrow politics of spectacle, falls outside the scope of the lottery mechanism as it is presently constituted.

To sum up, there is no doubt that cities stand to benefit greatly from lottery-funded projects, and the distributing bodies have all, to a greater or lesser extent, shown themselves willing to respond to criticisms of their priorities and procedures. Nevertheless, it is difficult to escape the conclusion that the lottery represents yet another step in the recent movement towards a 'political economy of place' (where the emphasis is on securing improvements of particular sites, through methods such as gentrification and flagship development) and away from a 'political economy of territory' (where the emphasis is on extending universal benefits to an urban population at large) (Harvey, 1989a).

Notes

1. In the months immediately following the Labour Party's victory in the general election in May 1997, several important developments took place on the National Lottery front. Rather than attempt to insert them into the body of the text of this chapter, which was essentially completed before the election, they are noted briefly here.

   An early confrontation between the government and Camelot was triggered by the news that the directors of Camelot had awarded themselves pay increases averaging 40 per cent despite a 10 per cent drop in lottery revenues over the preceding year. Amid talk of Camelot's profits being subjected to a windfall tax of the kind which Labour were planning to levy on the privatised utilities, the confrontation was defused by the directors agreeing to pay an undisclosed sum to charity. An important longer-term effect of the episode was that it drew a firmer commitment from the government to give the lottery franchise to a non-profit organisation when Camelot's franchise came to an end in 2001.

   Hard on the heels of the directors' salary issue, the government was faced with having to come to a firm decision about whether to give its support to the millennium exhibition in Greenwich. Powerful voices in the cabinet favoured calling it off, on the grounds that the costs of the project were steadily escalating, commercial sponsors remained reluctant, the planned level of entry charges would exclude many from visiting it, there was still little clarity about the content of the exhibition, and the project as a whole flew in the face of the government's election commitment to give

priority to matters of education and health, and not temporary spectacle. Despite the opposing voices, the government came out in favour of continuing with the project, apparently because of the Prime Minister's insistence about the crucial role it could play in reasserting Britain's world profile at the start of the new millennium. In an effort to consolidate the exhibition's role as an exercise in global-league spectacle, it was renamed the Millennium Experience and a number of changes were made to the organisation of the project, including bringing in the services of the musical impresario Sir Cameron Mackintosh and the sporting agent Mark McCormack.

In July 1997 a White Paper was published to explain how the government proposed to take forward its manifesto commitment to shift the emphasis of lottery spending away from buildings and elite institutions and towards more popular causes. Entitled *The People's Lottery*, it set out plans to create a sixth good cause, the New Opportunities Fund. The new fund would run alongside the existing good causes (which would each receive a corresponding reduction in anticipated funding), and provide resources for a series of major initiatives in health, education and the environment. The first three initiatives, to be delivered by 2001, would be: training and support for teachers in the use of information technology; the creation of out-of school activities for secondary and primary schools; and the setting up of a network of heathy living centres. In addition to the New Opportunities Fund, a National Endowment for Science, Technology and the Arts (Nesta) would also be established, to help talented individuals in the creative industries, science and technology; promote the exploitation of creative ideas; and contribute to public awareness of the creative industries, science and new art forms. Between them, the New Opportunities Fund and Nesta could expect to receive £1 billion of lottery money by 2001.

2. In July 1997 the Department of National Heritage was renamed the Department of Culture, Media and Sport.

Section IV

Conclusion

12

Contemporary Urban Policy: Summary of Themes and Prospects

NICK OATLEY

Themes in the making and unmaking of contemporary English urban policy

The central thesis explored in this book is that regeneration policy in England has undergone a major reorientation since 1991 in line with developments in other areas of social policy. For the Conservative government this reorientation of urban policy became an important part of the agenda to restructure Britain economically, socially, spatially and ideologically. Regeneration policy introduced after 1991 was the post-Thatcher Conservative government's attempt to address the economic and welfare state crisis as manifest in declining urban areas and socially deprived neighbourhoods. It involved the making and unmaking of the local mode of regulation based on new forms of economic intervention and institutional relations.

This redefinition of policy was shaped by a number of processes which are summarised in Figure 12.1. They include economic restructuring, a reassessment of the role of cities in light of global competition, the persistence of widespread social problems in inner cities, outer estates and rural areas, the redefinition of 'welfare' in relation to deprivation (and competitive cities), and the ideologically driven changes in governance pursued by the former Conservative government. These processes have led to pressures to maintain cities at the forefront of an increasingly competitive global economy while addressing the cumulative legacy of urban deprivation. The dominant policy approach that emerged during the 1990s was a further development of the neo-liberal agenda based on institutionalising the process of inter-locality competition. This chapter reviews the main themes to emerge from this distinctive phase of policy and sets out the main challenges facing cities and their governments on the verge of the millennium.

New political and economic processes have brought about a renewed political salience to cities and localities (Graham, 1995). The reach and hypermobility of capital expose cities to global economic changes more than ever before. Cities nowadays are as much influenced by global economic

parameters as they are by national or local economic factors. They are part of a world where national borders are losing their significance as national trade barriers are dismantled and individual cities operate within an increasingly global urban system. The specific local conditions required by globally mobile capital cannot be secured by the central state and, increasingly, this role is taken on by local political alliances. This has reinforced the potential of cities as autonomous creators of prosperity, and has made them less dependent on national economic developments. In this context, the importance of British cities has grown and attention has focused on their contribution to regional, national and European economic progress and prosperity (Mayer, 1994, p. 317; Wulf-Mathies, 1997).

Britain's cities are the nation's primary source of wealth creation and generate economic progress and prosperity. At the same time, cities, especially the depressed districts of medium-sized and larger cities, have borne many of the social costs of past changes in terms of industrial adjustment and dereliction, inadequate housing, long-term unemployment, crime, drug abuse and social exclusion. Cities not only contain opportunities and the seeds of innovation but also the costs and debris of systemic changes in economic, political and socio-cultural processes (Healey *et al.*, 1995, p. 275).

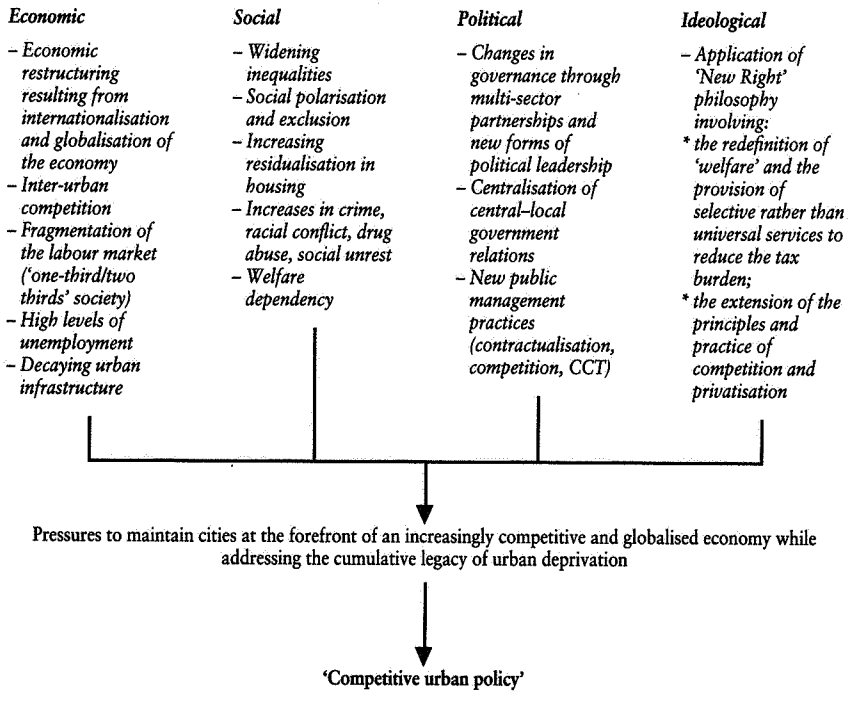


Figure 12.1 *Processes shaping contemporary urban policy*

The instability, conflict, increased social and spatial polarisation and selective rejuvenation experienced in cities have led to a growing realisation of the interdependence between economic competitiveness and social problems and that social inequality can retard economic growth (Glyn and Miliband, 1994): 'The costs were once considered to be the burden of the excluded; but the true costs are now becoming evident in the urban system. . . . The many externalities resulting from the inequalities hamper future economic growth' (Brink, 1996, p. 65).

Urban society and national governments will pay a heavy price if development is accompanied by major inequalities of access to rewards of economic progress in terms of direct costs of expenditure on social security and lower revenue from taxes and indirectly through the costs of crime and antisocial behaviour. Social polarisation and exclusion can also deter investors from large parts of British cities. The economy will suffer because adjustment to rapid change, to maintain the competitiveness of cities, is only likely to succeed where there are sufficient skills in the labour market and a degree of flexibility that commands the widest consensus. And finally, there is a danger that the country as a whole will pay through disaffection of its citizens and the loss of support for the British model of society (Wulf-Mathies, 1997, p. 13).

Urban policy in Britain has attempted to address many of these problems although, in the past, these efforts have tended to be fragmented, reactive and lacking in vision. Urban policy has shifted from welfare approaches dominated by social expenditure to support deprived groups in depressed districts (1969–79) to entrepreneurialism aimed at generating wealth and stimulating economic development (1979–91).

Policy since 1991 has continued with some of the approaches of previous phases (e.g. the newly established English Partnerships with their focus on property redevelopment) although there have been significant changes. The spate of initiatives introduced since 1991 has established a new orthodoxy in approaches to urban (and rural) economic decline and social deprivation. This new orthodoxy has involved a paradigm shift in policy and practice.

In this book the defining features of contemporary urban policy have been described in various ways. Figure 12.2 sets out a 'map' of the defining features of contemporary regeneration policy using the different terminology that appears in this book. In broad terms these features can be categorised under new forms of intervention and new institutional relations.

During the early 1990s the regeneration policy of the former government set out to construct a *new form of intervention* based on a localised apparatus, and a discourse to match, to reflect the broader reorientation of the national state that had been occuring since the late 1980s. The task of this apparatus was to develop a degree of co-ordination and control of policy supporting a 'localist' approach in which local policy makers were encouraged to construct local strategies to enhance the competitive position of English cities in Europe and beyond. It sought to establish a degree of co-ordination of policy, largely absent from earlier periods of policy, and to maintain central government

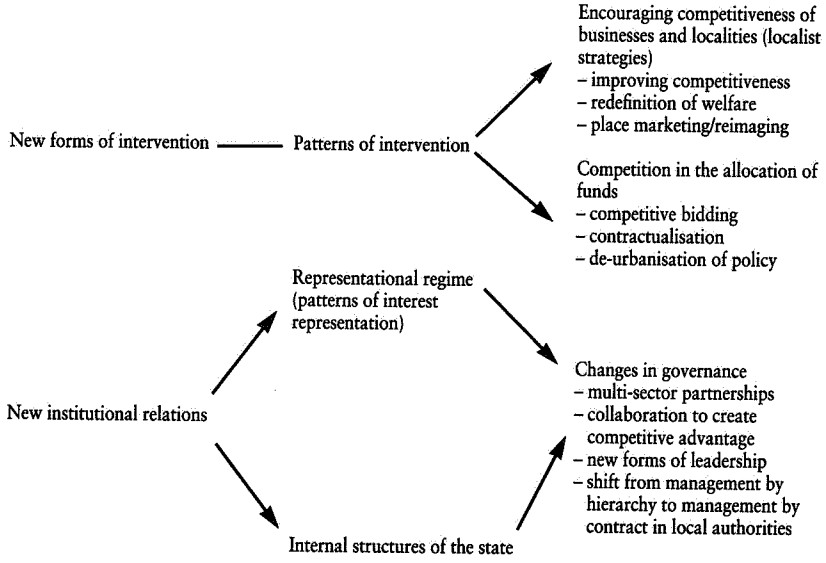


Figure 12.2 *A map of the defining features of contemporary urban policy*

control. This new form of intervention involved shifts both in policy emphasis and in the process by which funds were allocated.

During the 1980s one of the government's main concerns was with changing the governance of cities involving a significant redistribution of political power to the centre and the use of market principles and the enterprise culture to provide a climate of ideological change. By the 1990s this project had run into problems. Central government was experiencing difficulties in addressing the co-ordination of urban policies in the context of continual changes in policy aims and delivery mechanisms and the weakening of the capacity at local level through financial controls and a dilution of powers of local authorities. In this context, City Challenge, the Single Regeneration Budget Challenge Fund, City Pride initiatives and Rural Challenge represented a change of priorities in order to facilitate long-term collaboration and to provide greater coherence, co-ordination and targeting of resources.

The Single Regeneration Budget Challenge Fund (Chapter 9, Nick Oatley), and the City Challenge (Chapter 7, Nick Oatley and Christine Lambert) before it, radically altered the way in which policies aimed at tackling problems of urban decline and social disadvantage are formulated, funded and administered. City Challenge was an innovation in policy approach and was the prototype for Challenge Fund initiatives that came after it. The Challenge Fund model of policy extended the principles and practices of competition and realigned central–local government relations by establishing a purchaser–provider relationship. It has also carried forward trends towards new forms of

urban governance. The former government attached a great deal of importance to this approach in bringing about a radical reorientation of practice, as demonstrated in the following quotation from David Curry MP (one-time minister):

> More than any other initiative, the Challenge Fund, and the City Challenge before it, have captured the imagination and encouraged a new and vigorous approach to tackling some of the most difficult problems of our towns and cities. One of the greatest achievements is how they have driven forward the development of partnerships, which are now accepted as the foundation for successful regeneration. The real driving force here has been the competitive element, which has brought partners together to develop local plans to tackle local problems. The competitive edge ensures partners bring forth quality programmes that are made to last.
>
> (Public Sector Information Ltd, 1996, p. 3)

The Challenge Fund initiatives institutionalised the philosophy and practice of inter-urban competition, encouraging innovative proposals in relation to regeneration and economic development. It has been used to manage scarce resources and introduce a new form of (contractual) control of regeneration activity at the local level. In the Challenge Fund model of policy the Conservative government had found a way of promoting its belief in competition by establishing a practice designed to enforce it at the local level. Competition in the allocation and management of public resources is now an inherent feature of current institutional practice, not only in urban policy but in many other areas of social policy.

These initiatives were complemented by City Pride (Chapter 10, Gwyn Williams), which, as in other areas of policy, relied on the promotion of broad-based public–private partnerships whose role was to produce prospectuses to lever in additional resources and to achieve co-ordination and a strategic approach to economic development for their city. Together these initiatives represented a new dimension for evolving regulatory frameworks for local governance and another example of central government making and unmaking the institutions that comprise the mode of regulation, in this case creating a policy vehicle to achieve what its policies in the 1980s had failed to achieve.

Rural Challenge (Chapter 8, Jo Little, John Clements and Owain Jones) represents an extension of competition in the allocation of regeneration funds to the rural context and provides an important additional perspective on theories of local patterns of regulation that may emerge from particular forms of restructuring. Rural Challenge can be seen as an extension of the Challenge Fund formula that attempts to enhance the competitiveness of rural areas whilst dealing with the problems emerging as a result of economic restructuring. The transformation of the rural economy has involved sites of production changing to sites of consumption, in the form of the commodification of rural spaces for recreation and residence. This process has echoes of the reimaging and commodification of urban spaces noted by Ron Griffiths (Chapter 3).

In the sphere of housing, a more competitive and market-based approach to the delivery of housing policy objectives has also emerged (Chapter 6 by Christine Lambert and Peter Malpass). In particular, changes in local authority

housing finance have involved a move away from need as the criterion for the allocation of resources to a process in which housing associations and other registered social landlords, as the main providers of social housing, compete with one another for government funds. These changes have had major impacts on the supply, quality, cost and affordability of social housing, as well as on the nature and governance of the organisations supplying new social housing. With echoes of City Challenge, the government introduced competition into the allocation of capital resources for public housing, claiming that this would provide an incentive to local authorities to achieve the highest standards, enhance the rewards to those that succeed, and remove the sense of a guaranteed level of support. As with other competitive bidding initiatives, government is seeking a shift in both the content of policy and the process by which it is made and implemented, emphasising an expanded private and voluntary sector role and a diminishing local authority role. This process is also reflected in policies to diversify the supply of rented housing. However, the introduction of competition into the allocation of resources for social housing is about more than mimicking the market and improving efficiency. The abandonment of need as the basis for capital allocations to local authorities was both a centralising measure, a way that central government could steer local strategies in new directions, and a rationale for those new directions. The priorities for this new direction are increasingly tenure-based, motivated by ideological commitment to reducing still further the amount of local authority housing by forced stock transfers and encouraging both local authorities and housing associations to act in a more 'businesslike' fashion.

An emblematic feature of the current phase of urban policy is urban entrepreneurialism (Ron Griffiths, Chapter 3). This is a mode of urban governance which came about as a response by individual cities to the collapse of the Fordist social democratic arrangements and the crisis of managerialism that had underpinned economic expansion since 1945. The increasingly globalised nature of contemporary power relations has led to urban areas being treated in more commodity-like ways. Consequently, localities have engaged in a competitive search for new sources of economic development in response to the internationalisation of investment flows and the ceaseless process of economic restructuring. Entrepreneurialism can, therefore, be seen as a response by localities to the need to become more competitive in a national, European or international sense. It is distinguished by the emergence of different organisational forms and institutional processes from those characteristic of the managerialist era. It has typically involved the formation of partnerships and a degree of displacement of institutional processes based on democratic representation. Similarly, it has been associated with an ideological shift, away from public service criteria towards an acceptance of social inequalities and uneven development.

The National Lottery displays many of the features shared by other urban policy initiatives of the current era. The distribution of lottery proceeds is a competitive mechanism which places a strong emphasis on the promotion of

partnership. The competition for lottery funds is open to all with only limited targeting on social disadvantage. Although urban regeneration is not an objective of any of the lottery-distributing bodies, cities do stand to benefit greatly from lottery-funded projects. Recent announcements regarding a greater emphasis to be placed on regeneration in the allocation of National Lottery funds have increased the importance of this source of funding for revitalisation and redevelopment projects (*Planning*, 1997a, p. 4). With funds generated on an enormous scale the lottery has come to be seen as the single most important development as far as some aspects of regeneration in the UK are concerned (Pinto, 1995, p. 32). However, this source of funding also serves to exacerbate a number of major problems already apparent in urban policy, namely, the imbalance between capital grants and revenue support; partnership funding conditions skewing local authority funding towards projects that may not be the most socially beneficial for the locality in general (for example, recent research on Capital Challenge projects found spending priorities had been distorted and skewed away from basic needs and towards 'flavour of the month'-type projects: DETR, 1997, p. 5); the administrative burden of bidding; and lack of a strategic dimension to the allocation of funds.

The urban policy initiatives of the early 1990s and the extension of competition into the provision of local public services also established *new institutional relations* that would change the pattern of local governance (the patterns of interest representation and the internal structures of the state). These new institutional relations were central to delivering the former government's agenda of managing the process of inter-urban competition more effectively and redirecting local policy to improving the structural competitiveness of industry and the competitive edge of cities and their regions in the European and international market-places. They were also used to challenge traditional notions of welfare and urban deprivation and turn them on their head. This revolutionary change was not to be achieved 'with the bang of legislation in Parliament but through the whimper of partnership at local level' (Cochrane, 1993, p. 95).

The shifting nature of urban policy in England, and particularly the introduction of competitive bidding for funds, added a distinctive dimension to the changing pattern of governance, demanding the creation of new structures of local interest representation and leadership. Partnership became a key requirement for local participation in national regeneration initiatives and an essential ingredient to successful place marketing activities. Murray Stewart (Chapter 5), in his exploration of the role and nature of leadership in the context of regeneration partnerships, concluded that the proliferation of partnerships engendered by competitive urban policy has effectively 'depoliticised' regeneration strategy building with local elected politicians distanced from the development of local regeneration strategies. In parallel, a new 'positional elite' has emerged, identifiable as a consequence of their leadership status in one or more partnerships. A distinctive feature of the new local regulatory processes established during the last five or six years of Conservative govern-

ment, which is quite different from the experiences of the USA, and to a lesser extent the rest of continental Europe, is the degree of regimentation from the centre through strong central/local hierarchical and contractual control.

This entrepreneurial regime of urban governance has contributed to major changes in the institutional processes of local government, creating pressures within local authorities to adopt new practices, including greater inter-departmental and inter-agency liaison, generic roles and teamworking, and fast-track decision-making. The effect of the new institutional relations has been to make local authorities more businesslike (if not more like businesses). The impact of competition, in its various forms, on the internal management of local authorities has caused a shift from management by hierarchy to management by contract. Robin Hambleton (Chapter 4) describes how the unresponsive public service bureaucracies of the period from the 1950s to 1970s gave way to three strategies for public service reform: a new managerialism; an extension of democracy and empowerment model; and an extension of markets involving competitive models of behaviour, the Conservative government's preferred approach to public service reform. All of the models involve forms of contract.

In summary, contemporary regeneration policy has contributed to the restructuring of the relation between state and civil society involving the emergence of new forms of intervention and new institutional relations, with management and control based on a distinctive ensemble of norms, institutions, organisational forms, social networks and patterns of conduct. Whilst the regulatory regime of regeneration policy during the 1980s was confused and fragmented, the 1990s saw an attempt to create a more cohesive and strategic regulatory regime. Paradoxically, regeneration policy has been 'de-politicised' and 'de-urbanised' during a period in which the allocation of funds has become controversial and contested, uneven development and social polarisation increased, and the position of many urban areas, particularly metropolitan areas, has worsened. In a highly charged political arena the institutionalisation of inter-urban competition has undermined local democracy and rewarded 'right' thinking, and has resulted in a triumph of form over content (Hooton, 1996). The government's strategy enabled a redirection of resources, both spatially and ideologically, and effectively muted any dissent.

The initiatives introduced during the 1990s, with their emphasis on improving the competitiveness of businesses and localities, can be seen as part of the policy response to the competitive pressures exerted on businesses and cities of the increasingly competitive global economic system and the breakdown of Keynesian policies of economic management. These shifts in public policy can be seen as part of a transition from an era of 'Fordist' production supported by a Keynesian mode of social regulation (embodied in the realisation of the welfare state) to a transitional or contested 'post-Fordist' era characterised by flexible production and a post-Keynesian neo-liberal mode of social regulation (as pursued by successive Conservative governments since 1979, in which the

notion of welfare was redefined and entrepreneurialism championed). The emergence of the current phase of competitive bidding policy is shown to represent a significant realignment of policy priorities and practice, part of an experimental search for new local solutions to the contemporary urban (and rural) crisis (Chapter 2, Nick Oatley).

The challenges facing the cities

There is widespread agreement that new efforts are necessary to strengthen or restore the role of cities as places of social and cultural integration, as sources of economic prosperity and sustainable development and as centres of democracy. The number and scale of challenges facing cities today and in the years to come do not lend themselves to easy solutions. The combination of continuing economic crisis (in the regime of accumulation), the failure of social, political and economic institutions (the mode of regulation) and the arrival of a new government committed to extending local democracy and tackling social exclusion, open up the possibility of a new period of policy experimentation and institution building.

However, the immediate outlook for the major towns and cities of England looks bleak. Twenty-five years of concerted action against urban decline and social disadvantage have had only a marginal effect and there is no sign that the most recent phase of policy has been any more effective in turning cities around. In many respects the conditions are a great deal worse. Cities are increasingly socially and spatially segregated. A recent study has shown the UK to be 'massively' more unequal than it was 20 years ago (Goodman, Johnson and Webb, 1997). The Joseph Rowntree Foundation Inquiry into Income and Wealth (Barclay, 1995; Hills, 1995) highlighted the fact that the already substantial differences between deprived and affluent neighbourhoods grew further over the 1980s and suggests that ongoing support for marginalised areas through a co-ordinated package of measures – involving not only the labour market, but also education and training, housing, social security and benefits – is imperative if such areas are not to fall further from the economic mainstream (Green, 1997, p. 198).

A Policy Studies Institute report on urban trends published in 1992 stated that 'After 15 years and many new initiatives, surprisingly little has been achieved' (Wilmott and Hutchinson, 1992, p. 3). Robinson and Shaw (1994, p. 232) also claim that UK urban policy has failed; 'it has not reduced unemployment, cut crime, tackled homelessness or reduced poverty. It has not regenerated local economies or improved the quality of life for the majority of urban dwellers. . . . In short, the inner cities (and conurbations as a whole) are now more dangerous, deprived and demoralised places than they were a decade ago.' Even the major study commissioned by the DoE on urban policy over the last 15 years is ambivalent about achievements (Robson *et al.*, 1994).

More anecdotal evidence also paints a depressing picture. The 1990s have been dominated with images of 'joy-riding', rising crime, lawlessness, distur-

bances on outer estates and fear. In many city areas the silence of the night sky is regularly shattered by the sound of police helicopters carrying out surveillance. Begging on the streets has become commonplace, homelessness is on the increase, shootings on the streets of our cities may shock us but no longer surprise us, and racial attacks and murders inspired by prejudice are all too frequent occurrences. All of these are reminders of the enduring nature of the complex social and economic problems still to be found in many of our cities. Policy has not really reversed the economic decline in cities or reversed the trend towards social polarisation. Realistically, the world economy will be characterised by 'persistent instability, or the stability of permanent recession' well into the next century (Eatwell, 1995, p. 281). Lovering (1997, p. 81) predicts that 'In Britain the demand for work will continue to outstrip the supply. The cities will become harsher places to live in, and more threatening ones to visit.'

The starting point for assessing the challenges facing English cities is the way in which the interplay between local and global economic forces, within which the fortunes of city economies are shaped, is managed. The debate has tended to become polarised between the 'globalists' and the 'new localists' (Peck and Tickell, 1994; Lovering, 1995; Graham, 1995). Globalists emphasise the fragmentation and restructuring of local economies that occur as a result of the growing importance of the role played by global corporations, global financial movements and global politics, and local regulatory systems which have increased responsibilities but lack the power to counter global processes of accumulation and deregulation. The new localists, on the other hand, focus on the increased potential for local policy makers to improve the economic fortunes of their cities through the development of local economic strategies.

However, this is a false dichotomy, as the local/global interplay should be thought of as a single, combined process with two inherently related, albeit contradictory, processes which are involved in the restructuring of contemporary economic and social life. This contradictory process is referred to as 'glocalisation' (Swyngedouw, 1992, p. 40).

The importance of this argument for an assessment of regeneration policy is to remind us of the big picture and the constraints that impinge on the pursuit of localist measures. Such strategies will always be thwarted if they are reduced to self-destructive competition. These constraints imposed on localist measures and the problems associated with them have been demonstrated in many of the chapters in this book, whether it is in the attempts to pursue entrepreneurial practices of reimaging and place marketing, or in attempting to construct local strategies through City Challenge, City Pride and the SRB Challenge Fund. The key post-Fordist regulatory problem posed by this approach is the age-old problem of countering the destructive effects of competition.

Forms of intervention and new institutional relations pursued since 1991 may have contributed to a new growth model but the institutional inertia associated with entrenched habits of those in power, and the trend towards long-term problems of social disintegration, have tended to undermine the

emergence of a stable, sustainable post-Fordist mode of regulation. New forms of economic intervention, discussed above, designed to strengthen structural competitiveness and the subordination of social or welfare policy to the need to create flexible labour markets, have addressed the poor economic performance and high levels of social expenditure which contributed to the crisis of Fordism. New institutional relations involving the expansion of local political action leading to more pluralistic institutional structures have largely addressed 'the limits of the centralised, hierarchical, bureaucratic-corporative structures that were characteristic of the Fordist state and that ended up producing high costs, inefficiency and waste' (Mayer, 1994, p. 328). The shared responsibility for urban management and the institutional thickness that can be observed are better suited to conditions of heightened inter-regional and inter-city competition (Amin and Thrift, 1994).

However, as has been noted above, the emphasis on economic innovation and competition and the subordination of social programmes to economic priorities have produced deep social divisions and threaten the decay of civil society. A period of flux and transformation has characterised the period since the breakdown of Fordism in which powerful processes of global disorder have produced largely reactive and shallow local responses. Even if the localisation thesis is accurate in describing the emergence of local modes of regulation supportive of growth in the context of increased inter-city competition, merely by competing with one another does not mean localities are wielding significantly greater power, nor does it mean that the outcome, which may be beneficial for some city-regions that can create a good business climate, will not be at the expense of some other region. The competition engendered is at best a zero-sum game and at worst destructive, leading to a process of 'regulatory undercutting' (Peck and Tickell, 1994, p. 304). Local modes of regulation, then, the search for the new institutional fix to correct the crisis tendencies inherent in the accumulation process, are seen as indicative of the regulatory problem, and not part of the solution.

Without the construction of a new global regulatory order with supranational organisations and mechanisms to regulate global capitalism to fend off the destructive tendencies of competition there can be no basis for the formation of a new regime of accumulation. Stability cannot be achieved until competition and regulatory undercutting are overcome. Although it is felt unlikely, Peck and Tickell (1994, p. 307) argue that a new supra-local regulatory framework could be based on emergent politico-trading blocks, involving the collaboration between the European Union, the North American Free Trade Area and Japan/ASEAN with the Bank for International Settlements and the World Bank asserting control over monetary/financial matters.

In spite of trends towards the 'hollowing out' of the nation-state, Peck and Tickell (1994) argue that a major challenge facing the nation-state is to play a role in harnessing and reforming global financial and trading institutions (World Bank, GATT) and to revitalise democratic control. Although solutions to the crisis of uneven development must begin with action from above –

through national and global co-ordination – local strategies do have their place, although they are likely to be successful only if supported by national and supranational frameworks. Such local strategies should pose the question of how local, national and international processes work upwards to affect the way the global is constituted. Policies to facilitate more democratic participation through the new institutional structures that have emerged is seen as particularly important to influence the decision-making processes affecting our cities and countryside. The lobbying of the EU for support to compensate areas hit by defence job losses is an example of how local actions, provided they take a coherent political form, can modify the policy and resource context within which the local exists (Lovering, 1995, p. 125).

Realistically, many of the external pressures that impact on cities, including demographic and global economic trends, are not only out of reach of regional and national policies but are also beyond the scope of European actions. The new Labour government has no intention of challenging the social relations of the global order and in his first Budget speech (2 July 1997), the Chancellor of the Exchequer, Gordon Brown MP, embraced the status quo. The aim of the Budget, and of Labour policy more generally, is to ensure that Britain is equipped to rise to the challenge of the new and fast-growing global economy, and that the market is regulated to deliver a satisfactory combination of economic growth and social cohesion. The government believes, more strongly than the former government, that an economic policy cannot ignore its social consequences. It recognises that just as social cohesion has economic value, so social division has an economic cost.

Based on the work of Peck and Tickell (1994), Table 12.1 identifies the *local* regulatory problems of after-Fordism together with putative solutions. This provides the basis for an assessment of whether the *actual* policies proposed by the new Labour government are addressing the challenges facing cities.

On coming to power, the Labour government launched a series of comprehensive spending reviews (CSRs). The CSR for regeneration programmes reflects the government's recognition that regeneration policy cannot stand alone and must be integrated alongside other main spending programmes. At the time of writing the outcome of this review is not known but key priorities include strengthening local and regional economies, increasing economic opportunities for deprived areas, transforming urban environments into safer, greener, more healthy places to live and work, rebuilding neighbourhoods, enhancing the quality of life and ensuring that sustainable development takes place. This is to be achieved by following four key principles. First, a strategic approach which involves the integration of national policies and programmes with European regional, county and local programmes to ensure that the multifaceted problems of social disadvantage are tackled in a holistic urban policy approach. Second, local authorities are to be strengthened and given a central role in urban regeneration. Third, harnessing the commitment, aspirations and talents of local people in promoting community economic development will play an important role in urban policy. Fourth, partnerships are to

Table 12.1 Local regulatory problems, putative solutions and actual policy to be introduced by the Labour government (after Peck and Tickell, 1994)

Regulatory problems at the local level	Putative solution	(Labour) government policies
Zero-sum competition between localities encourages uneven development	Embedding of capital within localities supported by training or technological infrastructures. National and supranational state activities to limit wasteful competition.	Pre-election commitment to abolish competition for urban funds. Greater emphasis likely on targeting areas of need and links to main spending programmes. Emerging EU policy for cities will strengthen this approach.
Local growth coalitions are unstable and short-termist	Democratisation of growth aiming to benefit all residents. Reduced role for growth coalitions, enhanced powers for local and regional governments.	Government committed to greater local authority financial flexibility and the encouragement of democratic innovations (referenda, citizens' juries). Regional assemblies are likely.
Local state central to economic regeneration but limited powers	Increased local autonomy and power within wider strategic frameworks.	Locally based economic strategies to stimulate new jobs.
Links between successful areas detrimental to weaker areas	National and supranational stimulation of regional development to enhance position of less developed regions.	The role of the region will grow with Regional Development Agencies. Release of capital receipts for housing investment.
Flexible labour markets unable to contain contradictions	New interfirm modes of skill formation and labour regulation, reformed state regulation.	Minimum wage to be established with an independent Low Pay Commission. 'Welfare to Work' programme providing jobs for 250,000 under-25s. New Social Exclusion Unit, based in the Cabinet Office, to overcome poverty and inequality. New deal for lone parents.

be encouraged. These principles are to be implemented in the context of a long-term, strategic framework, based on adequate resourcing distributed on the basis of need and public planning (City 2020, 1994).

In terms of specific policies, these aims are to be achieved through a modified Challenge Fund, a strengthened role for local authorities, initiatives for local

democracy, the establishment of Regional Development Agencies, the release of capital receipts for housing, the Welfare to Work programme, the establishment of a minimum wage and other policies to combat social exclusion.

In spite of pre-election promises to abolish competitive bidding for regeneration funds the new Labour government continued with round 4 of the Challenge Fund. Supplementary guidance for each region was produced in July 1997 to ensure that those preparing bids had the clearest possible guidance on the government's policies and priorities. Three policy priorities were highlighted in the supplementary guidance, which gives an indication of the government's broader policy objectives. First, the need for proposals to contribute to the government's manifesto commitment to address the multiple causes of social and economic decline, and fit with its new policies, including those relating to employment, crime and housing. Second, a greater emphasis on tackling the needs of communities in the most deprived areas. And third, a requirement that proposals should take account of existing strategies for promoting economic development and tackling deprivation, such as economic development strategies prepared by local authorities, and fit with the government's policy on regional governance. Issued at the same time as the supplementary guidance were regional frameworks describing key regional regeneration needs and priority areas.

Although the long-term future of the competitive method of allocating regeneration funds open to any locality must be in doubt, the demise of the Challenge Fund model is not at all certain. In an interview regarding the initiative, the Minister responsible for regeneration, Richard Caborn, stated that 'there are always more claims on resources than we can meet, and so competition in some guise is a fact of life' (*Planning*, 1997b, p. 1). It is likely that a modified scheme may take the form of the 'New Deal' proposed by the Local Government Association, which would be taken forward through a series of pilot projects. Under the LGA's proposals, which build on the notion of Regeneration Audits identified by the Audit Commission (1989), local authorities would take the lead in preparing comprehensive regeneration statements for their areas. A wide range of key players – including central government – would contribute to drawing up these strategies and commit themselves to delivering and funding elements of them. Contracts would be used between partners to manage and deliver programmes. The strategic role of local authorities would be strengthened. There would be a fundamental shift from government as detached funder to government as a partner, through a more active role for the Government Offices for the Regions (*Planning*, 1997c, p. 2).

The Labour government has a number of proposals to restore and reinvigorate local democracy. Indeed, this has been the hallmark of the new government during the first 100 days of power. Bills have been placed before Parliament to establish a Scottish Parliament with tax raising powers and a Welsh Assembly, and a new strategic authority for London headed by a separately elected mayor. Regional Assemblies are likely to follow from the establishment of the RDAs. Referenda and citizens' juries have also been proposed. Central to Labour's overall strategy is for local decision-making to be less constrained by central government and more

accountable to local people. The government has made it clear that it wants to work more closely with local authorities through the 'New Deal' package. The Local Authority (Capital Receipts) Bill will also provide local authorities with powers to reinvest the £5bn capital receipts from the sale of council houses in building new homes and renovating old ones. Measures announced in the first Budget (June 1997) will enable local authorities to spend £900m of additional government finance over the following two years on new council houses and refurbishments.

A White Paper was published in 1997 and the Regional Development Agencies Bill will be put to Parliament in 1998 to establish English Regional Development Agencies (RDAs), modelled on the Welsh Development Agency and Scottish Development Agency, in 1999. This marks a significant increase in the role of the regions in policy (*Planning*, 1997b, p. 1). The task of the RDAs will be to coordinate regional economic development, to help attract inward investment and to support the small business sector. Central to this task is the need to bring together the various regional organisations to help them work together to ensure that the regions gain the greatest possible benefit from their efforts. Many see the RDAs as marking a new era in a decentralised approach to regeneration that will see the eventual decline of competitive Challenge Funding and greater accountability of government spending programmes to elected public bodies (Regional Assemblies). It is a measure intended to prevent the mushrooming of unaccountable bodies/quangos and the Government Offices for the Regions may provide the infrastructure to press ahead with plans for regionalisation of regeneration.

Anticipating criticisms that these agencies would be remote from the people, undemocratic and would act in a similar way to the old-style UDCs, it has been stressed that the format for these agencies would not be dictated by central government. Although the Bill will provide a framework for the agencies it will be up to the regions to make use of their powers to reflect their differing needs. The government supports the establishment of regional chambers, possibly formed by local authorities acting in partnership with regional business interests, as a step towards increasing accountability. Ministers are looking at the possibility of placing the chambers on a statutory footing in the Bill to establish RDAs. The Local Government Agency sees statutory backing for the chambers as essential if the centrally funded RDAs are to be accountable at regional level (*Planning*, 1997c, p. 2). Local growth coalitions are likely to continue where there is a strong history of such alliances but in some areas may fall under the scope of activities of the RDAs. However, the narrow 'Yes' vote for a Welsh assembly is likely to delay government plans for increased political devolution in England. This will increase fears that RDAs will become super-quangos and increase the tension between local government and business. It is hoped that a referendum in London in 1998 will lead to an elected local authority for the capital and renew interest in devolution in other English regions.

A package of measures can be identified aimed at overcoming inequalities and exclusion associated with the labour market. To overcome the problem of the wasted resource represented by the one-in-five working-age households without a

wage earner the government has proposed a radical modernisation of the welfare state. To help the millions out of work or in poverty in work a range of measures have been introduced. The Welfare to Work scheme involves spending £3.5bn from the windfall tax to provide 250,000 18–25-year-olds out of work for six months with the first step on the employment ladder (the offer of a job for six months with an employer who will receive £60 a week per placement, work with a voluntary organisation for a similar period, a place on the government's new Environmental Task Force, or full-time education or training). For the 350,000 adults who have been jobless for two years or more, there would be the offer of a job, with employers offered a £75 a week subsidy. In an attempt to enable single parents to return to work the disregard for childcare costs has been increased to £100 a week for lone parents who qualify for benefits. The government is also to set up the Low Pay Commission which will advise on the rate at which the minimum wage is to be set.

In one of the most impromptu policy announcements since the election, Peter Mandelson, Minister without Portfolio, used the occasion of the Fabian Lecture on 14 August 1997 to reveal a radical new drive to rescue Britain's 'underclass' from the twin dangers of unemployment and social exclusion. Describing social exclusion as the 'greatest social crisis of our times', he confirmed the creation of a Social Exclusion Unit to be set up in the Cabinet Office to co-ordinate policies to tackle it. The prestigious new Unit is to be based in the Cabinet Office and chaired by Tony Blair. It will be made up of around fourteen people, half seconded from the Civil Service and half from local government, businesses and the voluntary sector. Robin Young, a long-standing Civil Servant, is to head the Unit. There is a promise to do more for those on the lowest incomes when economic circumstances and the re-ordering of public expenditure makes this possible. However, the initiative is not just about raising benefit levels. A central aim of the Unit is to work towards greater co-ordination and synergy between the many existing programmes directed at the poor and socially excluded. Although the precise details are still to be worked out, the creation of the Social Exclusion Unit commits the government to placing an anti-poverty strategy at the heart of its agenda and lends credence to Labour's commitment to make Britain a more equal society within ten years in office.

Collectively, these measures go some way in addressing the local regulatory problems identified in Table 12.1. The greater emphasis given to targeting on areas with high concentrations of deprivation and the introduction of regional regeneration statements and RDAs should reduce the institutionalisation of the zero-sum competition between localities encouraged by government-sponsored regeneration initiatives. The release of capital receipts will help with the homelessness crisis and boost employment through new jobs in the construction industry. Estimates suggest that if the full £5bn was spent during the lifetime of the present Parliament 70,000 council homes could be built and 13,000 jobs created for every £1bn invested. Regeneration will also benefit from the £3.5bn earmarked for the Welfare to Work programme as most of the funds will be directed to struggling areas. The creation of the Social Exclusion Unit signals an important

commitment to put an anti-poverty programme near the top of the government's agenda. The production of local economic strategies co-ordinated with the programmes produced by the RDAs will improve the strategic framework for regeneration. The more effective use of EU funds on a regional level may mark a departure away from small area-based initiatives towards a broader strategic regional development approach.

The growing influence of the EU on British urban policy has already been documented (Stewart, 1994; Chapman, 1995). The UK's share of the European Structural Funds will amount to over £10bn between 1994 and 1999. As the British government has squeezed urban and local government funding, cash-starved local authorities have turned increasingly to EU finance for regeneration projects. European integration, and the prospect of the establishment of a specific competence for cities arising out of the inter-governmental conference process, would support the concept of Europe as a collection of city states, in which co-operation through policy networks and economic development pursued in the context of the Commission's policy statement on growth and competitiveness will strengthen the role of cities in the global economic context. The philosophy of the new Labour government is in alignment with Europe in relation to the role of regions and policy currently being developed at the EU level affecting cities will be well received.

The Labour government's approach to regeneration policy appears to redress many of the damaging features of the neo-liberal era of policy under the Conservative government. Long-term unemployment is seen as a waste of resources which can lead to destructive social consequences and economic costs. A more strategic/regional approach is advocated with more emphasis given to democratic accountability and the active involvement of local people. The multi-dimensionality of decline and disadvantage is acknowledged and the need for integrated initiatives linked to main spending programmes is recognised. However, the new social democratic approach of the Labour government will be severely tested. In attempting to achieve a balance between stable economic growth and redistributive goals, the government will be exposed to the pressures and constraints exerted on the British economy from global competition which will set the broad limits to what can be achieved. This tension can be seen in the Labour government's announcement that it will tackle social exclusion. The need to increase state resources to 'those on the lowest incomes' is accepted but only 'when economic circumstances and the reordering of public expenditure makes this possible' (Mandelson, 1997). If the context for local initiatives is one of austerity policies and a depressed labour market there will be little progress. The apparent failure of current neo-liberal policies presents an opening for the development of new after-Fordist economic practices, structures and institutional modes of regulation. The real challenge facing cities and the new Labour government is both to achieve sustainable growth and to combat the strong tendencies towards a polarised society and labour market.

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Index

Audit Commission 28, 29, 32, 71, 73, 96, 108, 214
authoritarian decentralism 24, 31, 78, 148

Baltimore 15, 47, 51
Barcelona 43, 51, 56, 171
Belfast 54
Birmingham 12, 52, 54, 55, 57, 65, 78, 163, 165, 167–77, 186, 187, 197
Bolton 160, 166
boosterism 44, 46, 58, 88
Boston 15, 51, 52
Bradford ix, 88, 161
Bristol 47, 78, 79, 81–3, 85, 86, 120, 123, 150, 160, 166, 186, 192, 194
Burnley 46
Business Link 13, 178

capacity building 78
Capital Challenge x, 5, 11, 13, 18, 24, 37, 85, 99, 121, 207
Capital Partnership 12
Cardiff ix, 186
CBI (Confederation of British Industry) 28, 32, 35, 108, 149, 168, 169
CCT (Compulsory Competitive Tendering) 69–71, 94, 202
Central government 8, 10, 12, 14, 15, 17, 19, 27, 31–4, 36, 37, 64, 69, 72, 73, 78, 86, 87, 95, 97, 98, 100, 103, 106, 111, 113, 116, 119–23, 148, 149, 154, 156, 157, 164, 204–6, 214, 215
centralisation 27, 32, 34, 72, 202
centralist localism 24, 31, 78
Challenge Fund 8–13, 15, 16, 18, 21, 24, 27, 30, 33, 35, 78, 80, 85, 101, 118, 119, 124, 146–62, 169, 204, 205, 210, 213, 214
Chicago 51
cities ix-xiii, 3–8, 14, 15, 18, 19, 21, 27–9, 32, 35, 41–54, 56–8, 76, 78, 85, 107–9, 113, 116, 119, 121, 123, 148, 158, 159, 181, 191, 192, 194, 195, 197, 201–10, 212, 213, 217
Citizen's Charter 64
City Action Teams 12, 147
City Challenge x, xiii, 5, 8, 10–14, 16, 18, 24, 30, 35, 61, 69, 72, 78, 79, 82, 98, 107–9, 111–13, 115–23, 138, 144, 146, 147, 154, 158, 159, 165 204–6, 210
City Pride x, xiii, 5, 12, 14, 18, 24, 35–7, 156, 163, 165–80, 204, 205, 210
Cleveland 45, 52
client 33, 58, 66–9, 153
coalition 20, 51, 77, 83, 86, 87, 151
community involvement 31, 108, 109, 116, 172, 173
competition 3–5, 7–9, 12–15, 19, 26, 27, 29, 30, 32–6, 42, 43, 56, 57, 58, 60–2, 69–71, 73–5, 77, 78, 85, 87–9, 92–4, 97, 98, 100–7, 109, 113, 116, 117, 119–24, 127, 131–4, 137, 138–40, 142, 144, 145, 147, 153, 155, 159–62, 181, 196, 201, 202, 204–8, 210, 211, 213, 214, 216, 217
competitive advantage 5–8, 42, 157, 170, 204
competitive bidding xi-xiii, 4, 9–16, 29, 30, 37, 43, 78, 89, 92, 99, 107, 111, 119, 121–3, 140, 157, 161, 163, 204, 206, 207, 209, 214
competitiveness 3–6, 8, 12, 13, 16, 19, 26, 28, 34–6, 92, 99, 100, 131, 146,

152, 155, 156, 161, 174, 175, 203–5, 207, 208, 211, 217
Conservative government x, xi, 4, 8, 21, 25, 34, 59, 60, 74, 101, 201, 205, 207, 208, 217
Conservative Party 36, 108, 164
consumer 44, 57, 61, 62, 64, 67–9, 75, 93
contract 4, 9, 10, 21, 31, 32, 37, 58, 63–5, 68, 70, 71, 73, 81, 94, 103, 111, 148, 204, 208
contract culture 4, 9, 10, 21, 31, 32, 37, 65, 94, 148
contracting out 27, 65, 69–71, 153
contracting with external providers 59, 69
contracting with the public 59, 65
contractor 58, 70, 71
contractualisation 9, 32, 121, 152, 202, 204
coordination 116
corporatist 17, 18, 24, 25, 31, 149, 150, 167
CSR (Comprehensive Spending Review) 212
customers 44, 60, 61, 62, 65–7, 69, 75

de-urbanisation of policy xii, 204
decentralisation 27, 72, 74, 94, 153
Department of Culture Media and Sport 198
Department of National Heritage 183, 198
Department of Education x, 147
Department of Employment x, 147
Department of the Environment x, 24, 28, 73, 97, 108, 147, 159
Department of Trade and Industry x, 147
Department of Transport x, 147
dependency culture 11, 29, 36, 92, 109
deprivation 9–11, 25, 107, 118, 124, 154, 158, 160, 162, 190, 201–3, 207, 214, 216
Detroit 45, 48, 54
Development Areas 12, 127
displacement 27, 34, 42, 43, 206

economic decline 3, 19, 203, 210, 214
economic development 5–8, 13–15, 19, 22, 28, 36, 42, 45, 48, 78, 89, 99, 118, 119, 137, 140, 141, 143, 146, 149, 151, 152, 154, 155–7, 162, 185, 203, 205, 206, 212, 214, 215, 217
economic restructuring 22, 201, 202, 206
effectiveness 6, 9, 14, 73–5, 98, 102
efficiency 8, 14, 31, 65, 70, 93, 94, 98, 102, 104, 105, 117, 119, 206
elites 24, 48, 54, 86, 87, 149–51, 166, 167
empowerment 9, 62, 63, 65, 68, 75, 119, 154, 157, 208
enabling authority 33
English Partnerships 16, 33, 77, 135, 137, 203
ESRC (Economic and Social Research Council) 3, 87
Estate Action 11, 12, 15, 16, 24, 99–101, 147, 159, 161
Estate Renewal Challenge Fund 13, 101
ethnic minorities 162
EU (European Union) 8, 13, 14, 33, 48, 153, 156, 211–13, 217
European Structural Funds 217
event-based strategies 48

Financial Management Initiative 10
flagship projects 55, 190
Fordism 7, 22, 25, 26, 44, 93, 128, 129, 133, 147, 211, 212
Fordist xi, 21, 23, 26–8, 41, 77, 128, 129, 206, 208, 210, 211, 217
Frankfurt 43, 49, 52

garden festivals 48
Glasgow 46, 57, 79, 186, 188
globalisation 4, 5, 34, 56, 202
GORs (Government Offices for the Regions) 10, 17, 24, 30, 33, 146, 148, 151–3, 154, 161, 214, 215
governance xi, xii, xiii, 4, 9, 15–19, 21, 23, 24, 27, 30–2, 41–4, 54, 85–7, 94, 95, 109, 124, 125, 148, 149, 152, 163, 201, 202, 204–8, 214
growth coalitions 6, 24, 213, 215

Home Office 10, 24, 33, 146, 147
Housing Act 1996 101
HATs (Housing Action Trusts) 99, 100, 147, 159
housing associations 94, 95, 97, 98, 100–6, 111, 206
HIP (Housing Investment Programme) 95
housing policy 92–4, 96, 106, 205

inequality 196, 203, 213
inner city ix, xi, 5, 6, 24, 30, 66, 105, 106, 109, 116, 133
institutional capacity 8, 107, 116, 122

internationalisation 5, 7, 26, 42, 202, 206

Keynesian xi, xii, 4, 21, 23, 24, 26, 147, 155, 208

Labour Government x, 71, 126, 153, 159, 162, 212–14, 217
Labour Party 37, 64, 82, 101, 116, 187, 197
landscape strategies 50, 51
leadership 4, 6, 15, 17–19, 25, 27, 30, 41, 51, 55, 58, 74, 77, 78, 80, 81–9, 108, 111, 120, 146, 149–51, 180, 191, 202, 204, 207
Leeds 87, 166
leverage 84, 109, 113, 118, 133, 156, 160
Liverpool 51, 112, 166
Local Challenge x, 11, 13, 24
local democracy 61, 74, 87, 88, 167, 208, 209, 214
local government 6, 9, 15, 17, 18, 23, 24, 27, 29, 31, 32, 34, 37, 55, 58, 59, 60, 62, 65, 66, 70, 71, 74, 76, 80, 82, 84, 87, 92, 93–6, 99, 106, 116, 120, 122, 141, 142, 148, 149, 152, 155, 181, 202, 204, 208, 214, 215, 217
Local Housing Companies 101
localities xiii, 4, 6–9, 11, 16, 18, 19, 30, 31, 34–7, 57, 74, 87, 89, 99, 116, 117, 122–4, 129, 144, 146, 153, 154, 158, 160, 161, 201, 204, 206, 208, 211, 213, 216
London 12, 151, 155, 165, 167, 168–76, 186, 187, 189, 192–4, 196, 197, 214

managerialism xii, 4, 15, 17, 24, 30, 42, 62, 69, 206, 208
Manchester 8, 11, 12, 29, 30, 86, 87, 109, 156, 163, 165, 167–78, 191
Manpower Services Commission 149
Mayors 58, 78, 87, 88
Merseyside 166
Milan 171
Millennium Commission 13, 177, 185–7, 194, 196
mode of regulation xi, 21, 23, 77, 78, 129, 130, 134, 140, 144, 152, 201, 205, 209, 211
mode of social regulation 22, 23, 31, 37, 208
monolithic state services 33, 60
multilateral partnerships 149, 152
multi-sector partnerships xii, 14, 19, 21, 31, 34, 109, 113, 148, 202, 204
municipalisation 24, 34, 149

National Audit Office 28
National Lottery x, xiii, 5, 8, 13, 43, 85, 181–3, 184, 185, 192, 206, 207
needs-based 138, 139
neighbourhood 16, 48, 74, 181
neo-liberalism 31, 32, 37
Newcastle 88, 166, 186, 191
New Deal 213–15
new localism 17, 18, 24, 77, 85, 121, 148, 152–4, 163
new magistracy 148
new managerialism 62, 69, 208
New Public Management 9, 37, 59, 153, 202
New Right 4, 14, 61, 93, 202

OECD 35, 118, 156, 157
Osaka 51
Oxford 63

Paris 43, 49
participation 10, 48, 50, 61, 75, 77, 113, 117, 119, 123, 138, 190, 195, 207, 212
partnership xiii, 6, 10, 12, 13, 15, 18, 20, 24, 27, 29, 31, 34, 37, 41, 51, 77–86, 88, 89, 97, 111, 112, 116, 117, 119–22, 131, 132, 133, 138–42, 144, 150–2, 155, 157, 158, 160, 163, 166–9, 173, 181, 185, 190, 192, 193, 195, 196, 206, 207, 215
performance indicators 9, 73
Pittsburgh 15, 47, 52
place marketing xiii, 4, 5, 19, 41, 43–5, 48–50, 53–8, 79, 204, 207, 210
Plymouth 143, 166
post-Fordism 7, 22, 128, 129, 133
post-Keynesian xiii, 4, 21, 23, 24, 208
PFI (Private Finance Initiative) 149, 160, 173
privatisation 202
privatism 4, 15, 27, 121, 163
procurement manager 10
Programme Authorities 11, 157
promotional strategies 45
property-led regeneration 4, 27, 108
public expenditure 9, 14, 15, 17, 92, 93, 95, 96, 101, 102, 104, 106, 109, 158, 159, 217
public service management 59, 66, 74, 75

purchaser-provider split 33, 73

quasi-markets 62, 93

RDAs (Regional Development Agencies) 180, 213–17
RDC (Rural Development Commission) 127, 130–4, 137, 139, 141
recession 3, 25, 27, 95, 97, 108, 210
regime theory 22, 78, 86, 89
regimes 6, 9, 14, 16, 17, 31, 37, 42, 48, 77, 85–7, 119, 161
regional assemblies 213–15
Regional Challenge x, 8, 13, 16, 18, 24
regional government 12, 157
regulation theory xi, xii, 21, 22, 25, 77, 86, 128, 129, 131
reimaging 44, 50
Rotterdam 51
Rural Challenge x, xiii, 5, 8, 12, 16, 18–20, 24, 36, 125, 127, 128, 130–4, 137–45, 204, 205
Rural Development Areas 12, 127
rural economy 127, 129, 205
rural policy 133, 134, 137, 140, 142, 144

Salford 167, 186
Schumperterian workfare state 23, 26, 155
Sector Challenge x, 5, 8, 13, 18, 24
Seville 49
SRB (Single Regeneration Budget) x, xiii, 5, 10–12, 14, 17, 19, 24, 30, 33, 35, 36, 72, 73, 77, 78, 85, 98, 100, 102, 107, 111, 120, 121, 123, 125, 126, 146–51, 153–65, 177, 204, 210
social cohesion 3, 44, 49, 170, 175, 212
social exclusion ix, x, xi, 3, 19, 28, 124, 160, 202, 209, 213, 214, 216, 217
Social Exclusion Unit 213, 216, 217
social housing 92, 94, 101–4, 106, 194, 206
social polarisation ix, 3, 28, 202, 203, 208, 210
socio-institutional structures 148
Stoke-on-Trent 46
structured coherence 6, 42, 129
Stuttgart 52, 171
Sydney 51

Task Forces 12, 14, 29, 77, 111, 123, 147
TEC Challenge 12, 147
Thatcherism 23, 25, 28, 36, 130
Training and Enterprise Councils 10, 12, 18, 77, 109, 113, 149, 150, 156, 158, 168, 178
trickle-down 14, 55, 121
Tyneside 190

unemployment ix, 11, 19, 47, 95, 108, 116, 118, 202, 209, 216, 217
urban deprivation 201, 202, 207
UDCs (Urban Development Corporations) 14, 24, 27, 28, 29, 41, 77, 100, 108–10, 118, 121, 147, 149, 159, 215
urban entrepreneurialism xii, 4, 15, 24, 41, 42, 45, 53, 54, 164, 206
Urban Partnership Fund 12, 24
urban policy ix, x, xi, xiii, 4, 8, 14, 28, 30, 107, 201, 202, 204
Urban Priority Areas xii, 12, 110, 111, 121, 158, 160
Urban Programme 10, 11, 15, 27, 29, 73, 108, 109, 113, 120, 147, 157, 158, 160
Urban Programme Management Initiative 27
urban regeneration 4, 5, 8, 14, 16, 19, 28, 29, 37, 43, 48, 77, 107–9, 116, 117, 121–3, 133, 147, 148, 154, 157, 159, 160, 181, 185, 186, 192, 194, 196, 197, 207, 212
urban spectacle 48

Victor Hausner and Associates 29
voluntary sector 65, 80, 99, 111, 113, 134, 139, 141, 151, 158, 162, 193, 206

Wallasey 47
welfare pluralism 94
Welfare to Work 213, 214, 216
welfarism 26, 31
World Bank 211
world economy 35, 210

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SAFER CITY CENTRES

Reviving the Public Realm

edited by *Taner Oc* and *Steven Tiesdell*, University of Nottingham

Crime, and the fear of crime, rob a city of its vitality. Increasing numbers of women – and many middle aged men – consider city centres in Britain to be dangerous places, especially at night. The problem is that either city centres are deserted or that they are dominated by the 'wrong kind of people'. In the competition for the scarce spatial resources, the young, unruly and criminal – and predominantly male – are wresting control of the city centre from the rest of the population. Those with choice elect not to use the city centre, setting off a spiral of decline which makes the situation worse for all social groups.

In some cities, the diminishing use of the city centre has been accompanied by an increasing militarisation of both its architecture and its police force, raising concerns about the kind of city and society being created. The continuation of these trends may mean 'fortress' cities whose citizens emerge heavily armed from defensive bunkers, to scuttle about in fear of their fellow citizens. But will all cities in the twenty-first century inexorably be fortresses, with urban life dictated and circumscribed by fear; or are there more positive alternatives whereby urban living and urban life can be enjoyed?

The editors discuss the limitations of what physical and environmental improvements can achieve, and support the argument that while crime cannot be 'designed out', environments can be made safer by reducing the opportunities for crime. The editors believe that the requirements of a safer environment do not preclude an attractive or rewarding environment, indeed they help maintain the vitality and viability of that environment. Alleviating the fear of crime and making city centres safer in absolute terms is a necessary – although not the only – part of their general revitalisation.

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For: urban planning, urban management courses and sociology/social studies.

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LOCAL SUSTAINABILITY

Managing and Planning Ecologically Sound Places

Paul Selman, Cheltenham & Gloucester College of H.E.

Following on from the UN Conference on Environment and Development in 1992, sustainable development has become a major policy objective throughout the world. UNCED's Agenda 21, which set out a strategy for sustainable development, has been taken up at both national and local government levels. Although it is widely accepted that sustainable development will largely depend on local action, little has been published on this in a consolidated and accessible way. The author addresses the nature of sustainable development, the particular issues raised at local level, and the ways in which local citizens, organizations and businesses can respond.

The book features an integrated and systematic treatment of the theories and actions associated with local sustainability. The author combines practical approaches with theoretical concepts and analytical methods.

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"This text is a welcome contribution to the exploration of what can be done at a local level to protect the environment."—LOCAL GOVERNMENT STUDIES

For: undergraduates; practitioners in environmental studies and planning.

1 85396 300 3 Paperback 186pp 1996

CHANGING PLACES: WOMEN'S LIVES IN THE CITY

edited by *Chris Booth*, Sheffield Hallam University, *Jane Darke*, Oxford Brookes University and *Sue Yeandle* Sheffield Hallam University.

This book offers a specifically feminist perspective on women's lives in contemporary cities; one which the editors hope will sustain and influence women's 'ways of being' in those cities. The contributors offer an array of knowledge about women's place and women's places in cities today. The book acknowledges women's positive as well as negative experiences in their roles as workers, mothers, housewives, shoppers and members of social networks. Women are not seen as passive victims of capitalism or of male violence, although the realities of exploitation and the fear of crime are recognized.

The book offers an original and important contribution to critical feminist commentary on women's experiences of living in and using the built environment. The editors have brought together authors from a variety of backgrounds: town planning, transport, housing, architecture and social sciences. The book stresses the multiplicity of ways in which women experience urban life, discussing positive aspects of the choices that some women now enjoy, as well as the experience of disadvantage and oppression. The diversity of the authors' backgrounds and experience gives the text both, richness and depth.

"Changing Places provides an up-to-date account of women's transport use, of gendered patterns in shopping behaviour and of women's access to housing in Britain today, as well as of initiatives to involve women in planning decisions."—LOCAL ECONOMY

For: students of urban studies, planning, housing, architecture, geography and surveying, on courses with a gender perspective on the built environment; students on women's studies courses; practitioners in the professions which shape the built environment.

1 85396 311 9 Paperback 224pp 1996

DIRECTIONS IN HOUSING POLICY

Towards Sustainable Housing Policies for the UK

edited by ***Peter Williams,*** Council of Mortgage Lenders

The UK is now at a crossroads in terms of its housing policies. Homes remain costly and in short supply, and there is a growing issue of disrepair. At the same time, the resources made available from government have been reduced.

Over the years a range of solutions have been proposed for tackling the country's housing problems. First, council housing was promoted as a solution to poor housing and as an alternative to the private landlord. Then improvement replaced clearance and the mass provision of council housing, and the promotion of home ownership became the focus of policy. Council housing became 'the problem' and together with home ownership, housing associations became 'the solution'. Now private renting is back on the agenda as the way forward.

Directions in Housing Policy provides a clear and authoritative examination of UK housing policy, its past, the present situation, and future policies. The contributions, written by distinguished experts, deal with issues such as the future of the local authority sector, improvement and clearance, home ownership, housing associations, the housing market and housing finance. Drawn together to mark the contribution to housing studies of Dr Alan Holmans, the now-retired Department of the Environment Chief Housing Economist, the authors set out to examine a long term and sustainable future for the UK housing system.

Directions in Housing Policy provides expert analysis and commentary on key housing issues. It raises major questions about current arrangements and sets out an agenda for future policy development in the 21st century.

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DISABILITY AND THE CITY

International Perspectives

Rob Imrie, Royal Holloway, University of London

People with disabilities are one of the poorest groups in Western societies. In particular, they lack power, education and opportunities. For most disabled people, their daily reality is dependence on a carer, while trying to survive on state welfare payments. The dominant societal stereotype of disability as a 'pitiful' state reinforces the view that people with disabilities are somehow 'less than human'. In taking exception to these, and related, conceptions of disability, this book explores one of the crucial contexts within which the marginal status of disabled people is experienced: the interrelationships between disability, physical access, and the built environment. The author seeks to explore some of the critical processes underpinning the social construction and production of disability as a state of marginalization and oppression in the built environment. These concerns are interwoven with a discussion of the changing role of the state in defining, categorising, and (re)producing 'states of disablement' for people with disabilities.

The book draws on a range of ideas from geography, sociology, and environmental planning and reflects the emergent interest in planning schools with equal opportunity issues and planning for minority groups. It will be relevant to final year geography, planning, and architecture courses and postgraduate planning courses.

"This is an important book for all who are concerned about the way our daily environments are made, used and abused."—ENVIRONMENT AND SOCIETY

"This book provides a much-needed and well-researched contribution to the study of disability in an urban context which will be of interest to geographers, environmental planners and sociologists."—URBAN STUDIES

For: planning students, practitioners and academics of planning; urban geography; the built environment and social and political studies.

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APPUNTI
di
DIRITTO COSTITUZIONALE
e
PUBBLICO

PARTE PRIMA
TEORIA GENERALE E STORIA DELLE ISTITUZIONI

CAPITOLO PRIMO
CONCETTI GENERALI

1. GENERALITÀ SUL DIRITTO

BARILE, delineando le prime nozioni intorno al concetto di diritto afferma che:

a) l'*oggetto* del **diritto** è costituito da *determinate regole di condotta che impongono comportamenti «intersoggettivi»* che si indirizzano, cioè, all'uomo visto nei rapporti con gli altri individui. Esso, pertanto, si differenzia dalla morale, dalla religione, etc. perché: mentre la *morale*, la *religione*, etc. si rivolgono all'uomo a prescindere dai suoi rapporti con i propri consociati, il *diritto*, invece, si indirizza all'individuo solo e perché entra in relazione con i suoi simili e detta una serie di comportamenti (norme giuridiche) che è tenuto a rispettare per poter convivere pacificamente nella Comunità Statale;

b) lo *scopo* del diritto è di assicurare la *pacifica convivenza all'interno* della comunità in cui esso vige e viene raggiunto attraverso la realizzazione della:
   - — *certezza del diritto*: è «certo» il diritto *scritto*, *chiaro* e che viene *fatto osservare da appositi organi giurisdizionali nazionali* (i *tribunali*, le *corti costituzionali*) e *sovranazionali* (Corte di Giustizia comunitaria);
   - — *effettività del diritto*: è «*effettivo*» il diritto applicato «effettivamente», cioé quello in vigore nell'ordinamento positivo;

c) *fondamento* (cioè ragione che giustifica l'esistenza, o il perché di un fenomeno). Per BARILE esso riposa nella *convinzione collettiva che le norme del diritto* (cioè le norme giuridiche) *sono osservate perché indispensabili al funzionamento della società.*

In altri termini, in un certo momento storico, in un determinato ordinamento i *soggetti* che sono a capo di una comunità:
- — si *convincono* che determinate regole siano *essenziali* al pacifico funzionamento del gruppo di cui fanno parte;
- — *individuano* tali norme e le *considerano «diritto»* (norme giuridiche) ponendole al di sopra delle altre norme di convivenza, in rapporto cioè di *eteronomia* (cioè di superiorità) rispetto al gruppo;
- — *predispongano* i mezzi idonei affinché le norme giuridiche vengano osservate dai componenti del gruppo stesso anche contro la volontà degli appartenenti ad esso.

Ci si chiede, a questo punto, se il complesso di regole, che coloro i quali reggono la comunità decidono di trasformare in «*diritto*», debbano, oltre al carattere della *certezza* e dell'*effettività*, essere anche «*giuste*».

La *giustizia*, come insegna KELSEN, consiste in un *giudizio soggettivo* di valore, mentre il diritto è una tecnica specifica di organizzazione sociale che *vige*, cioè è effettivo ed applicabile, prescindendo da considerazioni deontologiche (cioè di giustizia). Se così non fosse, verrebbe meno il carattere della «*certezza del diritto*». Esso infatti, giusto o ingiusto che sia vige per il solo fatto che è stato *posto in essere* a prescindere dal giudizio (di valore) positivo o negativo che ciascuno (cittadino, giudice, etc.) possa dare di esso.

2. L'ORDINAMENTO GIURIDICO

L'insieme delle norme giuridiche costituisce l'ordinamento giuridico. Per BARILE l'ordinamento giuridico presenta i seguenti aspetti:

— crea una serie di centri di potere, che costituiscono lo schema fondamentale dell'organizzazione statuale (es.: l'ordinamento crea degli organi sovrani come il Parlamento, le Regioni, etc.) e che reggono l'ordinamento (attraverso leggi, etc.);

— attraverso dei giudizi di valore stabilisce quali *comportamenti* e quali *fatti* debbano essere *regolati dal diritto* e quali, invece, sono da esso ritenuti indifferenti (c.d. *relatività* del diritto).

Si noti, comunque, che, con l'affermarsi del c.d. «Stato sociale» e con la conseguente maggior ingerenza dello Stato nelle attività dei singoli, la sfera del c.d. «*indifferente giuridico*» va sempre più restringendosi (es.: lo Stato sociale persegue numerosi compiti di benessere, di tutela del lavoro, degli inabili, etc. proteggendo e favorendo i soggetti più deboli);

— l'ordinamento tende, attraverso il ricorso a procedimenti analogici, a colmare le c.d. «*lacune*» che eventualmente si presentano di fronte alla necessità di dare una disciplina giuridica ai fenomeni nuovi (es.: applicazione analogica di norme di navigazione marittima al fenomeno più recente della navigazione aereo-spaziale);

— l'ordinamento tende, infine, a predisporre delle *garanzie* per la sua conservazione futura (così, ad esempio, la disposizione finale n. XII della Costituzione Repubblicana *vieta la ricostituzione del partito fascista* sotto qualsiasi forma in quanto una reviviscenza di tale regime farebbe venir meno le «*regole di democrazia*» su cui si fonda il regime instaurato della Costituzione).

3. LA PLURALITÀ DEGLI ORDINAMENTI GIURIDICI: GLI ORDINAMENTI POLITICI

Poiché ogni istituzione sociale (o gruppo sociale) presuppone un ordinamento, e poiché esistono più gruppi (o formazioni) sociali organizzati, è evidente che il nostro sistema riconosce il pluralismo degli *ordinamenti giuridici*. Ciò spiega la grande varietà di ordinamenti e diversi sono i criteri di classificazione.

In base agli *scopi* che perseguono, gli ordinamenti si distinguono in:

— *politici* (o «a fini generali»): sono quelli che perseguono una molteplicità di fini, in quanto mirano a soddisfare i potenziali interessi necessari per lo sviluppo e la conservazione della società in un determinato momento storico;

— *non politici* (o «a fini particolari»): sono quelli che si propongono la soddisfazione di interessi ben determinati: sportivi, culturali, economici, etc.

Mentre gli *ordinamenti politici*, in quanto abbracciano tutti i fini possibili, non si estinguono mai, neppure con il mutamento dei fini perseguiti (salvo che il gruppo sociale si disgreghi), gli *ordinamenti non politici*, in quanto diretti a perseguire singoli fini particolari, si estinguono ove il fine sia raggiunto, oppure diventi impossibile raggiungerlo; e si modificano, se si modifica lo scopo che si prefiggono. Tipici *ordinamenti politici*, o a fini generali, sono quelli *statali*.

Ordinamenti a fini particolari sono quelli propri di tutte le associazioni e istituzioni particolari di cui si è fatto cenno.

Al di sopra degli ordinamenti statali vi sono i c.d. «*ordinamenti sovranazionali*» (es.: ordinamento della Comunità Europea) di cui l'Italia ha accettato le regole e che hanno il potere di imporre norme alcune delle quali addirittura entrano in vigore negli ordinamenti *nazionali* senza il preventivo consenso degli Stati (così, ad esempio, un *regolamento comunitario*, appena emanato, ha pieno vigore nell'ordinamento italiano, senza che alcun organo italiano immetta nel nostro ordinamento, con qualsiasi procedimento interno, tale norma).

4. LO STATO (rinvio)

L'ordinamento «*politico*» per eccellenza è lo Stato che:

— è un ente politico *superiorem non recognoscens*: nel senso che non è vincolato da nessuna autorità ad esso superiore (salvo i limiti accettati e riconosciuti nei confronti degli ordinamenti sovranazionali art. 10 e 11 Cost.);

— *pone in essere una legge suprema*: la Costituzione, che incorpora gli ideali supremi che lo Stato si propone di perseguire.

5. LA COSTITUZIONE

A) Concetto

Ogni ordinamento giuridico, sia esso originario che derivato, ha una propria struttura giuridica le cui linee fondamentali sono tracciate dalla «Costituzione» che enuncia l'insieme dei *principi, dei procedimenti* e degli *organi fondamentali* visti nel loro funzionamento, nonché afferma solennemente le *libertà fondamentali* dei cittadini.

La Costituzione, pertanto, può essere definita, con VIRGA, come la «*legge suprema di organizzazione relativa alla struttura e al funzionamento del governo, nonché al regime politico statale, la quale condiziona la validità di tutte le altre leggi, che devono essere emanate nella forma da essa prevista e nell'osservanza dei principi da essa sanciti*».

B) Costituzione in senso formale e materiale (MORTATI)

La Costituzione può essere intesa in due sensi:

1) *in senso formale*: se si allude al documento materiale (c.d. *Carta Costituzionale*) o alle consuetudini vigenti con cui essa è espressa e rappresenta una «fonte» del diritto;
2) *in senso materiale*: se si allude all'*insieme delle norme e dei principi* che presiedono all'organizzazione governativa e caratterizzano il regime politico dello Stato in essa contenuti. È questa la costituzione *effettivamente* vigente in quanto espressione delle forze politiche dominanti.

Secondo una dottrina recente, di cui è fautore F. MODUGNO, il concetto di costituzione ha carattere polivalente, comprende, cioè, sia il dato originario istituzionale (la Costituzione come *norma* fondamentale), sia l'organizzazione della comunità (la Costituzione come *forma* di governo), sia, infine, il condizionamento delle scelte normative (la Costituzione come *principio* della normazione). Tale polivalenza è segno, pertanto, di una realtà composita e in divenire.

La Costituzione materiale muta col mutare di regime caratterizzato dall'avvento di un gruppo politico che annienti le forze politiche preesistenti (BARILE).

C) Tipi di costituzione

La costituzione, intesa come *documento giuridico-politico* vigente all'interno dell'ordinamento è:

a) **ottriata**: se concessa unilateralmente «per grazia» dal Sovrano (erano «ottriate» le prime costituzioni concesse nel secolo scorso dagli Stati liberali: i c.d. «Statuti»);
b) **votata**: se adottata volontariamente e spontaneamente dal popolo tramite i suoi rappresentanti liberamente eletti (è questo il tipo di Costituzione in vigore al giorno d'oggi);
c) **rigida**: se modificabile solo a mezzo di leggi assistite da garanzie particolari (c.d. *leggi costituzionali*, vedi *infra* «attività legislativa del Parlamento»);
d) **flessibile**: se modificabile anche a mezzo di leggi ordinarie e quindi più facilmente suscettibile di trasformazione (es.: Statuto Albertino e Costituzione Britannica);

e) **breve**: se si limita a regolare solo l'organizzazione dello Stato e i diritti e doveri dei cittadini rimandando alla legislazione ordinaria la disciplina delle c.d. *questioni di dettaglio*;
f) **lunga**: se contiene anche l'enunciazione di altri principi nonché dei diritti dei cittadini;
g) **scritta**: se consacrata in un atto formale (c.d. *Carta Costituzionale*);
h) **non scritta**: se fondata solo o prevalentemente su principi consuetudinari (es. Gran Bretagna).

Si noti che fino alle rivoluzioni americana e francese le «Costituzioni» non erano scritte e si basavano su principi consuetudinari. L'esigenza di una «*costituzione scritta*» scaturì dalla volontà di dare al «*contratto sociale*» stipulato dal Sovrano con il popolo una formulazione più precisa, dettagliata e concreta mettendo al riparo i sudditi da eventuali «ripensamenti» della Corona.

Non pochi autori (fra cui SANTI ROMANO) ritengono che proprio perché «*scritta*» una Costituzione finisce col presentare immancabilmente delle lacune ed invita, in tal modo, gli oppositori di essa a prospettarne, in alternativa, una migliore. *La Costituzione Italiana*, come si dirà più ampiamente in seguito, presenta le seguenti caratteristiche *votata, rigida, lunga e scritta.*

D) La rivoluzione come fenomeno giuridico

L'*attività costituente* con cui lo Stato si dà un nuovo assetto costituzionale può svolgersi:

— *conformemente alla precedente Costituzione*;
— *in forma autonoma o addirittura in contrasto al precedente assetto costituzionale.*

Quando la *Costituzione materiale* muta a seguito di un movimento *sovvertitore* ci troviamo di fronte al fenomeno della «*rivoluzione*».

La *rivoluzione* (in senso lato) è volta all'annientamento dell'ordinamento giuridico precedente e lo sostituisce con uno nuovo che rappresenta gli interessi e le esigenze dei nuovi detentori del potere. In questo caso, in particolare, distinguiamo i fenomeni di:

— *rivoluzione in senso stretto*: se il movimento sovvertitore è operato da forze popolari o da altri gruppi politici «*precedentemente al di fuori del sistema*»;
— *colpo di stato*: quando parte delle autorità governative, politiche o militari, sovvertono l'ordine precedente annientando i rimanenti detentori del potere o cancellando il gioco democratico delle minoranze.

CAPITOLO SECONDO
LO STATO

1. GENERALITÀ

Lo Stato rappresenta la forma più importante ed evoluta di «società», e a dirla con KANT «*la riunione di una moltitudine di uomini viventi sotto leggi giuridiche*».

BARILE, a proposito della nozione di Stato distingue:

— lo **Stato-apparato**: costituito dal complesso degli *organi centrali e fondamentali* che reggono il potere supremo (di esso fanno parte il Parlamento, il Presidente della Repubblica, il Governo, la Corte Costituzionale, etc.) conferito ad esso per delega dal popolo (c.d. democrazia indiretta);
— lo **Stato-comunità** è, invece, costituito dai cittadini (popolo) sia in quanto tali sia organizzati in forme associative diverse dallo Stato (es.: Regioni), titolari, negli ordinamenti moderni, di poteri originari, naturali ed autonomi che riconoscono ad essi la libertà, cioè, di autoorganizzazione entro i limiti e per i fini dettati dallo Stato-comunità;

Una netta distinzione tra Stato-persona - Stato-comunità se da un lato contribuisce a chiarire, dal punto di vista sociologico e politico, il *regime pluralistico* dello Stato, dall'altro può dar luogo ad equivoci perché spezza l'unità organica dello Stato che ha nel popolo (comunità) un elemento costitutivo e non un *quid* distaccato da esso (PERGOLESI).

Nel prosieguo della trattazione seguiremo, comunque, l'impostazione di BARILE, proprio per meglio mettere *in luce* le caratteristiche del nostro regime repubblicano.

2. CARATTERISTICHE

Lo Stato rappresenta una organizzazione:

— **politica**: perché ha una indeterminatezza di fini da realizzare, mentre le altre comunità (es. religiose) hanno fini determinati (es: salvezza delle anime);
— **giuridica**: perché trova il suo fondamento nel diritto, tramite il quale si impone su tutti i soggetti appartenenti alla comunità, infatti si dice che lo Stato, «*parla il diritto*»;
— **originaria e sovrana**: perché nessun'altra autorità può imporre limiti all'autonomia dell'organizzazione statale (anche se le attuali aspirazioni internazionalistiche tendono sempre più a limitare la sovranità nazionale) e i suoi poteri non «derivano» da altri soggetti (i poteri delle Regioni, invece, derivano dallo Stato);
— **necessaria**: poiché ciascun suddito fa parte dello Stato anche indipendentemente da una sua eventuale volontà contraria; la volontà dei consociati può solo influire su alcune circostanze, di cui l'ordinamento tiene conto al fine di determinare la loro appartenenza o meno allo Stato.

3. GLI ELEMENTI O PRESUPPOSTI (rinvio)

Per «presupposti» dello Stato si intendono quei fattori necessari per l'esistenza stessa dello Stato: attraverso essi, infatti, si rende effettiva la sovranità.

Per la maggioranza degli autori essi sono:

— **popolo**: cioè una comunità di soggetti legati da un vincolo che essi intendono istituzionalizzare;
— **territorio**: cioè una parte della superficie terrestre sulla quale il popolo vive (non esistono, infatti, oggigiorno come per il passato comunità nomadi);
— **governo**: cioè una organizzazione di centri di potere che si impone sui soggetti cittadini.
Tale organizzazione può essere: *oligarchica*, se tende a ridurre ad uno solo o comunque a pochi centri di potere (monarchia assoluta, dittatura), *democratica*, se basata sul bilanciamento tra molteplici centri di potere (cittadini, istituzioni, Stato).

4. IL POPOLO

È il complesso delle generazioni che indefinitivamente nel tempo si susseguono nell'appartenenza ad uno Stato. Riguardo al *rapporto di appartenenza* ad uno Stato distinguiamo:

A) Sudditanza

Designa la sottoposizione dell'individuo alla potestà d'imperio dello Stato ed afferisce sia ai *sudditi permanenti* (*cittadini*) che a quelli *temporanei* (*stranieri ed apolidi* che, se si trovano sul territorio dello Stato, e, come tali, sono soggetti alla potestà statuale).

B) Cittadinanza

Designa l'appartenenza di un individuo allo Stato in base ad un vincolo stabile e duraturo per cui viene definita una «*sudditanza permanente*».
Si ricordi che alle norme sulla cittadinanza sono legate, oltre alle persone fisiche, anche le persone giuridiche e tutte le «*comunità intermedie*» che hanno una soggettività giuridica autonoma.

C) Popolo

È costituito, per la dottrina da «quell'**insieme di individui che sono uniti ad uno Stato dal rapporto di cittadinanza**»; essi possono anche essere assenti dal territorio.

Gli *individui* — rispetto alla nozione di «popolo» — possono *considerarsi*:

— *cittadini*: se appartengono allo Stato ed hanno quasi tutti la nazionalità italiana ad eccezione di piccole minoranze;
— *stranieri*: se appartengono ad altri Stati;
— *apolidi*: se non appartengono ad alcuno Stato, cioè sono privi di cittadinanza;
— *bipolidi:* se appartengono a più Stati.

Gli stranieri e gli apolidi sono considerati «*sudditi temporanei*» nel nostro ordinamento che li obbliga all'osservanza delle disposizioni di Ordine Pubblico e di polizia. In particolare, lo Stato Italiano, ratificando la convenzione di New York del 29-9-1954 si è impegnato a facilitare in tutti i modi la naturalizzazione e l'assimilazione degli apolidi.

D) Popolazione e nazione

Al contrario del popolo la popolazione è formata da tutti coloro che si trovano in un *determinato momento* nel territorio dello Stato, siano essi cittadini, stranieri o apolidi (cioè indipendentemente dal vincolo di appartenenza ad uno Stato).

Si ricordi, infine, che il concetto di cittadinanza si differenzia da quello di **nazionalità**; il primo esprime il vincolo giuridico che lega il singolo allo Stato; il secondo esprime un *vincolo etnico-linguistico-religioso* che lega i vari appartenenti alla nazione (identità di lingua, razza, religione, sviluppo storico, etc.) che comunque è espressamente riconosciuto dalla Costituzione Repubblicana quanto parla di «Italiani non appartenenti alla Repubblica» (art. 51).

E) Modalità di acquisto (e perdita della cittadinanza)

I criteri generali idonei a qualificare una persona quale cittadino sono:

— *jus sanguinis*: è cittadino di uno Stato il figlio di genitori cittadini;
— *jus soli:* è cittadino chiunque sia nato sul territorio di uno Stato;
— *sistema misto*: sono cittadini sia i nati da cittadini, sia coloro che pur essendo figli di stranieri, nascono nel territorio di uno Stato.

In base alla *legge 5 febbraio 1992, n. 91*, la cittadinanza si acquista:

— *per nascita*. È cittadino il figlio di padre o di madre cittadini; il minore adottato da cittadino italiano; chi è nato nel territorio della Repubblica se entrambi i genitori sono apolidi o ignoti, purché non venga provato il possesso di un'altra cittadinanza o se il figlio non segue la cittadinanza dei genitori secondo la legge dello Stato di appartenenza; il figlio riconosciuto o dichiarato durante la minore età. Se il figlio riconosciuto o dichiarato è maggiorenne conserva il proprio stato di cittadinanza, ma può dichiarare, entro un anno del riconoscimento di eleggere la cittadinanza determinata dalla filiazione.

Per il figlio nato in Italia da genitori stranieri l'acquisto della cittadinanza è subordinato all'ordinamento del Paese dei genitori. Se uno dei genitori è cittadino italiano, il figlio potrà richiedere la cittadinanza prestando servizio militare, assumendo impiego pubblico (anche all'estero) o facendone richiesta entro un anno dal compimento della maggiore età a condizione che, nel biennio precedente al 18° anno di età, abbia risieduto in Italia;

— *per estensione*. Il matrimonio fa acquistare al coniuge, straniero o apolide, la cittadinanza italiana, quando questi risieda da almeno sei mesi nel territorio dello Stato, ovvero dopo tre anni dalla data del matrimonio, se non vi è stato scioglimento, annullamento o cessazione degli effetti civili e se non sussista separazione legale;
— *per beneficio di legge*. Lo straniero, del quale il padre e la madre o uno degli ascendenti in linea retta di secondo grado sono stati cittadini italiani, può acquistare la cittadinanza se:
  — presta servizio militare o assume un pubblico impiego e dichiara preventivamente di voler acquistare la cittadinanza stessa;
  — al raggiungimento della maggiore età, risiede da almeno due anni in Italia e dichiara, entro un anno, di voler acquistare la cittadinanza italiana.

  Anche lo straniero, nato in Italia e che vi ha risieduto ininterrottamente, diviene cittadino se ne fa richiesta entro un anno dal raggiungimento della maggiore età;
— *per naturalizzazione*. La cittadinanza può essere concessa con decreto del Capo dello Stato, sentito il Consiglio di Stato su proposta del Ministro dell'interno:
  — allo straniero del quale il padre, la madre o uno degli ascendenti in linea retta di secondo grado sono stati cittadini per nascita, o che è nato nel territorio della Repubblica e, in entrambi i casi, vi risiede legalmente da almeno tre anni;

— allo straniero maggiorenne adottato da cittadino italiano, se dopo l'adozione ha risieduto in Italia per almeno cinque anni;
— allo straniero che risiede legalmente da almeno dieci anni nel territorio della Repubblica o che ha prestato servizio, anche all'estero, per almeno cinque anni alle dipendenze dello Stato;
— al cittadino di uno Stato membro della Comunità europea, se risiede da almeno quattro anni nel territorio della Repubblica e all'apolide che vi risiede da almeno cinque.

L'acquisto della cittadinanza può essere precluso in caso di comprovati motivi inerenti alla sicurezza dello Stato, ovvero in ipotesi di condanna per reati di particolare gravità.

La cittadinanza italiana si può *perdere*:

— per acquisto spontaneo della cittadinanza straniera, accompagnato dal trasferimento della residenza all'estero;
— per assunzione di un impiego o prestazione di servizio militare presso uno Stato estero, nel caso in cui vi sia persistenza nell'impiego o il servizio entro un dato termine;
— per assunzione di carica o impiego pubblico, prestazione di servizio militare, o acquisto volontario della cittadinanza presso uno Stato estero, in quel momento in stato di guerra con l'Italia.

La cittadinanza italiana si può *riacquistare*:

— per prestazione del servizio militare o accettazione di un impiego pubblico in Italia, da parte di un ex cittadino;
— per rinuncia da parte di un ex cittadino alla cittadinanza estera o all'impiego o servizio militare all'estero, con trasferimento, per almeno due anni, della propria residenza in Italia;
— per dichiarazione di volerla riacquistare dopo aver ristabilito, da almeno un anno, la residenza in Italia.

La dichiarazione di volontà rivolta all'acquisto della cittadinanza deve essere corredata da una serie di documenti dettagliatamente elencati dall'art. 3 del *D.P.R. 12 ottobre 1993, n. 572*, di attuazione della L. 91/1992

F) Lo status di apolide

Un individuo può, tuttavia, trovarsi privo di cittadinanza, ossia in una situazione di **apolidia**. In tal caso il nostro ordinamento stabilisce che:

— chiunque risieda nello Stato senza cittadinanza italiana, o di altro Stato, soggiace alla legge italiana per ciò che attiene, in particolare, l'esercizio dei diritti civili (non quelli politici) e agli obblighi di leva;
— chi è privo di cittadinanza è soggetto alla legge del luogo ove risiede in tutti i casi in cui dovrebbe applicarsi la legge nazionale.

La cittadinanza italiana può, comunque, essere concessa all'apolide che risiede legalmente da almeno cinque anni nel territorio italiano.

Il Ministero dell'interno può certificare la condizione di apolidia, su istanza dell'interessato corredata da specifica documentazione.

G) La cittadinanza europea

Il configurarsi di una *cittadinanza europea* era già stato preconizzato nel 1972 da un progetto di convenzione, da parte italiana, i cui contenuti per la loro attualità sembrano essere gli antecedenti storico-giuridici-politici del Trattato di Maastricht.

In base al nuovo art. 8 del Trattato CE, la cittadinanza europea si pone come scaturigine della cittadinanza statale. Infatti tale articolo prevede che *si è cittadini europei in quanto si è cittadini di uno degli Stati membri dell'Unione Europea.*

In tal modo ogni cittadino europeo ha:

— il diritto di circolare e soggiornare liberamente in qualsiasi stato membro;
— il diritto di voto e di eleggibilità alle elezioni comunali dello Stato membro in cui risiede e del quale non ha la cittadinanza a condizioni identiche di quelle godute dai cittadini;
— il diritto di voto ed eleggibilità nelle elezioni per il Parlamento europeo nello Stato membro in cui risiede;
— il diritto di tutela da parte delle autorità diplomatiche e consolari di qualsiasi stato membro anche diverso da quelo di appartenenza quando si trovi in un paese estraneo all'Unione europea;
— la facoltà di proporre petizioni al Parlamento europeo;
— il diritto di rivolgersi al *Mediatore*, organo comunitario abilitato a ricevere le denunce relative a casi di cattiva amministrazione da parte delle istituzione comunitarie.

5. IL TERRITORIO

È la parte della superficie terrestre compreso il relativo sottosuolo sulla quale lo Stato esercita la sua sovranità.

Tutto ciò (persone e cose) che si trova nel territorio è soggetto alla *potestà d'imperio* (Sovranità) dello Stato. Tuttavia le frequenti relazioni internazionali hanno attenuato questo rigido principio, per cui si verificano casi di *extraterritorialità* del diritto in base ai quali un bene di uno Stato, pur essendo presente su un territorio altrui è, di diritto, considerato come se si trovasse sul territorio nazionale (es.: navi da guerra in porti ed acque straniere sulle quali vige incondizionatamente la giurisdizione dello Stato di bandiera). Altra eccezione è l'istituto delle *immunità* riservato agli agenti diplomatici stranieri ed alle sedi delle loro ambasciate ove l'*esercizio* della *sovranità* dello Stato territoriale (c.d. Stato ospitante) è *limitato dall'autorizzazione* da parte dello Stato di appartenenza degli agenti diplomatici (c.d. Stato della missione).

Il territorio comprende:

a) la **terraferma**: che abbraccia la parte della superficie terrestre compresa nei confini dello Stato;
b) il **mare territoriale**: cioè la fascia costiera di mare su cui si esercita la potestà dello Stato. La sua estensione differisce da Stato a Stato in quanto manca nel diritto internazionale odierno una precisa regolamentazione uniforme; così il nostro codice della navigazione fissa, all'art. 2 (così modificato dalla legge 2 agosto 1974), l'estensione del *mare territoriale* a 12 miglia;
c) la **zona economica esclusiva**: il limite delle 200 miglia è stato in via formale applicato al caso della *piattaforma continentale* dalla *Convenzione di Montego Bay* (10 dicembre 1982), elaborata dalla III Conferenza dell'ONU sul diritto del mare. Entro tali limiti gli Stati costieri sono titolari di un diritto esclusivo per lo sfruttamento del fondale marino (eccezion fatta per gli Stati che per ragioni di confine o di sponde contrapposte, necessitano di un equo riparto di tale piattaforma: es. confini tra Italia e Tunisia).
Tali Paesi possono, addirittura, far valere il diritto suindicato anche al di là delle 200 miglia, nel caso in cui il fondo del mare rappresenti il naturale prosieguo della terraferma;
d) il **sottosuolo e lo spazio aereo**: tali parti della terra fanno parte del territorio statale fino e dove lo Stato possa svolgere validamente l'*effettivo* esercizio della propria sovranità.
e) il **c.d. territorio in senso lato** (o fluttuante) comprendente:
— le *navi e gli aerei mercantili* se viaggianti in alto mare e sul cielo sovrastante sono considerati a tutti gli effetti sul *territorio nazionale*. Non così se si trovano nelle acque territoriali di un altro Stato;
— le *navi e gli aerei militari* che, *dovunque si trovino*, sono sempre considerati a tutti gli effetti «*territorio nazionale*». Questa tesi oggi si è molto attenuata: anche le navi e gli aerei da guerra non sono più considerate «*frammenti del territorio nazionale*».

— le *sedi diplomatiche* dello Stato all'estero oggi non sono più considerate vero e proprio territorio dello Stato, perché vigono una serie di Convenzioni internazionali (es: Vienna) che tutelano le immunità dei diplomatici e delle loro sedi per garantirne la piena libertà d'azione.

6. IL GOVERNO (rinvio)

È costituito dall'insieme delle istituzioni e degli organi che reggono lo Stato e rappresenta, per BARILE, l'*organizzazione* dei centri di potere. Esso stabilisce la necessità che il potere politico si serva di una struttura istituzionalmente predeterminata, che faccia capo alla potestà di imperio dello Stato (v. cap. II, parte II).

7. FORMAZIONE E CONTINUITÀ DELLO STATO

A) Formazione

Per BARILE uno Stato sorge sempre e solo in base ad un *procedimento di fatto* (in realtà la sua nascita non è prevista dal diritto): basta, infatti, che un aggregato di individui (*popolo*), stanziatosi su un certo *territorio*, senta il bisogno spontaneo di darsi un ordinamento *autonomo*, *effettivo* e *indipendente* (*Costituzione*), per poter parlare di «nascita» *di uno Stato*.

L'ordinamento, cioè, al momento in cui nasce si dà la prima norma base (*grundnorm*) che costituisce la *pietra angolare* su cui viene costruito l'edificio statale.

B) Continuazione e successione

Si hanno casi di *modificazione* dell'assetto statale quando ci si trova di fronte a *mutamenti istituzionali* del sistema.

Difficile è differenziare tale figura dalla «*estinzione dello Stato*». A proposito della Costituzione del Regno d'Italia (legge 17 marzo 1861, n. 4671), infatti, alcuni giuristi parlarono di *nascita di un nuovo Stato*, altri di *continuazione* del Regno di Sardegna che si trasformava in Regno d'Italia. BARILE in particolare, ritiene, che il Regno d'Italia costituisca una continuazione dello Stato Sabaudo.

Lo stesso autore precisa, tra l'altro, che nel caso della rivoluzione russa del 1917, non avendo il nuovo Stato sovietico riconosciuto nessun precedente impegno contratto dagli *zar*, si debba parlare, invece di nascita di uno Stato totalmente nuovo.

I mutamenti istituzionali, comunque, se non interrompono la vita e la continuità dello Stato, ne alterano la struttura determinando la nascita di un nuovo ordinamento costituzionale.

Il caso più appariscente di modificazione si ha a seguito di *procedimenti rivoluzionari* (rivoluzione, colpo di Stato, usurpazione, etc.) che legittimano la posizione di «insorti» in quella di governo «effettivo» quando si assiste alla nascita di un nuovo ordinamento riconosciuto dagli altri paesi della Comunità internazionale. Attualmente gli Stati nuovi sono generati da secessioni di gruppi etnici da Stati già esistenti o dall'iniziativa di altri Stati o dal ridursi di più Stati in uno. Si parlerà quindi di genesi per *annessione* o *incorporazione* o *smembramento* o *disintegrazione* di uno Stato o, ancora, per *fusione* o *sostituzione*.

8. FORME DI GOVERNO

A) Generalità e classificazioni

Per *forma di governo* si intende quella forma che l'organizzazione statale assume per esercitare la sua potestà d'imperio riguarda la *gestione* del potere, la *struttura* degli *organi*, il loro *numero*, i loro *poteri* e *rapporti*.

Le forme di governo, pertanto, vanno distinte dalle:

— *forme di Stato*: che riflettono lo Stato nella sua «*unità*» caratterizzata da un determinato sistema politico;
— *forme di regime*: indicano l'insieme delle formule e dei principi politici che ispirano la costituzione statale.

La prima classificazione di *forme di governo* risale ad *Aristotele* che nella «*Politica*» previde tre forme pure e tre forme impure:

a) la *monarchia* che da modello puro tende a degenerare nella *tirannia*;
b) l'*aristocrazia*, che degenera nella *oligarchia*;
c) la *democrazia* (o *politeia*) che degenera nella *demagogia*.

Machiavelli, a sua volta, distinse due forme di governo: la *monarchia* (o governo di uno) e la *repubblica* (o governo di molti). La *monarchia* (il cui capo prende il nome di Principe o Sovrano) è caratterizzata, dall'*ereditarietà della carica, durata vitalizia del Sovrano e non rappresentatività del popolo.*

Oggi, comunque, scomparse le monarchie legittimiste (cioé affidate a famiglie per tradizione regnanti) ci troviamo quasi sempre di fronte a Repubbliche democratiche rappresentative anche se diversamente organizzate.

B) Monarchia e Repubblica

La **monarchia**, nella sua evoluzione storica, ha assunto differenti aspetti presentandosi come:

— *monarchia assoluta*: se tutti i poteri sono concentrati nelle mani del monarca e questi è svincolato (cioè «*absolutus*») dal controllo di altri organi (es.: *Francia di Re Sole*) e rappresenta in questo caso l'unico organo costituzionale del sistema;
— *monarchia limitata*: se il monarca accetta al suo fianco la rpesenza di altri organi, con limitati poteri di governo (es.: dispotismo illuminato di Maria Teresa d'Asburgo);
— *monarchia costituzionale* ove la potestà di governo è ripartita specificamente e dettaglitamente tra la corona ed altri organi costituzionali in base a un documento solenne (Carta Costituzionale, Statuto, etc.) e secondo il *principio della separazione dei poteri*.

Tale tipo di monarchia, nella prassi costituzionale, ha assunto due forme:

— *monarchia costituzionale pura*: ove il consiglio che rappresenta un organo fiduciario della corona, e in singoli ministri non sono responsabili di fronte al parlamento (es.: *Statuto Albertino*);
— *monarchia costituzionale parlamentare*: ove i Ministri, nominati dalla corona, sono responsabili verso la corona ed il Parlamento (es.: *Statuto del Regno d'Italia*) e il re è tenuto a licenziare i Ministri che non godano della fiducia delle Camere.

Anche la **Repubblica** ha assunto, nel suo divenire, diversi aspetti:

— *repubblica aristocratica*: se il Governo spetta ad una *sola classe sociale* (es.: *Repubblica di Venezia*);
— *repubblica democratica: se governa il popolo*. Può differenziarsi in due tipi di governo:
  — *governo rappresentativo*: ove il popolo elegge e delega ad appositi organi la suprema direzione dello Stato;
  — *governo diretto*: ove il potere sovrano è esercitato direttamente dal popolo riunito in assemblea. Tale forma rappresenta una reminescenza storica (es.: la *democrazia ateniese del V sec. a.C.*).

C) Repubblica Democratica rappresentativa: tipi

È «*democratica*» ogni forma di governo nella quale il popolo partecipa largamente alla vita e alla politica dello Stato.

Lo *Stato democratico* per essere tale deve presentare le seguenti *caratteristiche*:

— *pluralità* di organi *costituzionali* indipendenti, separati e sovrani;
— *divisione dei poteri* e coordinazione degli stessi;
— *elettività del parlamento*, degli organi legislativi e degli enti pubblici territoriali (Regioni, Province, Comuni);
— *tutela giurisdizionale dei diritti fondamentali dell'uomo e del cittadino*;
— *ampio decentramento*.

La realtà giuridica contemporanea ci presenta differenti modelli di «*repubbliche democratiche rappresentative*». Esaminiamole:

a) *repubblica democratica parlamentare*: si ha quando il *Governo* (o Gabinetto) formula un *indirizzo politico* che si impegna a seguire e di cui è responsabile solo dinanzi al *Parlamento*, il quale — a sua volta — può, in ogni momento, revocarlo,

Caratteristiche fondamentali della «*Repubblica parlamentare*» sono: il *ruolo predominante* assegnato al Parlamento che esercita un'influenza decisiva nella vita politica del paese e la *pluralità* dei partiti politici. Questo sistema, con qualche correttivo, è adottato negli attuali governi dell'Europa Occidentale, compresa l'Italia;

b) *repubblica democratica d'assemblea o direttoriale*: si ha quando il *governo (direttorio)* è scelto direttamente dal *parlamento (assemblea)* del quale costituisce un *organo inferiore* ed è strettamente vincolato al parlamento di cui è immediata e diretta emanazione.
Principale pregio di tale forma è che il direttorio resta al potere per tutto il periodo di governo del parlamento (*legislatura*) e può realizzare programmi a lunga scadenza.
È la forma adottata oggi in Svizzera e fu quella adottata in Francia poco prima dell'avvento di Napoleone;

c) *repubblica democratica presidenziale*: ove il Presidente riveste contestualmente sia la carica di Capo dello Stato e Capo dell'esecutivo.
Il Governo, quindi, non dipende — per l'origine, per il funzionamento e la durata — dal Parlamento (o Congresso), ma esclusivamente dal Capo dello Stato di cui costituisce un ufficio subordinato gerarchicamente. I Ministri vengono nominati e revocati dal Presidente, rispondono solo verso di lui, assumono le vesti di suoi collaboratori tecnici e sono completamente indipendenti dal Parlamento (o Congresso). Sia il *Presidente* che il *Congresso* vengono *eletti*, periodicamente e democraticamente, *direttamente dal popolo*; essi esercitano poteri distinti e sono in posizione di netta separazione fra loro. Il Presidente, ad esempio, non può procedere allo scioglimento del Congresso, né questo può revocare il Presidente; tuttavia quest'ultimo dispone dei provvedimenti legislativi già approvati dal Parlamento.
È questo, in particolare, il sistema adottato negli U.S.A.;

d) *repubblica popolare o progressiva*: rappresenta l'attuazione delle ideologie comuniste che, partendo dalla concezione che l'uguaglianza sociale deriva da quella economica, ha cancellato le classi sociali, attribuendo allo Stato il monopolio degli strumenti di produzione.
In tale sistema la classe dei *lavoratori* sceglie nel suo seno i suoi rappresentanti che, posti al vertice del partito e dello Stato, dirigono la vita della collettività statale.
Questo modello è oggi in piena crisi: esso infatti è conservato in pratica solo in Cina. L'Unione Sovietica è scomparsa ed al suo posto è stata creata una Comunità di Stati indipendenti (CSI) mentre i paesi satelliti dell'ex URSS hanno inaugurato sistemi pluralistici che hanno fatto cadere la teoria del partito unico oltre ad avere reintrodotto un sistema economico di mercato.

- FORMA DI GOVERNO
  - MONARCHIA
    - assoluta
    - limitata
    - costituzionale
      - pura
      - parlamentare
  - REPUBBLICA
    - aristocratica
    - democratica
      - diretta
      - rappresentativa
        - parlamentare
        - direttoriale
        - presidenziale
        - popolare

9. FORME TIPICHE DI STATO UNITARIO: UNITARIO, FEDERALE, REGIONALE

A) Stato Unitario

È quello Stato che, pur rispettando le autonomie locali e le comunità intermedie, risulta composto da un solo *popolo*, un sol *territorio* ed un solo *ordinamento* giuridico. Il territorio, cioè presenta la stessa organizzazione giuridica per tutta la sua estensione e fa sempre capo ad *organi centrali* per lo svolgimento delle principali funzioni statali.

B) Stato Federale (o Stato composto)

Si ha quando il territorio statuale si divide in più *circoscrizioni* con ampie sfere di autonomia cui si riconosce la qualifica (non del tutto felice ed impropria) di «Stati».

Tali «Stati» (c.d. *Stati membri*) conservano una parte della loro sovranità anche se essa è limitata dallo *Stato Federale Centrale* cui spetta la «*competenza delle competenze*». Esempio tipico di Stato federale è quello degli U.S.A.

C) Stato Regionale

È uno Stato che sostanzialmente, rientra nella forma dello Stato unitario, ma è caratterizzato dall'esistenza, nell'ambito del proprio ordinamento, di organizzazioni autonome (*Regioni*) con limitata potestà legislativa, esecutiva e una «robusta» autonomia finanziaria (BARILE). Tipico esempio di «*Stato regionale*» è la Repubblica Italiana.

Sia nello *Stato unitario* che in quello *regionale* le divisioni interne (Regioni, Province, etc.) hanno solo un *carattere amministrativo*, mentre, nello *Stato federale*, gli Stati membri hanno non solo *rilievo costituzionale* ma sono titolari anche di un potere *originario*.

10. RAPPORTI TRA STATO E NAZIONE

a) Lo Stato è un'*organizzazione giuridica* e come tale ha *personalità, volontà ed attività* propria. Il concetto di *Nazione*, invece, è prettamente politico e sociologico, per cui il legame che unisce tra loro persone della stessa nazionalità non è giuridico, ed è quindi priva dei requisiti attribuiti allo Stato.

b) Lo Stato è dotato di una speciale capacità, la «*sovranità*» dalla quale deriva la sua *rilevanza giuridica* e *supremazia* sulle altre organizzazioni e comunità.

Il concetto di *Nazione*, invece, ha *rilevanza* giuridica per il nostro ordinamento solo in *casi eccezionali*, come ad esempio per quello dell'art. 51 della Costituzione in base al quale per l'ammissione ai pubblici uffici ed a cariche elettive, lo Stato può parificare gli Italiani non appartenenti alla Repubblica (cioè quelli di nazionalità italiana) ai cittadini italiani.

Anche l'art. 6 della Costituzione affermando che la Repubblica tutela «*con apposite norme le minoranze linguistiche*» dà rilievo giuridico alla nazionalità, in quanto *differente lingua è sinonimo di diversa nazionalità*: questo articolo, in particolare, ammette che nell'ambito del popolo italiano possano sussistere delle minoranze «*alloglotte*» (cioè comunità di altra lingua madre).

11. FORME ODIERNE DI STATO

A) Premessa

Al termine della I guerra mondiale lo schema statale tradizionale andò progressivamente evolvendosi in molteplici forme:

— taluni Paesi conservavano la struttura tipica dello *Stato di diritto*, apportando parziali modifiche al sistema al fine di assecondare le accresciute esigenze sociali e dando così luogo a forme di Stato definite di «*democrazia classica*» (meglio conosciute come «*democrazia occidentale*»);
— altri Paesi, privi di una solida tradizione democratica, furono vittima dell'affermarsi di regimi autoritari che diedero luogo a «*forme di Stato totalitario*» (è il caso dell'Italia fascista, della Germania nazista, della Spagna franchista);
— altri Paesi, infine, di fronte alla evidente ed irreversibile crisi dello Stato liberale, uniformandosi a principi radicalmente lontani dalle democrazie occidentali, tramutarono la loro struttura in «*forme di Stato socialista*».

B) Lo Stato di democrazia classica

La seguente forma di Stato presenta specifici e peculiari caratteri che possono così sintetizzarsi:

— adozione di una Carta Costituzionale lunga, rigida e votata;
— accoglimento della teoria della separazione dei poteri;

— effettività del Parlamento e degli organi legislativi degli enti minori;
— governo della maggioranza e tutela delle minoranze;
— tutela giurisdizionale dei diritti inviolabili dell'uomo.

C) Lo Stato totalitario

Col termine *totalitarismo* suole intendersi un tipo di regime politico caratterizzato da assenza di strutture e controlli sia del popolo che parlamentare, presenza di un partito unico, rifiuto del pluralismo liberale, esaltazione della collettività nazionale identificata nello Stato o nella «comunità di sangue e di razza», abolizione di libere elezioni, etc.

Tale termine assume un significato ed un valore *negativo* visto che il totalitarismo si identifica con la soppressione di ogni forma di garanzia per le libertà individuali e collettive.

D) Lo Stato socialista

Un altro sbocco della crisi dello Stato liberale, oltre a quello totalitario, è stato quello dello *Stato socialista*.

Il punto di partenza delle ideologie social-comuniste deriva dalla situazione di profonda disuguaglianza della classe lavoratrice, che in assenza di misure di protezione delle classi più deboli, non consente ad esse l'effettivo godimento dei diritti individuali, pur astrattamente garantiti dallo Stato liberale (MORTATI).

Il socialismo si propone di innovare questa situazione e di creare una società di *eguali*.

Lo *Stato socialista* è ispirato all'idea di una democrazia radicale ed egualitaria e sostiene la realizzazione di un sistema elettorale che permetta la piena ed effettiva rappresentanza dei lavoratori che solo in virtù della propria forza maggioritaria.

In questi ultimi anni, con l'affermazione del «nuovo corso» politico ed economico sovietico inaugurato da M. Gorbaciov, la dittatura del proletariato vigente in questi paesi che si autodefiniva «Socialismo» è totalmente venuta meno e, per la necessità di incoraggiare l'efficienza produttiva, si è inaugurato un sistema ove è caduta la *proprietà collettiva dei mezzi di produzione* e si è dato impulso alla *libera iniziativa economica privata*.

È venuta così meno l'impalcatura su cui si reggeva l'intero *stato bolscevico* che vedeva nell'affermazione della *proprietà socialista* dei mezzi di produzione, l'unica via per realizzare il socialismo. Nei paesi socialisti si è avuta una spinta al *pluripartitismo* e all'elezione a suffragio universale del Presidente della Repubblica. Tale nuova logica che ha guidato tutti i regimi dell'Est all'apertura verso il pluralismo politico, ha fatto definitivamente cadere la tradizione marxista-leninista del *partito unico* inteso come monolitico referente degli interessi dei lavoratori.

E) Lo Stato Democratico e la rappresentanza politica

Lo Stato democratico odierno è uno Stato **rappresentativo** in quanto i suoi organi rappresentano il popolo. Tale rappresentanza in particolare:

— *non implica necessariamente sostituzione* di volontà nel senso privatistico ma determina, una *discrezionalità* d'azione rappresentante nei confronti del rappresentato (popolo). Si pensi — ad esempio — all'attività dei deputati e alla loro discrezionalità d'azione sul terreno politico;
— comporta «*indipendenza*» e «*irresponsabilità*» dei rappresentanti di fronte ai rappresentati (così per l'art. 90 Cost.: «*Il Presidente della Repubblica non è responsabile degli atti compiuti nell'esercizio delle sue funzioni*»);
— si *risolve* sostanzialmente in un *problema di libertà* in quanto conduce ad una partecipazione (in rappresentanza di classi, ceti, nazioni, etc.) del popolo al governo.

Il concetto di **rappresentanza politica** è nato e si è ispirato al modello della *rappresentanza giuridica* proprio del diritto privato consistente nel fatto che un *soggetto* (*rappresentante*), in virtù di un contratto (*mandato*), agisca in *nome e per conto* di un altro soggetto (*rappresentato*).

Per BARILE, nelle democrazie moderne affiorano le seguenti tendenze:

— far coincidere la classe *governata e i governanti*: questa tendenza si realizza attraverso gli *istituti del suffragio universale, il referendum* lo *scioglimento anticipato delle camere*, etc. (vedi infra);
— assicuare *uguale tutela* a tutte le minoranze (art. 6 Cost.) e si attua garantendo al cittadino le libertà civili e politiche, tendenza in particolare, che si oggettiva, in uno stato c.d. «*democratico*» nella presenza in parlamento di più partiti politici.

12. LO STATO E LE ORGANIZZAZIONI INTERNAZIONALI

A) Generalità

Gli Stati durante la loro esistenza, vivono ed agiscono in due distinte sfere:

1) nell'*ordinamento interno*: dove il *potere sovrano* si oggettiva nella posizione di «*supremazia*» dello Stato nei confronti dei propri sudditi;
2) nell'*ordinamento internazionale* dove la sovranità conferisce allo Stato una posizione *paritaria* rispetto agli altri soggetti della comunità internazionale. In particolare uno Stato è tale se per il diritto internazionale è autonomo e indipendente rispetto agli altri: in tal caso esso è titolare della «*soggettività* (o personalità) *internazionale*» che lo pone, di diritto, fra i membri della *comunità internazionale*.

Si noti che oggi accanto alle regole del diritto internazionale generale (non scritte) si vanno affiancando numerose convenzioni internazionali in gran parte favorite dall'azione svolta in tal senso dalle N.U. Tra le principali convenzioni ricordiamo, la Convenzione di Vienna sul diritto del Trattati del 1969, le Convenzioni sul diritto del mare, quelle sulle immunità diplomatiche e consolari.

I rapporti internazionali fra Stati, nella loro evoluzione storica, furono dapprima limitati ad intese bilaterali, poi sono andati evolvendosi e sono nate intese più strette cui hanno partecipato più Stati dette «*Unioni di Stati*».

B) Le Unioni di Stati

Si ha Unione di Stati quando più Stati, a seguito di un accordo internazionale di cooperazione, *stabiliscono di riunirsi*, senza perdere la propria individualità e senza dar origine ad un nuovo Stato, ma solo per meglio raggiungere fini comuni.

L'*Unione di Stati* se assume una forma più «*stabile*» e «*istituzionale*» creando organi burocratici (*bureaux*, cioé uffici permanenti) prende il nome di «*Organizzazione internazionale*».

Tali Unioni possono essere *amministrative* (come l'Unione Postale e Telegrafica), costituite già nella metà del secolo scorso solo per realizzare scopi relativi all'attività amministrativa dei singoli Stati, ovvero *politiche*, per la realizzazione di fini politici e universalistici per il bene comune di tutti gli Stati (*pace, sicurezza internazionale*).

Va, infine, ricordato che le Unioni possono essere *chiuse o aperte* a seconda che permettano o meno l'ingresso di nuovi Stati nel loro ambito. Tipiche figure di *Unioni aperte* sono la ex Società delle Nazioni e l'O.N.U., che sorte all'indomani delle ultime guerre mondiali mettono la guerra «fuori legge» e si prefiggono di perseguire la pace e la sicurezza in tutto il mondo.

C) Segue: La Società delle Nazioni e le Nazioni Unite

a) *Società delle Nazioni*
L'accordo che diede vita alla società delle Nazioni, prevista nel programma dell'allora presidente americano Wilson, entrò in vigore alla fine della prima guerra mondiale il 10 gennaio 1920, con il delicato compito di conservare la pace nel mondo e (nell'esecuzione di tale funzione) considerava la *guerra illecita* (la liceità di essa era ristretta a pochi casi) e stabiliva (art. 16) le misure (economiche, militari) che gli altri Stati avrebbero dovuto adottare nei riguardi degli eventuali belligeranti. La Società delle Nazioni ebbe vita breve e fu proprio l'Italia, nel 1936, con la guerra di aggressione all'Etiopia (Stato membro della S.d.N.), a metterne in crisi il funzionamento.

b) *Le Nazioni Unite (O.N.U.)*
Entrate in funzione il 24 ottobre 1945 costituiscono un *ente politico internazionale* con specifiche competenze, istituti ed organi per il *mantenimento della pace, l'abolizione delle guerre, l'affermazione dei diritti dell'uomo*.

Al contrario del patto della S.d.N., l'Organizzazione delle Nazioni Unite rappresenta l'illimitata ed *universale* volontà di abbandono dell'impiego della forza in casi di controversie fra Stati, per cui rientrano nella *competenza* delle *N.U.* tutte le questioni politiche mondiali tali da *mettere in pericolo* la pace nel mondo.

Organi dell'O.N.U. sono:

— *il Segretariato* (il Segretario è il principale funzionario dell'Organizzazione);
— *un'Assemblea Generale* (composta da tutti gli Stati membri);
— *un Consiglio di Sicurezza* (composto da 5 membri permanenti: U.S.A., Russia, Francia, Cina, Gran Bretagna con diritto di veto e 10 non permanenti) attributari o di poteri inerenti alla pace e alla sicurezza internazionale;
— *un Consiglio economico e sociale*;
— *un Consiglio di Amministrazione fiduciaria*;
— *una Corte internazionale di Giustizia* (con sede all'Aja).

D) Organizzazioni regionali e sopranazionali: le Comunità Europee

Accanto alle organizzazioni mondiali ve ne sono altre di *carattere regionale*, come la NATO.

Durante gli anni '50 tra gli Stati dell'Europa occidentale, sono *sorte* delle vere e proprie organizzazioni *sopranazionali* volte ad instaurare una più stretta integrazione europea, anche in vista della realizzazione di un mercato unico. Delle tre organizzazioni — CECA, CEE (denominazione in seguito mutata in CE vale a dire Comunità Europea) ed EURATOM — facevano inizialmente parte solo sei Stati (Belgio, Paesi Bassi, Lussemburgo, Francia, Germania ed Italia) a cui si sono aggiunti nel 1973 l'Irlanda, la Gran Bretagna e la Danimarca; nel 1981 ha aderito la Grecia, nel 1986 la Spagna ed il Portogallo e nel 1995 l'Austria, la Finlandia e la Svezia. Attualmente i paesi membri delle Comunità Europee sono quindici.

Con la ratifica dei trattati comunitari, è stato istituito un nuovo tipo di ordinamento *giuridico* (nel campo del *diritto internazionale*) che impone agli Stati membri — limitatamente ai settori economico, carbosiderurgico e atomico — determinati comportamenti per il raggiungimento di una unione economica degli stessi.

La caratteristica di una *comunità sopranazionale* è costituita dal fatto che i rapporti fra Stati membri non sono improntati alla mera *coordinazione* intergovernativa per il raggiungimento dei fini dell'ente, ma sono *subordinati* direttamente (solo per determinati campi) alla volontà superiore dell'ente.

Le Comunità Europee, operano mediante *organi comuni* (Parlamento Europeo, Consiglio, Commissione, Corte di Giustizia) che emettono *atti normativi* vincolanti (regolamenti, direttive e decisioni) alcuni dei quali hanno *immediata efficacia* negli ordinamenti interni degli Stati della comunità (senza cioè che occorra per essi alcuna ulteriore attività di *ratifica* da parte di ciascun Stato membro).

Per il nostro ordinamento, in particolare, l'efficacia e la legittimità di tali atti è garantita dal dettato degli artt. 10 e 11 della Costituzione che consentono, in condizioni di parità con gli altri Stati, a *limitazioni* di *sovranità* a favore di organizzazioni internazionali che assicurino la pace e la giustizia fra le Nazioni.

E) Il Trattato sull'Unione Europea

Il 7 febbraio 1992 è stato firmato a Maastricht un Trattato (ratificato con L. 3-11-1992, n. 454) destinato a segnare il passaggio dalla *Comunità economica europea* all'*Unione europea* dando corpo alla volontà dei «Paesi membri» di approfondire l'integrazione e consolidare la loro unione politica, economica e monetaria, sulla scorta di quanto in passato già stabilito dall'*Atto Unico Europeo* (L. 23-12-1986, n. 909).

Gli obiettivi fondamentali che il Trattato in questione ha inteso perseguire possono sinteticamente, riassumersi: nel perfezionamento del mercato unico europeo (con la connessa libera circolazione di persone, merci, capitali e servizi) attraverso il graduale passaggio ad una Banca centrale unica e ad una moneta comune, che segnerebbero il completamento del processo di integrazione dei diversi sistemi economici; nell'elaborazione di indirizzi di politica estera comuni; nel potenziamento della cooperazione fra i dodici Stati membri nei settori specifici della giustizia e delle attività di polizia (ad evitare che l'eliminazione delle frontiere si traduca in un abbassamento del livello di sicurezza); nel rafforzamento della legittimità democratica della Comunità, attraverso l'ampliamento dei poteri del Parlamento europeo, la creazione di un *Comitato delle Regioni* (queste ultime considerate come un *vero e proprio livello istituzionale* seppur incompleto, della Comunità: MARTINES, RUGGERI), l'istituzione di una «cittadinanza dell'Unione» con relativi diritti ed obblighi, etc.

Va ricordato, peraltro, che uno dei principi fondamentali — e, al contempo, più discussi — introdotto dal Trattato di Maastricht è il c.d. **principio di sussidiarietà**, il quale implica (art. 3B, 2° comma) che, nelle materie che non appartengono alla sua competenza esclusiva, la Comunità interviene «solo se e nella misura in cui gli obiettivi dell'azione prevista non possono essere sufficientemente realizzati dagli Stati membri...». Ciò, se per un verso comporta affermazione della regola secondo cui le decisioni devono essere prese ad un livello il più vicino possibile ai cittadini (con implicita valorizzazione delle istanze di decentramento, prima fra tutte le Regioni), dall'altro espone all'eventualità che la Comunità possa intervenire in qualsiasi materia, purché ciò sia ritenuto necessario per lo sviluppo della Comunità stessa: con la possibile conseguenza che «non vi saranno più competenze garantite, ma una destrutturazione complessiva delle competenze con una concorrenza Comunità-Stato-Regioni retta da un principio di utilità comunitaria (CHITI)».

Si deve, altresì, ricordare che, dopo le resistenze emerse in molti paesi in sede di ratifica del Trattato e le perplessità da più parti avanzate verso la costituzione di una Banca Centrale (che — si ritiene — finirebbe per essere egemonizzata dalla *Bundesbank*), molti degli iniziali entusiasmi suscitati dalla stipula del Trattato di Maastricht sembrano essersi, almeno in parte, smorzati, con ricadute che — prevedibilmente — porteranno quanto meno ad un rallentamento dei tempi fissati per l'attuazione del progetto di Unione Europea.

13. Segue: RAPPORTI FRA STATO ITALIANO E DIRITTO INTERNAZIONALE

A) Gli artt. 10 e 11 della Costituzione

La Costituzione Repubblicana formula negli artt. 10 e 11 alcuni principi che regolano i rapporti tra lo Stato Italiano e la Comunità Internazionale:

a) l'*art. 10* regola l'adattamento tra diritto interno e internazionale, in particolare, prevede che l'Italia *si conformi* alle *norme di diritto internazionale generalmente riconosciute*.
Esso costituisce una norma di produzione giuridica che introduce la norma di diritto internazionale nel diritto interno.
Cosa s'intende per «*norme generalmente riconosciute*»?
Sono tali, innanzitutto, tutte le norme internazionali che non contrastino con la Costituzione. Per la maggior parte degli autori l'art. 10 si riferisce solo alle *norme non scritte*.

b) l'*art. 11*, invece, **pone due principi**:

1) il **ripudio della guerra**. Sia di aggressione che come mezzo per risolvere le controversie insorte con gli altri Stati. È questo il principio cosiddetto «*pacifista*» che, sulla scia di autorevoli precedenti come la Costituzione Francese del 1791, è stato inserito nella nostra Costituzione.

pacifico» e come tale, dimostrare nel nostro più solenne documento l'adesione al requisito fondamentale per entrare a far parte delle *Nazioni Unite* (che ammettono nel loro ambito solo gli Stati c.d. «*amanti della pace*»).

2) la **limitazione di sovranità dello Stato**. Tale limitazione è ammessa solo a condizione di parità con gli altri Stati e purché sia tesa alla creazione di un ordinamento internazionale capace di assicurare la pace e la giustizia fra le nazioni e nel promuovere le organizzazioni internazionali dirette a tale scopo. Si ricordi, infine, che su tale principio si poggia l'intera impalcatura delle Comunità Europee che costituiscono un'organizzazione sovranazionale con i caratteri previsti dal citato art. 11 (sent. n. 183 della Corte Costituzionale del 1973).

B) Organi interni con funzioni internazionali (rinvio)

I poteri in materia internazionale sono stati attribuiti dalla nostra Costituzione:

— al *Presidente della Repubblica* che, nella sua particolare veste, rappresenta lo Stato all'estero, accredita i diplomatici stranieri, ratifica i trattati internazionali, etc.;
— al *Parlamento*, in veste di organo centrale dello Stato, che è competente a dichiarare la guerra, autorizzare la ratifica dei trattati, eleggere i rappresentanti del Parlamento europeo;
— al *Ministro per gli Affari Esteri* che dirige la politica es tera del Paese.

14. RAPPORTI FRA STATO E CHIESA CATTOLICA

A) Introduzione

Lo Stato Pontificio, dopo la breccia di Porta Pia da parte delle Truppe di occupazione del Regno d'Italia che invasero Roma (1870) fu ridotto ad una minima estensione territoriale.

Per i seguaci della *teoria istituzionalistica* del SANTI-ROMANO la Chiesa, venuto meno il proprio elemento statuale territoriale rappresenta comunque una istituzione *originaria* in quanto presenta i seguenti caratteri:

a) *un corpo sociale*, cioé più persone che si associano;
b) un'*organizzazione* volta al raggiungimento degli scopi comuni del corpo sociale e che, attraverso gli *organi* e la loro *gerarchia* assume *carattere unitario*;
c) un *ordine normativo* che disciplini il funzionamento dell'organizzazione e i suoi rapporti esterni.

B) Cenni storici

Per diversi secoli, la *Chiesa* ha intrattenuto con gli Stati rapporti di diversa natura, così classificabili:

a) *cesaropapismo*
Si tratta di un sistema di *unione tra Chiesa e Stato* caratterizzato dalla *rigida sottoposizione della Chiesa allo Stato* dove il principe è «*imperator sacerdos*». Questo sistema si ebbe al tempo in cui il cristianesimo era la religione ufficiale dell'Impero Romano. Venne meno con la caduta dell'Impero d'Occidente, mentre rimase in vigore nell'Impero d'Oriente;

b) *giurisdizionalismo*
Anche in questo sistema la Chiesa è sottoposta allo Stato. Esso si sviluppò tra il XIV e il XVIII secolo e consentì ai sovrani di disciplinare unilateralmente l'attività della Chiesa (assunse diversi nomi: *gallicanesimo* in Francia, *regalismo* in Spagna, *tanuccismo* a Napoli). In pratica scopo di tale sistema era quello di *svincolare i sovrani e l'episcopato nazionale dall'influenza della curia romana*;

c) *teocrazia*
Completamente opposto al precedente, tale sistema prevede una *supremazia della Chiesa sullo Stato*. La dottrina teocrita, dovuta a Sant'Agostino, riteneva che il potenfice dovesse essere il capo, non solo spirituale, della repubblica cristiana, con *poteri di nomina e revoca dei sovrani*.
Tale sistema fu attuato nel medioevo.

C) Sistemi moderni

Oggi i rapporti Stato-Chiesa, come nota BARILE, possono condursi alle posizioni di:

a) *separazione*
Tale sistema è detto anche del «*laicismo*» o dello «*Stato non confessionale*»: lo Stato si disinteressa della Chiesa considerando la religione un affare privato e quindi limitandosi a garantire la *libertà di fede, di culto e di associazione a fini religiosi*;

b) *sistema concordatario*
Questo sistema (che è quello esistente attualmente in Italia a seguito dei Patti Lateranensi dell'11 febbraio 1929 e dell'accordo di revisione del 18-2-84), tende a regolare pattiziamente tra Chiesa e Stato le *res mixtae* ossia quelle materie, che sono di comune interesse tra le due autorità che entrambe dettano regole di comportamento ai *cittadini* e *fedeli* impossibilitati a seguire possibili direttive antitetiche provenienti dai due poteri.

Lo studio dei rapporti tra Chiesa e Stato è oggetto del *Diritto ecclesiastico*. Poniamo, comunque, nel paragrafo che segue alcuni cenni ai problemi più importanti.

15. ATTUALI RAPPORTI TRA LA REPUBBLICA ITALIANA E LA CHIESA CATTOLICA

Per l'art. 7 Cost. «*lo Stato e la Chiesa cattolica sono, ciascuno nel proprio ordine, indipendenti e sovrani. I loro rapporti sono regolati dai Patti Lateranensi. Le modificazioni dei Patti accettate dalle due parti, non richiedono procedimenti di revisione costituzionale*».

Da tale articolo sorgono alcuni problemi, esaminiamoli:

1) *i Patti sono stati inseriti o meno nella Costituzione*?
Tale problema si pone per il contrasto esistente tra alcune norme, contenute tra i patti e i principi di uguaglianza e libertà sanciti dalla Costituzione.
BARILE risolve la questione in senso *negativo*, argomentando dai lavori preparatori e soprattutto dal fatto che lo stesso art. 7 esclude il procedimento di revisione costituzionale per la modificazione dei Patti.
D'altronde, se la previsione fosse unilaterale da parte dello Stato Italiano, allora essa investirebbe lo stesso art. 7 non i Patti. Anche nelle sentenze 30, 31, 32 del 1971 la *Corte Costituzionale* ha affermato che le *norme costituzionali* risalgono a quelle *concordatarie*.

2) *L'art. 7 afferma la pari sovranità dello Stato e della Chiesa cattolica*
In realtà i due ordinamenti *hanno in comune due dei presupposti essenziali dello Stato: popolazione e territorio*, il che fa sorgere non pochi problemi di supremazia e conflitto tra i due sistemi.

Tutto ciò si risolve nel conferimento nel nostro ordinamento di una *posizione di privilegio* di cui gode la Chiesa cattolica. Soprattutto, come nota BARILE, nei seguenti campi:

— *matrimoniale* (riserva di giurisdizione dei tribunali canonici per i casi di nullità e dispensa del vincolo matrimoniale canonico);
— *penale* (la Chiesa cattolica è posta in una situazione di privilegio rispetto alle altre confessioni religiose, posizione che, nonostante numerose decisioni contrarie della Corte Costituzionale, BARILE ritiene comunque incostituzionale);
— *politico* (l'*Azione Cattolica e Comitati civici di laici e religiosi* sono in contrasto, secondo BARILE, persino con l'art. 43 dello stesso Concordato);

I più vistosi tra questi privilegi sono stati comunque attenuati o modificati dal «Nuovo Concordato del 18-2-84» (Craxi-Casaroli), infatti tra le principali innovazioni del nuovo accordo Stato-Chiesa vanno ricordate le seguenti:

a) **neutralità** dello **Stato** di fronte al **fenomeno religioso**. In tale nuova ottica «neutrale» lo Stato assicura ai propri cittadini cattolici l'assistenza spirituale e la possibilità di adempiere le

pratiche di culto in determinate strutture pubbliche: FF.AA., Polizia, ospedali, istituti di assistenza e di cura, istituti di pena, etc. (art. 11);

b) in tema di enti ecclesiastici e di impegni finanziari dello Stato sono venuti a cadere una serie di esenzioni e privilegi degli enti ecclesiastici e la legge n. 222/1985 ha riorganizzato tutta la tematica tributaria degli enti in questione;

c) *in tema di matrimonio*: il Concordato del 1929 riconosceva il matrimonio canonico quale sacramento e quindi ne sanciva il carattere indissolubile. Il nuovo accordo, giunto 14 anni dopo la legge sul divorzio, si limita, invece, a riconoscere effetti civili al matrimonio contratto secondo le norme del diritto canonico;

d) *in tema di istruzione religiosa*. Mentre nel '29 l'art. 36 affermava che l'insegnamento della dottrina cristiana era il coronamento dell'istruzione pubblica ed era considerato, salvo dispensa, obbligatorio, l'art. 9 del Nuovo Concordato del 1984 garantisce allo Stato e ai cittadini maggiori libertà nell'insegnamento della religione cattolica per cui l'ora di «religione» è divenuta facoltativa in tutte le scuole pubbliche di ogni ordine e grado.

CAPITOLO TERZO
IL DIRITTO E LE NORME GIURIDICHE

1. DIRITTO OGGETTIVO E SOGGETTIVO

Il diritto può essere considerato sotto *due aspetti*:

— come **insieme di norme** (*norma agendi*) che stabiliscono le regole di condotta cui i consociati devono adeguare il proprio comportamento in conformità delle esperienze di convivenza e cooperazione che stanno alla base della società;
— come **facoltà** (*facultas agendi*) in base alla quale ciascun soggetto, in conformità alle norme vigenti, pretende dagli altri un determinato comportamento.

Nel primo aspetto si ha il c.d. «*diritto oggettivo*», nel secondo il «*diritto soggettivo*».

Il procedimento con cui si accerta che la «*fattispecie concreta*» (cioè il fatto) corrisponda alla «*fattispecie astratta*» (dettata dal diritto oggettivo) segue la forma del *sillogismo* per cui:

— se la legge punisce i ladri (premessa maggiore; fattispecie astratta dettata dal diritto oggettivo) e
— Tizio è un ladro (*premessa minore*: fattispecie concreta)
— Tizio dovrà essere punito: *giudizio finale*.

Si noti, infine, che diritto soggettivo e diritto oggettivo non sono due realtà diverse, ma due manifestazioni della stessa realtà in cui il diritto si concreta per dirigere l'attività umana.

2. I SOGGETTI DEL DIRITTO

A) Nozione

Il diritto oggettivo crea i *soggetti di diritto* ovvero i destinatari delle norme giuridiche.

Soggetto di diritto (o «persona» in senso giuridico) si diventa solo in quanto l'ordinamento attribuisce — espressamente o implicitamente — tale qualità, per cui:

— **soggetto di diritto** è ogni centro di riferimento di diritti e di obblighi creato dall'ordinamento giuridico;
— **personalità giuridica** rappresenta il centro di imputazione (attribuzione) di qualificazioni giuridiche (BARILE).

B) Persone fisiche e persone giuridiche

Anzitutto, sono soggetti di diritto, le *persone fisiche*: tutte le persone fisiche sono soggetti di diritto, ma non in base alla loro mera esistenza materiale, bensì per un principio giuridico — fissato

nell'art. 1 del codice civile — che ricollega, in via generale, l'*acquisto* della *personalità giuridica* da parte dell'uomo all'evento naturale della nascita.

Accanto alle persone fisiche l'ordinamento attribuisce la soggettività giuridica anche ad entità prive di requisiti naturalistici ed umani: le *persone giuridiche*. Le persone giuridiche, dunque, sono «*enti ideali*, forme giuridiche di unificazione e concentrazione di diritti, obblighi, potestà per il perseguimento di interessi umani».

Si tratta, in sostanza, di *centri di riferimento* (imputazione) di diritti e doveri dell'ordinamento giuridico.

C) Capacità dei soggetti

I soggetti vivono ed operano nel mondo del diritto in quanto sono dotati di *capacità* (o personalità giuridica).

La *capacità giuridica* è un'attitudine riconosciuta dalla legge a divenire soggetto di diritti e doveri; essa spetta, come detto a ciascun individuo per il solo fatto della nascita. Barile la definisce come la misura della personalità, la qualificazione del tipo di persona. Eccezionalmente (artt. 462, 463, 715 c.c.) può spettare al *concepito* o al *non concepito* (artt. 339 e 784 c.c.).

Dopo aver determinato la personalità e la misura di essa, l'ordinamento giuridico distingue fra le persone capaci, coloro che hanno la capacità d'agire.

La *capacità di agire* è un'attitudine a compiere manifestazioni di volontà idonee a modificare la propria situazione giuridica, a far valere i propri interessi oltre che essere centri di imputazione di norme giuridiche. Tale capacità per il nostro legislatore viene acquistata col compimento degli anni 18 (salvo le debite eccezioni; es.: sono sufficienti 16 anni per poter validamente stipulare il contratto di autore art. 108 L. 633 del 1941 modificata dall'art. 13 della L. n. 39 del 1975).

Diversa dalla capacità d'agire risulta la *legittimazione* che spetta ad un soggetto solo perché è in una particolare relazione con l'oggetto giuridico.

3. GLI STATUS E LE SITUAZIONI GIURIDICHE SOGGETTIVE STATICHE

Per *status* si intende il raggruppamento di diversi rapporti giuridici imputati (cioè riferiti) ad una sola persona, conseguenti alla posizione che la persona stessa occupa nella società o nell'ordinamento stesso in cui vive (es. lo *status* di *cittadino* conferisce i diritti elettorali, di libertà, civici, lo *status* di genitore conferisce la potestà parentale, etc.). All'interno degli *status* vigono varie *situazioni giuridiche soggettive*, cioè quelle posizioni che *possono* essere assunte dai soggetti capaci nei rapporti intersoggettivi (*situazioni statiche*). Per BARILE e la dottrina dominante tali situazioni possono essere:

a) **di svantaggio** (o passive) e sono:
   - — *obblighi giuridici*, che corrispondono ai diritti soggettivi;
   - — *doveri giuridici*, che sono quegli obblighi cui non corrispondono diritti;
   - — *responsabilità*, che nasce in caso di inadempimento di obblighi o di doveri (così, ad esempio, un rapporto di debito, se non viene onorato alla scadenza, si trasforma *ipso-iure* in un rapporto di responsabilità);
   - — *soggezione*, che è la situazione preliminare a quella di svantaggio (obbligo, dovere) e che si concreta nello *stato di attesa* nel quale si trova un soggetto mentre perdura l'inattività del titolare della situazione di vantaggio (BARILE);

b) **di vantaggio** (o attive):
   - — *diritto soggettivo*: è una posizione soggettiva che fa capo esclusivamente ad un titolare e viene *tutelata direttamente* con apposite norme giuridiche. Il soggetto che ne è titolare, cioè, può invocare direttamente la norma per pretendere che gli altri consociati seguano un dato comportamento (BARILE) in ossequio al diritto che a lui fa capo (es.: chi vanta il diritto di proprietà ha il potere di escludere gli altri dal godimento di esso);
   - — *interesse legittimo* (od occasionalmente protetto): è una posizione soggettiva facente anch'essa capo ad un soggetto determinato, ma collegata con l'interesse generale e *tutelata indirettamente* solo attraverso norme che assicurano l'interesse generale. La norma, cioè, è dettata a protezione di un *interesse generale*, e solo di riflesso protegge l'interesse del singolo.

     Esempio: il Comune decide di ampliare il cimitero e porta lo stesso a confinare con la proprietà di Tizio occupando abusivamente la proprietà di Caio. Caio, in questo caso è protetto direttamente dalla legge e vanta un diritto soggettivo a difesa della sua proprietà abusivamente occupata dal Comune.
     Tizio, invece, ha solo un interesse (ex art. 238 T.U. leggi sanitarie) a che tra il cimitero e la sua proprietà vi siano almeno 200 metri di terreno libero: quello di Tizio è, dunque, solo un interesse legittimo a che la P.A. rispetti la legge;
   - — *diritto suscettibile di affievolimento*: in questo caso la norma è dettata a protezione dell'interesse del singolo, ma tale interesse è compenetrato nell'interesse collettivo ed è quindi destinato eventualmente a cadere di fronte alla prevalenza dell'interesse collettivo. Si pone perciò come situazione soggettiva intermedia fra diritto soggettivo ed interesse legittimo.

     Esempio: nel caso di espropriazione per pubblica utilità il diritto del proprietario, subìta l'espropriazione, affievolisce ad interesse legittimo: la legalità dell'azione di espropriare è giustificata dalla necessità di salvaguardare l'interesse generale;
   - — *diritto in attesa di espansione*: è un diritto che nasce condizionato (es.: diritto di costruire sul proprio fondo) per il cui esercizio occorre un provvedimento dell'autorità amministrativa tendente a rimuovere un ostacolo che ne impediva l'esercizio (es.: licenza edilizia che consente di costruire sul proprio terreno).

4. LE SITUAZIONI SOGGETTIVE DINAMICHE (BARILE)

A) Potere giuridico

Il potere giuridico è l'*aspetto concreto della capacità di agire* (BARILE), consiste nel far valere una *pretesa*, producendo così volontariamente un mutamento in un rapporto giuridico.

B) Facoltà

Le facoltà sono poteri particolari, privi di autonomia, che possono configurarsi analizzando il contenuto di un diritto soggettivo. Per BARILE essi si concretano in *comportamenti materiali* che tendono a *modificare una realtà di fatto* (es.: piantare alberi su un fondo di nostra proprietà).

C) Diritti potestativi

Sono quei diritti che si possono esercitare quando la legge conferisce al titolare di un diritto soggettivo la *potestà* di creare, di modificare o estinguere un rapporto giuridico con una *manifestazione unilaterale di volontà*.

D) Funzioni

È questa una fattispecie di potere-dovere: cioè la legge non solo riconosce, ma impone (al privato o all'ente pubblico) di esercitare un potere, perché tale esercizio è necessario all'interesse pubblico. Esse hanno sempre carattere pubblicistico anche se alcune di esse sono affidate a privati (es.: potestà parentale dei genitori sui figli). Si distinguono in *vincolate e discrezionali* a seconda che la norma di diritto oggettivo lascia o meno un ambito di autodeterminazione al soggetto agente.

Esempio: per l'accertamento della gradazione alcolica del vino e per la conseguente applicazione dell'imposta l'autorità amministrativa non gode di nessuna discrezionalità nei sistemi di misurazione, mentre nella scelta di un sistema di trasmissione televisiva a colori è concesso alla P.A. di scegliere il dispositivo che ritiene più conveniente.

5. RAPPORTI GIURIDICI

A) Nozione

Il *rapporto giuridico* implica una relazione intersoggettiva, un rapporto cioè, fra due o più soggetti. Tale relazione ha per contenuto un rapporto «sociale», che l'ordinamento giuridico rende «rilevante» facendolo assurgere, a seguito di un giudizio di valore, a rapporto giuridico.

Per il fatto che è «giuridico», il rapporto si distingue dagli altri rapporti umani, che non sono giuridici (come è, ad esempio, il rapporto tra due colleghi d'ufficio; o quello che può stabilirsi fra due persone, tra loro estranee, le quali compiono un viaggio col medesimo mezzo di trasporto).

B) Le vicende dei rapporti giuridici

I rapporti giuridici hanno un loro «ciclo vitale» e, pertanto, è riscontrabile in essi un momento *iniziale* che ne segna il sorgere, un momento finale di estinzione, e vicende intermedie dalle quali derivano mutamenti nella struttura degli stessi.

La **nascita** di un rapporto può derivare da uno qualsiasi dei fatti cui il diritto ricollega una conseguenza giuridica: fatto volontario o involontario, lecito o illecito, etc.

Le **modificazioni** dei rapporti possono riguardare:

a) i *soggetti*, e si hanno quando un soggetto subentra ad un altro nello stesso rapporto (c.d. «successione»);
b) l'*oggetto*, e si verificano quando, per eventi di forza maggiore o per volontà di parte, si sostituisce al bene originariamente preso in considerazione un altro diverso;
c) il *contenuto*, e sono quelle dipendenti dagli eventi che tengono sospeso il verificarsi degli effetti del rapporto (*condizione o termine*), oppure che portano a sostituire al rapporto esistente un altro di diversa natura ma collegato al precedente (come nel caso della «conversione»), o anche a prolungarne la durata, fermi restando gli altri elementi.

6. LE NORME GIURIDICHE: CARATTERI

Precedentemente si è visto che, a disciplinare la condotta degli uomini in società, concorrono le norme sociali. Di queste alcune sono *norme non giuridiche* (es.: le regole dell'onore, dell'etichetta, i precetti morali e religiosi, etc.), altre, invece, sono *denominate norme giuridiche*, in quanto disciplinano quegli aspetti della vita umana che, a giudizio del legislatore, assumono particolare rilevanza e costituiscono il diritto.

Le norme giuridiche, in particolare, presentano i seguenti *caratteri*:

— **generalità**: in quanto, proprio perché abbracciano fattispecie astratte (es.: art. 575 c.p. chiunque cagiona la morte di un uomo è punito...), si rivolgono alla *generalità* dei consociati. A volte, però, esse hanno una categoria di destinatari più ristretta (es.: legge sui combattenti) e finiscono col non essere rivolte più alla generalità, ma a determinati gruppi di soggetti sempre, però, solo astrattamente determinati;
— **astrattezza** in quanto, come nota BARILE, la norma esamina la *possibilità di una condotta futura* e non si riferisce ad una situazione concreta particolare. Così non esiste la norma «Tizio deve pagare il suo debito verso Caio», ma quella «il debitore è tenuto alla prestazione»;

— **novità**: scaturisce dal principio della *relatività* del *diritto* e disciplina un comportamento precedentemente non disciplinato o disciplinato in maniera diversa (così la legislazione sull'aborto, disciplina una fattispecie che prima dell'entrata in vigore della L. 180/78 e poi della L. 833/78, non solo non era disciplinata, ma era addirittura considerata «*fuori dal diritto*»);
— **imperatività o coazione**: è questo un carattere tipico delle norme fornite di sanzione.

Infatti, è da ricordare che, rispetto alla sanzione, le *norme* si dividono in:

— *perfette*: se munite di *sanzione diretta* (es.: chi ruba è punito);
— *meno che perfette*: se munite di *sanzione solo indiretta* (ovvero incapaci di ripristinare la situazione preesistente). Così chi compie un negozio di donazione senza la prescritta forma vede il suo atto colpito da nullità;
— *imperfette*: se non sono munite di sanzione. Così l'art. 315 c.c. impone al figlio l'obbligo del rispetto dei genitori senza comminare nessuna sanzione per il figlio disobbediente;
— *positività*: le norme giuridiche, per operare, devono essere state poste in essere espressamente dal legislatore.

Si noti che le *sanzioni*, nelle norme di diritto costituzionale (attinente, ad esempio all'attività del Parlamento) sono, oltre che *giuridiche* (per violazione della Costituzione), anche *politiche*: queste ultime si concretano nella non rielezione, da parte degli elettori, dei parlamentari, etc.

7. Segue: CATEGORIE DI NORME GIURIDICHE

Le norme possono essere:

— **imperative** (o cogenti o di ordine pubblico) esse non possono mai essere derogate dalla volontà delle parti;
— **relative e permissive**: che possono essere derogate dall'accordo delle parti, e si distinguono in:
  — *dispositive*: se regolano un rapporto giuridico, ma possono essere liberamente modificate dalle parti (es.: l'art. 1815 c.c. stabilisce che, se le parti non hanno disposto diversamente, il mutuatario — colui che ha preso a prestito — deve corrispondere gli interessi legali al mutuante.
  — *norme suppletive*: se disciplinano un rapporto in mancanza della volontà delle parti.

Es. nel caso di mutuo, qualora le parti non abbiano stabilito specificamente il tasso d'interesse, questo è dovuto nella misura legale del 5%. Si ricordi, a tal proposito, che la L. 23-12-1996, n. 662, ha riportato il saggio legale di interessi dal 10% al 5% così come era previsto originariamente dal codice civile prima della modifica di cui alla L. 353/90.

8. DIRITTO PUBBLICO E PRIVATO

A) Generalità

Il diritto oggettivo, negli ordinamenti più complessi ed evoluti, si suole distinguere in due grandi sfere che attengono l'una al diritto privato, l'altra al diritto pubblico.

Ma come si delimita il settore privato da quello pubblico?

La questione, che risale al diritto romano, non può dirsi pacificamente risolta in dottrina, benché rivesta notevole importanza non solo dal punto di vista scientifico, ma anche da quello pratico. Oggi, come nota BARILE, è pressocché impossibile fissare una distinzione netta e sicura fra i due rami del diritto.

B) La preminenza del diritto pubblico e la sua espansione

Il diritto pubblico e quello privato hanno, nella vita dello Stato, una posizione ed un'importanza profondamente diversa:

— *il diritto pubblico*, svolge un compito *preminente* in quanto riguarda l'attuazione degli interessi primari della collettività; esso dunque, sorge con lo «Stato» e non può mai venir meno;
— *il diritto privato*, invece, svolge un compito *sussidiario* e *subordinato* rispetto a quello del diritto pubblico.

La preminenza della sfera del diritto pubblico, soprattutto al giorno d'oggi, si riscontra e si obiettiva nella funzione dello *Stato sociale* che non si limita a tutelare i soli diritti dei cittadini (c.d. *Stato di diritto*), ma mira a soddisfare anche interessi di altra natura (economica, sociale, etc.) e si pone come limite a numerose libertà concesse ai privati.

Nello «Stato sociale», dunque, si ha:

— la *preminenza* del *diritto pubblico* sul privato in vista degli interessi più generali che il primo riflette;
— il progressivo *espandersi*, a spese del diritto privato, di *norme pubblicistiche* (o cogenti, o eteronome) in tutti quei campi dell'attività umana dove l'interesse collettivo è particolarmente meritevole di tutela (si pensi al regime della *proprietà* ove l'utilizzazione da parte del singolo non deve porsi mai in contrasto con la funzione sociale della proprietà: art. 42 Cost.).

Per MORTATI dal punto di *vista giuridico la preminenza* del *diritto pubblico* si spiega per due motivi fondamentali: *in primis* perché il diritto pubblico contiene i *principi fondamentali* che sono alla base dell'ordinamento e, in secondo luogo, perché esso mette in grado gli individui di realizzare, attraverso le norme di diritto privato, i loro interessi, e rappresenta un mezzo con cui lo *Stato realizza*, anche attraverso l'attività dei singoli, l'*interesse collettivo*.

C) Criteri di distinzione (interesse e derogabilità)

Tra i numerosi criteri proposti spicca per la sua autorevolezza la tesi dell'interesse.

Secondo il giurista romano ULPIANO, infatti:

— il diritto pubblico è il complesso di norme riguardanti l'*interesse pubblico*;
— il diritto privato è il complesso di norme riguardanti l'*interesse privato*.

Tale criterio di classificazione è, ancora oggi seguito, anche se è stato, di recente, in parte modificato ponendo maggiormente l'accento sulla *natura degli interessi sociali tutelati dalle norme*.

Per la dottrina dominante, infatti:

— si ha *diritto pubblico* quando la norma prende in considerazione *interessi generali, immediati e collettivi* della società considerata nel suo complesso;
— si ha, invece, *diritto privato* quando la norma soddisfa *interessi particolari* degli individui considerati come singoli (MORTATI).

Tale tesi per BARILE è la più rispondente alla realtà ma va integrata con un altro criterio: quello della *derogabilità*.

Secondo BARILE il *diritto pubblico* ha la caratteristica di *non poter mai essere derogato* dalla volontà dei singoli (e pertanto ha natura *cogente*). Ciò significa che laddove le norme sono espressamente dichiarate inderogabili ci troviamo quasi sempre, nel campo del *diritto pubblico*, ove, invece, le norme non sono tassativamente inderogabili (o sono di carattere dispositivo) ci troviamo di fronte a norme di diritto privato.

Anche questo criterio di classificazione, però, non può essere preso in considerazione in assoluto perché, come nota BARILE «*in una stessa branca del diritto coesistono norme derogabili e inderogabili perché l'intreccio del diritto pubblico col privato è massimo*».

Esempio: in diritto privato accanto a norme derogabili (soprattutto in materia di contratti) coesistono numerose norme inderogabili (soprattutto in materia di famiglia).

Negli ultimi tempi, il largo utilizzo che si è fatto del diritto privato, ha indotto parte della dottrina a parlare di «fuga dell'amministrazione nel diritto privato» (AMATO-BARBERA). Tali considerazioni partono infatti dal presupposto che il diritto privato può essere utilizzato per regolare talune attività di soggetti pubblici (c.d. *privatizzazione di primo grado*: il soggetto è pubblico ma agisce nelle forme di diritto privato).

Esiste, altresì, una c.d. *privatizzazione di secondo grado*, che consiste nella creazione di soggetti privati che per loro stessa natura operano in regime di diritto privato (es. società a partecipazione statale).

9. I RAMI DEL DIRITTO PUBBLICO

Il diritto pubblico innanzitutto si divide in:

A) Diritto pubblico internazionale

Esamina i rapporti dello Stato con gli altri Stati. Di esso, nel nostro ordinamento, fanno parte:

— il **diritto internazionale pubblico**: che regola, i rapporti degli Stati nella «*family of Nations*» o comunità internazionale;

— il **diritto comunitario**: che regola fra gli Stati membri delle Comunità Europee.
È questo un diritto «*sovranazionale*», nel senso che si pone organicamente e istituzionalmente al di sopra dei diritti degli Stati membri che hanno rinunciato in alcuni settori (economico, carbosiderurgico, atomico, etc.) alla propria sovranità a favore e nell'interesse della «*comunità*» da essi costituita.

Si noti che il c.d. «*diritto internazionale privato*» non fa parte di tale gruppo in quanto costituisce un ramo del «*diritto interno in materia internazionale*» e, come tale rientra nel gruppo che esamineremo sub B.

B) Diritto pubblico interno

La materia in oggetto, per la sua ampiezza e complessità, abbraccia un campo vastissimo di interessi e rapporti, che corrispondono alle varie ripartizioni dei rami del diritto pubblico: tali rami si ricordano agevolmente tramite l'espressione: C.A.P.P.E. e sono costituiti da:

1) **Diritto Costituzionale**
Pone in essere i *principi* e le *norme fondamentali* della vita dello Stato, dei cittadini e di tutti gli altri soggetti della comunità. È, inoltre, la *premessa indispensabile* del diritto pubblico e privato.

Il diritto costituzionale, come nota BISCARETTI, a sua volta, si divide in:

a) *diritto costituzionale particolare*: se si limita all'analisi dell'ordinamento costituzionale di un solo Stato;
b) *diritto costituzionale generale*: se, partendo dall'analisi di più sistemi positivi, delinea schemi più vasti e comprensivi ponendo in chiaro specifici e contingenti tratti distintivi di ciascun ordinamento e «famiglie» di ordinamenti (DAVID);
c) *diritto costituzionale comparato*: ove il raffronto di più sistemi positivi non costituisce, come sub b, un metodo d'indagine, ma un ramo autonomo della scienza giuridica.

2) **Diritto Amministrativo**
In esecuzione della Costituzione, disciplina l'attività Amministrativa dello Stato nei suoi molteplici modi di essere e di operare. In particolare si rivolge all'organizzazione, ai mezzi e alle forme dell'attività della Pubblica Amministrazione. Esso comprende parecchi rami minori tra i quali ricordiamo:

a) *Diritto Finanziario*. È un ramo particolare del diritto amministrativo e, in esecuzione della Costituzione, contiene il complesso delle norme volte a disciplinare la gestione e l'erogazione dei mezzi economici necessari agli enti pubblici. Si distingue ancora in:
— *diritto tributario* che regola i rapporti fra cittadini ed enti pubblici in relazione all'imposizione e la riscossione dei tributi;
— *contabilità di Stato* che regola la gestione e la contabilità del patrimonio dello Stato;
b) *Diritto Sanitario*: che abbraccia le norme che tutelano la *salute pubblica*, disciplinando sia l'attività degli enti pubblici ad essi preposti che la condotta dei singoli in ordine a tale tutela.
c) *Diritto scolastico, pubblico dell'economia, etc.*

3) **Diritto Penale**
In esecuzione della Costituzione, abbraccia tutte quelle norme che l'ordinamento statale rivolge a cittadini e non cittadini per prevenire e reprimere determinati fatti illeciti denominati «reati». Caratteristica delle norme penali è di essere munite di una speciale sanzione, chiamata *pena* (che può anche aggiungersi a sanzioni diverse).

4) **Diritto Processuale**
In esecuzione della Costituzione, è costituito dal complesso delle norme che disciplinano l'amministrazione della giustizia, cioè, l'esercizio della funzione giurisdizionale in campo penale, civile, amministrativo, del lavoro e tributario.

5) **Diritto Ecclesiastico**
In esecuzione della Costituzione, disciplina l'attività delle Comunità Religiose ed i rapporti di queste con lo Stato e gli altri Enti Pubblici. È da tenere distinto dal *diritto canonico* che è, invece,

il diritto interno della Chiesa ed ha vigore solo nell'ordinamento di essa o negli altri ordinamenti se ad essi fanno esplicito rinvio.

Si noti pure che solo nel nostro ordinamento esso, in virtù degli accordi lateranensi e delle successive modifiche del 1984, assurge a «*ramo autonomo*» del diritto pubblico, negli altri ordinamenti europei, invece, esso rappresenta una parte del diritto costituzionale.

6) **Branche del diritto a contenuto misto**

Sono discipline afferenti sia a settori di diritto pubblico e settori di diritto privato: per quanto riguarda il *diritto del lavoro* si ricordi che la parte pubblicistica di esso è costituita in gran parte dalla *legislazione sociale* che è disciplinata secondo norme di *diritto pubblico*.

Il *diritto della Navigazione*, infine, disciplina la navigazione marittima ed aerea. Nel suo corpo sono comprese contemporaneamente norme di diritto pubblico e norme di diritto privato. Così pure il *diritto agrario*, *bancario* etc.

10. L'ORDINE PUBBLICO

A) Definizione

Non esiste una definizione coniata dal legislatore, ma solo una *costruzione dottrinale* sulla base di numerosi richiami legislativi (così l'art. 31 delle preleggi afferma che in nessun caso *atti di ordinamenti stranieri* possono aver effetto in Italia se: *contrari all'ordine pubblico*; l'art. 1343 c.c. stabilisce l'illiceità della *causa* del contratto se *contraria* all'*ordine pubblico*; così pure il Titolo V, 2° libro di diritto penale parla di «*repressione di delitti contro l'ordine pubblico*»).

Per la generalità degli autori l'*ordine pubblico è costituito dal complesso dei principi fondamentali di natura cogente sui quali si poggia il regime statale* (CANSACCHI).

Tali principi (che possono appartenere anche al diritto privato) rivestono un'importanza fondamentale e, come tali, sono dotati di una *speciale efficacia sostanziale* come l'inderogabilità, la prevalenza interpretativa, etc. (LAVAGNA).

Se tali principi attengono al comportamento degli individui inteso come costume si parla di *principi di buon costume*.

B) Campo di applicazione

Poiché i principi di O.P. rappresentano le norme basilari del regime, essi funzionano, per VIRGA:

— come *limite alla facoltà di disposizione dei privati* in quanto le norme di O.P. sono cogenti e non possono essere derogate da fatti o convenzioni fra privati;
— come *limite etico all'esercizio dei diritti fondamentali*: così, per esempio, la libertà di culto incontra un limite negli atti contrari all'ordine pubblico e al buon costume.

Le norme di O.P. vigono sia nel campo del diritto pubblico, che nel diritto privato in materie (es. diritto di famiglia e diritto del lavoro) che riguardano interessi fondamentali della vita dello Stato. Tutte le norme di ordine pubblico sono di carattere «*coattivo*».

11. LE FONTI DEL DIRITTO (FONTI SCRITTE)

A) Generalità

Per «fonte» del diritto s'intende — in senso lato — l'origine da cui il diritto scaturisce, ovvero la causa del sorgere, modificarsi, estinguersi del diritto stesso.

In genere la dottrina tradizionale così classifica le fonti:

— **fonti di produzione**: sono i *soggetti* o gli *organi* investiti del potere di emanare atti che fanno sorgere, modificare, estinguere le norme (Parlamento, Consiglio regionale, parti stipulanti un contratto);
— **fonti di cognizione**: sono gli *atti* o i *documenti* nei quali le norme giuridiche sono contenute (es.: leggi, regolamenti, etc.);
— **fonti di elaborazione**: sono i *procedimenti* di creazione, modificazione, estinzione delle norme giuridiche (es.: procedimento per porre in essere le leggi ordinarie).

Nel contesto delle «fonti» distinguiamo poi:

— *fonti scritte*: la Costituzione, le leggi, i regolamenti, gli atti giurisdizionali, i contratti, i testamenti, etc.;
— *fonti non scritte*: rappresentate dalla «consuetudine» (gli usi).

Esaminiamo, nei paragrafi che seguono, le «fonti» del diritto restringendo l'analisi alle sole fonti giuspubblicistiche e seguendo la loro gerarchia.

B) Gerarchia

Per BARILE la gerarchia delle fonti segue questo ordine:

a) la **Carta Costituzionale** e le *leggi* costituzionali (queste leggi aggiungono, sopprimono, emendano la Costituzione in alcuni suoi precetti: si noti, però, che la Costituzione contiene alcuni *principi fondamentali intangibili* considerati di rango «*supercostituzionale*» come quello dell'*immutabilità* della forma repubblicana dello Stato; delle libertà, etc.);
b) le **leggi formali** (le leggi, cioè, emanate dal Parlamento). Alcune di esse, come nota BARILE, sono solo vincolate al rispetto della Costituzione, altre, invece, sono *vincolate* anche al contenuto della Costituzione come, ad esempio, quelle relative alla modifica dei Patti Lateranensi o quelle che ratificano trattati internazionali che devono rispettare: le *prime* le «intese» tra Stato e Chiesa, e le seconde, il contenuto dei trattati (c.d. «*fonti rinforzate*»). Stessa efficacia (grado e forza) di legge hanno:
   — i *decreti legislativi e i decreti legge* (*leggi cd. sostanziali* in quanto pur avendo la stessa efficacia delle leggi formali, sono poste in essere in *forma diversa*, cioé dal Governo con delega o ratifica del *Parlamento*, vedi *infra*);
   — i *regolamenti parlamentari*;
   — i *regolamenti comunitari*;
   — le *leggi regionali*;
   — le *norme di attuazione degli Statuti delle Regioni ad autonomia speciale*;
   — i *risultati del «referendum» abrogativo di legge ordinaria*;
c) le **norme secondarie e terziarie**: emanate, cioè, da autorità amministrative come i regolamenti, che sono subordinati alle fonti di grado superiore.

C) Il principio della separazione delle competenze

Vige poi, come nota BARILE, nel nostro sistema il principio della *separazione di competenze* per cui:

— il funzionamento delle Camere può essere disciplinato solo attraverso i *regolamenti parlamentari* e non con leggi ordinarie (per tutelare le minoranze presenti in Parlamento);
— le Regioni a statuto speciale hanno una competenza *esclusiva* nelle *materie* indicate *tassativamente* negli statuti regionali e la legge statale non può sostituirsi ad esse;
— i regolamenti comunitari che non possono essere abrogati da leggi statali in quanto gli interessi della comunità europea si considerano «di rango superiore» rispetto a quelli della comunità statale (così l'art. 189 del trattato CE).

Questo principio si intreccia con quello della *gerarchia*, creando alcuni casi di *intangibilità* da parte di altre norme dello stesso grado, ma emesse da una «competenza» diversa.

12. LA RISERVA DI LEGGE

Come regola generale tutte le materie che non sono oggetto di norme costituzionali possono essere regolate o da *norme primarie* o da altre di *grado inferiore*, qualora non siano regolate dalle primarie o comunque per completare le prime (BARILE).

Tale regola soffre, però, di una importante eccezione, costituita dalla *riserva di legge*, che si concreta nel fatto che la *costituzione riserva o rinvia al solo legislatore* (e non al potere amministrativo) la disciplina di determinate materie.
Essa può essere:

— **assoluta** (o di legge): quando il legislatore è chiamato dalla Costituzione a regolare tutta la materia che residua dalla norma costituzionale: in tal caso solo il Parlamento e non anche il Governo (*con attività regolamentare*) può disciplinare il dettato costituzionale;
— **relativa** (o della legge): quando, secondo la norma costituzionale, il legislatore può limitarsi a «*tracciare i capisaldi, della regolazione di dettaglio della materia*» (BARILE), lasciando così *facoltà di completamento* al potere amministrativo;
— **rinforzata**: quando non solo è assoluta, ma anche limitata dagli stessi principi della norma Costituzionale (es.: l'art. 45 della costituzione, rinviando al legislatore ordinario la disciplina dell'espropriazione per pubblica utilità, sancisce il *principio* costituzionale dell'*indennizzo* come cardine della legislazione sull'espropriazione);
— **costituzionale**: quando la stessa norma costituzionale vieta ogni intervento in materia da parte del legislatore ordinario, oppure stabilisce che si deve provvedere a regolare la materia solo con la legge costituzionale.

Secondo la più recente dottrina la *riserva di legge* si concreta in una delle più efficaci forme di *protezione delle minoranze politiche*, presenti in Parlamento ma non nel Governo che altrimenti potrebbe emanare norme secondarie senza alcun controllo da parte delle minoranze stesse.

13. LE FONTI NON SCRITTE

A) La consuetudine

La consuetudine è una manifestazione della vita sociale che si concreta in una *attività costante ed uniforme dello Stato comunità.*

La consuetudine consta dei seguenti elementi:

— *elemento oggettivo o «diuturnitas»*: o «*usus*» che consiste nel ripetersi per un periodo indeterminato di un comportamento *costante* ed *uniforme* di un definitivo aggregato sociale;
— *elemento soggettivo* o «*opinio iuris ac necessitatis*»: la convinzione che l'osservanza di un certo comportamento corrisponda all'osservanza del diritto;
— *richiamo della legge.*

Per quanto riguarda il *valore*, la consuetudine intesa come fatto normativo, *non ha sempre* lo stesso valore. Infatti essa può avere:

— *valore di fonte autonoma*: se ha la stessa efficacia della legge;
— *valore di fonte sussidiaria*: se ha efficacia solo se posta in essere nei casi, modi e limiti stabiliti dalla legge;
— *non ha valore di fonte*: come accade per il nostro diritto penale ove vige il principio della legalità «*nullum crimen sine lege*» (cioè è richiesta espressamente ed unicamente la legge come fonte di norme penalistiche).

Si noti che l'ampia opera di codificazione iniziata con Napoleone ai primi dell'800 e, in seguito, diffusasi in tutto il mondo, ha *ristretto* notevolmente l'ambito di influenza della *consuetudine*. Oggigiorno conserva importanza (soprattutto nell'ambito del *diritto privato*) solo in *Gran Bretagna* mentre altrove trova applicazione solo nel ramo pubblicistico come «*consuetudine costituzionale*».

Completamente diverse dalla consuetudine sono le *norme di correttezza costituzionale* (ossia quelle di buon funzionamento) e le *conventions* (ossia accordi di reciprocità comportamentale tra organi costituzionali).

B) La prassi

È questa una particolare «*consuetudine* che sorge e si sviluppa nell'ambito degli *uffici pubblici*», e indica il *comportamento (di fatto)* degli uffici tra di loro e nei rapporti col pubblico. La prassi a volte si concreta in una *tacita modificazione* delle norme scritte.

C) Il c.d. «diritto giudiziario» (cioè derivante dai giudizi)

Per il nostro diritto positivo (a differenza dei paesi anglosassoni) non rientra tra le *fonti del diritto* se non nel senso che le norme che si ricavano dalle decisioni giurisprudenziali *interpretano* il diritto vigente e ne possono *colmare eventuali lacune*. Nei paesi anglosassoni, invece, vige il principio dello «*stare decisis*» cioè di accogliere le massime formulate da giudici superiori per la decisione di casi analoghi.

Ricordiamo però che le *sentenze della Corte Costituzionale di annullamento di una norma in contrasto con la Costituzione hanno forza di legge.*

D) Il rinvio ad altri ordinamenti

Può assumere la forma di:

— *rinvio materiale o recettizio*: quando, le norme straniere vengono recepite nell'ordinamento italiano, nello stato in cui esse si trovano nel momento in cui si emana la norma italiana che contiene il rinvio, e quindi *nazionalizzate*;
— *rinvio formale o non recettizio*: quando la norma che contiene il rinvio non fa altro che *indicare la materia* per la quale devono essere applicate nel nostro ordinamento norme che sono e restano straniere. In sostanza, nel rinvio materiale si fa rinvio alla *norma*, cioé al contenuto di un atto; in quello formale si fa invece rinvio all'*atto-fonte*.

E) La presupposizione

Istituto affine al precedente, si ha quando le leggi italiane *pressuppongono* le definizioni di istituti stranieri contenute nelle leggi dei relativi ordinamenti (BARILE). Ad es. per sapere se uno straniero sia o meno cittadino del proprio Stato, occorre far riferimento alle leggi dello Stato di appartenenza per considerarlo cittadino del suo Stato.

F) Rinvio a norme non giuridiche

Tali norme entrano a far parte del «*rilevante giuridico*» solo in quanto sono espressamente richiamate dall'ordinamento e sono:

— *le regole di buon andamento della pubblica amministrazione* enunciate dall'art. 97 della Costituzione cui recentemente hanno fatto seguito anche le c.d. «*regole di trasparenza*», codificate con la legge 241/90 sul procedimento amministrativo;
— i *canoni di equità*, che si applicano solo dopo aver controllato e dimostrato l'inopportunità di applicare norme di diritto concretamente inique.

14. L'INTERPRETAZIONE DELLE NORME GIURIDICHE

A) Definizione

Interpretare una norma significa *identificare l'esatta volontà del legislatore nel momento in cui aveva emanato la norma*, non considerando, però, mai la norma singolarmente, ma nel contesto

dell'ordinamento giuridico. Si noti che, oggigiorno, sono ancora in vigore nel nostro Paese norme emanate nel passato ordinamento fascista il cui valore non può essere concretamente riferito alla volontà del legislatore pre-repubblicano, e la cui sfera di azione è limitata entro l'ambito dei principi affermati *ex post* dalla Carta Costituzionale.

B) Tipi

L'*interpretazione* può essere:

— **dottrinale**: è quella che viene fornita dai *giuristi*: essa non vincola, ma *influenza*;
— **giurisprudenziale**: è quella che viene data dai *giudici*; particolarmente importante è quella della Corte di Cassazione; essa nel nostro ordinamento non vincola, ma influenza;
— **autentica**: è quella che promana dall'autorità che ha posto la norma, ed è *vincolante*;
— **burocratica**: è quella data all'interno di un ministero o di una P.A. dall'organo gerarchicamente superiore. Essa vincola gli uffici interni e tutti i soggetti esterni che con essa vengono a contatto (questi ultimi possono eventualmente impugnare l'esattezza dell'interpretazione solo davanti ai giudici).

C) Operazioni interpretative

I criteri interpretativi sono stabiliti nell'art. 12 delle preleggi al codice civile; tali operazioni sono:

— **grammaticale o lessicale**: se si tende a ricercare il significato delle parole e delle frasi secondo le regole di grammatica e di sintassi;
— **logica**, se si tenta le ricostruzione del pensiero del legislatore per accertare le intenzioni dello stesso;
— **ricorso ai lavori preparatori**, quando esistono dubbi di interpretazione. Anche se, come nota BARILE, una norma giuridica, una volta uscita dalle mani di chi l'ha emanata, assume una propria autonomia.
Si noti comunque che, talvolta, per l'intreccio di proposte di legge e a causa dei compromessi cui si addiviene in sede di formazione delle leggi... i lavori preparatori finiscono con l'essere *più ambigui* delle stesse leggi!!
— **analogica o sistematica**: «se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe, se il caso rimane ancora dubbio, si decide secondo i principi generali dell'ordinamento giuridico dello Stato» (art. 12 preleggi).

D) L'analogia legis

Quando non esiste una disposizione normativa che si possa applicare al singolo caso concreto, il nostro ordinamento consente al giudice la ricerca di una norma affine e la sua applicazione.

Tuttavia tale procedimento non è consentito:

— *per le leggi eccezionali* ove la «*ratio*» dell'eccezionalità non giustifica un ricorso analogico anche di fronte a fattispecie analoghe;
— *per le leggi penali*, in omaggio di due principi del *favor libertatis* e di quelli «*nulla poena sine lege*» che garantiscono una rigorosa delimitazione dei casi di privazione della libertà personale. (BARILE nota che nell'ordinamento dell'Unione Sovietica fino al 1958 non vigeva questo principio e ciascuno poteva essere sottoposto a pena se era considerato «*socialmente riprovevole*»).

E) L'analogia iuris

Soccorre quando, in mancanza di una norma affine, il caso può essere risolto nella *presunzione di coerenza dell'ordinamento giuridico*, col ricorso ai *principi generali* (che, per BARILE, si identificano in gran parte nei principi costituzionali). Se anche l'*analogia iuris* dà risultati negativi, il giudice non può, tuttavia, rifiutarsi di decidere.

A questo punto le opinioni della dottrina divergono. Per alcuni autori, infatti, esisterebbe una lacuna non colmabile. Per altri, invece, esiste sempre una elementare «*norma di chiusura*» atta a regolare la fattispecie, e, solo al di là di tale norma si entra nella sfera dell'*indifferente giuridico* (si noti che tale sfera è, comunque, temporanea per il principio della relatività del diritto e va sempre più restringendosi).

F) Risultati dell'interpretazione

Rispetto al significato apparente della norma, l'interpretazione può essere:

— **estensiva**, se ne estende il raggio d'azione;
— **restrittiva**, nel caso opposto al precedente, cioè se lo restringe;
— **storico-evolutiva**, se tale interpretazione cambia completamente il significato originario, a causa del mutamento dei *principi costituzionali* vigenti nell'ambito temporale in cui la norma deve esplicare la sua funzione;
— **adeguatrice.**

Come nota BARILE, sui limiti dell'interpretazione storico-evolutiva, ferve in Italia una vivacissima polemica. in quanto di fronte ad un'interpretazione confliggente, il giudice può:

— disapplicare la norma ordinaria: se vige una norma o un principio costituzionale contrario a tale norma;
— rimettere alla Corte Costituzionale la decisione se una norma ordinaria successiva alla Costituzione sia in contrasto con la Costituzione stessa;
— applicare la norma ordinaria (precedente o successiva alla Costituzione) se tale norma sia *secundum Constitutionem*.

Tra le possibili interpretazioni, dunque, va preferita quella più conforme alla Costituzione ed è questa l'interpretazione *adeguatrice*;

— **alternativa**: cioè un'interpretazione totalmente opposta a quella tradizionale che se portata agli eccessi, sconvolgerebbe buona parte della costruzione giuridica vigente.

BARILE fa infine notare come, nel caso dell'*interpretazione delle norme costituzionali*, oltre a servirsi dei criteri descritti (con particolare riguardo a quello storico e a quello di adeguamento) l'interprete deve avere piena conoscenza dei rapporti attuali tra le forze politiche regolati dalla Costituzione materiale e dei conflitti di interesse che la Costituzione è chiamata a regolare.

15. EFFICACIA DELLE NORME NEL TEMPO

La legge entra in vigore (art. 73 Cost.), cioè diviene obbligatoria (art. 10 preleggi), nel quindicesimo giorno dopo la pubblicazione sulla «*Gazzetta Ufficiale*» a meno che, in via di eccezione, non sia stabilito un termine diverso (es.: Decreti legge detti anche «catenaccio»).

Il periodo di quindici giorni si chiama «*vacatio legis*», la legge si presume, dopo la pubblicazione, nota a tutti, e tale *presunzione è assoluta*, non ammette, cioè, prova contraria.

Quanto all'efficacia delle norme nel tempo vigono, in particolare, i seguenti principi.

A) Irretroattività

Secondo l'art. 11 delle preleggi, la *legge*, di regola, non *dispone che per l'avvenire*, essa non ha effetto retroattivo.

Si badi che solo per le *leggi penali* tale principio ha rango *costituzionale* (art. 25 Cost.); pertanto una legge ordinaria *non penale*, che si ponga dichiaratamente in contrasto con l'art. 11 (che è legge ordinaria) *può anche essere retroattiva.*

Come nota BARILE, una legge penale retroattiva è tipica dei regimi dittatoriali e serve a colpire nemici politici, in quanto dà mano libera al legislatore di porre in essere norme che, più che sancire ipotesi future e astratte, condannano fatti già avvenuti.

Per quanto riguarda le *leggi tributarie*, in particolare, la Corte Costituzionale ha stabilito che è *costituzionalmente illegittima* una legge tributaria retroattiva che non tenga conto del fatto che il reddito *imponibile*, al quale si riferisce il tributo, sia già stato impiegato o consumato nel tempo passato.

Anche i *regolamenti*, norme secondarie (o terziarie) *non possono essere retroattivi.*

Come limite al principio della retroattività della legge, alcuni autori hanno, comunque, invocato la intangibilità dei *diritti quesiti*, cioè di quei diritti *definitivamente acquisiti dalla persona* o dal suo patrimonio. Se, ad esempio oggi la maggiore età fosse spostata da 18 a 25 anni, coloro che sono già maggiorenni ed hanno meno di 25 anni non potrebbero comunque essere considerati più minori. BARILE ritiene che si possono considerare intoccabili dalla retroattività solo i *rapporti definitivamente esauriti.*

B) Successione delle norme nel tempo

Se ad una norma giuridica ne succede un'altra di *pari grado* vale il principio «*lex posterior derogat priori*», vale a dire la norma posteriore abroga sempre quella anteriore (di pari grado o di grado minore), espressamente o implicitamente.

Unica eccezione si ha quando la legge anteriore è norma *speciale. Nel caso, invece, le norme siano di grado diverso*, allora la norma *più «resistente»* (CALAMANDREI) prevale sia sulle norme anteriori che su quelle posteriori. Cioè una norma costituzionale non può essere abrogata da una norma ordinaria ancorché successiva.

16. EFFICACIA DELLE NORME NELLO SPAZIO

La regola generale è quella della *territorialità* per cui le norme si applicano su tutto il territorio dello Stato o della Regione (in caso di leggi regionali) e sulla comunità umana cui sono destinate.

Esistono, però, alcune *eccezioni* che sanciscono casi di *ultrattività* (estensione) delle norme:

a) *le norme di carattere generale* si applicano anche ai *cittadini italiani residenti all'estero* (es. obbligo del servizio militare) che anche se non vivono in Italia sono, comunque, tenuti all'osservanza di tali norme;
b) *le norme penali e di polizia* (e di ordine pubblico) devono essere osservate anche dagli *stranieri* che si trovino nel territorio dello Stato (art. 28 delle preleggi);
c) *le norme costituzionali in tema di diritti di libertà* si applicano, comunque, *anche agli stranieri* residenti in Italia (il costituente, infatti per tali norme adopera l'ampia dizione «Tutti....»).

17. BREVI CENNI DI DIRITTO INTERNAZIONALE PRIVATO

Tali principi regolano le attività svolte dagli stranieri per quei rapporti in cui sono coinvolte le nostre istituzioni (matrimonio, contratti, etc.) e, come detto, fanno parte del diritto interno dello Stato italiano.

Al riguardo vigono tre criteri:

— **territorialità** (es.: in materia di proprietà immobiliare si applica la legge del luogo dove è sito l'immobile);
— **cittadinanza** (es.: per stabilire lo *status* e la capacità della persona, o i rapporti di famiglia si applica, di regola, l'ultima legge nazionale del soggetto, non quella italiana);
— **volontà delle parti** (es.: in caso di contratti, si applica la legge della *nazionalità* dei contraenti se è comune, o quella del *luogo* di conclusione del contratto, o, subordinatamente, quella voluta dalle parti).

Esiste comunque una *norma di chiusura* (art. 31 preleggi): «... in nessun caso le leggi e gli atti di uno Stato estero, gli ordinamenti e gli atti di qualunque istituzione o ente, o le private disposizioni e convenzioni, possono aver effetto nel territorio dello Stato, quando siano *contrarie all'ordine pubblico* (internazionale, secondo la prevalente dottrina) o al *buon costume*».

CAPITOLO QUARTO

CENNI STORICI SUL COSTITUZIONALISMO IN ITALIA

1. IL TRIONFO DEL COSTITUZIONALISMO

Il 1848, accanto al trionfo delle idee liberali, segna l'affermazione del *costituzionalismo*.

Sull'esempio del Regno delle due Sicilie (29 gennaio), il Granduca di Toscana (17 febbraio), il Re di Sardegna (4 marzo), il Papa (14 marzo) concessero anch'essi delle Carte Costituzionali (Statuti) ai loro sudditi. Le sole vicende dello Statuto Albertino (che si trasformerà, poi nella legge fondamentale del Regno d'Italia) sono quelle che interessano più da vicino la nostra indagine.

2. LO STATUTO ALBERTINO: CARATTERI

Concesso da Carlo Alberto il 4 marzo 1848 fu denominato «*Statuto*» (e non Costituzione) per distinguerlo da quelle precedenti Costituzioni (come quella spagnola del 1812) e per sancirne l'origine non rivoluzionaria.

Lo Statuto, composto di un preambolo e di 84 articoli, fu pubblicato in lingua italiana e francese e rappresentava un compromesso fra la classe conservatrice e la classe borghese che finalmente vedeva, anche se entro ristretti limiti, riconosciuti alcuni diritti.

Lo Statuto Albertino che doveva, poi, trasformarsi in Statuto del Regno d'Italia, e che rimase in vigore per un secolo (fino al 1948) presentava i caratteri di una costituzione:

— *ottriata*: cioè era una carta concessa unilateralmente e spontaneamente dal sovrano che, fino ad allora, aveva governato in qualità di sovrano assoluto;
— *flessibile*: cioè di grado pari alla legge ordinaria, modificabile con un procedimento legislativo ordinario. In questo modo non veniva offerta nessuna garanzia ai cittadini poiché eventuali modifiche statutarie potevano essere, in seguito, apportate ed approvate senza ricorrere ad un procedimento più rigido, più ponderato di quello ordinario che coinvolgesse una più ampia aerea di consensi;
— *contenente disposizioni generiche* che davano credito a molteplici e pericolose interpretazioni.

3. Segue: ESEGESI DEL CONTENUTO DELLO STATUTO

Dall'analisi degli articoli dello Statuto i poteri dello Stato risultavano così ripartiti:

a) *il potere legislativo*

Era affidato a due camere:

— *Senato*: composto da membri della famiglia reale, vescovi, ex deputati e ministri, alti magistrati ed ufficiali, ambasciatori nominati a vita, senza limite numerico, direttamente dalla corona.
Si trattava, dunque, di una camera di «*fiduciari*» del sovrano, fedeli alla corona e ligi ai desideri del monarca;
— *Camera bassa*: composta da membri elettivi che duravano in carica 5 anni: anch'essa fino all'estensione del suffragio, era portatrice degli interessi di una ristretta classe politica (infatti, mentre il Regno d'Italia contava 22 milioni di abitanti, solo 600 mila cittadini, selezionati in base al censo, avevano diritto di voto).

Tra le due camere, quella *bassa* aveva poteri più ampi: le misure di carattere finanziario, infatti, dovevano essere sottoposte, in primo luogo, all'approvazione della camera bassa, inoltre il voto di sfiducia al governo del solo senato (se pure questa norma non era originaria) non importava l'obbligo di dimissioni del governo stesso.

Il Sovrano godeva, sul terreno legislativo, di ampi poteri, in quanto:

— poteva sciogliere e convocare le Camere;
— attraverso il senato (composto di uomini di sua fiducia) aveva la possibilità di imporre direttamente sotto forma di legge la propria volontà al paese;

b) *il potere esecutivo*
Era concentrato nelle sole mani del re, che lo esercitava, attraverso i ministri di sua fiducia, responsabili solo davanti a lui. Questo accentramento di poteri fu, invero, immediatamente mitigato da una consuetudine (invalsa dopo appena 4 mesi dalla entrata in vigore dello Statuto) secondo la quale i *Ministri*, oltre a godere la fiducia della Corona, richiedevano anche lla fiducia delle Camere.
In tal modo, da una prima breve fase di governo costituzionale «*puro*», il sistema slittò verso una forma di governo Costituzionale «*parlamentare*»;

c) *il potere giurisdizionale*
Vedeva al vertice della sua gerarchia la figura del Re. Questi, infatti, era chiamato a scegliere i giudici che, in suo nome, amministravano la giustizia;

d) *politica estera*
Anche per le questioni di politica *estera* il Sovrano occupava una posizione di preminenza, conducendo talvolta una *politica estera propria* indipendente da quella del gabinetto.
Da questa breve analisi risulta che i poteri dello Stato, anche se affiancati da istituzioni rappresentative del popolo, erano monopolizzate dalla persona del Re che costituiva il «*deus ex machina*» di tutto il sistema.
Il sovrano regnava per «*grazia di Dio e volontà della Nazione*» cioè l'origine del potere sovrano nasceva da un compromesso fra la componente tradizionale del potere su basi ideologiche e quella più liberale, che riteneva il popolo essere titolare del potere sovrano.
La Corona era, inoltre, statuariamente *irresponsabile*: di fronte alle Camere erano responsabili i soli ministri che controfirmavano gli atti del Re;

e) *diritti fondamentali (o naturali) dei cittadini*
I diritti dei cittadini (diritti affermati dalla dichiarazione del 1789) erano pallidamente ricalcati dallo Statuto, che si limitava ad elencare le libertà dei singoli (eguaglianza, legalità dei tributi, libertà individuale e di domicilio, di stampa, riunione, etc.) rinviando al legislatore l'ambito di concreta applicazione.
Per il carattere flessibile dello Statuto e per la posizione conservatrice delle Camere, tali diritti spesso rimasero sulla carta, in quanto, di fatto, le libertà civili e politiche dei cittadini non furono mai rispettate e numerose furono le occasioni in cui venne limitata la libertà di stampa, di riunione, etc.

4. EVOLUZIONE DEL SISTEMA

Con la trasformazione del sistema nella forma «parlamentare» (di cui si è detto) si ebbero i seguenti effetti:

— *i poteri della Corona* furono *mitigati* in quanto la nomina o revoca dei ministri si fece dipendere dalla «*fiducia*» delle Camere e non più dal mero arbitrio del Re;
— *il Parlamento* ne uscì *rafforzato* in quanto, con l'adozione del sistema della fiducia, era in grado di controllare il potere esecutivo;
— il Governo ampliò la sua sfera d'azione rendendosi indipendente dalla Corona e strappando alla stessa numerose prerogative sovrane (fra cui la nomina dei senatori che non rimase a lungo una sola *prerogativa regia*).

L'evoluzione storica confermò la profonda debolezza dello Statuto soprattutto riguardo alle libertà del cittadino che furono calpestate da numerose leggi di polizia (si ricordino tra le altre le famigerate «Leggi Eccezionali», emanate, alla fine del XIX sec., dal governo Pelloux per sedare i moti di Milano).

Anche la base elettorale si manteneva ristretta malgrado lo Statuto astrattamente affermasse «*che tutti i regnicoli godono egualmente dei diritti politici*. Tuttavia, solo dopo un periodo di gravi disordini la classe più umile — esclusa da ogni partecipazione politica — riuscì ad ottenere dal Governo Giolitti, nel 1912, l'adozione del principio del «*suffragio universale*» con cui si riconosceva il diritto elettorale a tutti i cittadini che avessero compiuto i 30 anni indipendentemente dalla alfabetizzazione e dal censo di ciascuno.

Malgrado l'allargamento della base elettorale, il sistema mostrava sempre più, segni di profonda debolezza che, aggravati dagli eventi internazionali, prepararono il terreno al colpo di stato monarchico-fascista.

5. IL COLPO DI STATO MONARCHICO-FASCISTA

La debolezza istituzionale del sistema parlamentare allora vigente permise il colpo di stato del 28 ottobre 1922.

In quella data, infatti, le squadre fasciste dopo aver perpetrato numerose violenze su tutto il territorio nazionale, confluirono su Roma. Il Re, d'altro canto, invece di firmare il *decreto di Stato di assedio*, proposto dal governo Facta per arginare l'avanzata fascista e disperderne le bande accompagnate alle porte di Roma, con prassi del tutto estranea al regime parlamentare, designò primo ministro Benito Mussolini (capo del fascismo). Tale decisione fu presa dal monarca timoroso del quotidiano franamento dello *«Stato liberale»*.

Si riteneva che l'azione risolutiva del fascismo potesse giovare alla politica conservatrice che la Corona, sorda alle istanze sociali già affermatesi, voleva ancora condurre.

Ottenuta la fiducia dalle Camere, in un clima di grave intimidazione, Mussolini iniziò una serie di innovazioni istituzionali (creando, tra l'altro, la *Milizia fascista* nel 1923, mentre con l'introduzione della *legge Acerbo* nel 1924, si assicurava al «regime fascista» il premio di maggioranza parlamentare, etc.) con le quali il sistema parlamentare si andava trasformando in dittatura.

Dopo l'efferato *delitto Matteotti* (10 giugno 1924), Mussolini tenne un discorso alla Camera nel quale preannunciava la fine delle libertà civili e politiche e, con la legge del 24 dicembre 1925 n. 2263, riuscì ad accentrare numerose prerogative nella sua persona (*duce* o capo del governo).

Successivamente si liberò dei suoi avversari politici dichiarando decaduti, dalla loro carica, quei deputati dell'opposizione che si erano astenuti dal partecipare alle attività parlamentari per protestare contro il delitto Matteotti (c.d. *aventiniani*).

Nel 1928 in Italia si poté votare, per l'ultima volta, per un solo partito: il partito fascista.

Nacquero nuovi organi costituzionali del regime «Il Gran Consiglio del fascismo» (1928), supremo organo politico dello Stato che prese il posto del governo e la *«Camera dei fasci e delle Corporazioni»* che si sostituì alla Camera dei deputati.

6. GLI ORGANI DELLO STATO NEL PERIODO FASCISTA

Il *Parlamento* fu svuotato del suo significato rappresentativo: la Camera dei deputati, infatti, dopo il 1939 divenne di nomina del duce, mentre il Senato, a seguito di numerose infornate fasciste, cadde anch'esso, quasi totalmente, sotto il controllo del regime.

Il governo fu posto in stato di subordinazione nei confronti del «duce» del fascismo che si arrogò il diritto di nominare e revocarne i membri a suo piacimento.

Capo del governo era appunto il duce del fascismo che divideva (solo teoricamente) con la Corona la responsabilità politica. Questa situazione per BARILE configurò una vera e propria temporanea *abdicazione* della Corona a favore del duce.

L'unico *partito politico* lecito fu quello «nazionale fascista» e l'appartenenza ad esso era condizione indispensabile per l'ammissione ai pubblici impieghi.

Anche le *libertà civili*, mai fino ad allora veramente riconosciute, furono soppresse definitivamente, gli organi del regime godevano di una grande discrezionalità per sopprimere le più elementari libertà umane (di domicilio, soggiorno, locomozine, riunione, associazione, stampa, etc.). L'istituto del confino permetteva di relegare, dove meglio credeva il regime, gli oppositori politici.

Fu, infine, istituito il *Tribunale Speciale* per la difesa dello Stato strutturato in modo da annullare anche i più elementari diritti di difesa degli imputati (R.D. 12-12-1926 n. 2062). Alla vigilia degli anni quaranta la propaganda del regime spinse il paese (totalmente impreparato) all'entrata in guerra a fianco della Germania.

7. DALLA CADUTA DEL FASCISMO AL REFERENDUM

Dopo una serie di rovesci militari, il duce perse il consenso tanto che, con la seduta del 24 luglio 1943 il Gran Consiglio del fascismo destituì Mussolini, capo del governo, attribuendo l'effettivo comando del paese alla Corona.

Il Re, arrestato Mussolini, nominò capo del governo il maresciallo Badoglio che, con un contegno ambiguo, favorì il disfacimento totale dell'Italia rimasta divisa dopo l'armistizio con gli ex nemici (8 settembre), in due tronconi, essendo a nord occupata dai tedeschi e a sud dagli alleati.

Nell'Italia liberata i partiti anti-fascisti costituirono i *Comitati di liberazione Nazionale*.

Intanto nell'Italia settentrionale, dove operava il CLNAI (Comitato di liberazione per l'Alta Italia) i fascisti riorganizzatisi, dopo la liberazione di Mussolini ad opera dei tedeschi, avevano fondato la *Repubblica Sociale di Salò* che collaborava con questi ultimi.

Il 18 giugno 1944 il Comitato centrale di liberazione nazionale ottenne l'incarico di *designazione del Governo della Corona* divenendo così l'organo provvisorio che sostituiva le camere ed assunse la funzione di *organismo rappresentativo dell'Italia*.

Col decreto legge 25 giugno 1944 il Governo assunse istituzionalmente, anche se provvisoriamente, la titolarità del potere legislativo. Nel decreto stesso si stabiliva che una eventuale scelta istituzionale (monarchia o repubblica) sarebbe stata deferita successivamente al popolo italiano, tramite elezione di un'assemblea Costituente.

Contemporaneamente fu pattuita la *«tregua istituzionale»*: da quella data, fino all'entrata in vigore dell'assemblea Costituente, da nessuna parte potevano essere compiuti atti tali da pregiudicare la questione istituzionale (Patto di Salerno).

Un altro decreto, del 16 marzo 1946, stabilì che la questione istituzionale sarebbe stata decisa direttamente dal popolo, tramite *referendum*. Fu anche stabilito che, durante il periodo di lavoro dell'Assemblea Costituente, il potere legislativo ordinario sarebbe rimasto al governo.

Il 9 maggio 1946 il re Vittorio Emanuele III che, a seguito del Patto di Salerno, si era ritirato a vita privata senza tuttavia abdicare, riapparve e dichiarò di *abdicare in favore del figlio Umberto, luogotenente del regno*.

Quest'ultimo, violando la tregua costituzionale, e quindi compiendo, secondo l'opinione di BARILE, *un colpo di Stato*, cinse la corona di Re col nome di Umberto II.

I partiti, per non rimandare il *referendum*, riconobbero Umberto II come re. Il *referendum* (che ebbe luogo il 2 giugno 1946) dette, anche se di stretta misura, risultato favorevole alla Repubblica, per cui Umberto cinse la corona solo per pochi giorni fino alla sua espulsione dal territorio Nazionale.

8. L'ASSEMBLEA COSTITUENTE

L'assemblea Costituente si riunì il 22 giugno; il 28 elesse *capo provvisorio dello Stato Enrico De Nicola*.

L'assemblea, che con varie deroghe restò in funzione fino al 31 gennaio 1948, affermò subito la pienezza della sua sovranità e, in contrasto col decreto del 1946, che aveva riservato al governo la potestà legislativa ordinaria, acconsentì a delegare tale potestà al governo, ma con l'intesa che in qualunque momento avrebbe potuto riassumerla.

Il governo doveva quindi presentare tempestivamente all'assemblea tutti i provvedimenti legislativi prima dell'approvazione.

Nel seno dell'assemblea fu creata la *Commissione dei 75* che si divise in tre sottocommissioni e dopo 6 mesi presentò il progetto di Costituzione.

Il progetto fu discusso in 173 sedute e approvato il 22 dicembre 1947.

La Costituzione promulgata da Enrico de Nicola il 27 dicembre entrò in vigore dal 1¶ gennaio 1948.

Essa si compone di 139 articoli e 18 disposizioni transitorie e finali.

9. CARATTERI DELLA COSTITUZIONE REPUBBLICANA

I «padri della nostra costituzione» scelsero una costituzione:

— *lunga*, che, al contrario delle precedenti, abbracciava un complesso più ampio di principi e che, sull'esempio della Costituzione tedesca di Weimar, del 1919, *garantiva a livello costituzionale* una più ampia sfera di rapporti.
Una costituzione lunga, nota BARILE, raggiunge una maggiore sistematicità ed organicità, permette una migliore analisi ed interpretazione (a dispetto della sarcastica affermazione di Napoleone secondo il quale una «Costituzione deve essere breve ed oscura»), nonché una più precisa puntualizzazione dei principi costituzionali;
— *rigida*, ossia non modificabile da leggi ordinarie, ma solo da leggi costituzionali.

Sorgeva allora il problema del *controllo* di conformità, alla costituzione delle leggi. Si preferì affidare tale controllo ad un organo apposito, creato *ad hoc*: la *Corte Costituzionale*, assegnando a tutti i giudici di merito la possibilità di sottoporre al controllo della Corte qualsiasia norma giuridica che, nel corso di un qualsiasi processo, fosse apparsa viziata di incostituzionalità (vedi infra).

10. CARATTERI DELLA REPUBBLICA

Compiutosi il *referendum* sulla forma di governo e prevalsa, se pure di poco, la scelta della forma repubblicana, venne adottato il *tipo* di *repubblica parlamentare*, apportando ad essa, come nota BARILE, numerose innovazioni attraverso:

a) l'*ampliamento delle sfere di potere del Presidente della Repubblica* al quale, oltre alla titolarità dei poteri classici del capo dello Stato parlamentare, furono attribuiti anche specifici poteri di *controllo, equilibrio e stimolo* atipici tra cui quello di «*scioglimento anticipato delle camere*» (vedi *infra*);

b) *introduzione di nuovi organi, quali*:
   — la *Corte Costituzionale* per limitare l'onnipotenza delle Camere obbligandole al rispetto della Costituzione;
   — il *Consiglio Superiore della Magistratura* che, garantendo l'indipendenza della magistratura stessa, assicura il principio della divisione dei poteri sottraendo i giudici dal controllo del Ministro di Grazia e Giustizia;

c) *conferendo numerose autonomie*:
   — *locali*: istituendo le Regioni (a Statuto speciale ed ordinario), riconoscendo rilievo costituzionale a province e comuni;
   — *istituzionali delle comunità intermedie* (famiglia, associazioni civili e religiose, etc.);
   — *individuali*: garantendo i diritti inviolabili del cittadino;

d) *prevedendo il ricorso a istituti di democrazia diretta come il «referendum»*, come correttivo alla totale rappresentatività delle Camere.

11. L'ATTUAZIONE DELLA COSTITUZIONE

Come efficacemente rileva BARILE, l'attuazione della Costituzione, nel nostro ordinamento positivo, ha proceduto *estremamente a rilento* tanto è vero che oggi, dopo molti anni dall'entrata in vigore, molte disposizioni costituzionali sono ancora inattuate e, recentemente, la classe politica si dibatte in acerrime polemiche sul tema di un nuovo impianto costituzionale con modifiche che, in taluni ambiti, porterebbero, addirittura ad una «seconda Repubblica».

BARILE riassume in tale modo l'inadempimento costituzionale non ancora sanato, riferendolo ai singoli istituti:

a) le *camere*, funzionando regolarmente, hanno, in deroga a quanto prescritto:
   — portato il numero dei *loro membri* a 315 senatori e 630 deputati in luogo della proporzione stabilita dalla Costituzione;
   — stabilito la durata di entrambe a 5 anni in luogo dei sei previsti per il Senato; anche le ultime legislature sono state sciolte tutte anticipatamente;

b) il *Presidente della Repubblica* ha visto, per quanto riguarda la modalità di esplicazione dei suoi poteri, affermarsi una prassi innovativa, soprattutto durante l'ultimo periodo della presidenza Cossiga;

c) il *Governo*: numerosi governi sono nati in seguito a dimissioni di governi precedenti (c.d. crisi extra-parlamentari) e non a seguito di voto di fiducia. Prevalente è stata l'attività legislativa attraverso la decretazione d'urgenza (di decreti legge);

d) la *Corte Costituzionale* ha iniziato tardi la sua attività (1956). Alle competenze originarie (1953) se ne è aggiunta una quarta (legge costituzionale n. 2 del 1967), riguardante la competenza a giudicare sulla ammissibilità del *referendum* abrogativo ex art. 75 Cost.;

e) il *Consiglio Superiore della Magistratura* spesso al centro di numerose polemiche;

f) il *Consiglio Nazionale dell'Economia e del Lavoro* attuato con tre leggi (1957, 1967 e 1986) non ha quasi mai funzionato;

g) il *Consiglio di Stato e la Corte dei Conti* che tutt'oggi funzionano secondo le stesse norme che vigevano anteriormente alla Costituzione. Si pone, comunque, il problema di assicurare anche a tali *giudici* la posizione di indipendenza caratteristica fondamentale di tutte le giurisdizioni;

h) i *referendum* sono sempre stati boicottati dalla classe di governo mentre le *Regioni di diritto comune* hanno preso il via solo nel 1970;

i) *la giurisdizione militare* è stata di recente parzialmente riordinata con l'istituzione del Consiglio Superiore della Magistratura militare (L. 30-12-88, n. 561);

l) la costituzione, infine, risulta scarsamente attuata in tutte quelle norme che concernano i *diritti sociali*, che essendo contenuti in principi generali a carattere programmatico possono essere attuati solo in presenza di una volontà e di un indirizzo politico preciso tendenti alla loro attuazione (fattori questi che sono in gran parte mancati in Italia fino ad oggi).

12. L'ATTUAZIONE DELLE LIBERTÀ COSTITUZIONALI

L'attuazione e la vigilanza sull'applicazione dei *principi fondamentali* riguardanti le libertà costituzionali è stata, fino a questo momento, affidata unicamente a sentenze della Corte Costituzionale.

L'art. 3, in particolare, è stato spesso chiamato in causa, ma come nota BARILE, quasi del tutto inattuato è rimasto il II comma dell'articolo stesso, in quanto la Repubblica raramente è intervenuta a «rimuovere gli ostacoli di ordine economico e sociale...» di cui al citato art. 3.

Anche la norma dell'art. 4 ha trovato sino a questo momento scarsa applicazone. Ciò ha fatto sì che, come nota BARILE, la società italiana non è riuscita:

— né ad assicurare soddisfacimento e il pieno sviluppo della persona umana;
— né ad assicurare a tutti i cittadini il diritto al lavoro;
— né, tantomeno, a rimuovere i gravi squilibri economici e sociali tuttora esistenti.

Per gli articoli riguardanti la libertà, distinguiamo:

— per la *libertà personale* la riforma del codice di procedura penale (1989) ha profondamente innovato, in senso più garantista, ma sta trovando nella pratica, numerose difficoltà d'ordine politico ermeneutico e applicativo;
— per la *libertà di espressione* nel campo dell'editoria si sono tentati — con scarsi risultati pratici — riordini legislativi della materia, specie in funzione *antitrust* (e, quindi, antimono della proprietà dei giornali) e per assicurare una più libera e diversificata informazione.
  Nel campo *radiotelevisivo*, dopo il monopolio RAI e dopo che, dal 1976, miriadi di emittenti radiotelevisive avevano invaso l'«*etere*», senza alcuna normativa regolamentatrice, nel 1990 una legge, seppure contestatissima e lacunosa, ha colmato tale vuoto.

Per le norme in *materia di famiglia* (artt. 29, 30, 31 cost.) invece si è avuta, in base al principio di eguaglianza giuridica dei coniugi, un'incisiva riforma del diritto di famiglia seguita solo nel dicembre 1977 dalla legge n. 904 «*sulla parità tra uomo e donna*» in materia di lavoro e finalmente sancita dalla recente legge 10 aprile 1991, n. 125.

In tema di *sindacati* e *diritto di sciopero* (artt. 39 e 40), o almeno per quest'ultimo, sono state dettate norme specifiche per quanto concerne la regolamentazione di esso per i servizi pubblici essenziali (L. 12-6-1990, n. 146).

La normativa citata, in particolare, dispone che sono da considerarsi *servizi pubblici essenziali* quelli volti a garantire il godimento dei diritti della persona, alla vita, alla salute, alla libertà e alla sicurezza, alla libera circolazione, all'assistenza e previdenza sociale, all'istruzione e alla libertà di comunicazione.

In tali servizi, pertanto, il diritto di sciopero deve essere esercitato nel rispetto delle norme che per loro stessa natura, consentono l'erogazione delle prestazioni indispensabili, con un preavviso di

Nel 1988, con l'entrata in vigore della legge 23 agosto n. 400, è stato finalmente organicamente disciplinato l'ordinamento della Presidenza del Consiglio dei Ministri.

13. IL DIBATTITO SULLE RIFORME ISTITUZIONALI

A) L'attuale assetto politico-istituzionale

La lacunosa attuazione della Costituzione repubblicana e l'evidente crisi dell'assetto politico ed istituzionale manifestatosi nella seconda metà degli anni '80 ha reso improcrastinabile l'avvio delle tanto discusse **riforme istituzionali.**

Il grande dibattito sulla riforma istituzionale degli ultimi anni, tuttavia, è avvenuto in un clima politico istituzionale profondamente mutato. Le principali novità sono:

— la **crisi ed il declino dei partiti tradizionali.** La lenta, ma inesorabile, erosione del consenso di cui hanno goduto nei passati decenni partiti come la D.C., il P.C.I. ed il P.S.I. ha portato ad una radicale trasformazione del panorama politico italiano. Sono, infatti, emersi in questi anni nuove forze politiche (Lega Nord, Verdi, Rete, Alleanza democratica, Forza Italia, etc.) mentre all'interno del P.C.I. si consumava la scissione tra P.D.S. e Rifondazione Comunista, la DC avviava un profondo rinnovamento interno cambiando anche il nome in Partito Popolare e nel P.S.I. finiva il lungo periodo del Segretariato di Bettino Craxi. Il declino dei partiti tradizionali risultava evidente confrontando le elezioni politiche tenutesi nel 1992 e quelle del 1994: in soli due anni erano scomparse quasi tutte le sigle dei partiti che per oltre quarant'anni avevano animato la scena politica italiana.
Le note vicende giudiziarie di «tangentopoli» ed il varo della riforma elettorale nel 1993 hanno portato ad una maggiore polarizzazione delle forze politiche, che non ha, tuttavia, assicurato una maggiore governabilità;

— l'**assunzione da parte del Presidente della Repubblica di un ruolo più incisivo nell'assetto istituzionale.** Già negli ultimi anni del suo mandato il Presidente Cossiga aveva abbandonato quel ruolo di imparzialità che caratterizzava fino ad allora il suo mandato, intervenendo direttamente nel dibattito politico (si ricordino le «*esternazioni*» e le «*picconate*»), identificandosi sempre più con il modello di Presidente della Repubblica previsto in Francia (dove è eletto a suffragio universale diretto da tutti i cittadini) che non a quello delineato dalla nostra Costituzione.
L'importanza della figura presidenziale si è accresciuta con il nuovo Presidente Scalfaro che, nel clima di totale delegittimazione delle forze pubbliche «*storiche*», si è assunto il ruolo di *garante dell'unità nazionale* (per contrastare tendenze separatiste che sempre più si manifestano) e *della governabilità del Paese.*

B) La Commissione bicamerale

Per imprimere una svolta al dibattito sulle riforme istituzionali, già da lungo tempo agitato sulla scena politica italiana, il Parlamento ha approvato con legge costituzionale l'istituzione di una nuova **Commissione bicamerale** per le riforme.

La Commissione è costituita da 35 deputati e 35 senatori, nominati rispettivamente dal presidente della Camera dei deputati e dal presidente del Senato su designazione dei gruppi parlamentari, rispettando la proporzione esistente tra i gruppi medesimi, e assicurando la partecipazione delle *minoranze linguistiche* riconosciute, presenti in Parlamento (art. 1).

Alla Commissione spetta il compito di elaborare progetti di revisione della parte seconda della Costituzione in materia di **forma di Stato e di governo, bicameralismo, sistemi di garanzia** ed eventuali progetti di legge ordinaria conseguenti e strettamente connessi ai progetti di revisione. Alla

Commissione vengono anche trasmessi i disegni e le proposte di legge costituzionale e ordinaria relativi alle stesse materie e presentati entro la data di entrata in vigore della legge istitutiva della Commissione.

Il progetto o i progetti di legge trasmessi dalla Commissione sono approvati da ciascuna Camera, con due successive deliberazioni a intervallo di tre mesi, e articolo per articolo delle Camere, senza voto finale su ciascun progetto, ma con un *voto unico* sul complesso degli articoli di tutti i progetti. Nella seconda deliberazione per il voto unico finale, è richiesta la *maggioranza assoluta* dei componenti di ciascuna Camera.

È ammesso proporre emendamenti agli articoli del testo della Commissione o agli emendamenti proposti dalla Commissione o dai parlamentari (cd. *subemendamenti*) prima dell'inizio della discussione generale in assemblea.

La disciplina approvata col voto unico finale è sottoposta a unico *referendum* popolare entro tre mesi dalla pubblicazione (**referendum confermativo**).

La legge istitutiva della Commissione bicamerale introduce un procedimento di revisione costituzionale del tutto peculiare, in cui si prevede la sottoposizione obbligatoria a *referendum* del progetto finale per suggellare con il consenso popolare la *riforma dello Stato*. L'intesa raggiunta fra le forze politiche in merito all'istituzione della Commissione sembrerebbe escludere l'ipotesi, in passato ventilata da diverse forze politiche, di una nuova *Assemblea costituente* eletta dal popolo.

14. CONCLUSIONI

La Costituzione della Repubblica Italiana, sebbene costituisca una pregevole testimonianza di Costituzione civile e democratica, non è sufficiente considerarla solo come documento, e senza una precisa volontà di attuazione, ad assicurare uno sviluppo democratico al nostro paese.

La lentezza del nostro ordinamento ad inserire nel corpo delle leggi ordinarie i principi costituzionali deriva, inoltre, da numerosi fattori, tra i quali ricordiamo:

— è stato in parte soffocato il principio della *separazione dei poteri* (che la Costituzione aveva cercato di mantenere) dalla prassi politica che ha creato numerose deroghe ed eccezioni;
— il degradare dei *partiti* che hanno trasformato la vita del Parlamento in vita dei partiti all'interno del Parlamento;
— la caduta del *Parlamento* da organo centrale del sistema (ove si dovrebbero operare le scelte fondamentali) a *semplice organismo* che conferisce *forma legislativa* e scelte operate dal Governo e, comunque, al di fuori di esso;
— la particolare posizione dell'*esecutivo* che tende a svincolarsi dal controllo previsto dal sistema;
— il fatto che le manovre economiche o finanziarie sono lasciate ad organismi extra-costituzionali (es.: governatore della Banca d'Italia: così VIRGA);
— l'esclusione di vasti strati di cittadini dal controllo e alla partecipazione alla cosa pubblica ed la crescente disaffezione di essi dalla politica;
— la carenza di leggi nuove in sostituzione di norme fasciste ancora vigenti.

Per D'ANTONIO oggigiorno vige «un ordinamento di fatto del tutto fuori delle mura costituzionali... ove... prevalgono i gruppi più forti e gli emarginati rimangono tali...» e ciò perché «la composizione dei vari interessi avviene sempre a discapito dell'interesse generale con il progressivo aumento della fascia parassitaria ed il sacrificio degli emarginati in modo che è completamente silente la voce del bene comune e altrettanto soffocato il richiamo ai doveri inderogabili di solidarietà sociale».

Il peso dei costi parassitari è sostenuto da iniziative caritatevoli come la creazione di industrie antieconomiche, il sostegno di imprese passive, l'elefantiasi burocratica.

Il rimedio a tali deformazioni può trovarsi solo «*nel diffuso impegno politico dei singoli*» che non devono limitarsi a partecipare, ma *devono governare* (sempre se la partitocrazia glielo consenta).

PARTE SECONDA
LO STATO APPARATO

CAPITOLO PRIMO
I SOGGETTI DI DIRITTO PUBBLICO

1. IL PROBLEMA DELLA PERSONALITÀ GIURIDICA DELLO STATO

A) Stato-ordinamento, Stato-comunità, Stato persona

Oggigiorno con la parola «Stato» si fa riferimento ai fenomeni dello:

— *Stato-ordinamento*: è il caso dello Stato inteso come *istituzione globale* che abbraccia gli *elementi* (popolo, territorio, sovranità) che tradizionalmente ad esso fanno capo;
— *Stato-comunità*: se ci si riferisce al *solo elemento dei «soggetti»*, intesi come «comunità sociale» (*popolo*), distinti dallo Stato con ente di Governo e dotati di poteri autonomi propri;
— *Stato-governo o Stato apparato (o Stato persona)*: se si vuole indicare l'*elemento organizzativo* che fa capo al potere supremo di comando (*sovranità*) dello Stato.

A tale distinzione, si affianca quella fra:

— *soggetti governanti*: dotati di potestà pubbliche particolari e in posizione di supremazia rispetto agli altri soggetti (es. *autorità pubbliche, operatori politici*, etc.) che costituiscono lo Stato-governo (o Stato-persona o Stato-apparato);
— *soggetti governati* sono cioè i «*sudditi*» che assurgono a soggetti di diritto pubblico quando entrano in rapporto con i governanti (es. cittadino che adempie il dovere politico dell'elettorato attivo), mentre negli altri casi sono soggetti privati che costituiscono lo Stato-comunità.

Si parla, in particolare, di *Stato-persona*, se lo *Stato-governo* è riconosciuto come una *persona giuridica pubblica* sottoposta alle leggi emanate dallo *Stato-ordinamento* come si verifica nel nostro Paese.

B) Fonti e simboli della personalità

La personalità dello Stato italiano è prevista:

— *dalla Costituzione*: che pone ed individua la personalità dello Stato: implicitamente agli artt. 1 e 5 che configurano lo Stato italiano come *Repubblica Unitaria*; agli artt. 7, 8, 10, 130, 134, che considerano i rapporti dello Stato con gli altri soggetti interni ed internazionali e agli articoli 42 e 43 quale titolare di diritti economici, etc. (PERGOLESI);
— *dal codice civile*: che non elenca all'art. 11 lo Stato tra le persone giuridiche per «non menomare la posizione dello Stato come fonte principale del diritto positivo» (così testualmente la relazione del Guardasigilli al Re del 1942), ma che considera tale personalità come *presupposto di tutto il sistema*;

— *dal codice penale*: che al titolo I del libro II parla di *delitti contro la personalità dello Stato* distinguendoli, poi, in delitti contro la personalità di diritto internazionale e di diritto interno.

La personalità dello Stato è unica (cioè, nel contempo, sia di diritto pubblico che di diritto privato). Anche i *simboli* confermano l'unità e personalità dello Stato: tra di essi ricordiamo la *bandiera* (art. 12 Cost.) l'*emblema* (stella con ruota dentata, tra rami di quercia e olivo con la dicitura «Repubblica Italiana»), *sigillo, inno nazionale*, etc.

2. RAPPORTO ORGANICO E RAPPORTO DI SERVIZIO

A) Il rapporto organico

Lo Stato (e in particolare la Pubblica Amministrazione), quando agisce in veste di persona giuridica, è privo di un proprio corpo fisico. Esso dunque, per espletare la propria attività, si serve dell'intermediazione di *persone fisiche*. Tali persone sono gli organi dello Stato. *Organo è il complesso organizzato di persone fisiche* (c.d. «*titolari*») *e di mezzi materiali predisposti per l'esercizio di potestà pubbliche* (c.d. *uffici*) *dotato di rilevanza giuridica esterna* all'apparato dello Stato (MORTATI).

L'attività degli *organi* statali costituisce attività dello Stato e ad esso va imputata. Il rapporto fra *titolari ed uffici* è detto organico.

La dottrina poi distingue:

— **l'organo in senso ampio**, cioè l'organo astrattamente considerato (*ufficio*) che riflette la sfera di attività, funzioni, compiti, etc. attribuibili ad un pubblico funzionario;
— **l'organo in senso stretto**: cioè la persona fisica (*titolare*) che, in un determinato momento, ricopre quella particolare carica.

Solo l'*ufficio* è portatore diretto della volontà dello Stato, il suo *titolare* è un individuo, con volontà propria, che può porsi in contrasto con quella statale.

Pertanto, secondo la totalità della dottrina, *solo l'ufficio può essere adeguatamente concepito come organo dello Stato* in quanto solo esso presenta la caratteristica essenziale dell'organo: quella, cioè, di compenetrarsi, di immedesimarsi con lo Stato.

B) Segue: Preposizione e titolarità dell'ufficio

Quanto al problema di stabilire la *natura* del *rapporto* tra l'*ufficio* ed il *soggetto* ad esso preposto sono state avanzate due tesi:

a) la tesi più antica della *rappresentanza* per cui il *soggetto preposto*, conserva la sua individualità anche se rappresenta l'ufficio;
b) la tesi odierna del *rapporto organico* per cui il *soggetto preposto* quando svolge le funzioni di cui è investito non è cosa diversa dall'ufficio, ma parte dell'ufficio, e cioè l'ufficio stesso (c.d. *immedesimazione dell'organo nell'ente*).

Da tempo è più seguita la *seconda teoria*: in quanto, il concetto di rappresentanza presuppone la contrapposizione fra due soggetti, il rappresentato ed il rappresentante, situazione che non si verifica nel rapporto *ufficio-preposto*.

Di converso, la teoria organica molto più efficacemente evidenzia l'unicità tra *Ente* ed *organo* cioé (la persona fisica preposta).

Dalla preposizione all'ufficio va distinta la *titolarità dell'ufficio*, che ricorre quando la *preposizione ha carattere stabile*. Si ricordi, infine, *addetti all'ufficio* sono invece coloro i quali, seppure ricompresi nell'ufficio, non ne sono investiti e non ne rappresentano la volontà.

C) Segue: Principi in materia di organi

a) *La competenza*

È la *misura della quantità di potestà* assegnata all'organo che delimita la sfera di attività di esso, suole distinguersi in:

— **funzionale**: rispetto alle funzioni esercitate dall'organo;
— **per materia**: rispetto all'*oggetto di tali funzioni*;
— **per territorio**: rispetto all'*ambito spaziale* in cui si svolge;
— **per grado**: quando, cioè, gli organi di un determinato grado sono legittimati ad emanare atti e provvedimenti, mentre ad altri è attribuita una diversa e più ampia competenza a riesaminarli (modificandoli o annullandoli a seconda dei casi).

La mancanza di «competenza» si chiama «incompetenza». L'atto affetto da incompetenza può essere *annullato* dal giudice amministrativo o *disapplicato* da quello ordinario (quest'ultimo, infatti, essendo titolare di un potere diverso, quello *giudiziario*, non può intervenire modificando il procedimento amministrativo in quanto così violerebbe il principio della tripartizione dei poteri, ma può solo limitarsi, in sede giudiziaria, a non tenerne conto rispetto alla singola fattispecie per la quale è chiamato a decidere).

L'*incompetenza* può essere:

— **assoluta**, quando l'atto sarebbe di competenza di altra branca dell'amministrazione o di altro potere dello Stato;
— **relativa**, quando l'atto sarebbe di competenza di altro organo appartenente alla stessa branca dell'amministrazione.

b) **La gerarchia**

La gerarchia è la *disposizione dell'organo secondo un ordine piramidale*, per cui v'è un organo supremo e altri subordinati (BARILE).

I rapporti tra tali organi sono di:

— **vigilanza** sugli atti emanati dagli organi minori (con possibilità di *delega* di atti dall'organo superiore agli inferiori, di *sostituzione* dell'uno agli altri in caso di loro inerzia, di *avocazione* degli atti degli organi inferiori da parte di quello superiore, di *annullamento* o *modificazione* di atti degli organi inferiori illegittimi o inopportuni);
— **emanazione di ordini e direttive** che può realizzarsi in *forma specifica* e sono dette «*istruzioni*», o in *forma generica* e si chiamano «*circolari*» per quanto riguarda gli ordini;
— **risoluzione di conflitti di competenza** fra gli organi inferiori da parte di quello superiore.

D) Attività e rapporti fra organi

L'*attività degli organi* è regolata dalla legge (ex l'art. 97 Cost. che stabilisce una riserva di legge *relativa*) onde *assicurare il buon andamento e l'imparzialità dell'amministrazione.*

I *rapporti tra organi* (c.d. «*interorganici*»), giuridicamente irrilevanti, secondo alcuni autori, perché interni al procedimento di formazione della volontà dello Stato, sono, invece, ritenuti da BARILE «*giuridici*» per il fatto stesso di essere regolati da leggi o regolamenti.

E) Rapporto di servizio

Dal rapporto organico occorre tener distinto il *rapporto di servizio*, che è un vero e proprio rapporto giuridico che intercorre tra l'organo e la persona fisica del suo titolare. Sotto tale profilo, il *soggetto non viene* in rilievo come preposto d'ufficio, ma come *persona* nella sua giuridica *individualità* e, quindi, contrapposto all'ufficio.

Tanto il rapporto organico quanto il rapporto di servizio possono sorgere o per atto della P.A. o, eccezionalmente, in via di mero fatto.

L'atto amministrativo con cui sorge il *rapporto organico*, è l'*assegnazione* (c.d. *incardinazione*) all'ufficio; esso generalmente *segue all'instaurazione del rapporto di servizio* che sorge con l'atto di *assunzione.*

I titolari dell'organo (funzionari) sono assunti ad esso in qualità di:

— *funzionari onorari*: nominati o eletti a tempo (di regola determinato) dietro corresponsione di *indennità* (esempio: Presidente della Repubblica, e di solito quelli che coprono cariche «politiche»);
— *funzionari impiegati*: nominati con concorso, a tempo indeterminato, e dietro corresponsione di retribuzione.

Accanto al rapporto di servizio volontario - che è la regola - vi sono casi di assunzione coattiva dell'organo (*servizio militare* obbligatorio).

Presupposto necessario perché l'attività delle persone fisiche che compongono un organo sia a questo riferita è la *legittimazione* conseguente a alla regolarità di nomina e allo svolgimento delle funzioni.

3. CLASSIFICAZIONE DEGLI ORGANI

Gli organi si distinguono in:

A) Organi Costituzionali e derivati

Il fondamento, la composizione, la struttura degli organi costituzionali è determinata direttamente dalla Costituzione, mentre quella degli organi derivati è indicata dalla legge ordinaria. Ciò determina la posizione di indipendenza, supremazia e di reciproco controllo (sistema dei «*check and balances*» o «*pesi e contrappesi*») degli organi costituzionali (MORTATI).

Gli organi costituzionali, comunque, sono «quelli che tra loro ripartiscono la sovranità», ossia «individuano lo Stato in un determinato momento storico» (BARILE, GHELI, VIRGA).

Più in particolare, la suddetta qualificazione è considerata da BARILE riassuntiva di specifici attributi propri dell'organo costituzionale. Esso è, infatti:

— **necessario** (se esso manca, l'attività dello Stato — come prevista dalla Costituzione — è paralizzata);
— **indefettibile** (se viene sostituito, ciò implica mutamento di regime);
— **a struttura predeterminata** dalla Costituzione, pariordinato rispetto agli altri organi costituzionali.

Secondo BARILE tutti gli organi costituzionali sono contitolari della funzione di *indirizzo politico*, mentre tutti gli altri, anche quelli di rilievo Costituzionale (cioé solo menzionati dalla Costituzione, ma regolati da leggi ordinarie — come il C.N.E.L., la Corte dei Conti, il Consiglio di Stato —) svolgono funzioni più squisitamente «tecniche».

B) Organi rappresentativi e non rappresentativi

Sono rappresentativi gli organi che assumono una **responsabilità politica** di fronte a coloro che li hanno nominati e la conservano per tutta la durata della carica.

La rappresentatività non si identifica con l'*elettività*, (cioè non è sufficiente un meccanismo di nomina da parte del corpo elettorale), ma è — invece — necessariamente *collegata alla responsabilità*

politica, del nominato rispetto a chi lo nomina. Se manca la responsabilità politica non può aversi rappresentatività perché manca la responsabilità dell'organo nei confronti di chi ha eletto l'organo. Ciò accadeva per i senatori del regno d'Italia, che erano eletti direttamente dalla Corona, e ancora oggi, con i senatori a vita eletti direttamente dal Presidente della Repubblica, etc.

C) Organi individuali e collegiali

Nel secondo caso, i soggetti che compongono l'organo collegiale danno vita ad un collegio, che manifesta la *propria volontà*, ossia la somma di quelle dei singoli che per l'appunto scompaiono, come tali, all'atto della deliberazione confondendosi nella volontà della maggioranza (è fatto salvo, talvolta, il diritto delle *minoranze* di far verbalizzare il loro dissenso).

Affinché gli organi collegiali deliberino validamente, devono essere convocati tempestivamente secondo norme prestabilite, e, per poter *funzionare* e per *deliberare* devono raggiungere un determinato «*numero legale*» rispettivamente definito **quorum strutturale** e **quorum funzionale.** L'applicazione di questi concetti si riscontra soprattutto in tema di maggioranze parlamentari.

D) Organi semplici e complessi

I secondi sono composti da più organi semplici. Esempio: il Governo è organo composto, ex art. 92 Cost., dal presidente del Consiglio e dai ministri, i quali, singolarmente sono, di converso, organi semplici.

E) Organi attivi, consultivi, di controllo

La distinzione è qui compiuta con riferimento alle *funzioni*:

— **attivi**: sono gli organi che formano e manifestano la volontà dello Stato e portano ad esecuzione la volontà della P.A. mediante *decreti, deliberazioni, ordini, ordinanze* (es: Governo);
— **consultivi**: sono gli organi che manifestano preventivamente un giudizio ed apprezzamento sulla legittimità o sul merito di atti di altri organi attraverso **pareri** (es: C.N.E.L., Consiglio di Stato, etc.).

Tali pareri, in particolare, possono essere:

— *facoltativi*;
— *obbligatori* (l'organo attivo può discostarsene solo con motivazione espressa;
— *vincolanti* (l'organo attivo può discostarsene solo se rinunzia ad emanare l'atto);

— **di controllo**: sono gli organi che esercitano vigilanza sull'operato di organi attivi, in termini di controllo sugli atti e sulle persone (es: Corte dei Conti).

Il **controllo sugli atti** può essere:

— *preventivo*: autorizzazione (esso incide nella fase del procedimento di formazione dell'atto);
— *successivo*: approvazione, visto, registrazione se interviene (ad atto *già* formato);
— *di legittimità*: quando tale controllo si limita a valutare la conformità dell'atto alle leggi vigenti;
— *di merito*: se invece tale controllo è più penetrante ed investe la valutazione dell'*opportunità* dell'emanazione dell'atto.

CAPITOLO SECONDO

ORGANI DEL DIRITTO COSTITUZIONALEE DI AMMINISTRAZIONE ATTIVA

Sezione Prima
Nozioni Introduttive

1. GENERALITÀ

Mentre nello *Stato assoluto* il potere si accentra nella persona del sovrano, negli *Stati costituzionali*, ove trova applicazione il *principio della divisione dei poteri*, la direzione dello Stato è affidata ad una pluralità di organi costituzionali.

Tali organi sono, tra di loro, in condizione di *indipendenza* e *parità giuridica* (*non politica*, in quanto un organo può avere nel sistema un peso politico preponderante rispetto agli altri) sono, cioé, *superiorem non recognoscentes*.

Nel nostro *sistema*, detto appunto «*parlamentare*», è il *Parlamento* che, in quanto emanazione più diretta del *popolo* è al centro della vita dello Stato e costituisce l'organo politicamente dominante, in quanto condiziona l'operato del Governo (potere esecutivo).

Nei *regimi autoritari*, nei quali il popolo è privato della titolarità della Sovranità, invece, è il *Governo*, e più ancora il suo capo che, determinando l'indirizzo politico generale, dirige tutta la vita nazionale (PERGOLESI).

2. ORGANI COSTITUZIONALI DI AMMINISTRAZIONE ATTIVA

Sono organi costituzionali:

— *il corpo elettorale* (opinione controversa);
— *il Parlamento* (e cioè ciascuna delle due Camere);
— *il Presidente della Repubblica*;
— *il Governo* (Consiglio dei Ministri come tale, Presidente del Consiglio e i ministri);
— *la Corte Costituzionale*.

Questi organi non dipendono gerarchicamente da nessun altro organo superiore e sono tra di loro in posizione di reciproca indipendenza.

Sono organi di rilievo costituzionale: ma non costituzionali: (sostanzialmente amministrativi cfr. cap. 3):

— *il Consiglio superiore della magistratura*;
— *il Consiglio nazionale dell'Economia e del Lavoro (CNEL)*;
— *il Consiglio di Stato*;

— *la Corte dei Conti*;
— *il Consiglio supremo di difesa* (cfr. la sez. terza).

Non sono, invece, costituzionali gli **organi giudiziari**, *quelli cioé titolari della giurisdizione civile, penale, amministrativa e militare*, perché, pur essendo *autonomi* rispetto agli altri organi dello Stato, per il principio della divisione dei poteri, non partecipano alla vita costituzionale. La Magistratura, in particolare, non può essere considerato «organo costituzionale» perché rappresenta un *potere senza vertice*. Infatti, non può essere vertice della Magistratura né la Corte di Cassazione, che è soltanto un organo di controllo giuridico delle sentenze, né, tantomeno, il Consiglio Superiore della Magistratura, organo che si limita solo a garantire l'effettiva autonomia e indipendenza interna ed esterna del giudice, ma che non manifesta la volontà del potere giudiziario (BARILE), pur essendo costituzionalmente garantito nella sua indipendenza dagli altri poteri.

Non sono organi *costituzionali* neanche le *Forze Armate* che, pur svolgendo un'attività fondamentale per lo Stato, non partecipano alla vita Costituzionale, nemmeno nel settore della difesa della nazione, ove esse sono destinate a svolgere attività *subordinata* alle direttive che vengono impartite dal **Governo** e dal **Consiglio Supremo di Difesa.**

Sezione Seconda
Il corpo elettorale: generalità

Premessa

Il **popolo** è il primo *soggetto del «Diritto Costituzionale»*, titolare della sovranità, che ha una posizione *dominante* ed *autonoma* nei confronti dello Stato, delle Regioni ed altri soggetti pubblici.

Ciò trova conferma nell'art. 1 della Costituzione il quale, proclamando che la sovranità appartiene al *popolo*, ha inteso garantire ad esso la partecipazione all'esercizio delle *funzioni di Governo*, che derivano dal concetto stesso di *«sovranità»*.

Poiché, tuttavia, questi poteri non sono stati attribuiti a tutto il popolo, ma soltanto a quella emanazione del popolo stesso che va sotto il nome di *«corpo elettorale»*, si deduce che il *popolo è organo costituzionale esclusivamente* in veste di *corpo elettorale*, costituito dall'insieme dei cittadini che sono in grado di esercitare il diritto di voto per formare gli organi elettivi dello Stato e per partecipare, nelle varie forme previste dalla Costituzione, alla funzione di governo.

Si tratta in sostanza di un *organo costituzionale originario*, di un *organo stabile* anche se per motivi pratici le sue manifestazioni sono saltuarie (elezioni degli organi rappresentativi; atti di democrazia diretta: *referendum*, iniziativa popolare).

1. IL DIRITTO DI VOTO

L'elettorato costituisce, *per il singolo*, allo stesso tempo, un *diritto soggettivo* ed un *dovere politico*.

L'art. 48 (1) della Costituzione fissa, per l'elettorato i seguenti caratteri:

a) *suffragio universale* («tutti i cittadini»), per cui l'ammissione al voto non può essere subordinata a condizioni di carattere economico o culturale (censo, comprovato superamento della scuola dell'obbligo, alfabetizzazione, etc., come era richiesto nella seconda metà dell'800 nel Regno d'Italia);

(1) L'art. 48 Cost. così recita: «*Sono elettori tutti i cittadini, uomini e donne, che abbiano raggiunto la maggiore età. Il voto è personale ed eguale, libero e segreto. Il suo esercizio è dovere civico.*

Il diritto di voto non può essere limitato se non per incapacità civile o per effetto di sentenza penale irrevocabile o nei casi di indegnità morale indicati dalla legge.

b) *maschile o femminile* «uomini e donne», per cui il sesso non può esser causa di esclusione dal diritto di voto;
c) *personale*, per cui l'unico modo consentito per esercitare il diritto stesso è quello di recarsi alle urne, non essendo possibile, per il nostro ordinamento, il voto per posta o il conferimento della delega a votare (previsto dal diritto inglese);
d) *eguale*, essendo esclusi i voti plurimi per determinate categorie (es. elettori laureati) o i voti multipli (elettore che può votare in più circoscrizioni).

Si discute se la legge elettorale che regolava le elezioni politiche del 1953 (che distingueva la c.d. «*proporzionale corretta o con premio di maggioranza*»), secondo la quale la lista o le liste apparentate cui andasse il 50% più 1 — non il 51% — dei suffragi avrebbero avuto diritto a 90 seggi in più di quelli spettanti secondo il riparto proporzionale, a titolo di «premio» («premio» ottenuto, ovviamente, penalizzando le minoranze), fosse o meno violatrice del principio di eguaglianza del voto. Per BARILE tale legge violò il principio di eguaglianza in quanto l'uguaglianza del voto va intesa anche nel senso che il *peso* dei voti deve essere uguale in potenza e in atto senza che i voti di maggioranza «*pesino*» di più, per effetto di un artificio elettorale (e ciò ferma restando la possibilità — anzi la necessità democratica — della dislocazione delle forze politiche tra maggioranza e opposizione).
La legge elettorale del '53 (c.d. «*legge truffa*»), qualunque sia il giudizio che se ne voglia dare, non è — comunque — assimilabile alla legge Acerbo del 1924, come sostiene la pubblicistica ad essa contraria, in quanto, la legge Acerbo, voluta da Mussolini, attribuiva il 75% dei seggi non già ad una *maggioranza*, ma a chi avesse ottenuto il 25% dei voti. Questo indubbiamente favorì l'affermazione elettorale del partito fascista, che ottenne peraltro il 64,9% dei voti, in un'elezione di cui Matteotti denunciò il clima di intimidazione e la sostanziale illegalità delle stesse;

e) *libero e segreto*, al fine di garantire la libertà di voto.

Tale principio, peraltro, se è quasi sempre valido per il corpo elettorale (con la sola eccezione dei ciechi che hanno la facoltà di farsi accompagnare in cabina da persona di fiducia) è derogato per i *collegi rappresentativi* nei quali è spesso richiesto il «*voto palese*» per favorire la pubblica assunzione di responsabilità dell'eletto nei confronti dell'elettore (ad es. nel caso di fiducia al Governo, votata su mozione ad appello nominale).

Tale principio costituzionale viene, tra l'altro, salvaguardato mediante talune norme di attuazione tra cui:

— quelle che vietano le coartazioni che possono derivare dal potere nascente dello svolgimento di certe funzioni (pubblici ufficiali: ex art. 98 T.U. 361/57);
— quelle che indicano come reato la somministrazione di cibi o denaro nell'imminenza delle votazioni (art. 95 T.U. 361/57);
— quelle che vietano comizi nei giorni delle elezioni (art. 9 L. 4-4-56 n. 212);

f) *obbligatorio*: il voto è un *dovere civico*.
È questa una formula di compromesso raggiunta in sede costituente per accontentare chi ad ogni costo sosteneva l'obbligatorietà morale del voto.

Invece, con questa discutibile ed oscura formulazione il costituente ha cercato di mascherare il proprio imbarazzo nel dover ammettere che tale esercizio, comunque, non può essere in nessun modo coartato. I cittadini pertanto, in quanto titolari della fondamentale libertà di opinione, sono liberi di manifestarla in qualsiasi modo (positivo e negativo) non recandosi alle urne. Tale comportamento, malgrado il grave silenzio degli Autori che non approfondiscono questa delicata questione, non è e non può essere in nessun modo censurato né sanzionato essendo preminente la libertà di non votare sul «fumoso» enunciato «dovere civico» di cui al II co. dell'art. 48.

2. ELETTORATO ATTIVO ED ELETTORATO PASSIVO

Per la *capacità elettorale*: *attiva* (capacità di eleggere) e *passiva* (capacità di essere eletti), la Costituzione e le leggi ordinarie esigono *cinque requisiti*, di cui due positivi e tre negativi, cioè:

a) **requisiti positivi**
   1) *cittadinanza*;
   2) *età* che differisce a seconda se si tratti di elettorato attivo o passivo, riferiti alla Camera e al Senato;

b) **requisiti negativi**
   3) assenza di cause di incapacità civile;
   4) assenza di sentenze penali irrevocabili che inibiscano il voto;
   5) assenza di cause di indegnità morale.

Quanto all'**esame dettagliato** delle norme sovraesposte si ricordi che:

1) votano soltanto i **cittadini**, e infatti solo a loro la Costituzione riconosce il diritto di associazione e quello dell'iscrizione ai partiti attraverso i quali si svolge la competizione elettorale, in particolare quanto all'**età** vigono questi livelli:
   — *elettorato attivo* 18 anni (2), 25 anni (3);
   — *elettorato passivo* 25 anni (2), 40 anni (3), 50 anni (4);
2) quanto all'*assenza* di cause di *incapacità civile* la costituzione rinvia al codice civile. La dottrina ritiene che il legislatore non possa estendere l'incapacità elettorale ad ipotesi al di là di quelle previste dal diritto comune; può però il legislatore considerare capaci di votare taluni incapaci civilmente (*inabilitati per prodigalità, ciechi, sordomuti*);
3) le *sentenze penali irrevocabili* inibenti il voto sono quelle:
   — che comportano la perdita totale: quelle per delitti fascisti (art. 2, n. 8 T.U. n. 223/1967);
   — che comportano la perdita temporanea (5 anni): quelle per una serie di reati di cui all'art. 2 citato;
4) le cause di **indegnità morale** stabilite dal legislatore riguardano: i falliti, i sottoposti a talune misure di prevenzione o a quelle di sicurezza detentive o a libertà vigilata, gli interdetti temporanei dai pubblici uffici, i concessionari di case da giuoco, tutti in via *temporanea*; sono indegni definitivamente gli interdetti perpetui da pubblici uffici a seguito di talune condanne penali.
   Si ricordi, infine, che la legge **non** può — per motivi politici — **privare della capacità giuridica**, della cittadinanza, del nome (art. 22 C.): dunque nemmeno della capacità elettorale. Risulterebbe pertanto illegittima una norma di legge ordinaria che limitasse il diritto di voto, sotto il pretesto dell'indegnità morale, per dissimulati motivi politici.

3. LEGGI ELETTORALI

Su questo tema di grande attualità alla *vigilia d'una importante riforma* la Costituzione nulla dice. Peraltro BARILE ritiene che nel concetto di «*Repubblica democratica*» rientri quello di «rappresentanza delle minoranze», ovunque possibile; LAVAGNA, poi, ritiene costituzionalizzato (e con lui — tendenzialmente — FERRARA) il proporzionalismo.

Invero il problema se la Costituzione dovesse o meno dettare principi specifici in tema di leggi elettorali fu discusso in sede costituente, ma si decise negativamente. L'opinione dominante era orientata nel senso di non far pesare, con un procedimento «aggravato», eventuali diverse scelte delle leggi elettorali perché la Costituzione era destinata a valere in un futuro ove sarebbero stati difficili cambiamenti «rivoluzionari» nella struttura politica del Paese. Pertanto in altre norme è stabilito che una legge elettorale non può essere cambiata a piacimento della maggioranza prima delle elezioni: deve essere sentito sempre e preventivamente il corpo elettorale al quale il gruppo politico che intende proporre le modifiche chiederà il consenso.

Della scelta dei sistemi elettorali derivano notevoli conseguenze per la vita politica di uno Stato.

4. I SISTEMI ELETTORALI

Sono i modi mediante i quali si svolge l'attività elettorale. Esaminiamo alcuni problemi:

a) **estensione del voto**. Sotto tale profilo si ha il:
   — *suffragio universale* se votano *tutti i cittadini* che abbiano raggiunto una determinata età e che non si trovino in determinate situazioni di incapacità o indegnità previste dalla legge;

(2) Per elezione alla camera.
(3) Per elezione al senato.
(4) Per elezione a Presidente della Repubblica.

   — *suffragio ristretto*, se votano *solo alcuni cittadini*, che si trovano in determinate condizioni (di censo, di sesso, etc.);
   — *suffragio plurimo*, se votano tutti i cittadini, ma *alcuni di essi possono votare più volte* (laureati, capifamiglia, etc.);
b) **raggruppamento degli elettori**, e possiamo avere il:
   — *collegio uninominale*: nel quale viene eletto un solo candidato (come avviene in Italia);
   — *collegio plurinominale*: nel quale vengono eletti più candidati;
c) *facoltà di scelta per gli elettori*, che possono esprimersi con:
   — *voto individuale*, che si effettua con la scelta dell'individuo;
   — *voto di lista*, che si effettua con la scelta della lista che può essere:
   — *bloccata*, se s'impone all'elettore di votare solo per una lista;
   — *con voto preferenziale*, se l'elettore può scegliere nell'ambito della lista alcuni candidati;
   — *con voto aggiunto*, facoltà di votare per un individuo non compreso nella lista, aggiungendo il suo nome.

5. Segue: SINGOLI SISTEMI ELETTORALI

A) Sistema maggioritario

Questo sistema penalizza pesantemente le minoranze in quanto il seggio o i seggi a disposizione vengono tutti assegnati al candidato o alla lista che ottiene la metà più uno dei voti del collegio.

A seconda che tale maggioranza sia calcolata sul numero dei votanti o degli aventi diritto al voto, si parla di **maggioranza semplice o assoluta.**

Se è stabilito che il seggio venga assegnato al candidato che comunque raggiunge il più alto numero di voti si parla di **maggioranza relativa.**

In alcuni casi il *quorum* da raggiungere per l'assegnazione del seggio è superiore al 50%: c.d. **maggioranza qualificata.**

Questo sistema, a sua volta, può assumere le forme di:

— *maggioritario puro*, in cui risulta eletto quel candidato che nel collegio raggiunge la maggioranza, anche relativa, dei voti (è adottato in Inghilterra); esso però presenta il grave inconveniente che, in concreto, la maggioranza globale può andare ad un partito che, di fatto, ha riportato un minor numero totale di voti;
— *maggioritario con ballottaggio*, in cui per essere eletti nel primo scrutinio occorre una maggioranza qualificata (normalmente i due terzi) e, se essa non è raggiunta, si procede al ballottaggio fra i due candidati che hanno riportato il maggior numero di suffragi; nel *turno di ballottaggio* però, basta, per essere eletti, la maggioranza relativa (è adottato in Francia). Questo sistema consente alleanze e accordi tra *partiti* in vista del *turno di ballottaggio*.

B) Sistema proporzionale

Questo sistema si propone di assicurare a ciascun partito un numero di seggi proporzionale alla sua forza effettiva: esso consente anche alle forze politiche minoritarie di essere rappresentate nelle assemblee elettive affinché venga rispecchiato il più fedelmente possibile l'orientamento espresso dagli elettori. Si distingue al riguardo:

— una **rappresentanza** (delle minoranze) **generica**: cioè predeterminata dal legislatore, che riserva loro un numero *fisso* di seggi;
— una **rappresentanza** (delle minoranze) **specifica**: che rispecchia l'insieme delle forze politiche minoritarie effettivamente presenti nel paese.

Il primo sistema pecca per arbitrarietà, il secondo presenta l'inconveniente di favorire la frammentazione partitica.

Fin dalla nascita della *prima Repubblica* in Italia si è votato con il sistema proporzionale.

Solo di recente sono state approvate due leggi elettorali (entrambe dell'agosto '93: le leggi 4-8-1993 n. 276 e 277) che hanno introdotto anche nel nostro ordinamento il **sistema elettorale maggioritario** (con correttivi in senso proporzionalistico) in linea con i modelli prevalenti su scala europea.

Attualmente, pertanto, i 630 deputati e i 315 senatori sono eletti:

— per il 75% (475 deputati e 232 senatori) in *collegi uninominali* con il sistema a *maggioranza relativa*;
— per il 25% (155 deputati e 83 senatori) con il *sistema proporzionale*.

6. I PROCEDIMENTI ELETTORALI

Ogni elezione politica mette in moto un meccanismo che vede coinvolti, a vario titolo, migliaia di persone. Se il compito dell'elettore si esaurisce in pochi minuti, altrettanto non può dirsi della complessa macchina elettorale che deve avviarsi alcuni mesi prima, allo scopo di adempiere a tutte quelle procedure che assicurano sia il corretto svolgimento delle elezioni e la pari opportunità per tutti i candidati in lizza.

A) Convocazione dei comizi elettorali

Rappresenta il primo atto, che dà l'avvvio al procedimento elettorale. Si effettua con decreto del Capo dello Stato ed è *atto dovuto*, poiché l'art. 61 Cost. prescrive che le elezioni delle nuove Camere abbiano luogo entro settanta giorni dalla fine delle precedenti.

B) Presentazione delle candidature

a) *Camera dei deputati*

Il procedimento per la presentazione delle candidature nei collegi uninominali o delle liste si articola nelle seguenti fasi:

— *deposito* al Ministero dell'Interno, da parte dei partiti o gruppi poli∞tici organizzati, dei *contrassegni di lista*, assieme alla denominazione del partito o gruppo;
— *accertamento della regolarità del contrassegno* da parte del Ministero dell'Interno o, in csao di opposizione, da parte dell'Ufficio centrale elettorale nazionale presso la Corte di Cassazione;
— *sottoscrizione delle candidature* nei collegi uninominali, da parte almeno di 500 elettori e non più di mille. Per la presentazione delle *liste* che concorrono alla ripartizione dei seggi con il metodo proporzionale, esse devono essere sottoscritte da un numero minimo di elettori variabile da 1500 a 4000, in relazione alla densità demografica della circoscrizione. Se la Camera è stata sciolta oltre 4 mesi prima della sua scadenza naturale il numero delle firme è ridotto alla metà;
— *accertamento della regolarità delle candidature*;
— *stampa e diffusione* delle stesse nonché delle liste.

b) *Senato della Repubblica*

Le singole *candidature* sono presentate al Ministero dell'Interno, insieme ad apposito *contrassegno*.

Valgono le norme previste per la Camera interna di presentazione delle liste, con l'unica eccezione rappresentata dalla possibilità di presentare candidature indipendenti, non ammesse per le elezioni alla Camera.

In entrambi i casi non sono ammesse candidature in più collegi uninominali, né è possibile la candidatura contestuale al Senato ed alla Camera.

C) Campagna elettorale

Si apre al momento dello scioglimento delle precedenti Camere.

È proibita la pubblicità luminosa ed è vietato il lancio di manifestini. L'uso di altoparlanti su mezzi mobili è consentito soltanto per l'annuncio degli orari e delle località dei comizi elettorali.

I manifesti elettorali possono essere affissi in appositi tabelloni ed è vietato affiggerli sugli immobili. Soltanto i partiti e i gruppi politici possono farsi propaganda con drappi e striscioni: non potrebbero i singoli candidati.

È vietata la propaganda elettorale con inserzioni pubblicitarie e spot elettorali nei 30 gg. che precedono le elezioni: è consentito soltanto l'annuncio di dibattiti, la presentazione dei programmi delle liste o dei candidati nonché i dibattiti tra questi ultimi.

È altresì vietato, nei quindici giorni antecedenti alle elezioni, diffondere i risultati dei sondaggi. Tale divieto si applica sino alla chiusura dei seggi.

D) Costituzione dei seggi elettorali

Appositi organi comunali nominano il personale dei singoli seggi elettorali. Per garantire un più attento reclutamento degli addetti a tali delicate operazioni in ogni Comune è istituito l'Albo delle persone idonee all'ufficio di scrutatore di seggio elettorale. È altresì previsto che presso la Cancelleria di ciascuna Corte d'Appello sia istituito l'Albo delle persone idonee all'ufficio di presidente di seggio elettorale.

E) Consegna a tutti gli elettori del certificato di iscrizione nelle liste elettorali e comunicazione del collegio di appartenenza

Tale certificato viene inviato agli elettori a cura di competenti uffici comunali ed il suo possesso abilita all'esercizio del diritto di voto. Nel caso in cui non sia recapitato può essere personalmente ritirato dall'elettore presso l'apposito Ufficio comunale dall'ottavo giorno antecedente l'elezione.

Se il territorio del Comune è suddiviso in più collegi uninominali, dovrà essere comunicato all'elettore il suo collegio di appartenenza.

F) Votazione

È la fase essenziale del procedimento elettorale. La sua regolamentazione tende a due fini fondamentali: attuare l'esatta identificazione dell'elettore, per impedire che la stessa persona voti due volte o senza averne diritto, e assicurare l'assoluta segretezza e libertà del voto.

L'elettore non può accedere ai seggi elettorali se non è in possesso del certificato elettorale e non può votare se non presenta un docuento di identità personale.

La votazione si tiene di regola in una sola giornata: la domenica.

G) Scrutinio

Segue la votazione e costituisce la fase di accertamento dei risultati elettorali. Il lavoro di scrutinio inizia poco dopo la chiusura dei seggi, e prosegue ininterrottamente fino alla chiusura delle operazioni, alla verifica e computo dei risultati, e alla consegna delle schede e del verbale dei risultati agli uffici elettorali.

H) Proclamazione dei risultati e controlli

L'Ufficio elettorale circoscrizionale, ricevute le schede scrutinate dai presidenti dei vari seggi, controlla i calcoli effettuati e dà proclamazione dei risultati.

Ricordiamo, infine, che i controlli successivi sono svolti presso le singole Corti d'Appello o Tribunali; per le elezioni politiche la convalida dei risultati è effettuata dalle stesse Camere, attraverso la c.d. **verifica dei poteri**.

Sezione Terza
Il Parlamento

1. DEFINIZIONE, FONTI E SISTEMATICA

Il Parlamento è quell'*organo costituzionale complesso e rappresentativo cui è affidata la funzione legislativa ed il controllo sul potere esecutivo*, esso costituisce, cioè:

a) *Organo costituzionale*: il Parlamento infatti partecipa, per dettato costituzionale, alla funzione di indirizzo politico, in quanto organo legislativo, in posizione di parità ed indipendenza rispetto agli altri organi (VIRGA). È *necessario* e *indefettibile* in quanto organo di connotazione del sistema: esso caratterizza non solo la forma di Governo (cioè la distribuzione del potere tra gli organi dello Stato), ma anche la forma di Stato cioè il rapporto tra governanti e governati (MANZELLA);
b) *Organo complesso*, in quanto le sue deliberazioni risultano dalla confluenza delle volontà dei due organi semplici (*Camera e Senato*) dai quali è formato (così MORTATI);
c) *Organo rappresentativo*, in quanto rappresenta *politicamente* gli interessi della comunità statale, poiché la quasi totalità dei suoi membri è eletta dal popolo con metodi democratici;
d) *Organo collegiale* in quanto sia il Parlamento nel suo complesso, che numerosi organi interni ad esso (ad es. le commissioni parlamentari) sono formati da più componenti o membri;
e) con *funzioni*:
   — *legislative*: ad entrambe le Camere, collegialmente, spetta il potere di farsi interprete della volontà politica dei cittadini, trasfondendola in norme giuridiche aventi valore di legge;
   — *di controllo politico*: ciascuna Camera, singolarmente, esercita il controllo politico sul Governo che, per poter svolgere le sue funzioni, deve godere permanentemente della fiducia delle stesse;
   — *di messa in stato d'accusa del Presidente della Repubblica*, per i reati di alto tradimento e attentato alla Costituzione.

Il complesso delle norme che disciplinano l'organizzazione, le strutture e le attribuzioni delle Camere costituisce il c.d. *Diritto Parlamentare*.

Fonti del diritto parlamentare sono:

— la *Costituzione*: in particolare gli artt. 55-70;
— le *leggi ordinarie*: leggi elettorali, leggi sulle incompatibilità e indennità dei parlamentari, etc.;
— i *regolamenti parlamentari*, che, ciascuno per ogni ramo del Parlamento, disciplinano l'organizzazione interna e lo svolgimento dei lavori di ciascuna Camera;
— le *consuetudini parlamentari*, ossia quei comportamenti costantemente e uniformemente seguiti con la convinzione della loro giuridica doverosità, riguardanti alcuni aspetti dell'attività delle assemblee legislative.

Si noti che in questa parte si fa riferimento alla sola descrizione strutturale degli organi di Costituzione. Le funzioni che ciascuno di essi svolge saranno esaminate separatamente nel capitolo III.

2. CENNI STORICI

Il Parlamento nacque in Inghilterra, nel XIV secolo in forma bicamerale, allo scopo di affiancare alla Camera dei Nobili e del Clero (di nomina regia) una Camera dei *Comuni*, elettiva e rappresentativa delle categorie professionali. Nel corso dei secoli l'importanza della Camera elettiva si è sempre più accresciuta rispetto a quella della Camera dei *Lords* che oggi conservano competenze marginali (di *riflessione* e *ripensamento*), di secondo piano rispetto alla prima.

Anche lo Statuto Albertino del 1848, accolse il principio bicamerale, sul modello delle coeve costituzioni belga e francese, soprattutto allo scopo di rafforzare la corona affiancando, alla Camera elettiva, un Senato di nomina regia.

Il sistema parlamentare inaugurato con lo Statuto restò anche se solo formalmente, invariato fino al 1939, anno in cui la *Camera dei Deputati* fu sostituita dalla *Camera dei fasci e delle corporazioni*, i cui componenti erano di fatto nominati dal Capo del Governo, e non più dal popolo.

Nel 1945, con la caduta del regime fascista, fu istituita una Consulta Nazionale, cui restò affiancato, ma solo nominalmente, il Senato.

La *Consulta Nazionale*, i cui membri erano nominati in parte dal Governo ed in parte dai Comitati di liberazione, aveva il compito di dare *pareri* al Governo sui problemi di carattere generale e sugli atti legislativi; tali pareri, tuttavia, erano per lo più *facoltativi*, tranne che in materia di bilanci, imposte e leggi elettorali.

La Consulta Nazionale fu sostituita, il 2 giugno 1946, dall'*Assemblea Costituente* la quale, oltre a redigere la Carta Costituzionale, provvide anche all'emanazione delle leggi ordinarie e degli altri atti di Governo durante il periodo in cui restò in carica.

Il 18 marzo 1948 venne eletto il primo Parlamento della Repubblica Italiana.

Il Parlamento, in particolare, fu posto al centro del sistema in quanto i compilatori della Carta Costituzionale scartarono l'adozione di una forma di *governo presidenziale* (memori della recente dittatura) né presero in considerazione la *forma direttoriale* (adatta alla piccola Svizzera confederale, non all'Italia unitaria), ma preferirono una *forma parlamentare mista* che prevedeva, accanto alla *centralità* del parlamento nel sistema, anche l'adozione di due istituti (*possibilità di scioglimento delle Camere da parte del P.d.R. e referendum*) non caratteristici del governo parlamentare (LUIGI BIANCHI D'ESPINOSA).

3. IL BICAMERALISMO ED I PROBLEMI AD ESSO CONNESSI

Ai sensi dell'art. 55 della Costituzione, «*il Parlamento si compone della Camera dei deputati e del Senato della Repubblica*»: dopo qualche tentennamento, infatti, prevalse in seno all'Assemblea Costituente l'orientamento favorevole all'adozione del sistema bicamerale, e per di più nella sua forma piena, che assegna poteri perfettamente identici alle due Camere ponendole su un piano di assoluta parità.

Ciò si ricava dagli artt. 70 («la funzione legislativa è esercitata collettivamente dalle due Camere») e 94 («il Governo deve avere la fiducia delle due Camere»).

Negli *Stati* istituzionalmente *divisi in classi*, l'adozione del sistema bicamerale aveva lo scopo di conferire rilievo politico autonomo agli interessi eterogenei dei diversi gruppi sociali contrapposti. Ciò spiega perché il Parlamento inglese nacque con una struttura bicamerale affinché accanto alla Camera dei Nobili e del Clero vi fosse quella rappresentativa delle corporazioni professionali.

Negli *Stati federali* il bicameralismo ha essenzialmente una funzione equilibratrice e di coordinamento tra i diversi Stati-membri: accanto ad una Camera nella quale essi sono rappresentati in proporzione alla popolazione, ve ne è un'altra nella quale essi si trovano in posizione di parità tra loro, perché hanno lo stesso numero di rappresentanti a prescindere dalla popolazione.

Oggigiorno molti ritengono non del tutto giustificata — negli Stati unitari — l'adozione del sistema bicamerale in quanto rallenta e duplica il procedimento di formazione delle leggi.

Secondo le giustificazioni tradizionali invece, tale scelta è sorretta da:

— ragioni di **opportunità**, perché l'esistenza di una seconda Camera (c.d. *camera di riflessione*) assicura una maggiore ponderazione delle scelte legislative e le correzioni di eventuali atecnie nei testi di legge;
— di **garanzia costituzionale**: l'esistenza di due Camere che si controllano reciprocamente mette al riparo da possibili degenerazioni assolutistiche della Camera unica e costituisce un ulteriore garanzia del rispetto dei principi costituzionali (c.d. *sistema dei pesi e contrappesi*).

Il bicameralismo, tuttavia, pone tre problemi di notevole importanza:

A) il problema della *differenziazione* fra le due Camere;

B) il problema dei *rapporti* fra esse;
C) il problema della *risoluzione degli eventuali conflitti.*

Esaminiamoli alla luce del nostro ordinamento:

A) Differenziazione fra le Camere

Nel nostro ordinamento è così attuata:

a) *elettorato attivo*: bastano 18 anni per essere elettori per la Camera dei Deputati, ma ne occorrono 25 per essere elettori per il Senato;
b) *elettorato passivo*: occorrono 25 anni per essere eleggibili alla Camera e 40 al Senato;
c) *numero dei componenti*: la *legge costituzionale* n. 2 del 9-2-1963 ha fissato in 630 il numero dei deputati e in 315 quello dei senatori elettivi;
d) *base regionale* del Senato: sancisce l'art. 57 Cost. che «*il Senato della Repubblica è eletto a base regionale*», e cioè in collegi di estensione regionale;
e) *presenza al Senato di membri non elettivi*: i senatori a vita di nomina presidenziale (scelti dal P.d.R. tra i cittadini insigni, in numero non superiore complessivamente a cinque: art. 59[2] Cost.) e quelli di diritto (*gli ex Presidenti della Repubblica*).

L'Assemblea Costituente giustificò l'adozione del sistema bicamerale con l'esigenza di attuare una più completa rappresentanza delle varie necessità da soddisfare nell'ambito della comunità nazionale. In particolare nelle intenzioni del Costituente il *Senato* doveva essere un organo di *rappresentanza regionale*, per consentire il raccordo tra Stato e Regioni ed evitare che queste ultime si rendessero portatrici di interessi politici in conflitto con quelli nazionali.

L'attuazione del disposto costituzionale da parte del legislatore ordinario è stata invece alquanto platonica: la «base regionale» per la elezione del Senato consiste solamente nel fatto che l'estensione delle circoscrizioni elettorali coincide con il territorio delle singole Regioni.

Sta di fatto che attualmente la composizione politica dei due rami del nostro Parlamento risulta essere pressocché identica. Per questa ragione sembra difficile — ferma la innegabile funzione di garanzia esplicata dalla doppia lettura delle leggi da parte di due assemblee ugualmente rappresentative del popolo — ravvisare il «fondamento razionale» (FERRARA) del bicameralismo italiano. Esso costituisce infatti un *unicum* nel panorama comparatistico poiché tutti gli Stati moderni che adottano il sistema bicamerale hanno da tempo provveduto a differenziare — sul piano della *composizione* o/e su quello delle *funzioni* — le due assemblee parlamentari.

B) Rapporti fra le due Camere

Nel nostro ordinamento tali rapporti sono di **assoluta parità**, per cui vige un *bicameralismo perfetto*, con la conseguenza che per dare vita ad una legge sono necessarie due approvazioni conformi dello stesso testo da parte di ciascuna Camera (c.d. *atto complesso uguale*).

In Gran Bretagna, invece, *si ha bicameralismo «imperfetto»* o «*zoppo*» in quanto ad una Camera *elettiva* (*Camera dei Comuni*), titolare della funzione legislativa, se ne affianca un'altra *ereditaria* (*Camera dei Lords*) con *semplici funzioni di riflessione e ripensamento.*

C) Risoluzione dei conflitti fra le due Camere

Il problema *non è stato risolto dalla nostra Costituzione*, per cui, nella pratica, si è costretti a ricorrere a particolari espedienti (es. riunione dei Presidenti delle due Camere o dei gruppi parlamentari di maggioranza al fine di trovare una intesa) nell'ipotesi in cui ci si trova di fronte a possibilità di conflitti.

Un conflitto fra le due Camere, comunque, se si presenta *insanabile*, può anche determinare lo scioglimento anticipato delle stesse da parte del Presidente della Repubblica (vedi *infra*).

4. LE CAMERE IN SEDUTA COMUNE

Di regola, le Camere svolgono la loro attività *separatamente*.

Esse deliberano *in seduta comune* (e cioè a Camere unite) e sotto l'egida del Presidente della Camera (art. 63) soltanto nei *casi tassativamente previsti dalla Costituzione* (art. 55[2]) e cioè per:

— *elezione e giuramento del Presidente della Repubblica* (artt. 83 e 91); all'elaborazione del P.d.R. partecipano anche delegati dalle regioni;
— *messa in stato d'accusa del Presidente della Repubblica per i reati di alto tradimento e di attentato alla Costituzione* (art. 90) (1);
— *elezione di un terzo dei componenti del C.S.M.* (art. 104[4]);
— *elezione di un terzo dei giudici della Corte Costituzionale* (art. 135[1]);
— *formazione della lista di persone tra le quali vengono sorteggiati i sedici giudici aggregati che devono integrare la Corte Costituzionale nei giudizi di accusa contro il P.d.R.* (art. 135 u. co.).

In definitiva si tratta unicamente di compiti *elettorali* ed *accusatori*: tali funzioni sono state assegnate alle Camere riunite per *ragioni di opportunità pratica* (le funzioni elettorali non si prestano ad un esercizio disgiunto, essendo già difficile raggiungere le maggioranze qualificate prescritte a Camere riunite) o *politiche* (sarebbe gravissimo se lo stato d'accusa fosse deliberato da una Camera in contrasto con l'altra).

Le elezioni dei *componenti* di alcuni *organismi internazionali* infatti sono invece effettuate separatamente dalle due Camere, ciascuna delle quali vota per la metà dei seggi da assegnare (18 membri dell'assemblea consultiva del Consiglio d'Europa e 18 membri dell'Unione Europea Occidentale).

È problema controverso se le Camere in seduta comune costituiscano un terzo e diverso organo distinto dalle Camere singolarmente considerate, ovvero siano soltanto un diverso modo di riunione delle Camere stesse.

Propende per questa seconda teoria BALLADORE-PALLIERI, secondo il quale quando le due Camere si riuniscono in seduta comune *non si ha un nuovo organo*. Le due Camere, cioè, non perdono mai la propria individualità: si ha solo una unica dichiarazione di volontà che viene imputata ad entrambe.

Attualmente, tuttavia, sembra prevalere la tesi (MORTATI, PALADIN, VIRGA, CUOMO) che considera le Camere in seduta comune un *organo collegiale autonomo* con una propria competenza distinta da quella delle singole Camere.

Ciò, peraltro, non significa che il bicameralismo si sia trasformato in «*tricameralismo*», in quanto la funzione essenziale del Parlamento, e cioè quella legislativa, viene esercitata dalle due Camere separatamente (VIRGA).

Si discute inoltre se il Parlamento in seduta comune sia o meno un *collegio perfetto*, cioè abilitato, se del caso, a discutere prima di votare.

La dottrina prevalente (MANZELLA, PALADIN) è favorevole alla tesi del collegio perfetto, ma la prassi è orientata in senso contrario.

Va infine ricordato che, ai sensi dell'art. 63 Cost., quando il Parlamento si riunisce in seduta comune, è presieduto dal *Presidente della Camera dei Deputati* ed utilizza il regolamento e le strutture di questa.

5. ELEZIONE DELLA CAMERA DEI DEPUTATI (L. 277/1993)

Dei 630 deputati della Repubblica, 475 vengono eletti in collegi uninominali mentre i restanti 155 vengono scelti all'interno delle liste presentate dai diversi partiti politici.

L'assegnazione di una specifica quota di seggi con il metodo proporzionale è stata voluta al fine di mitigare gli eccessi del sistema maggioritario puro.

A) Suddivisione territoriale

Per le elezioni alla Camera dei deputati il territorio nazionale è suddiviso in 27 circoscrizioni elettorali che in linea di massima coincidono con i confini delle regioni: soltanto la Sicilia, il Piemonte,

(1) Si noti che a seguito dell'entrata in vigore della L. Cost. n. 1/99 i Ministri non sono più giudicati dalla Corte Costituzionale

il Veneto, la Lombardia, la Campania ed il Lazio hanno più circoscrizioni elettorali. Ogni circoscrizione è a sua volta suddivisa in tanti collegi uninominali quanti sono i deputati ad essa assegnati: per la quota proporzionale la ripartizione avviene, invece, avendo come riferimento l'intera circoscrizione.

B) Schede e votazioni

Ogni elettore riceve due schede sulle quali deve esprimere due diversi voti. Sulla prima deve scegliere il candidato, fra quelli presentatisi nel suo collegio (uninominale), che intende sostenere; sulla seconda deve indicare il partito prescelto ai fini dell'assegnazione dei seggi con il sistema proporzionale, senza esprimere preferenze fra i candidati (c.d. *lista bloccata*).

Il numero dei candidati varia da un minimo di 1 ad un massimo di 4, collocati in lista nel rispetto dell'alternanza tra i sessi.

C) Ripartizione dei seggi con la formula uninominale

La ripartizione dei 475 seggi da attribuire con il sistema uninominale è molto semplice: in ogni collegio **vince il candidato che ha ottenuto il maggior numero di voti.** Ogni candidato può presentarsi in un solo collegio uninominale, ma può cumulare tale candidatura con quella proposta nelle liste per la ripartizione proporzionale, fino ad un massimo di tre diverse circoscrizioni.

Se nel corso della legislatura il deputato eletto in un collegio uninominale muore o si dimette, si dovrà procedere ad una nuova elezione nel collegio di appartenenza: si tratta delle c.d. *elezioni suppletive*, ben note nella tradizione elettorale anglosassone e che spesso rappresentano un importante indicatore del consenso di cui gode il governo.

D) Ripartizione dei seggi con la formula proporzionale

L'assegnazione dei restanti 155 seggi richiede un procedimento alquanto complesso, che rispecchia in vari punti il sistema precedentemente in vigore. Esso si articola nelle seguenti fasi:

— in ogni circoscrizione viene calcolata la cifra elettorale circoscrizionale, ovvero la somma dei voti validi ottenuti da ciascuna lista;
— da tale somma va detratto un numero di voti pari a quelli ottenuti da ciascun candidato di quella medesima lista eletto in collegi uninominali. Più esattamente bisogna sottrarre un numero di voti pari a quello del secondo piazzato più uno (cd. *scorporo*). La cifra da sottrarre non può tuttavia essere inferiore al 25% dei voti validamente espressi in quel collegio. Se il candidato eletto ha ottenuto meno del 25% dei voti, alla lista sarà sottratto un numero di voti pari a quelli ottenuti dall'eletto.

Il meccanismo risulterà più semplice con un esempio. Immaginiamo che la lista A abbia ottenuto, a livello circoscrizionale, 10.000 voti. La stessa lista ha eletto un proprio candidato in un collegio uninominale, da cui sono scaturiti i seguenti risultati:

candidato lista A = 1200 voti
candidato lista B = 0450 voti
candidato lista C = 0350 voti

In teoria, dalla cifra elettorale circoscrizionale della lista A sarebbero da sottrarre un numero di voti pari a quelli del secondo piazzato più uno (ovvero 450 + 1 = 451). Ma quest'ultima cifra non rappresenta il 25% dei voti validamente espressi (cioè 1200 + 450 + 350 = 2000) per cui alla lista A dovrà essere sottratto 1/4 di 2000 ovvero 500 voti.

Se il candidato eletto nel collegio uninominale è sostenuto da più liste la detrazione deve avvenire proporzionalmente per ciascuna lista, tenendo conto dei voti ottenuti nell'ambito del collegio uninominale.

Riprendendo l'esempio precedente è possibile ipotizzare che il candidato vincitore fosse sostenuto da tre liste che abbiano ottenuto i seguenti voti nel collegio (i voti ricevuti dalle liste non coincidono necessariamente con quelli del candidato eletto poiché, come si ricorderà, si vota su due diverse schede per cui è possibile esprimere anche indicazioni diverse):

lista A1 = 800 voti
lista A2 = 700 voti
lista A3 = 500 voti

Tale cifra dev'essere moltiplicata per il numero dei voti da detrarre (500) e divisa per il numero complessivo dei voti ottenuti dalle tre liste nel loro insieme (2000): il risultato rappresenterà il numero di voti da detrarre a ciascuna lista.

lista A1 = 800 x 500 : 2000 = 200
lista A2 = 700 x 500 : 2000 = 175
lista A3 = 500 x 500 : 2000 = 125

Per quanto riguarda questo complicato meccanismo di deduzione dei voti, meglio noto come **scorporo**, sono da fare due precisazioni:

— *le finalità dello scorporo.* Esso mira ad evitare che la stessa lista che ha già eletto propri candidati a livello uninominale possa poi indirettamente giovarsi di quei suffragi per vedersi attribuire un numero elevato di seggi con il sistema proporzionale. Poiché quest'ultimo è mirato ad assicurare una certa rappresentanza parlamentare anche alle forze politiche minoritarie, che difficilmente possono conquistare successi nei collegi uninominali, è necessario penalizzare, in questa seconda fase, le liste più forti;
— *perché lo scorporo dei voti del secondo candidato e non dell'eletto.* Questa norma è intesa ad evitare che i candidati che concorrono per la ripartizione proporzionale dei seggi possano contrastare i candidati della loro stessa lista nei collegi uninominali. Poiché il meccanismo dello scorporo opera nel senso di penalizzare quelle liste che nei collegi uninominali hanno conseguito più voti, potrebbe crearsi una competizione tra candidati della stessa lista. Il problema è parzialmente superato facendo riferimento ai voti ottenuti da un candidato di una lista avversaria.

— i voti riportati dalle singole liste a livello circoscrizionale vengono sommati a livello nazionale, ottenendo in tal modo la cifra elettorale nazionale. In questa fase opera la c.d. *clausola di sbarramento* (presente, ad esempio, nel sistema elettorale tedesco) che estromette dalla ripartizione dei seggi quelle liste che, a livello nazionale, hanno ottenuto *meno del 4%* dei voti validamente espressi;
— vengono sommati i voti di tutte le liste non escluse dalla clausola di sbarramento: questa somma è poi suddivisa per il numero dei seggi da assegnare per ottenere il quoziente elettorale nazionale. I voti ottenuti da ciascuna lista saranno poi divisi per quest'ultima cifra ottenendo così il numero dei seggi alla lista stessa spettanti.

Se ad esempio tre liste hanno ottenuto complessivamente 31.000 voti (lista A = 16.650, lista B = 8.500, lista C = 5.850), bisogna dividere questa cifra per il numero dei seggi da assegnare (155) ottenendo il quoziente elettorale nazionale

31.000 : 155 = 200 = quoziente elettorale nazionale

Si procede poi ad assegnare i seggi a ciascuna lista dividendo i voti che quest'ultima ha riportato per il quoziente elettorale nazionale.

lista A = 16.650 : 200 = 83 seggi assegnati resto voti 50
lista B = 08.500 : 200 = 42 seggi assegnati resto voti 100
lista C = 05.850 : 200 = 29 seggi assegnati resto voti 50

Il restante seggio non ancora assegnato sarà attribuito alla lista che ha ottenuto il maggior resto (nel nostro esempio la lista B).

— dopo la ripartizione i seggi vengono distribuiti nelle varie circoscrizioni con una operazione simile a quella già esaminata a livello nazionale.

6. ELEZIONE DEL SENATO DELLA REPUBBLICA (L. 276/1993)

La legge elettorale per il Senato era stata in pratica già *scritta* dal referendum del 18 aprile 1993. La legge 4 agosto 1993, n. 276 (confluita nel T.U. 533/1993) ha rispecchiato fedelmente i risultati della consultazione popolare dando tuttavia organicità alla materia ed inserendovi alcune novità.

Anche i 315 senatori sono quindi eletti per il 75% circa (232 seggi) in collegi uninominali e per il restante 25% (83 seggi) con metodo proporzionale.

A) Suddivisione territoriale

Le circoscrizioni per l'elezione del Senato coincidono, ex art. 57 Cost., con i confini delle Regioni: queste ultime sono suddivise in tanti collegi uninominali quanti sono i senatori da eleggere con questa formula (fa eccezione la Valle d'Aosta che elegge un solo senatore).

B) Schede e votazioni

A differenza di quanto avviene per l'elezione della Camera, al Senato è consegnata all'elettore una sola scheda sulla quale è presente il contrassegno (non più di uno) di affiliazione politica del candidato ed il suo nome per esteso: l'elettore può scegliere soltanto un nominativo tra quelli presenti, votando in questo modo sia per l'assegnazione del seggio nel proprio collegio uninominale che per la ripartizione della quota proporzionale.

È possibile presentare candidature indipendenti, non legate ad alcun partito politico: tuttavia, per poter concorrere all'assegnazione dei seggi con la formula proporzionale, è necessario il collegamento di almeno tre candidati nella stessa circoscrizione.

C) Ripartizione dei seggi con la formula uninominale

Così come per la Camera, anche per il Senato 232 candidati sono eletti in collegi uninominali, con un sistema che nei paesi anglosassoni è noto come *first past the post* (espressione ripresa dall'ippica con cui si indica il cavallo che per primo ha superato il palo, che segna l'arrivo): in pratica **vince chi ha ottenuto anche soltanto un voto in più del secondo**.

Anche in questo caso il decesso o le dimissioni di un senatore portano ad *elezioni suppletive* nel suo collegio.

D) Ripartizione dei seggi con la formula proporzionale

La ripartizione dei seggi con il metodo proporzionale avviene *a livello regionale* e non nazionale.

La procedura è identica a quella già adottata con la precedente legge elettorale, con la rilevante novità dello *scorporo*. Dalla somma dei voti ottenuti dai diversi candidati di ciascuna lista vanno, infatti, sottratti

quelli di coloro che sono risultati eletti nel proprio collegio. Si tratta in questo caso di uno scorporo *totale* e non parziale (come abbiamo visto, invece, per la Camera, dove vengono sottratti i voti del secondo piazzato, o alternativamente il 25% dei voti). Non esiste alcun tipo di sbarramento, anche se la base regionale e il numero ridotto di seggi da assegnare tagliano fuori di fatto le forze politiche minori.

La procedura prevede le seguenti fasi:

— vengono sommati (a livello regionale) i voti ottenuti da tutti i candidati di un partito in ogni collegio uninominale (sia i candidati eletti che quelli non eletti);
— sono scorporati i voti dei candidati eletti nei propri collegi uninominali. In questo caso, ripetiamo, si tratta di uno scorporo totale e non parziale;
— i voti ottenuti da ciascun partito vengono divisi per 1, 2, 3,... etc. fino a raggiungere il numero dei seggi da assegnare con la formula proporzionale;
— i seggi sono attribuiti a quei partiti che ottengono i quozienti più alti;
— all'interno del partito risulteranno eletti quei candidati dei collegi uninominali che sono stati battuti, ma che in percentuale hanno ottenuto il maggior numero di voti.

Il procedimento risulterà più semplice con un esempio. Immaginiamo che vi siano due liste partecipanti e che, dopo lo scorporo, abbiano ottenuti i seguenti risultati a livello regionale.

Lista A: 600 voti
Lista B: 450 voti

I seggi da assegnare sono tre per cui i voti di ciascuna lista vengono così suddivisi:

Lista A	Lista B
600 : 1 = 600	450 : 1 = 450
600 : 2 = 300	450 : 2 = 225
600 : 3 = 200	450 : 3 = 150

I tre seggi saranno assegnati alla lista che, in ordine decrescente, ha ottenuto i quozienti più elevati. Nel nostro esempio la lista A (primo quoziente 600) la lista B (primo quoziente 450) e ancora la lista A (secondo quoziente 300).
La prima lista ottiene 2 seggi, la seconda soltanto 1.
Per quanto riguarda l'assegnazione dei seggi ai candidati passiamo ad un'ulteriore esemplificazione.
La lista B, come abbiamo visto, ha ottenuto un solo seggio, per il quale sono in lizza due candidati non eletti nei rispettivi collegi uninominali. Pur essendo stati entrambi bocciati hanno ottenuto una percentuale di voti diversa.

candidato X della lista B = 30% dei voti nel suo collegio
candidato Y della lista B = 25% dei voti nel suo collegio

Il seggio spettante alla lista B sarà assegnato al candidato non eletto X di quella lista.

Si ricordi, infine, che di recente, è stata respinta una proposta di legge che consentiva a circa 10 milioni di italiani residenti all'estero di votare ed eleggere un certo numero di deputati e senatori nello Stato in cui risiedono.

Sezione Quarta
Organizzazione delle Camere

Premessa

L'insieme delle norme sull'organizzazione o il funzionamento delle Camere assumono autonomia scientifica in quanto formano il c.d. *diritto parlamentare* che costituisce una branca importantissima del diritto Costituzionale permeata da influenze di carattere politico e integrata, nelle sue disposizioni scritte, dagli usi e dalla prassi (PERGOLESI) e dai regolamenti parlamentari.

1. I REGOLAMENTI PARLAMENTARI (C.D. «INTERNA CORPORIS»)

Il funzionamento delle Camere, il comportamento dei membri e degli estranei che vengono in contatto con esse sono disciplinati dai *regolamenti Parlamentari* (BARILE).

I regolamenti sono previsti dalla Costituzione che nell'articolo 64, stabilisce che «**Ciascuna Camera** adotta il proprio regolamento a maggioranza assoluta dei suoi componenti». Infatti ciascuna Assemblea, in piena autonomia dall'altra, adotta il proprio regolamento e lo modifica senza ricorrere allo strumento legislativo: la legge, infatti, dovendo far «*navetta*» fra le due assemblee creerebbe ingiustificate interferenze tra i due rami del parlamento.

Le norme regolamentari trovano nella Costituzione il loro fondamento. I regolamenti sono *atti di supremazia speciale* con cui le Camere, in quanto organi costituzionali, provvedono autonomamente alla loro organizzazione. Essi contengono le norme sull'organizzazione interna e sul funzionamento delle assemblee parlamentari. Alcune hanno *natura esecutiva*, in quanto applicano direttamente principi sanciti dalla Costituzione; altre sono espressione del *potere di autonomia* proprio di ciascuna Camera in quanto organo sovrano.

Come rileva BARILE, la Costituzione ha introdotto una *riserva di regolamento parlamentare* (art. 64 Cost.) che impedisce al legislatore ordinario di dettare norme nella stessa materia. L'Autore ritiene che soltanto con legge costituzionale sarebbe possibile imporre modificazioni ai regolamenti parlamentari.

La Corte Costituzionale, con la sentenza n. 154 del 1985, ha affermato l'**insindacabilità** dei regolamenti parlamentari, in quanto espressione della piena autonomia delle Camere.

2. UFFICIO DI PRESIDENZA

Esso è composto da:

A) Presidente dell'Assemblea (Camera o Senato)

È l'organo che presiede ciascuna Camera. Per la sua elezione occorre (almeno nei primi scrutini) una maggioranza qualificata. È titolare di:

— **attribuzioni costituzionali proprie** in quanto:
  — ha il potere di convocazione straordinaria della Assemblea (art. 62);
  — deve esser necessariamente consultato dal Presidente della Repubblica se questi è deciso a sciogliere le Camere (art. 88 Cost.);

— **attribuzioni derivanti dall'ufficio** in quanto:
  — è l'oratore ufficiale e dirige i dibattiti, le sedute, fissa il calendario di lavori dell'Assemblea e proclama i risultati delle votazioni; per far rispettare il calendario dei lavori ha il potere di ripartire («contingentare») il tempo a disposizione dei parlamentari per la discussione;

  — nomina i componenti della giunta per il regolamento e per le elezioni;
  — ha altri poteri disciplinari e di polizia (applica le sanzioni meno gravi ai deputati che hanno un comportamento riprovevole in aula).

Le attribuzioni conferitegli pongono il Presidente di assemblea *al di sopra dei gruppi parlamentari*, in veste di arbitro e garante dell'applicazione imparziale delle norme regolamentari e consuetudinarie (PERGOLESI).

Per CUOMO il Presidente d'Assemblea costituisce un:

— *organo imparziale delle Camere*, ponendosi come il moderatore di contrapposti interessi espressi dai gruppi parlamentari;
— *tutore dell'autonomia delle Camere*, in quanto cura i rapporti tra Camera e Governo indipendentemente dai vincoli che lo legano al suo partito.

B) Vice Presidenti

Fissati in numero di quattro sostituiscono il Presidente in caso di sua assenza e lo coadiuvano nell'esercizio delle sue funzioni.

C) Questori e Segretari

I *questori* (fissati in numero di 3) sovraintendono al cerimoniale ed ai servizi interni e svolgono attività di polizia.

I *segretari* (in numero di 8), invece, assicurano il buon funzionamento dell'assemblea e svolgono attività di compilazione e lettura dei processi verbali delle adunanze, accertano l'esistenza del numero legale, procedono agli appelli, etc.

3. FUNZIONAMENTO DELLE CAMERE

A) Convocazione delle Camere

La Costituzione prevede i seguenti tipi di *convocazione*:

— **iniziale**: la prima riunione ha luogo entro 20 giorni dalle elezioni (art. 61), nel giorno fissato dal Presidente della Repubblica nel decreto di convocazione dei comizi elettorali;
— **di diritto**: le Camere si riuniscono il primo giorno non festivo di febbraio e di ottobre (art. 62[1]);
— **straordinaria**: per iniziativa del Presidente di ciascuna Camera, del Presidente della Repubblica, o di un terzo dei componenti dell'assemblea. Quando si riunisce in via straordinaria una Camera è convocata di diritto anche l'altra (art. 62[2-3]).

Queste regole sono, al giorno d'oggi, del tutto superate in quanto, per la grande mole di lavoro legislativo, vige ormai il principio di *permanenza delle assemblee*.

Di fatto, cioè, le assemblee siedono ininterrottamenrte per tutta la legislatura, salvo brevi interruzioni che esse stesse deliberano nei periodi festivi e feriali.

B) Periodi di lavoro

La legislatura è il periodo di vita di ciascuna Camera: essa ha inizio con la prima convocazione e termina alla scadenza naturale (dopo 5 anni) o anticipatamente, in caso di scioglimento anticipato ai sensi dell'art. 88 Cost.

Come rileva BARILE, la voce «legislatura» sottolinea il carattere di collegi non permanenti delle due Camere.

Con il termine **sessione** si indica il *periodo continuativo di lavoro delle Camere* compreso tra una convocazione e l'*aggiornamento dei lavori* (cioè la temporanea sospensione degli stessi con rinvio ad altra data).

Recentemente è stata introdotta la c.d. *sessione di bilancio*, ossia il periodo di lavoro compreso tra il primo ottobre e il 31 dicembre di ogni anno, dedicato prevalentemente all'esame e all'approvazione del bilancio e dei documenti finanziari [illegible]

Sedute sono invece denominate le singole riunioni delle Camere: ogni sessione consiste di più sedute.

La fine della legislatura comporta l'automatica decadenza di tutto il lavoro parlamentare rimasto incompiuto, e quindi anche dei disegni di legge approvati da una sola Camera: opportunamente peraltro i regolamenti parlamentari del 1971 hanno previsto procedure abbreviate per la riapprovazione di tali progetti nella nuova legislatura.

La durata delle camere non può essere prorogata, salvo che ricorrano due condizioni: lo *stato di guerra* ed un'apposita *legge di proroga* (art. 60[2]).

Istituto diverso dalla proroga è la *prorogatio* prevista dall'art. 61[2]: «Finché non siano riunite le nuove Camere sono prorogati i poteri delle precedenti».

Ciò è dovuto alla necessità di assicurare la continuità dell'organo parlamentare: Camere vecchie e Camere nuove devono avvicendarsi senza soluzioni di continuità.

Questo significa, secondo BARILE, che lo scioglimento del Parlamento non opera immediatamente ma ha *efficacia differita* al momento dell'effettiva entrata in funzione delle nuove Camere.

I poteri delle Camere prorogate sono limitati all'esercizio della *ordinaria amministrazione* (ai sensi dell'art. 85 infatti, esse non possono eleggere il Presidente della Repubblica).

C) Ordine del giorno

L'ordine del giorno contiene l'elenco delle questioni da trattare in una data seduta, nell'ordine in cui si è deciso che vengano trattate: ciò rappresenta un'importantissima ed insopprimibile *garanzia* per i parlamentari, che in tal modo sono preventivamente a conoscenza degli argomenti da discutere e votare.

Il sistema dell'o.d.g. mette al riparo da possibili discussioni e votazioni «a sorpresa»; salvo eccezioni, che però devono essere decise con maggioranze qualificate.

L'o.d.g. viene concordato per un periodo massimo di due mesi dai presidenti dei vari gruppi parlamentari, sotto la direzione del Presidente di ciascuna Camera.

4. DELIBERAZIONI, VOTAZIONI E PUBBLICITÀ DELLE SEDUTE

A) Generalità

Per la *validità delle sedute* è richiesto un certo numero (*quorum*) di presenze in assemblea, costituito dalla metà più uno dei parlamentari; per la *validità delle deliberazioni* è richiesto — di regola — un *quorum* di voti pari alla metà più uno dei presenti (maggioranza semplice).

In alcuni casi però sono previste delle *maggioranze speciali o «qualificate»* (ad es. la maggioranza assoluta dei componenti, o anche dei due terzi, per l'approvazione delle leggi costituzionali: art. 138) (art. 64).

Per evitare la paralisi dei lavori parlamentari e l'invalidazione *ex post* di deliberazioni adottate senza la presenza del *quorum* prescritto, vige la regola della *«presunzione del numero legale»*. Si presume, cioè, che in aula vi sia sempre il numero minimo di presenti (cioè il 50% più 1 dei parlamentari): ma in qualsiasi momento i parlamentari presenti (è però necessario un *quorum* determinato) possono chiedere al Presidente dell'Assemblea la *«verifica del numero legale»* e questi è *obbligato* ad eseguirla (atto dovuto). Se il presidente accerta la mancanza del numero legale, deve interrompere la seduta.

Secondo il regolamento della Camera dei deputati, il *quorum* dei votanti, ai fini della validità della deliberazione, si calcola escludendo gli *astenuti*. Si tratta di una regola che favorisce la maggioranza, perché abbassa il *quorum* e svaluta il significato politico dell'astensione. Essa inoltre appare in contrasto con l'art. 64 Cost., che richiede la «maggioranza dei presenti» per la validità della deliberazione, ma la Corte Costituzionale l'ha ritenuta costituzionalmente legittima (sent. 78/1984).

Al Senato, invece, gli astenuti sono computati tra i presenti, pertanto coloro che intendono astenersi si allontanano dall'aula, se non vogliono che la loro astensione valga come voto contrario.

Schede *bianche* e *nulle* concorrono sempre a formare il *quorum* dei presenti in entrambe le Camere.

B) Votazioni

La *votazione* è lo strumento con il quale le Assemblee parlamentari manifestano concretamente la loro volontà in tutti i campi nei quali sono chiamate dalla Costituzione ad operare. Le Camere sono per definizione *organi deliberanti*: per tale motivo la Costituzione e i regolamenti devono disciplinare minuziosamente le modalità di votazione e fissare i principi fondamentali che ne stanno alla base.

Per quanto riguarda i tipi di votazione, la Costituzione ha lasciato la massima libertà alle Camere e ai loro Regolamenti interni, imponendo l'appello nominale solo per le votazioni di fiducia o sfiducia (art. 94[2]).

La distinzione fondamentale è quella tra *voti segreti* e *voti palesi*: i primi garantiscono l'assoluta segretezza della decisione dei singoli parlamentari, i secondi invece permettono di conoscere l'orientamento di ciascuno in merito alla proposta in discussione. Si ricordi, comunque, che ad eccezione di alcune ipotesi particolari (es: votazioni riguardanti singole persone) la tendenza attuale privilegia la *votazione palese*.

Un'altra distinzione prospettabile è quella tra *voti determinati* e *voti indeterminati*: i primi sono quelli in cui è registrato analiticamente il numero o il nome dei votanti; e che implicano pertanto la verifica automatica del numero legale; i secondi invece consentono solo un orientamento di massima, senza un accertamento individuale dei votanti (es.: il voto per alzata di mano) (LONGI).

Per quanto riguarda le *modalità di voto*, quello palese può aver luogo *per alzata di mano*, per *appello nominale* o per *divisione dell'aula*. Lo scrutinio segreto si svolge col *sistema delle palline* bianche e nere o tramite *schede*. Oggi è comunque in applicazione un sofisticato sistema di votazione elettronico.

C) Voto palese e voto segreto

Le modifiche apportate nel 1988 ai regolamenti delle Camere e del Senato, hanno fissato nuovi criteri tra i due tipi di votazione.

All'origine il *voto segreto* aveva lo scopo di garantire il rispetto del principio costituzionale, sancito dallo Statuto Albertino, del divieto di mandato imperativo e conseguente assoluta libertà del parlamentare.

Oggi che il deputato viene eletto nell'ambito di una lista di partito, l'esigenza di garantirgli la possibilità di esprimersi liberamente anche contro le direttive del gruppo cui appartiene va contemperata con quella — ugualmente meritevole di tutela — che esso si assuma la responsabilità del proprio operato di fronte al partito di appartenenza e di fronte agli elettori.

Il voto segreto è limitato ad una serie di materie, la cui estensione, peraltro, è interpretata con ampia discrezionalità dal Presidente dell'assemblea. Alla Camera è stato abolito l'obbligo dello scrutinio segreto per la *votazioni finale delle leggi*, retaggio dello Statuto Albertino e sancito dal regolamento del 1971.

Tale obbligo è stato, viceversa, conservato per tutte le *votazioni riguardanti giudizi sulle persone*: nel rispetto di un principio pacifico mai codificato.

La *regola generale* dunque è, oggi, dello *scrutinio palese*.

La votazione *a scrutinio segreto* — per le due assemblee — è tuttavia ammessa, *su richiesta* di un certo numero di parlamentari, quando riguarda:

— i principi e i diritti di libertà di cui agli artt. 6, 13-22, 24-27 Cost. (Tutela delle minoranze linguistiche, libertà di domicilio, di riunione, associazione, etc.);
— i diritti della famiglia di cui agli artt. 29, 30 e 31 Cost.;
— il diritto alla salute sancito dall'art. 32 Cost.;
— modifiche ai regolamenti parlamentari;

— leggi ordinarie relative agli organi costituzionali dello Stato e agli organi delle Regioni;
— leggi elettorali;
— istituzione di commissioni d'inchiesta.

Si noti che le ultime tre previsioni sono contenute solo nel Regolamento della Camera dei deputati.

In nessun caso si può ricorrere allo scrutinio segreto per le votazioni concernenti la *legge finanziaria* e la *legge di bilancio*, e per le deliberazioni che comunque abbiano conseguenze finanziarie.

D) Pubblicità

La *pubblicità delle sedute* e la *pubblicazione degli atti parlamentari* costituiscono una garanzia per l'opinione pubblica che viene tempestivamente informata di quanto avviene in Parlamento. Le Camere, comunque, eccezionalmente, possono riunirsi in seduta segreta (art. 64).

Il *principio di pubblicità* vale anche per i *lavori delle Commissioni* la cui attività può essere seguita in separati locali con impianti audiovisivi.

I *resoconti parlamentari* sono pubblicati successivamente in modo anonimo, e ciò secondo BARILE, è inconcepibile perché, in tal modo, i due rami del Parlamento non si assumono la responsabilità dell'esattezza dei resoconti stessi.

5. ORGANIZZAZIONE INTERNA DELLE CAMERE

Vengono in rilievo, a questo riguardo:

A) L'Assemblea Plenaria

Costituita da *tutti* i membri di ciascuna Camera riuniti in Assemblea.

B) Le Commissioni Parlamentari (art. 72)

Le *Commissioni parlamentari* sono organi necessari di ciascuna Camera, previsti dall'art. 72 Cost. e formate in modo da rispecchiare la proporzione tra i vari gruppi presenti nell'Assemblea plenaria. Esse hanno il compito di esaminare preventivamente ogni disegno di legge presentato alle Camere, per farne relazione all'assemblea che deve approvarli (art. 72 co. 1: c.d. **commissioni in sede referente**); possono, nei casi previsti dai regolamenti, procedere direttamente all'approvazione dei disegni di legge in luogo dell'assemblea (art. 72 co. 3: c.d. **commissioni in sede deliberante**).

Si distingue tra:

— **commissioni speciali**, se costituite *occasionalmente* da ciascuna Camera solo per risolvere particolari questioni (sono dette anche *straordinarie*);
— **commissioni permanenti**, se costituite in base ai regolamenti di ciascuna Camera che determina, per ogni Commissione, la competenza per materia. Nel nostro sistema ne esistono 13 sia per il Senato che per la Camera.

Oggi la loro attività non è più limitata alla partecipazione al procedimento legislativo: i nuovi regolamenti parlamentari, infatti, attribuiscono loro, esplicitamente, anche funzioni di indirizzo, controllo e informazione. Tranne casi speciali nessun deputato può essere assegnato a più di una commissione permanente.

Le materie in cui sono competenti le commissioni sono quelle tipiche dell'intervento pubblico in gran parte similari alle attribuzioni dei Ministeri: Affari costituzionali della Presidenza del Consiglio e Interni; Giustizia; Affari esteri e comunitari; Difesa, Bilancio; Tesoro e programmazione; Finanze; Cultura; Scienza e istruzione; Ambiente, territorio e lavori pubblici; Trasporti; Poste e telecomunicazioni; Attività produttive; Commercio; Lavoro pubblico e privato; Affari sociali.

A parte vanno considerate, infine, le **Commissioni bicamerali miste** (formate da senatori e deputati) sia straordinarie che permanenti. Esse si sono rese necessarie sia per superare il rigido dualismo fra le due assemblee, sia per consentire l'univoco esercizio del potere parlamentare in delicate materie (questioni regionali, controllo sui servizi radiotelevisivi, etc.).

C) Le Giunte

Anch'esse risultano formate in proporzione alla forza dei vari gruppi parlamentari.

Attualmente esistono i seguenti tipi di giunta:

— *giunta per le elezioni*: accerta la regolarità dei risultati elettorali, (nessun altro organo costituzionale può compiere tale operazione);
— *giunta per il regolamento*: promuove ed elabora aggiornamenti e modifiche dei regolamenti di ciascuna Camera;
— *giunta per le autorizzazioni a procedere*: è composta da 21 deputati scelti dal Presidente della Camera. Al Senato tale funzione è svolta dalla giunta per le elezioni e le immunità composta da 23 senatori;
— *giunta per le Comunità europee*: è composta da 24 Senatori e fornisce pareri sull'applicazione dei trattati comunitari.

D) I gruppi parlamentari

L'esistenza dei *gruppi parlamentari* è riconosciuta espressamente dalla Costituzione che esige, per la formazione delle Commissioni legislative e di quelle d'inchiesta, il rispetto della proporzione esistente tra i vari gruppi parlamentari (artt. 72[3] e 82[2]).

I parlamentari sono obbligati ad appartenere ad un gruppo: entro due giorni della prima seduta successiva alla loro elezione essi devono dichiarare a quale gruppo intendono iscriversi (la loro elezione in una lista di partito non comporta l'automatica iscrizione nel corrispondente gruppo parlamentare). Se non manifestano la volontà di far parte di nessun gruppo, vengono iscritti d'ufficio nel c.d. *gruppo misto*.

Per formare un gruppo occorre un *numero minimo* di parlamentari: 20 deputati e 10 senatori. I Presidenti possono autorizzare la costituzione di gruppi più piccoli, a condizione che essi siano sufficientemente rappresentativi.

Per BARILE i «gruppi parlamentari» sono organi di collegamento tra lo Stato-Comunità e lo Stato-persona. Essi, infatti, rappresentano la proiezione dei partiti politici (istituto tipico dello Stato-comunità) in seno al parlamento (principale istituto dello Stato-persona).

Per MORTATI essi sono caratterizzati da due compiti ben definiti: da un lato fanno capo ai *partiti politici* di cui sono espressione; dall'altro sono *organi interni delle Camere* con funzioni preparatorie di decisioni spettanti in proprio alle Camere stesse.

I gruppi svolgono un ruolo fondamentale per l'esercizio delle funzioni del Parlamento; semplificano il dibattito politico, in quanto le decisioni più importanti vengono prese a seguito delle dichiarazioni di voto espresse dai rappresentanti dei gruppi parlamentari; sono determinanti per la formazione degli organi parlamentari, perché i membri delle Commissioni permanenti sono designati dai gruppi parlamentari in base alla propria consistenza numerica e i presidenti dei gruppi formano la *conferenza dei capigruppo*, competente a definire il programma dei lavori dell'assemblea.

E) Rimedi contro l'ostruzionismo parlamentare (filibustering)

La volontà del Parlamento deve essere quanto più possibile la *sintesi* delle opinioni contrastanti che emergono dal dibattito assembleare: per questa ragione deve essere garantita la più ampia libertà di espressione ai singoli parlamentari, anche a quelli delle minoranze.

Fino all'emanazione degli ultimi regolamenti parlamentari è accaduto che alcuni parlamentari, al fine soprattutto di far decadere alcuni decreti legge alla vigilia della loro scadenza hanno abusato di tali prerogative.

È il caso del c.d. *ostruzionismo parlamentare*, che BARILE definisce «atto emulativo», col quale le minoranze, abusando dei poteri consentiti dal regolamento, paralizzano i lavori delle assemblee per impedire l'adozione di provvedimenti adottati dalla maggioranza e da esse non condivisi.

L'ostruzionismo peraltro non deve essere condannato a priori: esso adempie un'utile e importante funzione politica quando mira ad impedire l'approvazione di misure che contrastano con la Costituzione o che incontrano nel Paese un dissenso diffuso.

Per evitare gli eccessi verificatisi in passato, tuttavia, i Regolamenti parlamentari hanno introdotto opportuni congegni anti-ostruzionismo: sono stati ridotti i tempi della discussione sui singoli articoli; è stato attribuito al Presidente della Camera il potere di dichiarare assorbiti interi gruppi di emendamenti palesemente defatigatori; è stata abolita la possibilità di intervenire senza limiti di tempo nella discussione finale; è stato previsto il c.d. *contingentamento dei tempi*, ossia la possibilità per i capigruppo di stabilire il numero di sedute necessario per la discussione.

Una prassi discutibile tende a bloccare l'ostruzionismo anche mediante il ricorso alla *questione di fiducia*, che preclude la votazione sugli emendamenti (v. *infra*) ed espropria le minoranze di ogni possibilità di dialettica.

6. IL PROBLEMA DEGLI INTERNA CORPORIS

Ci si chiede se i *procedimenti interni* che si svolgono in seno alle singole Camere possono essere sindacati da altri organi e, in caso affermativo, fino a dove può spingersi tale controllo?

La risposta in passato era negativa: il giudice non può, per il principio della separazione dei poteri, sindacare l'operato delle assemblee parlamentari, perché in tal modo il potere legislativo verrebbe a trovarsi in una posizione sostanzialmente subordinata rispetto al potere giudiziario.

Oggi la dottrina propende per l'affermativa: l'esistenza di una Costituzione rigida e garantista infatti modifica i termini della questione.

In primo luogo esistono norme di rango costituzionale che disciplinano il funzionamento delle assemblee e che neppure il Parlamento può disattendere.

Inoltre esiste un organo — la Corte Costituzionale — che svolge istituzionalmente il controllo di conformità alla Costituzione degli atti dei pubblici poteri e che non è un giudice comune, bensì un organo costituzionale, dotato di sovranità pari a quella del Parlamento.

Così come provvisto di pari sovranità è il Presidente della Repubblica, chiamato a promulgare le leggi.

Anche ammessa la sindacabilità degli *interna corporis* da parte del P.d.R. (rinvio delle leggi: art. 74) e della Corte Costituzionale, rimane il problema dei *limiti* di tale controllo.

Secondo BARILE il sindacato sugli *interna corporis* del Parlamento deve limitarsi ad accertare l'osservanza delle *norme costituzionali che regolano il procedimento*, mai di quelle regolamentari o consuetudinarie.

Sezione Quinta
Le prerogative

1. LE PREROGATIVE DELLE CAMERE

Le Camere, per esercitare pienamente le loro funzioni sovrane, godono di particolari *prerogative*, che non vanno confuse con quelle dei singoli parlamentari.

Tali prerogative sono:

A) Autonomia regolamentare (art. 64 Cost.)

Come già si è detto, ciascuna Camera ha il potere di disciplinare, con propri *regolamenti*, l'organizzazione dei suoi uffici e lo svolgimento dei lavori parlamentari.

B) Autonomia finanziaria

Ciascuna Camera approva il proprio *bilancio* e il proprio *consuntivo*: essi vengono predisposti dai questori e deliberati dall'Ufficio di presidenza e successivamente discussi e votati in Assemblea. L'autonomia finanziaria esclude qualunque forma di controllo esterno e costituisce un'importante garanzia per l'indipendenza del Parlamento, che è in condizione di gestire autonomamente i mezzi economici necessari al suo funzionamento, senza intromissioni da parte dei normali organi di controllo contabile (Corte dei Conti).

C) Reati contro le Camere

Sono previsti come *reati* tutti gli atti diretti ad impedire l'esercizio delle funzioni delle Camere (art. 289 c.p.: attentato contro le Camere) o eventuali offese contro di esse (art. 290 c.p.: vilipendio).

D) Immunità per l'edificio

È vietato l'ingresso alla Forza Pubblica nelle singole Camere, a meno che il suo intervento non sia stato richiesto dallo stesso Presidente della Camera. Questa immunità vige in virtù di una *norma consuetudinaria*. Le funzioni di polizia all'interno di ciascuna Camera sono svolte dal personale del Parlamento (questori, commessi e guardie).

E) Verifica dei poteri

Secondo un principio tradizionale di sovranità, consacrato all'art. 66 Cost., è attribuito a ciascuna Camera il sindacato sulla regolarità delle operazioni elettorali e sulla sussistenza dei requisiti di capacità, eleggibilità e compatibilità degli eletti.

Tale controllo è svolto dalla *Giunta per le elezioni* in ciascuna Camera. La Giunta esamina tutti i casi e poi rimette la decisione all'assemblea.

Secondo BARILE questo sistema è criticabile perché conferisce alla maggioranza parlamentare la potestà di invalidare o meno le elezioni secondo il proprio tornaconto e a danno delle minoranze, senza che nessun organo abbia il potere di rilevare gli eventuali errori di diritto e gli eccessi di potere. Appare preferibile pertanto la soluzione accolta nella Germania occidentale, che ammette il *ricorso alla Corte Costituzionale* contro le decisioni in materia di verifica dei poteri.

2. PREROGATIVE DEI MEMBRI PARLAMENTARI

Consistono nelle *guarentigie* destinate ad assicurare la più assoluta *indipendenza* del singolo parlamentare di fronte agli altri poteri dello Stato. Tali prerogative, inerenti alla funzione e quindi *irrinunciabili* sono:

A) Insindacabilità delle opinioni e dei voti espressi

I parlamentari «*non possono essere chiamati a rispondere delle opinioni espresse e dei voti nell'esercizio delle loro funzioni*» (art. 68, 1° c. Cost. così come sostituito dalla L. Cost. 3/1993).

BARILE ritiene che l'insindacabilità si estenda anche all'attività che i parlamentari svolgono al di fuori delle Camere, cioè alle opinioni espresse in comizi, interviste, etc. Ciò perché il parlamentare svolge gran parte della sua attività al di *fuori* del Parlamento, a contatto con gli elettori. Questa considerazione trova conferma nel fatto che mentre lo Statuto Albertino riferiva l'insindacabilità alle sole *opinioni* e ai voti dati nelle Camere, la Costituzione Repubblicana al riguardo è stata volutamente più generica.

B) Divieto del mandato imperativo

Ai sensi dell'art. 67 Cost., il Parlamentare «*esercita le sue funzioni senza vincolo di mandato*». Con ciò si è voluta sancire l'indipendenza dei Parlamentari dai gruppi politici ed economici che, giocando sulla revocabilità del mandato, ne potrebbero condizion[illegible]

Esiste, però, un'ipotesi di presunta attenuazione del divieto del mandato imperativo, per i vincoli derivanti dalle direttive di votazione del gruppo parlamentare cui si affidano. Tali vincoli non costituiscono deroga al divieto del mandato imperativo, in quanto l'adesione ai vari gruppi parlamentari è sempre libera ed è rimessa alla scelta del singolo (1).

C) Immunità penale

L'art. 68, 2° c. Cost. stabilisce che «*senza autorizzazione della Camera alla quale appartiene, nessun membro del Parlamento può essere sottoposto a perquisizione personale o domiciliare, né può essere arrestato o altrimenti privato della libertà personale o mantenuto in detenzione, salvo che in esecuzione di una sentenza irrevocabile di condanna, ovvero se sia colto nell'atto di commettere un delitto per il quale è previsto l'arresto obbligatorio in flagranza*».

Con questa nuova formulazione dell'art. 68, modificata dalla legge costituzionale 29-10-1993, n. 3, è consentito:

— *sottoporre ad indagini i parlamentari*, senza la necessità di richiedere una preventiva autorizzazione a procedere da parte della Camera di appartenenza;
— *arrestare il parlamentare*, quando vi è una sentenza irrevocabile di condanna;
— *trarre in arresto il parlamentare*, nel caso in cui sia colto nell'atto di commettere un reato per cui è previsto l'arresto obbligatorio in flagranza (art. 380 c.p.p.): tale facoltà era comunque prevista anche dalla precedente formulazione dell'art. 68.

Non è consentito all'autorità giudiziaria, senza la preventiva autorizzazione della Camera cui appartiene:

— sottoporre a *perquisizione personale o domiciliare* il parlamentare;
— *arrestare o comunque privare della libertà personale* il parlamentare, ad eccezione dei due casi prima citati (arresto in flagranza e sentenza irrevocabile);
— procedere a *intercettazioni delle conversazioni o comunicazioni e a sequestro della corrispondenza.*

D) Ineleggibilità

In Italia vige di regola il principio secondo cui chi è elettore è anche eleggibile, purché abbia la prescritta età. Tuttavia, oltre alle ipotesi di incapacità generali elettorali (che comportano, naturalmente, anche incapacità ad essere eletti), sono previsti dalla legge casi di ineleggibilità dovuti alla posizione istituzionale di supremazia in cui si trovano alcuni soggetti, per cui essi potrebbero influire, in virtù della propria condizione, sulla volontà del corpo elettorale. In base a tale criterio, non possono aspirare alla carica di deputati, fra gli altri: i *magistrati* che non siano in aspettativa da almeno 6 mesi; i *diplomatici*; i titolari di *uffici* che, si presume, godano di una situazione privilegiata rispetto agli altri candidati.

La ineleggibilità, tuttavia, è da tener distinta dalla *incompatibilità*, che si sostanzia nel divieto del cumulo di due o più uffici o cariche: l'incompatibilità, a differenza della ineleggibilità, non invalida le elezioni, ma comporta solo per l'eletto un diritto di *opzione* fra le due o più cariche. Pertanto:

— l'*ineleggibilità*: è la mancanza di elettorato passivo con la conseguente invalidità della elezione.
— l'*incompatibilità*: è il divieto del cumulo di due o più cariche o uffici, con conseguente diritto di scelta per l'eletto di una fra esse (Senatore o deputato, Consigliere regionale o Parlamentare).

(1) Nota, in proposito, BARILE, che se l'indipendenza è tutelata sul piano giuridico, essa è, però, molto meno attuabile sul piano politico: il Parlamentare ribelle infatti viene, prima o poi, emarginato.

E) Incompatibilità

L'incompatibilità si configura come divieto di contitolarità di altre funzioni; essa comporta un diritto di **opzione** a favore del Parlamentare. Anch'essa è una forma di prerogativa, perché mira a garantire l'indipendenza del parlamentare.

Vi sono *quattro specie* di incompatibilità:

a) *con uffici di carattere costituzionale.*
   L'ufficio di deputato è incompatibile con quello di senatore (art. 65 Cost.).
   La carica di parlamentare è incompatibile con quella di Presidente della Repubblica (art. 84 Cost.)
   Con quella di membro del Consiglio Superiore della Magistratura (art. 105 Costituzione) e giudice della Corte Costituzionale (135).
   Con quella di componente del C.N.E.L.
b) *con uffici di nomina governativa in enti pubblici o privati*;
c) *con cariche in Enti dipendenti o sovvenzionati dallo Stato*;
d) *con cariche in Istituti Bancari o Finanziari.*
   Non esiste, invece, incompatibilità con i pubblici impieghi.
   I pubblici impiegati eletti al Parlamento, infatti, sono posti d'ufficio in *aspettativa* per tutta la durata del mandato; essi però non possono conseguire promozioni, se non per anzianità, in tale periodo (art. 98 Cost.). Cessato poi il mandato, viene emanato nei loro riguardi un provvedimento di ricostruzione della carriera.
   Sull'incompatibilità dei Parlamentari decide la *Giunta delle elezioni* della Camera cui il Parlamentare appartiene.

F) Indennità

L'art. 69 della Costituzione stabilisce che il Parlamentare ha diritto ad un indennità composta da una somma fissa giornaliera e dalla diaria di rimborso spese per il soggiorno a Roma.

Tale indennità è stata commisurata allo stipendio dei presidenti di Sezione della Corte di Cassazione. Dopo una certa permanenza nelle Camere matura anche una *pensione* a favore del parlamentare a riposo.

Anche l'indennità è da considerare come una forma di prerogativa parlamentare, in quanto essa mira, con l'attribuzione di una determinata somma di danaro (che non può, però, configurarsi a titolo di retribuzione), per garantire il decoro e l'indipendenza economica del Parlamentare.

Si noti che lo Statuto Albertino non prevedeva alcuna indennità, ma nell'ultimo secolo tale regola è stata ovunque superata per consentire la partecipazione attiva alla vita politica anche dei meno abbienti. L'inconveniente di questo sistema è tuttavia — come rileva BARILE — la nascita del professionismo nella politica.

Sezione Sesta
Il Presidente della Repubblica

1. SIGNIFICATO E DEFINIZIONE DELLA FIGURA

Nel nostro sistema, il Presidente della Repubblica costituisce un potere neutro con funzioni di garanzia e di controllo (VIRGA) *esercitato stabilmente, imparzialmente al di fuori ed al si sopra delle tre funzioni tradizionali.*

Il Presidente è *tutore della Costituzione ed arbitro tra i partiti*; ciò trova conferma nell'art. 87 della Costituzione in base al quale egli è il «*Capo dello Stato Italiano e rappresenta l'unità nazionale*».

Proprio per la sua posizione di neutralità o imparzialità, il Presidente della Repubblica nel nostro sistema non può imporre al Governo o al Parlamento un propria politica personale.

Nelle «Repubbliche parlmentari» come l'Italia, invero, la funzione presidenziale talvolta si è limitata, soprattutto quando il sistema non ha presentato alcuna anomalia, a mera *rappresentanza ed influenza morale*; ciò, però, non significa che il Presidente scade automaticamente al rango di semplice «maestro di cerimonie», ma significa solo che la sua influenza si esercita, sia con i mezzi posti a sua disposizione dalla Costituzione che col proprio prestigio personale in relazione, soprattutto, anche allo «stato di salute» del nostro ordinamento Costituzionale.

La funzione del Presidente della Repubblica per Barile risiede nell'attuazione dei valori costituzionali fondamentali. Egli è titolare della funzione di *indirizzo politico costituzionale*.

Il Presidente della Repubblica, in quanto *organo monocratico*, è in grado di personificare i valori fondamentali traendoli dal limbo di astrattezza in cui la Carta Costituzionale inevitabilmente li colloca. Si parla del Presidente come *viva vox costitutionis*.

2. ELEZIONE DEL PRESIDENTE DELLA REPUBBLICA

Nel nostro sistema, dunque, il Presidente della Repubblica è eletto dal Parlamento in seduta comune dei suoi membri a cui si aggiungono tre delegati per ogni Regione, eletti dai Consigli regionali in modo che sia assicurata la rappresentanza delle minoranze.

La presenza dei *delegati Regionali* mira al raggiungimento di due scopi: *inserire le Regioni nel vivo della vita costituzionale dello Stato* e *allargare la base elettorale del Capo dello Stato*, consentendo anche la partecipazione delle minoranze alla elezione del Presidente.

Si noti, però, che fino all'elezione del Presidente Leone, non avendo il fenomeno regionale trovato piena attuazione, non si è potuto adempiere a questo obbligo Costituzionale. Gli unici rappresentanti regionali, presenti infatti, erano i rappresentanti delle Regioni a statuto speciale.

In un ordinamento repubblicano ci sono tre vie per risolvere il problema dell'elezione del Capo dello Stato: quella della scelta diretta da parte del Corpo elettorale, quelle dell'elezione da parte del Parlamento e quella intermedia del ricorso ad un collegio elettorale *ad hoc* (magari con elezioni di secondo grado per cui gli elettori presidenziali vengano eletti direttamente del popolo).

I costituenti hanno optato per la seconda soluzione, giudicandola la più consona alla forma di governo parlamentare, nella quale il P.d.R. ha la veste di organo *politicamente neutro*: il Capo dello Stato eletto dal popolo infatti (che caratterizza le repubbliche presidenziali) dispone sempre di una forza politica propria, indipendentemente dai poteri che gli sono costituzionalmente attribuiti (PALADIN). L'investitura popolare, inoltre, favorisce le degenerazioni autoritarie (e questo fu, come sottolinea BARILE, l'argomento chiave per la soluzione del problema).

L'elezione avviene a scrutinio segreto e risulta eletto:

— *nei primi tre scrutini*, chi ha riportato la *maggioranza qualificata dei due terzi* dei voti;
— *negli scrutini successivi*, chi ha riportato la *maggioranza assoluta* (metà dei voti + 1).

La maggioranza qualificata è prescritta perché si vuole che il Presidente nella sua veste di organo *super partes* e di rappresentante della Nazione, goda di un ampio consenso nel Paese (più ampio di quello espresso dalla maggioranza di governo esistente al momento della sua elezione). Si è ritenuto opportuno, dopo i primi tre scrutini, limitare la maggioranza per evitare che il protrarsi delle operazioni elettorali indebolisca l'autorità e sminuisca la personalità del futuro eletto.

Il Presidente eletto deve prestare giuramento innanzi alle Camere in seduta comune.

Quattro sono i requisiti per l'eleggibilità a Presidente della Repubblica:

1) *la cittadinanza italiana*;
2) *l'età non inferiore ai 50 anni*;
3) *il godimento dei diritti civili e politici*;
4) *non esser membro o discendente della Casa Savoia*.

È prevista la *rieleggibilità* perché i freni posti alla possibilità di una politica autonoma del Presidente, al di fuori dei poteri conferitigli dalla Costituzione sono tali che astrattamente non può temersi alcuna degenerazione autoritaria di tale figura nel nostro sistema (MORTATI).

Il silenzio della Costituzione in materia di rieleggibilità del Presidente vale come «assenso» alla rieleggibilità stessa in quanto il legislatore quando ha voluto escludere, lo ha detto espressamente (es.: art. 104, *Membri del Consiglio Superiore della Magistratura* e art. 135 *Giudici della Corte Costituzionale*).

Il P.d.R. rimane in carica sette anni (art. 85): tale periodo, piuttosto lungo, è superiore a quello di durata in carica delle Camere per svincolare il Capo dello Stato dalla maggioranza politica che lo ha eletto.

3. POSIZIONE GIURIDICA - PREROGATIVE - PATRIMONIO

A) Posizione giuridica

Quanto alla **posizione giuridica** la carica di Presidente della Repubblica è *incompatibile* con qualsiasi altra carica da cui egli decade *automaticamente* all'atto del *giuramento* di fedeltà alla Repubblica e della contemporanea assunzione delle *funzioni*.

Tale incompatibilità è giustificata dalla necessità di svincolare la persona del Presidente da qualsiasi altra attività (di carattere economico e politico) per consentirgli di svolgere il suo mandato in posizione di perfetta autonomia ed indipendenza e col massimo prestigio.

In particolare il Presidente:

— *rappresenta l'unità nazionale*: la «figura del Presidente impersona l'unità e la continuità dello Stato, la sua forza permanente al di sopra delle mutevoli maggioranze» (così la relazione RUINI all'Assemblea Costituente);
— *tutela l'interesse generale*: tale interesse nel nostro ordinamento democratico, è tutelato in via generale, dal Parlamento, nel quale confluiscono le esigenze collettive del popolo. Ma, per evitare che il sistema possa talvolta incepparsi e cadere in crisi (esempio: le Camere non riescono a svolgere la loro attività), spetta al Presidente, nell'ambito dei poteri attribuitigli dalla Costituzione, di regolare le disarmonie che ostacolano il sistema, svolgendo la propria attività di *propulsione* (esempio: *scioglie le Camere e indice nuove elezioni*) nella tutela dell'interesse generale (vedi *infra*).

B) Prerogative

Quanto alle **guarentigie**, il P.d.R. gode di una *speciale tutela penale* (artt. 276, 279 e 289 C.P.) ed è *irresponsabile* per gli atti compiuti nell'esercizio delle sue funzioni, salvo che per *alto tradimento* e *attentato alla Costituzione* (art. 91 Cost.).

In tali casi è messo in stato d'accusa dal Parlamento in seduta comune (a maggioranza assoluta) per essere poi giudicato dalla Corte Costituzionale.

L'art. 89 Cost. stabilisce che «nessun atto del Presidente della Repubblica è valido se non è controfirmato dai ministri proponenti, che ne assumono le responsabilità»: tale norma riguarda — secondo la dottrina prevalente — solo la **responsabilità politica** di fronte al Parlamento.

Per quanto concerne la **responsabilità penale** bisogna distinguere: per i *reati commessi fuori dall'esercizio delle sue funzioni* il P.d.R. — nel silenzio della Costituzione — è responsabile e punibile come ogni altro cittadino e la relativa azione penale può avere normalmente corso durante il settennato (*tesi prevalente*). I procedimenti penali comuni di per sé non costituiscono una causa automatica di

decadenza dall'incarico, anche se il fatto dell'accusa e del processo vulnerano inevitabilmente il prestigio del Capo dello Stato. Per uscire da una situazione insostenibile egli potrà sempre ricorrere alle *dimissioni volontarie*.

Per i *reati commessi nell'esercizio delle funzioni* occorre ulteriormente distinguere tra quelli espressamente menzionati dall'art. 90 e gli altri.

I reati di *alto tradimento* e di *attentato alla Costituzione* coincidono — secondo un orientamento dottrinale — con le fattispecie previste (rispettivamente) dall'art. 77 del codice penale militare di pace e dall'art. 283 c.p.: ciò per rispettare il principio di legalità di cui all'art. 25 Cost. (*nullum crimen sine lege*).

Altri invece ritengono che si tratti di fattispecie autonome, e che rispetto a tali figure non definite dalla Costituzione il principio di legalità non sia violato perché, pur mancando il carattere della *descrittività* del reato, non manca quello essenziale della *tipicità*.

C) Patrimonio

Ai sensi dell'art. 84[2], l'ufficio di Presidente della Repubblica è incompatibile con qualsiasi altra carica: per questa ragione egli gode di un **trattamento economico** che renda superflua qualsiasi altro reddito ai fini di uno svolgimento decoroso delle sue funzioni.

L'*assegno* è il corrispettivo per le prestazioni presidenziali, attribuito al P.d.R. a titolo di *indennità personale*.

La *dotazione* consiste nell'insieme di beni immobili indicati nell'art. 1 della L. n. 1077 del 1948 compresi i beni mobili in essi contenuti) e nella somma di 2.500 milioni annui, occorrenti per la loro manutenzione. Essa è messa a disposizione del P.d.R. per garantirgli l'assolvimento dei suoi compiti con adeguato prestigio. I beni che ne fanno parte rientrano nel patrimonio indisponibile dello Stato e sono pertanto inalienabili.

Sia è assegno che la dotazione del Capo dello Stato sono determinati per legge (riserva assoluta *ex* art. 84 co. 3 Cost.).

4. SUPPLENZA E CESSAZIONE DALL'UFFICIO

A) Generalità

La nostra Costituzione non prevede né l'istituto della vicepresidenza né la delega temporanea a terzi delle funzioni del Presidente della Repubblica.

È previsto invece (art. 86) l'istituto della *supplenza*: «Le funzioni del Presidente della Repubblica, in ogni caso che egli non possa adempierle, sono esercitate dal Presidente del Senato».

In caso di *impedimento permanente, morte* o *dimissioni*, il Presidente della Camera indice le elezioni di un nuovo Capo dello Stato.

Sono dunque due gli organi chiamati ad intervenire in caso di impedimento del P.d.R.: il *Presidente della Camera*, che deve indire le elezioni del successore e il *Presidente del Senato*, che costituisce temporaneamente il Presidente impedito.

La supplenza presuppone necessariamente un *impedimento* che può essere *permanente* o *temporaneo*. In realtà la Costituzione disciplina solo la prima eventualità.

Impedimento *temporaneo* può aversi sicuramente in caso di malattia. Sono ipotesi dubbie il riposo per ferie e i viaggi del P.d.R. all'estero. Nel primo caso infatti sembra difficile sostenere l'impossibilità di attendere alle cose dello Stato. Per quanto concerne i viaggi all'estero, in realtà, le funzioni presidenziali possono comunque essere esercitate nelle sedi delle rappresentanze diplomatiche. La prassi, inizialmente, era infatti nel senso di escludere l'esistenza di un impedimento; in seguito si è invece fatto ricorso all'istituto della *supplenza* per l'esercizio delle funzioni presidenziali non inerenti allo svolgimento della missione all'estero.

B) L'impedimento permanente e poteri del supplente

La disposizione di cui al secondo comma dell'art. 86 non pone particolari problemi per il caso di *morte* o *dimissioni*. Problematica è invece l'ipotesi di «impedimento permanente»: ci si chiede quale

sia l'organo cui spetti di accertare l'esistenza e la presumibile permanenza dell'impedimento, nel caso in cui il P.d.R. non sia in grado di esprimere liberamente la sua cosciente volontà. Le tesi sostenute in dottrina sono le più varie: chi propone il Presidente della Camera o del Senato, chi asserisce le competenze del Consiglio dei Ministri.

BARILE, in particolare, ritiene che questa lacuna non possa essere colmata con sicurezza, poiché il ricorso all'analogia è reso difficoltoso dal carattere eccezionale dei casi cui la norma in esame si riferisce. Propone comunque, come soluzione che meglio si armonizza col sistema, quella che indica come organo competente il Parlamento, in quanto organo deputato sia ad eleggere il P.d.R. che a creare una vacanza ponendolo in stato d'accusa.

Il problema assunse rilevanza concreta nel 1964, quando il *Presidente Segni* fu colpito da una grave malattia: a trarre fuori dall'imbarazzo governo e parlamento fu lo stesso Presidente, che rassegnò spontaneamente le dimissioni.

Un altro caso di dimissioni fu quello, clamoroso, del *Presidente Leone* nel 1978, travolto da uno scandalo personale senza che i partiti intervenissero a sua difesa.

Altro problema, comune a tutti i casi di impedimento, è quello relativo all'*estensione dei poteri del supplente*, che i più reputano circoscritti al disbrigo della c.d. *ordinaria amministrazione*, secondo i principi generali in materia di supplenza.

In sostanza si ritiene che egli debba rinviare tutti gli atti che non sono urgenti o doverosi e che possono attendere, senza danno per lo Stato, che sia il titolare della carica a deciderli.

C) Dimissioni

Le *dimissioni del Capo dello Stato* sono, per tradizione universalmente accolta, *irrevocabili ed incondizionate*: ciò preclude l'uso delle dimissioni come arma politica. Una volta annunciate pubblicamente esse obbligano il P.d.R. ad uscire immediatamente di scena, senza che nessuno possa chiederne e ottenerne il ritiro. Ecco le ragioni per cui la Costituzione ha previsto la supplenza anche per il caso di dimissioni volontarie.

Al supplente si estendono *tutte le norme* che riguardano il P.d.R.

D) Conclusioni

La cessazione dall'ufficio di Presidente, dunque, può aver luogo per:

a) *morte*;
b) *fine del settennato*: i sette anni cominciano a decorrere dal giuramento, poiché solo con tale atto il Presidente assume le *funzioni*, e scadono 30 giorni prima del compimento effettivo del settennato, in quanto in tale data le Camere vengono convocate per la nuova elezione: se le Camere sono sciolte (o manca meno di tre mesi alla loro cessazione) l'elezione ha luogo entro 15 giorni dalla riunione delle nuove Camere e, nel frattempo, i poteri del Presidente in carica sono prorogati (art. 85 Cost.);
c) *dimissioni* che , come già si è detto, sono irrevocabili ed operano, appena comunicate al Parlamento, non dovendo da questo essere accettate;
d) *impedimento permanente*;
e) *perdita di uno dei requisiti per la nomina*;
f) *destituzione* a seguito di sentenza di *condanna per i reati di alto tradimento o attentato alla Costituzione* pronunziata dalla Corte Costituzionale.

Alla cessazione della carica di P.d.R. diventa automaticamente Senatore a vita (salvo i casi di rinuncia o di perdita della cittadinanza o dei diritti civili e politici).

Sezione Settima
Il Governo

1. CENNI STORICI - DEFINIZIONE - COMPOSIZIONE

La *Costituzione Repubblicana* considera:

— *il Governo*: l'organo costituzionale complesso che concorre alla formulazione e presiede all'attuazione dell'indirizzo politico ed è costituzionalmente responsabile nei confronti del Parlamento di cui deve godere la *fiducia*;
— *i Ministri*: gli organi preposti ai vari settori dall'amministrazione statale che, uniti fra loro da un *idem sentire de repubblica*, imprimono una direzione politica unitaria allo Stato.

Il *Governo*, inoltre, può dettagliatamente definirsi *come l'organo costituzionale, complesso, titolare della funzione di iniziativa, impulso e direzione dell'attività amministrativa e con funzioni legislative eccezionali.*

In particolare:

— *è un organo costituzionale* in quanto previsto dalla Costituzione;
— *complesso*: ai sensi dell'art. 92 Cost. «il governo della Repubblica è composto dal Presidente del Consiglio e dai Ministri, che costituiscono insieme il Consiglio dei Ministri». Vi sono dunque *organi individuali* (il Presidente del Consiglio e i Ministri) e un *organo collegiale* (il Consiglio dei Ministri);
— *di parte*: perché espressione delle forze politiche di maggioranza che lo sostengono con la *fiducia*;
— di *iniziativa* in quanto concorre alla formulazione dell'indirizzo politico;
— di *impulso* in quanto presiede all'attuazione dell'indirizzo politico;
— di *direzione* in quanto è il supremo organo dell'attività amministrativa (o esecutiva);
— *con funzioni legislative eccezionali*, che svolge nei modi e nei limiti previsti dalla Costituzione (ricorrendo all'emanazione di *decreti legislativi* e *decreti legge*).

Si possono distinguere altresì:

— *Organi principali*: Presidente del Consiglio, Ministri, Consiglio dei Ministri;
— *Organi ausiliari*: Sottosegretari, Alti Commissari, Comitati Interministeriali, etc.

2. VICENDE DEL GOVERNO: FORMAZIONE E FIDUCIA DELLE CAMERE

Per quanto riguarda la formazione del Governo la Costituzione, all'art. 92, si limita ad affermare che il Presidente della Repubblica nomina il Presidente del Consiglio dei Ministri e, su proposta di quest'ultimo, i Ministri. Nulla è invece detto, in sede costituzionale, per quanto attiene alla procedura da seguire per cui al riguardo si sono venute a formare una serie di regole convenzionali e consuetudinarie.

Attualmente, secondo una prassi che si è instaurata per la prima volta nel 1958, alla formazione del Governo si perviene attraverso le seguenti fasi:

A) Crisi e dimissioni

Apertasi la crisi, il governo in carica dà le *dimissioni*, restando formalmente in attività per il disbrigo degli affari correnti fino alla nomina di un nuovo governo.

Si noti che non è prevista nel nostro ordinamento la c.d. **mozione di sfiducia costruttiva**, che deve indicare anche il successorre del Presidente del Consiglio sfiduciato.

B) Attività di consultazione del Presidente della Repubblica

Il Presidente della Repubblica per prassi costituzionale, è tenuto a consultare i protagonisti più importanti della vita politica del paese (ex Presidenti della Repubblica, Presidenti delle due camere, capi-gruppo parlamentari e segretari dei partiti): scopo delle consultazioni è quello di accertare chi sia la persona più adatta a formare il nuovo Governo, tenendo conto dei concreti rapporti di forza tra i partiti nonché degli orientamenti politici presenti in Parlamento.

C) Incarico

Accertato, a seguito delle consultazioni, l'orientamento maggioritario delle forze politiche del paese, il Presidente della Repubblica incarica di formare la compagine governativa alla persona che, in quel dato momento, appare la più idonea a coagulare intorno a sé (e al proprio programma di Governo) la futura coalizione di maggioranza.

Il Presidente della Repubblica *non è libero* nella scelta dell'incaricato, ma deve tener conto, nell'effettuare la designazione, degli orientamenti espressi dalla maggioranza delle forze politiche del paese e del *fine costituzionalmente imposto*, che è quello di formare un esecutivo che possa ottenere la *fiducia* delle Camere (art. 94).

Qualora la situazione politica si presenti molto complessa o le prime consultazioni non abbiamo fornito indicazioni esaurienti per la scelta dell'incaricato, il P.d.R. può conferire ad altra personalità il compito di svolgere un ulteriore giro di consultazioni tra le parti politiche (c.d. *mandato esplorativo*, che viene normalmente affidato al Presidente di uno dei due rami del Parlamento). Qualora non ci sia alcuna possibilità di formare un Governo, il Presidente della Repubblica, sentiti i Presidenti dei due rami del Parlamento, deve sciogliere le Camere ed indire le elezioni per la formazione di nuove Camere.

D) Attività dell'incaricato

L'*incaricato* accetta con *riserva*, riservandosi cioè di accettare di formare il nuovo governo o di rinunciare all'incarico.

Egli inizia a sua volta a consultarsi con *i partiti che*, appoggiandolo, *formeranno la nuova coalizione* di Governo, e cioè che voteranno la fiducia in Parlamento. Durante questa fase il Presidente incaricato *elabora un programma* di Governo comune ai partiti della coalizione e *sceglie* sempre tra i rappresentanti di essi, i *Ministri e i Sottosegretari.*

E) Designazione e nomina del Gabinetto

Al termine delle consultazioni il Presidente incaricato si reca dal Presidente della Repubblica per sciogliere la riserva: positivamente in caso di successo, negativamente qualora non fosse riuscito a formare il nuovo Governo. Se accetta l'incarico egli deve presentare al Capo dello Stato la lista dei Ministri. I *decreti di nomina del Presidente del Consiglio e dei Ministri* verranno emessi contestualmente, previa accettazione delle dimissioni del Gabinetto uscente, precedentemente accolte con *riserva.*

Come tutti i D.p.R. anche quelli di nomina devono essere *controfirmati* dai Ministri proponenti *ex* art. 89[1] Cost. In passato si discuteva se il decreto di nomina del nuovo Presidente del Consiglio dovesse essere controfirmato da lui stesso o dal Presidente uscente. La questione è stata risolta dalla L. 400/1988 che ha scelto (art. 1) la prima soluzione: il neo-Presidente controfirma il proprio decreto di nomina oltre a quelli dei Ministri e quello di accettazione delle dimissioni del Governo uscente.

F) Giuramento e fiducia

Prima di assumere le funzioni, il Presidente del Consiglio ed i Ministri debbono *prestare* **giuramento** nelle mani del Capo dello Stato (art. 93 Cost.).

Il giuramento, secondo, BARILE, costituisce una conferma del *dovere di fedeltà* che incombe su tutti i cittadini, e in particolare su coloro che svolgono funzioni pubbliche fondamentali, *ex* art. 54 Cost.

Entro dieci giorni dalla formazione (cioè dal decreto di nomina), il Governo si deve presentare davanti a ciascuna Camera, per ottenere il voto di *fiducia*, che deve essere motivato e votato per appello nominale (art. 94).

Si noti che il Presidente del Consiglio e i Ministri assumono le loro *funzioni* dopo il *giuramento* e prima della fiducia. La *fiducia*, dunque, costituisce una *condizione risolutiva* dell'esistenza del Governo.

Per «*fiducia*» si intende l'atto di gradimento politico con cui il Parlamento aderisce al programma politico del Governo. La fiducia, in particolare, è accordata se risultano graditi al Parlamento:

1) i singoli membri del gabinetto;
2) l'indirizzo politico (o programma di governo) che il governo vuole seguire.

La fiducia, accordata sulla base di una dichiarazione di giudizio, detta «*mozione*», impegna il Governo a seguire l'indirizzo politico ed il *programma* esposto dal neo- Presidente del Consiglio nelle c.d. «*dichiarazioni programmatiche*» fatte dinanzi al Parlamento prima del voto.

In questa fase il Presidente della Repubblica non può in alcun modo interferire nella valutazione circa la piattaforma politica del governo e la sua composizione: le sole Camere sono titolari del potere di conferire o negare la fiducia.

G) Sfiducia

Per quanto riguarda poi la *sfiducia* al Governo si ricordi che:

— l'art. 94 prevede che il voto contrario di una o entrambe le Camere su una singola proposta del Governo non importa obbligo di dimissioni (cioè non vale come sfiducia implicita);
— la fiducia al Governo può essere ritirata mediante l'approvazione di una *mozione di sfiducia*, che deve essere presentata da almeno un *decimo* dei componenti di una delle Camere, deve essere *motivata* o votata per *appello nominale*, come la fiducia;
— lo stesso Governo può sempre chiedere la «*verifica della maggioranza*» per accertare se gode ancora della fiducia del Parlamento: ponendo la c.d. **questione di fiducia** su un proprio provvedimento all'esame del Parlamento il Governo si impegna a dimettersi qualora tale provvedimento non venga approvato. Affermatosi nella prassi questo istituto è stato recentemente codificato nella L. 400/88: la questione di fiducia può essere posta — previo assenso del Consiglio dei Ministri — solo dal Presidente del Consiglio e mai da un singolo Ministro (artt. 3 e 5).

3. Segue: CRISI - RIMPASTO - DIMISSIONE

A) La crisi del Governo

La necessità di dar vita ad un nuovo esecutivo sorge quando il precedente entra in *crisi*: le crisi di Governo si distinguono in *parlamentari* ed *extraparlamentari*. Solo le prime vengono contemplate dalla Costituzione che, come già si è detto, prevede — all'art. 94 — che la fiducia si accorda e si revoca sulla base di un atto — chiamato *mozione* — che deve essere motivato e votato per appello nominale. Per la mozione di sfiducia, in particolare, sono previsti requisiti ulteriori: essa dev'essere presentata da almeno 1/10 dei componenti la Camera e non può essere messa in discussione prima di tre giorni della presentazione (art. 94[5]): ciò serve a garantire la società dell'iniziativa e ad assicurare a tutti i parlamentari la possibilità di venirne a conoscenza.

In seguito all'approvazione di una mozione di sfiducia il Governo è giuridicamente *obbligato* a dimettersi. Non così quando il Parlamento respinge una proposta del Governo (art. 94[4]): tuttavia il Governo *può* dimettersi se ritiene che implicitamente la fiducia del Parlamento sia venuta meno. Le dimissioni del Governo per *sfiducia tacita* sono inquadrate da taluno nelle crisi parlamentari (LAVAGNA), per altri invece si tratta più propriamente di crisi extraparlamentari.

Dall'entrata in vigore della Costituzione ad oggi non si sono mai verificate **crisi parlamentari** provocate da un formale voto di sfiducia: tutte le crisi di governo interessanti i Governi italiani sono classificabili infatti come **crisi extraparlamentari**, in quanto estranee alle previsioni dell'art. 94 Cost. e nate da dimissioni spontanee, originate dai motivi più vari. In particolare le numerose crisi sono quasi sempre state provocate da una rottura delle alleanze politiche su cui si reggono i *governi di coalizione*, che devono la propria debolezza e instabilità al fatto che è sufficiente il ritiro anche di uno dei partiti minori per far entrare il Governo in crisi: il loro «peso politico» infatti è notevolmente superiore a quello reale.

L'ammissibilità di *dimissioni libere*, si fonda, secondo BARILE, proprio sul dettato costituzionale: là dove si dice che «il voto contrario di una o entrambe le Camere su una proposta del Governo non importa obbligo di dimissioni, si afferma *implicitamente* che le dimissioni *possono essere date*, anche quando non sia stata votata la fiducia. Ciò del resto è abbastanza ovvio, se si pensa all'eventualità di una malattia del Presidente del Consiglio o di una sua decisione di dimettersi per ragioni personali.

Comunque si devono ritenere legittime le dimissioni spontanee del Governo, a prescindere della causa che le ha originate.

B) Il rimpasto

Diverso dalla crisi è il rimpasto, con cui si provvede alla *sostituzione di uno o più Ministri perché non godono più della fiducia del Presidente o per altre cause* (malattia, morte, dimissioni, etc.).

In genere, si ha rimpasto quando si delinea la opportunità politico-amministrativa di una revisione nella distribuzione di portafogli ministeriali (PERGOLESI).

Poiché il rimpasto comporta sempre una modificazione sostanziale nell'ambito del Governo, taluni sostengono che il Governo deve ripresentarsi alle Camere per riottenerne la fiducia (VIRGA).

Altri ritengono, invece, che non esista un obbligo giuridico in tal senso se il rimpasto non ha alterato l'orientamento politico del Governo: cio dipende, volta per volta, dal numero dei ministri sostituiti e — soprattutto — delle ragioni che l'hanno determinato (GALIZIA).

Ci si deve chiedere a questo punto quale atteggiamento deve assumere il Capo dello Stato di fronte alle dimissioni formalmente volontarie del Governo: egli può senz'altro invitare il Governo a ritirarle oppure a presentarsi alle Camere per verificare, mediante una questione di fiducia, se l'appoggio parlamentare gli sia effettivamente venuto meno. Ma sul valore di tali suggerimenti la dottrina è divisa: taluni li ritengono non vincolanti, di tal che il Governo non avrebbe alcun obbligo giuridico di aderirvi, essendo tenuto soltanto a garantire il disbrigo degli affari correnti, in omaggio al principio di continuità (PALADIN).

Altri ritengono, invece, che di fronte alle dimissioni volontarie il P.d.R. sia tenuto a rinviare il Governo alle Camere affinché esso esponga le ragioni della crisi e si apra un dibattito parlamentare (c.d. *parlamentarizzazione della crisi*) e che tale invito abbia carattere vincolante per il Governo (BARILE). La prassi negli ultimi anni è stata effettivamente orientata in tal senso.

4. ORGANI DEL GOVERNO: IL PRESIDENTE DEL CONSIGLIO

A) Generalità

Il Governo è un organo complesso: tra gli elementi costitutivi previsti dall'art. 92[1] Cost., vi sono due tipi di *organi individuali* (il *Presidente del Consiglio* e i singoli *Ministri*) e un *organo collegiale* (il *Consiglio dei Ministri*), di cui fanno parte tutti i titolari degli organi individuali. Le posizioni e le funzioni attribuite a ciascuno di questi tre organi semplici sono molto diverse le une dalle altre.

Il *Presidente del Consiglio dei Ministri* è nominato con decreto del Capo dello Stato, che egli stesso *controfirma* ai sensi dell'art. 2[2] della L. 400/88.

Unici requisiti richiesti per la nomina sono la *cittadinanza italiana* e il *godimento dei diritti civili e politici* (art. 64[4]). Egli si trova in posizione diversa e superiore a quella degli altri Ministri, pur non potendosi configurare un vero e proprio rapporto di sovraordinazione gerarchica.

B) Poteri

Dopo aver esercitato la proposta delle nomine dei Ministri al Capo dello Stato (art. 92[2]) egli «*dirige la politica generale del Governo e ne è responsabile*» (art. 95): il Presidente del Consiglio ha, dunque, un potere di direzione nei confronti di tutti gli altri membri del Governo; inoltre «*mantiene l'unità di indirizzo politico ed amministrativo promuovendo e coordinando l'attività dei Ministri*».

Il contenuto di questi *poteri di propulsione, direzione e coordinamento* è indicato nella **L. n. 400/1988** che detta una disciplina organica della struttura e delle attribuzioni degli organi del Governo e dell'organizzazione burocratica della Presidenza del Consiglio.

Ai sensi dell'art. 5 il Presidente del Consiglio dei Ministri a nome del Governo tiene i rapporti con il Parlamento ed è l'unico legittimato a presentare alle Camere i disegni di legge di iniziativa governativa. In nome proprio, ai sensi dell'art. 95[1], indirizza ai Ministri le direttive politiche ed amministrative, coordina e promuove la loro attività, ne controlla l'adozione (con potere di sospensione e rinvio alla decisione collegiale del Consiglio: L. n. 400/88; egli non ha tuttavia né potere di avocazione né di revoca o sostituzione). Concorda con i Ministri le loro dichiarazioni pubbliche quando queste possono impegnare la politica generale del Governo; promuove e coordina i rapporti con le Comunità Europee e le Regioni.

C) L'Ufficio della «Presidenza» e la vice-presidenza

Il Presidente del Consiglio è capo della «*Presidenza del Consiglio dei Ministri*». L'art. 95[3], demanda alla legge ordinaria il compito di disciplinare l'organizzazione: la legge n. 400/88 ha infatti regolato — sia pure con notevole ritardo — l'organizzazione burocratica della Presidenza del Consiglio, prevedendo un *Segretario generale* con compiti molto ampi, diretti a supportare il Presidente del Consiglio nell'esercizio delle sue funzioni; un *ufficio di segreteria*; uffici, dipartimenti, comitati di consulenza, di ricerca e di studio su specifiche questioni; un ufficio centrale per il coordinamento dell'iniziativa legislativa e dell'attività normativa del governo; un dipartimento per l'informazione e l'editoria; una ragioneria centrale, dipendente dal Ministero del Tesoro.

Al Presidente del Consiglio si affianca spesso uno o più *Vice-presidenti del Consiglio*, cioè uno o più ministri ai quali viene attribuita una qualifica non prevista dalla Costituzione. Si è dubitato dalla legittimità Costituzionale di questa figura, perché le funzioni presidenziali non sono delegabili e non è prevista la supplenza. La L. n. 400/88 ha comunque ratificato la prassi invalsa precedentemente, prevedendo la possibilità, per il Presidente del Consiglio, di proporre al Consiglio l'attribuzione ad uno o più Ministri della Vice-presidenza. In caso di impedimento o assenza del Presidente, la *supplenza* spetta al Vicepresidente (al Ministro qualora non vi fossero vicepresidenti) più anziano.

5. I MINISTRI

A) Generalità: la figura del Ministro senza Portafoglio

I Ministri sono, al tempo stesso, *organi amministrativi*, in quanto capi gerarchici del proprio dicastero, ed *organi di governo*, in quanto partecipano alla determinazione dell'indirizzo politico del Gabinetto.

Per «*dicastero o ministero*» si intende un apparato amministrativo ordinato gerarchicamente corrispondente ad un dato settore della pubblica amministrazione, al vertice del quale si pone un Ministro.

I c.d. *Ministri senza portafoglio* (e cioè non preposti ad un dicastero) invece sono solo organi di governo e non anche amministrativi (perché non hanno la responsabilità di nessun Ministero e utilizzano, per lo svolgimento delle funzioni loro delegate l'organico della Presidenza del Consiglio).

Sulla legittimità costituzionale di tali Ministri si è dubitato in quanto essi non essendo titolari di alcun Ministero non possono assumere alcuna responsabilità individuale (vedi art. 95) ma soltanto collegiale.

La legge n. 400/1988 ha, invece, disciplinato anche questa figura (art. 9) affermando che essi partecipano a pieno diritto, alle deliberazioni del Consiglio dei Ministri e sono responsabili collegialmente dei relativi atti al pari dei Ministri titolari di dicastero.

B) Nomina e funzioni

I Ministri sono nominati con decreto del Presidente della Repubblica su proposta del Presidente del Consiglio.

Essi di solito rivestono la qualifica di membri del Parlamento, ma non necessariamente: in alcuni casi, sono scelti cittadini non appartenenti alle Camere per dicasteri ove occorra una specifica competenza tecnica (ad esempio, quello delle finanze, dell'universtà e della ricerca scientifica, commercio estero, etc.).

Le loro funzioni sono:

— *funzioni costituzionali* se consistono nel diritto di iniziativa legislativa, nella deliberazione collettiva dell'indirizzo politico e nel potere di controfirmare gli atti del Capo dello Stato (vedi più avanti, par. 8 lettera b);

— *funzioni amministrative* se attengono, invece, all'attività del Ministro in quanto capo del dicastero cui è preposto. Di tali funzioni si dirà a proposito della pubblica amministrazione.

C) Posizione giuridica

I Ministri non sono impiegati, bensì *funzionari onorari dello Stato*, in quanto l'ufficio che essi ricoprono è di nomina presidenziale e non costituisce la loro professione. Nel nostro ordinamento sono l'uno rispetto all'altro in posizione paritaria.

D) L'istituzione di nuovi Ministeri

Discusso è il problema della *competenza* per l'*istituzione di nuovi ministeri*.

Per alcuni autori, in base al principio della divisione dei poteri, tale *competenza* dovrebbe spettare agli *organi* stessi del *potere esecutivo* che in tal modo avrebbero la possibilità di organizzare, nel modo da loro ritenuto più idoneo, lo svolgimento della funzione esecutiva.

La Costituzione Repubblicana, invece, ha accolto il principio opposto attribuendo agli *organi del potere legislativo* il compito di determinare il numero, le attribuzioni e l'organizzazione dei Ministeri (art. 95, 2° c.p.v.).

Una legge organica in materia non è ancora stata emanata e la L. n. 400/88 autorizza espressamente il Presidente del Consiglio a nominare — sentito il Consiglio dei Ministri — Ministri senza portafoglio.

6. Segue: IL CONSIGLIO DEI MINISTRI

A) Formazione ed attività

È un *organo costituzionale collegiale* del governo formato dal *Presidente del Consiglio* e da *tutti i Ministri* (con e senza portafoglio).

È presieduto dal Presidente del Consiglio, che lo convoca e ne fissa l'ordine del giorno.

Le funzioni di Segretario (senza voto deliberativo) sono svolte del Sottosegretario alla Presidenza del Consiglio).

Le deliberazioni del Consiglio dei Ministri vengono adottate a *maggioranza* (relativa) dei suoi membri; il voto del Presidente del Consiglio vale quanto quello di ciascun Ministro.

Le regole sulla maggioranza valgono però solo *all'interno* del Consiglio, ai fini della decisione in quanto *all'esterno* la stessa appare sempre come presa all'*unanimità* dal Governo nel suo complesso; ciò sia per la *solidarietà* che lega i membri del Gabinetto, sia per la *collegiale responsabilità* (art. 59 comma 2, Costituzione) *politica* che grava su di essi.

Nel sistema britannico, invece, formano il «*Consiglio di Gabinetto*» solo i Ministri che occupano i dicasteri più importanti.

La competenza del Consiglio è *generale* (cioé non sono previste attività specifiche) ed è regolata dalla L. n. 400/1988, la quale precisa le *materie* che *devono* essere *sottoposte alla deliberazione* del Consiglio per consentirgli, in concreto, l'esercizio della sua attività.

B) Attribuzioni e funzioni

Le attribuzioni del Consiglio dei Ministri possono così sintetizzarsi:

a) funzione di **indirizzo politico e amministrativo del Paese.**
Il Consiglio dei Ministri «*determina la politica generale del Governo e, ai fini dell'attuazione di essa, l'indirizzo generale dell'azione amministrativa; delibera, altresì, su ogni questione relativa all'indirizzo politico fissato dal rapporto fiduciario con le Camere*» (art. 2).
Ciò, infatti, costituisce il logico e naturale presupposto dell'opera di direzione e coordinamento politico del Presidente del Consiglio.

Spetta, in particolare, al Consiglio:

— *approvare* le dichiarazioni che saranno rese note dal Presidente del Consiglio alle Camere all'atto della presentazione del Governo dinnanzi alle stesse;
— *esprimere* l'*assenso* alla iniziativa del Presidente del Consiglio di porre la questione di fiducia dinanzi alle Camere;
— *deliberare* sulle questioni di *ordine pubblico* e di *alta amministrazione* nonché sulle questioni *internazionali* e *comunitarie* in genere;
— *deliberare* sugli atti concernenti i rapporti tra lo Stato e la *Chiesa cattolica* (art. 7 Cost.) e tra lo Stato e le *altre confessioni religiose* (art. 8 Cost.).

b) *Decisioni sulla* **politica normativa** *del Governo.*

Spetta, infatti, al Consiglio dei Ministri deliberare:

— sui *disegni di legge* di iniziativa governativa da presentare al Parlamento;
— sulle *comunicazioni* che il Governo intende fare alle Camere, in ordine a proposte di legge non governative;
— sui *decreti aventi valore o forza di legge* (decreti-legislativi e decreti-legge) e sui *regolamenti* (c.d. *governativi*) da emanare con decreto del P.d.R.

Per quanto concerne, invece, i *regolamenti ministeriali* (per lo più di esecuzione) ed anche quelli *interministeriali* (di carattere interno ed esecutivo), rientrando nella *competenza* dei *singoli Ministri*, non occorre deliberazione del Consiglio dei Ministri; è opportuna, comunque, la loro comunicazione preventiva al Presidente del Consiglio il quale ne valuterà la corrispondenza alle direttive politico- amministrative del Governo.

c) *Determinazione dell'***atteggiamento** *del Governo nei* **rapporti con le Regioni.**

Sono sottoposti alla deliberazione del Consiglio dei Ministri:

— la nomina del *Commissario di Governo*, ex art. 124 Cost.;
— la deliberazione degli *atti* di *indirizzo* e *coordinamento* dell'attività amministrativa delle Regioni;
— la proposta motivata al P.d.R. di scioglimento di un Consiglio regionale ex art. 126 Cost.;
— il promovimento della questione di *legittimità* di una legge regionale innanzi la Corte costituzionale o della questione di *merito* innanzi le Camere (art. 127 Cost.).

Com'è noto per risolvere il problema dell'interferenza fra le diverse sfere di competenza tra Stato e Regioni e per contemperare il principio unitario con quello autonomistico nel confronto tra indirizzo statale e locale, la L. 400/88 prima e il D.lgs. 418/89 dopo, hanno disciplinato rispettivamente struttura e funzioni della **conferenza permanente per i rapporti fra Stato-Regioni e province autonome.**

d) *Soluzione delle* **divergenze** *e dei conflitti di attribuzione fra i* **Ministri.**
I contrasti possono presentarsi in veste di *divergenze politiche* o come *conflitti di competenza*. In *entrambi* i casi la decisione definitiva spetterebbe al Consiglio dei Ministri, ma ciò non esclude che anche il solo Presidente del Consiglio possa svolgere un'azione risolutiva.
Il Presidente del Consiglio, o ciascun Ministro interessato, possono sempre chiedere l'intervento del Consiglio sulla questione.

È inoltre richiesta la *delibera del Consiglio dei Ministri per*:

— provvedimenti da emanarsi *in contrasto* con il *parere* (obbligatorio ma non vincolante) del Consiglio di Stato;
— *richieste alla Corte dei Conti* di registrazione o apposizione del visto ad atti con *riserva*;
— *annullamento straordinario*, a tutela dell'ordinamento, degli *atti amministrativi illegittimi* (art. 6 T.U. legge com. e prov. n. 383/1934 fatto salvo dall'art. 63 della L. 142/90 di riforma delle autonomie locali).
Con sent. 21 aprile 1989, n. 229, la Corte Cost. ha dichiarato l'illegittimità costituzionale dell'art. 2, 3° c., lett. p) della L. 400/88, nella parte in cui prevede l'adozione da parte del Consiglio dei Ministri delle determinazioni concernenti l'annullamento straordinario degli atti amministrativi illegittimi delle Regioni e delle province autonome;
— approvazione dell'elenco dei nuovi Sottosegretari;
— *nomine* ai più alti gradi della gerarchia amministrativa nei settori economici dell'attività statale (es.: Presidenza dell'IRI, ENI, Ente Ferrovie dello Stato, etc.).

Si noti che il Presidente, il Consiglio o i singoli Ministri prima di procedere alle nomine, proposte, designazioni di Presidenti e Vicepresidenti di enti pubblici (anche economici) devono richiedere il *parere* ad apposite Commissioni parlamentari (permanenti) all'uopo istituite. È questo un modo per garantire il *controllo parlamentare sulle nomine negli enti pubblici* sancito dalla L. 24-1-78, n. 14, soprattutto per la verifica di situazioni di *incompatibilità* (art. 7) e di *altri adempimenti* (art. 8) cui i neo-presidenti di enti pubblici sono tenuti.

7. Segue: ORGANI NON NECESSARI DEL GOVERNO

A) Il Consiglio di Gabinetto

A norma dell'art. 6 della L. n. 400/88, il Presidente del Consiglio nello svolgimento delle funzioni di cui all'art. 95[1] Cost., può essere coadiuvato da un **Comitato**, che prende il nome di **Consiglio di Gabinetto** ed è composto dai ministri da lui designati (artt. 7-8) sentito il Consiglio dei Ministri. La legge ha così istituzionalizzato questa figura, creata in via sperimentale nel 1983 con deliberazione del Consiglio dei Ministri, che vuole essere una struttura interna di ausilio allo svolgimento dell'attività di direzione della politica generale del Governo da parte del Presidente del Consiglio e di promozione dell'attività dell'intero Consiglio dei Ministri.

In pratica si tratta di *una sede ristretta* in cui si prendono le «decisioni che contano» e che poi vengano formalizzate nelle deliberazioni del Consiglio.

Ad evitare che esso possa divenire una struttura rigida, la L. 400/88 prevede (art. 6) che il Presidente ha la facoltà di invitare alle sedute altri Ministri in ragione della loro competenza.

Il Consiglio di Gabinetto non ha *funzioni* deliberative, ma solo *istruttorie*: una delle più rilevanti è la discussione preventiva degli schemi di disegni di legge la cui deliberazione formale spetta poi al Consiglio dei Ministri.

B) I Comitati interministeriali

I Comitati di Ministri sono *organi collegiali* formati da più Ministri (e in alcuni casi anche da funzionari ed esperti) istituiti con legge o con decreto del Presidente del Consiglio, allo scopo di esaminare, in via preliminare, problemi di comune competenza: il moltiplicarsi delle interferenze reciproche tra i vari settori della P.A. imponeva talvolta la necessità di un *coordinamento dell'attività di più Ministeri*.

Quelli **istituiti con decreto** del Presidente del Consiglio sono organi puramente **interni**, con funzioni preparatorie, consultive, esecutive, detti Comitati di Ministri.

Quelli **istituiti con legge** hanno invece *rilevanza esterna* e sono i veri e propri **Comitati interministeriali.**

In seguito alla soppressione di numerosi comitati interministeriali disposta con L. 537/93 quelli più importanti ancora operanti sono:

— il **C.I.P.E.** (Comitato Interministeriale per la programmazione economica).

Esso è costituito dal Presidente del Consiglio, dai Ministri del Bilancio; delle Finanze; degli Esteri; dell'Industria; del Commercio con l'Estero; dei Trasporti e della navigazione.

— il **C.I.C.R.** (Comitato interministeriale per il credito e il risparmio).

Esso è costituito dal Ministro del Tesoro (che lo presiede); dei Lavori pubblici, dell'Industria del Bilancio; del Commercio con l'Estero; del Coordinamento per le politiche agricole, alimentari e forestali; delle Finanze; del Coordinamento delle politiche comunitarie e regionali; dal Governatore della Banca d'Italia;

— il **C.I.S.** (Comitato interministeriale per la Informazione e la Sicurezza)

Istituito presso la Presidenza del Consiglio, è composto dal Ministro degli Affari esteri, dell'Interno, di Grazia e Giustizia, della Difesa, dell'Industria e delle Finanze.

C) I sottosegretari di Stato

I sottosegretari di Stato non sono contemplati dalla Costituzione; la normativa che li prevede è contenuta nell'art. 10 della L. 400/1988.

Essi in particolare non fanno parte del Governo (in senso stretto) né hanno rilievo costituzionale, ma sono semplicemente incaricati di coadiuvare i *Ministri*, anzi, la loro nomina costituisce nell'attuale prassi costituzionale il primo atto ufficiale del nuovo Governo.

La creazione di tali figure risale al sistema costituzionale inglese ove i Ministri (che non ne sono membri) non possono accedere alle Camere e, quindi, si fanno rappresentare dai loro delegati: i *sottosegretari*.

Essi vengono nominati dal Presidente della Repubblica, su proposta del Presidente del Consiglio dei Ministri di concerto con il Ministro che il sottosegretario deve coadiuvare, sentito il Consiglio dei Ministri.

Poiché sono legati al Consiglio dei Ministri, *seguono la sorte del Governo* e, pertanto, in caso di sfiducia sono tenuti a dimettersi insieme con i membri del Governo stesso.

Il loro numero non è fisso, ma varia da Governo a Governo sia per garantire gli equilibri tra i partiti della coalizione sia per le necessità specifiche dei singoli Ministri.

Il sottosegretario collabora col Ministro nel campo amministrativo, ed in particolare:

— *coadiuva* il Ministro nell'esercizio delle sue funzioni amministrative;

— *rappresenta* il Ministro in caso di emergenza o di impedimento per gli affari amministrativi di particolare urgenza;
— *sostiene* eventualmente in Parlamento la discussione degli atti e progetti del Ministro;
— *esercita* le attribuzioni delegategli con decreto dal Ministro, anzi, a volte, la delega è implicita nella nomina (es.: il sottosegretario alle pensioni di guerra sostituisce il Ministro nella relativa competenza).

I sottosegretari sono pubblici funzionari come i Ministri, non hanno (salvo rara eccezione) competenze proprie, ma svolgono *attività delegate* dal Ministro. Tale *delega è temporanea e speciale*. Solo pochi sottosegretari (come il sottosegretario alle pensioni di guerra) hanno uno specifico compito istituzionale.

Per quanto riguarda la responsabilità valgono le regole dettate per i Ministri.

Si noti, infine che il *Sottosegretario alla Presidenza del Consiglio* dei Ministri funge da Segretario delle riunioni del Consiglio stesso, e si trova in una posizione di fatto e di diritto *intermedia* tra i Ministri e gli altri sottosegretari (CUOCOLO).

D) Alti commissari e commissari straordinari del Governo

All'origine gli *alti commissari* sono stati istituiti come figure affini ai Ministri senza portafoglio, che godevano di piena autonomia nel settore di loro competenza e dipendevano unicamente dal Presidente del Consiglio (alto commissario per le sanzioni contro il fascismo; per la Sicilia e la Sardegna; per l'Alimentazione; per l'Igiene e la Sanità; per il Turismo e lo Spettacolo; tutti istituiti nel primo dopoguerra e poi soppressi o trasformati in Ministri o organi di Ministeri).

I *commissari straordinari* sono particolari figure di pubblici funzionari, nominati con decreto del Presidente della Repubblica su proposta del Presidente del Consiglio e previa deliberazione del Consiglio dei Ministri, per realizzare «specifici obiettivi» o per particolari temporanee «esigenze di coordinamento operativo» fra amministrazioni statali.

L'incarico è a termine (salvo proroghe o revoche). Del loro operato il Governo è tenuto a riferire al Parlamento (art. 11 L. 400/88) tra essi si può ricordare il *Commissario per la protezione civile* nominato in caso di catastrofi o calamità naturali.

8. LA RESPONSABILITÀ E LE RELATIVE SANZIONI

La responsabilità del Presidente del Consiglio e dei Ministri è regolata dall'art. 95[2] Cost., ai sensi del quale «i Ministri sono responsabili collegialmente degli atti del Consiglio dei Ministri, e individualmente degli atti dei loro dicasteri».

Si tratta innanzitutto di una *responsabilità politica* davanti al Parlamento: la relativa sanzione può giungere fino alla revoca della fiducia, che obbliga il Governo (o anche solo il singolo Ministro: c.d. sfiducia individuale, prevista dal regolamento della Camera) alle dimissioni.

Esiste poi una *responsabilità amministrativa* dei singoli Ministri in quanto impiegati pubblici, in seno ai rispettivi dicasteri.

La *responsabilità civile* è regolata dall'art. 28 Cost. per tutti i pubblici funzionari, e deriva dalla «violazione di diritti». La relativa sanzione è l'obbligo di risarcire i danni. I Ministri sono responsabili civilmente anche nei casi di mancata conversione dei decreti legge che, ex art. 77 Cost., il Governo adotta sotto la propria responsabilità, che non è solo politica ma anche civile (BARILE).

La *responsabilità penale* è regolata dall'art. 96 Cost., come modificato dalla legge costituzionale n. 1 del 1989 che ha abolito le c.d. *giustizia politica*. I Ministri, infatti, per i *reati commessi nell'esercizio delle loro funzioni* (*reati ministeriali*) sono sottoposti alla *giurisdizione ordinaria* (previa autorizzazione del Senato della Repubblica o della Camera dei Deputati) e non più alla *commissione inquirente*, formata da parlamentari e quindi considerati «*judex suspectus*» in quanto non dotati di *autonomia di giudizio* in quanto facenti parte dello stesso partito, etc.

Per i *reati comuni* (cioé non commessi nell'esercizio delle funzioni ma come privati cittadini) rispondono davanti al giudice ordinario. Valgono le prerogative parlamentari solo se il Ministro è anche membro del Parlamento.

Sezione Ottava
La Pubblica Amministrazione

1. I PRINCIPI COSTITUZIONALI IN MATERIA

Il «*principio della divisione dei poteri*» si realizza in concreto quando per ciascuna funzione si costituiscono appositi organi.

La *funzione esecutiva* (o amministrativa) viene esercitata da un complesso di *organi* e *uffici* che prendono il nome di **organizzazione amministrativa**.

Va innanzitutto rilevato, che la nostra organizzazione amministrativa si basa sulla distinzione fondamentale tra:

— **amministrazione diretta**: la quale viene in rilievo nei casi in cui l'organizzazione fa capo allo **Stato-persona** e si configura come insieme di organi costituenti parte integrante di esso;
— **amministrazione indiretta**: la quale viene in rilievo nei casi in cui l'organizzazione si articola in **soggetti giuridici diversi**, che si pongono accanto allo Stato, ma che *soggettivamente sono autonomi* (*enti pubblici*).

Prima di esaminare gli aspetti generali di ciascuna delle due forme di organizzazione amministrativa, analizziamo i *principi costituzionali* in tema di organizzazione e attività della P.A.

a) *Decentramento amministrativo e autonomie locali*
Lo Stato *contemporaneo*, che interviene in modo sempre più ampio ed incisivo nella vita sociale, tende istituzionalmente ad attuare nell'ambito dello *Stato-apparato* un *decentramento* dell'amministrazione burocratica sempre più ampio e nell'ambito dello *Stato-comunità* un'*autonomia* sempre maggiore ai soggetti pubblici che di essa fanno parte.

Proprio in considerazione di tali esigenze la Costituzione all'art. 5 sancisce:

1. il *principio delle autonomie locali*: che mira a configurare l'ordinamento generale dello Stato come un ordinamento *composto da una pluralità di ordinamenti territoriali minori*. Tali enti sono poi espressamente individuati dall'art. 114 della Costituzione il quale dispone che «la Repubblica si riparte in *Regioni, Province* e *Comuni*»;
2. il *principio del decentramento amministrativo*: che consiste nel distacco di determinate attribuzioni dagli organi centrali a quelli periferici, al fine di garantire una maggiore *speditezza* ed *incisività* dell'azione amministrativa. Esso si realizza:
   — mediante la *ripartizione delle varie funzioni amministrative fra gli uffici centrali e periferici* nell'ambito dello Stato-persona (*decentramento burocratico*; es.: *Intendente di Finanza che svolge funzioni delegate dal Ministro delle Finanze*, etc.);
   — mediante la distribuzione delle funzioni amministrative tra lo Stato e gli enti pubblici a carattere *territoriale* (*decentramento autarchico*; es.: *Regioni*);
   — mediante la distribuzione delle funzioni amministrative tra lo Stato e gli altri enti pubblici a carattere *non territoriale* (*decentramento istituzionale*; es.: *Università*).

b) *Principio di legalità*
L'art. 97 Cost. prevede che l'attività della P.A. sia interamente disciplinata dalla *legge*. Ne consegue, che *solo* la legge può determinare i *fini* che l'azione amministrativa deve perseguire nonché il contenuto *tipico* dei vari atti posti in essere dalle autorità amministrative ed il loro procedimento di *formazione*.
La legge 7-8-1990, n. 241 ha fissato delle regole generali che valgono per tutti i procedimenti amministrativi per i quali non sia prevista una disciplina specifica.

Tali regole generali possono così sintetizzarsi:

a) *semplicità e speditezza delle forme* (art. 1);
b) *celerità di svolgimento*, nel senso che ogni amministrazione deve determinare, se non è già previsto dalla legge, il termine entro cui il procedimento deve svolgersi; in mancanza di tale determinazione, il procedimento non può comunque superare i trenta giorni (art. 2);
c) *obbligo di motivazione* del provvedimento terminale (art. 3);
d) *obbligo di indicare* in ogni atto notificato al destinatario il *termine e l'autorità cui è possibile ricorrere*;
e) *l'obbligo di determinare* per ciascun tipo di provvedimento, *e di rendere pubblico, l'unità organizzativa responsabile* della istruttoria e di ogni altro adempimento procedimentale nonché dell'adozione del provvedimento finale;
f) *l'obbligo di far partecipare al procedimento i soggetti nei confronti dei quali il provvedimento finale è destinato a produrre effetti diretti nonché quelli che per legge debbono intervenire*;
g) *la facoltà di intervenire nel procedimento riconosciuta a qualunque soggetto, portatore di interessi pubblici o privati, nonché ai portatori di interessi diffusi costituiti in associazioni o comitati, cui possa derivare un pregiudizio dal provvedimento* (art. 9);
h) *il diritto degli interessati* (*supra*, lettera f) *e degli intervenuti* (*supra*, lettera g) di *prendere visione* degli atti del procedimento, salvo quelli esclusi dal diritto di accesso (art. 10);
i) la *massima semplificazione dei procedimenti che coinvolgono vari interessi pubblici*.

c) *Principio del buon andamento della P.A.*
Il principio di buona amministrazione (sempre espresso nell'art. 97, 1° comma Cost.) sta ad indicare l'obbligo per i funzionari amministrativi ed in genere per tutti gli agenti dell'amministrazione, di svolgere la loro attività secondo le modalità più idonee ed opportune per l'*efficacia*, la *speditezza* e l'*economicità* dell'azione amministrativa, con il minor sacrificio degli interessi particolari dei singoli (RESTA).

Nell'ambito degli **organi centrali** distinguiamo:

— i **Ministeri**, i quali curano i diversi interessi dello Stato sulla base di una ripartizione *di competenza per materia*; essi sono gli organi centrali di massima rilevanza;
— gli **organi di controllo**, costituiti dalle *Ragionerie centrali*, che esercitano la vigilanza su tutta la *gestione patrimoniale* dei Ministeri e che sono dirette e coordinate dalla *Ragioneria generale dello Stato* istituita presso il Ministero del Tesoro;
— gli **organi consultivi**: importanza fondamentale va riconosciuta all'*Avvocatura Generale dello Stato*, composta da un corpo di avvocati che svolgono funzioni di *consulenza legale* di *rappresentanza* e di *difesa in giudizio* dello Stato e degli altri enti pubblici;
— l'**amministrazione autonoma**, che è costituita da organi i quali pur essendo privi, in genere, della personalità giuridica e pur essendo incardinati nel Ministero competente, godono di una *considerevole autonomia*.

Gli **organi periferici** esercitano funzioni amministrative in sede locale, alle dipendenze dirette degli organi centrali preposti ai vari settori (c.d. *decentramento burocratico*). Ad esempio:

— le **Questure**, che esercitano funzioni di pubblica sicurezza, dipendono dal Ministero dell'Interno;
— i **Provveditorati agli Studi**, che curano l'istruzione primaria e secondaria, dipendono dal Ministero della Pubblica Istruzione;
— le **Intendenze di Finanza**, che sono uffici provinciali del Ministero delle Finanze;
— gli uffici del **Genio Civile** che sono uffici provinciali del Ministero dei lavori pubblici, etc.

Una posizione a parte, ma di rilievo tra gli organi dell'amministrazione *periferica* dello Stato è riservata ai *Prefetti*, che rappresentano, in sede locale, il Governo. Dal punto di vista *organico*, l'Ufficio del Prefetto dipende dal *Ministero dell'Interno*,

ma dal punto di vista *funzionale*, data la molteplicità delle sue competenze, esso dipende dai singoli Ministeri ai quali, di volta in volta, inerisce la sua attività (c.d. *coodipendenza orizzontale*).

d) *Principio di trasparenza*

Il principio di trasparenza dell'azione amministrativa è stato finalmente previsto come principio generale del nostro ordinamento in seguito all'emanazione della L. 7-8-1990, n. 241 sul «procedimento amministrativo e sul diritto di accesso ai documenti amministrativi».

La legge, nell'intento di svincolare la procedura amministrativa dai lacci burocratici e di porla al servizio del cittadino-utente detta alcuni principi fondamentali volti a regolare l'azione amministrativa in uno Stato di diritto.

La legge, infatti, oltre a prevedere l'obbligo della P.A. di concludere il procedimento in tempo ragionevole mediante provvedimento scritto e l'obbligo di adeguata motivazione, garantisce la partecipazione degli interessati al procedimento amministrativo e il diritto di accesso ai documenti «al fine di assicurare la trasparenza dell'attività amministrativa e di favorirne lo svolgimento imparziale» (art. 22).

e) *Il principio di informatizzazione dell'azione amministrativa*

Una delle principali novità introdotte dal panorama normativo degli ultimi anni è data dall'emergere di una sempre più spiccata tendenza all'*informatizzazione ed organizzazione dell'azione amministrativa*. Informatizzazione necessaria, per un verso, onde garantire snellezza e produttività, per altro verso, allo scopo di assicurare trasparenza e facilitare l'attivazione di adeguati meccanismi di controllo sull'operato dei pubblici poteri.

Un passo decisivo in questa direzione è stato compiuto con l'emanazione del *D.Lgs. 3-2-1993, n. 29*, in materia di pubblico impiego che, all'art. 12, contempla l'istituzione di un complesso meccanismo di informatizzazione dei pubblici uffici. A tale scopo è previsto un apposito organismo: l'Autorità per l'informatica nella pubblica amministrazione (es. *D.Lgs. 12-2-1993, n. 39*), con il precipuo compito di definire i necessari modelli e sistemi informativi, onde adempiere al dovere di informazione, interna ed esterna, nei confronti dei cittadini e di espletare funzioni di coordinamento delle iniziative e di pianificazione degli investimenti in materia di automazione.

2. L'AMMINISTRAZIONE INDIRETTA

L'attività amministrativa, oltre che dall'*apparato centrale e periferico dello Stato*, è svolta da una serie di *enti pubblici*:

— a **carattere territoriale** come la *Regione*, le *Province* e i *Comuni* che hanno una sfera d'azione limitata ad un certo territorio;
— a **carattere non territoriale**, cioé da persone giuridiche pubbliche per le quali il territorio non costituisce elemento strutturale indefettibile ma delimita solamente l'ambito della competenza territoriale locale o nazionale.

Per gli enti pubblici territoriali il *territorio* non costituisce soltanto la *sfera* di *competenza* dei relativi poteri ma è anche e necessariamente *elemento costitutivo* dell'ente nel senso che lo stesso non potrebbe esistere senza di esso. Unici enti territoriali nell'ordinamento italiano sono le *Regioni*, le *Province* e i *Comuni* (e loro forme associative *ex* L. 142/90). Essi presentano le seguenti *caratteristiche*:

— sono *enti autarchici*, cioé operano in regime di diritto amministrativo;
— sono enti ad *appartenenza necessaria*, in quanto ne fanno parte necessariamente tutti coloro che risiedono stabilmente nel loro territorio, e che hanno diritto di voto nelle elezioni amministrative degli *organi* regionali, provinciali e comunali;
— sono dotati dell'*autonomia politica, amministrativa e finanziaria*.

3. IL RAPPORTO DI PUBBLICO IMPIEGO

A) Concetto

Il rapporto di impiego pubblico è quel rapporto di lavoro in cui una persona fisica pone volontariamente la propria attività, in via continuativa, e dietro retribuzione, al servizio dello Stato o di un ente pubblico non economico, assumendo particolari diritti e doveri.

La Corte di Cassazione (Sez. Unite), con la sentenza n. 618 del 17 febbraio 1975, ha ritenuto che si è in presenza di un *rapporto di pubblico impiego*, quando concorrono le seguenti condizioni:

a) *che l'ente datore di lavoro sia pubblico*, il che esclude che possa instaurarsi rapporto di pubblico impiego con un concessionario o un appaltatore della P.A.;
b) *che i compiti affidati al lavoratore attengano ai fini istituzionali dell'ente-datore di lavoro* e non si riferiscano, invece ad esigenze eccezionali ovvero a prestazioni marginali, come le pulizie in un ufficio, l'attività di «uomo di fatica», etc.
Occorre notare, tuttavia, che secondo un successivo orientamento giurisprudenziale, la qualifica di pubblico dipendente prescinde dall'espletamento di mansioni attinenti al fine istituzionale dell'ente (non economico), ma sussiste allorquando l'attività si svolga nell'ambito di una struttura pubblica (Cass. 5-12-80, n. 6333);
c) *che l'assunzione avvenga per prestazioni continuative e durevoli* e, quindi, non a termine e con retribuzione determinata;
d) *che sussista un atto formale di nomina*, anche se risultante da un qualsiasi atto o insieme di atti (Cass. 26 aprile 1976, n. 1499).

B) Caratteri

I caratteri giuridici del rapporto d'impiego possono così riassumersi:

— **rapporto di diritto pubblico:** il carattere necessariamente pubblico di uno dei soggetti — Stato o ente pubblico autarchico — il *fine pubblico* che tali soggetti perseguono, sono tutti elementi dai quali si desume l'appartenenza del rapporto al diritto pubblico.

Peraltro a seguito dell'emanazione del D.Lgs. 29/93 e successive modificazioni si è disposta l'applicazione ai rapporti di lavoro dei dipendenti delle amministrazioni pubbliche, delle disposizioni del capo I, Titolo II del libro V del codice civile e delle leggi sui rapporti di lavoro subordinato nell'impresa, tale qualificazione va sottoposta a verifica. Se infatti, da un lato l'applicazione della normativa privatistica sembrerebbe deporre nel senso del carattere privato del rapporto dall'altro la permanenza di alcuni aspetti pubblicistici (natura pubblica del datore di lavoro, permanenza di poteri autoritativi in capo ad esso), fa propendere per la conclusione contraria. Stante l'incertezza è necessario attendere gli sviluppi giurisprudenziali in materia;

— **rapporto volontario:** in quanto sia per la costituzione che per la continuazione del rapporto è richiesta non solo la volontà della P.A., ma altresì la volontà del dipendente;
— **rapporto strettamente personale:** in quanto la specifica capacità intellettiva e tecnica richiesta per ogni singolo ufficio e la fiducia che l'ente deve avere nella persona cui affida la cura dei propri interessi comportano che il rapporto sia costituito *intuitu personae*;
— **rapporto giuridico bilaterale:** esso, infatti, importa diritti ed obblighi reciproci per ciascuna delle parti;
— **rapporto di subordinazione gerarchica:** infatti la subordinazione gerarchica e disciplinare costituisce l'elemento che differenzia l'impiego dall'incarico professionale (*locatio operis*).

4. I PRINCIPI COSTITUZIONALI IN MATERIA DI PUBBLICO IMPIEGO

Numerose sono le norme costituzionali concernenti il rapporto di pubblico impiego quali:

a) l'art. **51** Cost. stabilisce che «tutti i cittadini dell'uno o dell'altro sesso possono accedere agli uffici pubblici o alle cariche elettive in condizioni di eguaglianza, secondo i requisiti stabiliti dalla legge».

La parità fra uomo e donna in materia di lavoro è stata ribadita con la legge 9 dicembre 1977 n. 903, che ha fatto venir meno, almeno sul piano giuridico, ogni disparità di trattamento fra uomini e donne. Secondo l'art. 1 della legge, «*è vietata qualsiasi discriminazione fondata sul sesso per quanto riguarda l'accesso al lavoro, indipendentemente dalle modalità di assunzione e qualunque sia il settore o il ramo di attività, a tutti i livelli della gerarchia professionale*».
La parità tra uomo e donna, nel pubblico impiego, ha trovato, peraltro, concreta attuazione con L. 164/90, L. 125/91, nonché con il D.Lgs. 29/93.

Con la legge 164/90 è stata istituita presso la Presidenza del Consiglio dei Ministri, la *Commissione Nazionale per la parità e le pari opportunità tra uomo e donna*, con il compito di promuovere l'eguaglianza tra i sessi rimuovendo fattori di discriminazione e gli ostacoli di fatto limitativi della parità in conformità dell'art. 3 Cost. Con L. 125/91 il Parlamento ha promosso una serie di iniziative per la realizzazione della parità di uomo e donna nel lavoro, con lo scopo precipuo dell'occupazione femminile. Il D.Lgs. 29/93, infine, ha introdotto alcune innovazioni per garantire pari opportunità tra uomini e donne per l'accesso ed il trattamento sul lavoro. In particolare le P.A.:

— riservano alle donne almeno un terzo dei membri delle commissioni di concorso;
— adottano atti volti ad assicurare pari dignità tra uomini e donne sul lavoro;
— garantiscono la partecipazione delle dipendenti ai corsi di formazione e di aggiornamento professionale.

«La legge può, per l'ammissione ai pubblici uffici e alle cariche elettive, parificare ai cittadini gli italiani non appartenenti alla Repubblica».

«Chi è chiamato a funzioni pubbliche elettive ha diritto di disporre del tempo necessario al loro adempimento e di conservare il suo posto di lavoro»;

b) l'art. **54** detta che: «I cittadini cui sono affidati funzioni pubbliche hanno il dovere di adempierle con disciplina ed onore, prestando giuramento in casi stabiliti dalla legge» ed è integrato dall'art. 98 il quale, premesso che «i pubblici impiegati sono al servizio esclusivo della nazione», vieta che gli impiegati, membri del Parlamento, possano conseguire promozioni per ragione diversa dell'anzianità e consente che la legge stabilisca limiti al diritto di iscriversi a partiti politici per determinate categorie d'impiegati.
Si è tentato in questo modo di affermare il principio della *apoliticità degli impiegati nello svolgimento delle pubbliche funzioni*, in quanto essi devono svolgere la propria attività al servizio della *nazione*, e non dei partiti nei quali sono stati eletti;

c) l'articolo **97** Cost. riserva alla legge l'ordinamento degli uffici, compresa la determinazione delle sfere di competenza, delle attribuzioni e delle responsabilità degli impiegati e dei pubblici uffici, dunque, sancisce anche il principio del buon andamento dell'amministrazione: l'attività deve svolgersi con prontezza, efficacia, efficienza ed imparzialità;

d) l'art. **98** Cost., in base al quale i pubblici impiegati vengono assunti tramite pubblico concorso e sono al servizio esclusivo della Nazione.

Risultano applicabili al pubblico impiego anche i seguenti articoli:

e) art. **35** Cost., relativo alla tutela del lavoro ed alla promozione della formazione professionale dei lavoratori;
f) art. **36** Cost., relativo alla «equa retribuzione», alla durata della giornata lavorativa, al diritto al riposo settimanale ed alle ferie;
g) art. **37** Cost., relativo alla tutela dei minori e delle donne nel rapporto di lavoro;
h) art. **38** Cost., relativo alla assistenza degli inabili al lavoro, ed alla statuizione di forme di previdenza per i lavoratori;
i) artt. **39** e **40** Cost., relativi all'organizzazione sindacale ed al diritto di sciopero; non vi è dubbio, infatti, che anche ai pubblici impiegati, salvo poche eccezioni che vedremo più avanti (magistrati, militari), spetti il diritto di associarsi in sindacati e di scioperare.

5. LA RIFORMA DEL PUBBLICO IMPIEGO (D.LGS. 3 FEBBRAIO 1993, N. 29)

A) Generalità

Con l'emanazione del **decreto legislativo n. 29 del 3 febbraio del 1993**, successivamente modificato ed integrato con D.Lgs. 470/93 e 546/93, *recante norme in materia di razionalizzazione dell'organizzazione dell'amministrazione e revisione della disciplina del pubblico impiego*, è stata realizzata una vera e propria rivoluzione culturale, oltre che giuridica.

Il pubblico impiego, tradizionalmente informato ad un regime autonomo e differenziato rispetto al lavoro privato, è stato quasi integralmente assoggettato alle disposizioni dettate, per quest'ultimo, dal *codice civile*, dallo *Statuto dei lavoratori* e dalla *legislazione speciale*.

È stata così attuata quella che, con termine atecnico ma di sicura efficacia, è stata definita la *privatizzazione del pubblico impiego*, ossia la parificazione, sotto il profilo normativo e tecnico-operativo, del lavoro pubblico con quello di marca privatistica.

La scelta del legislatore di operare in questo senso è scaturita dalla percezione di come buona parte delle disfunzioni dell'organizzazione e dell'azione amministrativa era in realtà addebitabile ad un regime normativo troppo garantista per il lavoratore pubblico e di come, quindi, l'applicazione delle regole privatistiche avrebbe prodotto effetti positivi sul piano dell'efficienza e della economicità.

A ben vedere, peraltro, questa scelta del legislatore del 1993 costituisce solo l'ultima tappa di una evoluzione normativa particolarmente complessa, nel corso della quale le distanze tra lavoro pubblico e privato, pur se mai azzerate, sono state progressivamente ridotte.

In tal senso va ricordato il D.P.R. 10 gennaio 1957, n. 3, *Testo unico degli impiegati civili dello Stato*; la legge 11 luglio 1980, n. 312 ed infine la c.d. legge quadro sul pubblico impiego (L. 20 marzo 1983, n. 93) quasi totalmente abrogata, ad accezione di alcuni articoli.

B) Principi generali

La *ratio* ispiratrice della riforma del pubblico impiego è fondamentalmente data dalla applicazione al settore pubblico delle regole e dei criteri operativi e gestionali vigenti nel settore privatistico (c.d. *privatizzazione*). Di conseguenza, viene meno qualsivoglia distinzione sul piano delle fonti (vedi § successivo): sia il lavoro pubblico che il lavoro privato sono soggetti alle norme dettate dal codice civile, dallo Statuto dei lavoratori e dalla legislazione speciale. Entrambe le tipologie di rapporti lavorativi sono destinate ad essere regolate attraverso la contrattazione individuale e collettiva.

Alla base di questo riassetto milita una mutata concezione della stessa P.A., vista non più nella sua tradizionale veste autoritativa, ma nei panni di soggetto erogatore di servizi in favore della collettività.

Detta *ratio* di fondo si concreta:

— in una razionalizzazione dell'attuale organizzazione dei pubblici uffici;
— in un riassetto complessivo della dirigenza pubblica, imperniato sulla responsabilizzazione e su di una più spiccata autonomia del ceto dirigente rispetto alla classe politica;
— nella ridefinizione del regime della contrattazione collettiva;
— nell'abbandono del previgente sistema della recezione degli accordi contrattuali da parte di provvedimenti a carattere normativo;
— nella razionalizzazione del sistema di accesso;
— nella valorizzazione della mobilità lavorativa, verticale ed orizzontale;
— nella devoluzione della cognizione delle controversie in materia di pubblico impiego al Pretore del lavoro a fardata dal 1996.

C) Ambito di applicazione

Il secondo ed il terzo comma dell'art. 1 del decreto delegato determinano l'ambito di applicazione della normativa di riforma in materia di pubblico impiego.

Onde evitare perplessità interpretative, il legislatore, dopo aver premesso che la riforma si applica a tutte le pubbliche amministrazioni, con le eccezioni di cui si dirà, ha precisato che per amministrazioni pubbliche si intendano *le Regioni, le Province, i Comuni, le Comunità montane e loro consorzi ed associazioni, le istituzioni universitarie, gli istituti autonomi case popolari, le Camere di commercio, industria, artigianato, ed agricoltura e loro associazioni, tutti gli enti pubblici non economici nazionali, regionali e locali, e le amministrazioni, le aziende e gli enti del servizio sanitario nazionale.*

D) Eccezioni

L'art. 2 del decreto delegato prevede l'esclusione di talune categorie di dipendenti pubblici dall'ambito di applicazione della normativa di riforma. Di conseguenza, tali categorie restano assoggettate alla normativa in vigore.

Trattasi delle seguenti categorie di dipendenti:

— magistrati ordinari, amministrativi e contabili;
— avvocati e procuratori dello Stato;
— personale militare e delle forze di polizia;
— personale delle carriere diplomatica e prefettizia, a partire rispettivamente dalle qualifiche di segretario di legazione e di vice consigliere di prefettura;
— dirigenti generali dello Stato e dirigenti del Parastato equiparati;
— dipendenti che svolgono la loro attività nelle materie contemplate dal D.Lgs. C.P.S. n. 691/1947 (risparmio, funzioni creditizia e valutaria), e dalle leggi n. 281/1985 (tutela del risparmio, valori mobiliari) e n. 287/1990 (tutela della concorrenza e del mercato).

Recita l'art. 2 c. 5 del D.Lgs. 29/93 (come modificato dal D.Lgs. n. 546/93): «*Il rapporto di impiego dei professori ricercatori universitari resta disciplinato dalle disposizioni rispettivamente vigenti, in attesa della specifica disciplina che lo regoli in modo organico ed in conformità ai principi dell'autonomia universitaria*».

Trattasi di eccezioni in larga misura opportune, in quanto suggerite dalle connotazioni di specialità dei rapporti *de quibus*, oltretutto concernenti categorie già precedentemente escluse dalla disciplina dettata dalla normativa generale previgente.

E) Profili processuali

Naturale corollario della privatizzazione, sul piano squisitamente sostanziale del pubblico impiego, è, sul versante processuale, la devoluzione del relativo contenzioso, precedentemente riservato alla giurisdizione esclusiva del giudice amministrativo, al *giudice ordinario*, nella persona del Pretore del lavoro, devoluzione, peraltro, destinata a trovare applicazione a far data dal 1996.

6. IL NUOVO SISTEMA DELLE FONTI DEL PUBBLICO IMPIEGO

Come si è avuto modo di rilevare in precedenza, la *ratio* ispiratrice della riforma è fondamentalmente data dalla volontà legislativa di abolire le differenziazioni precedentemente intercorrenti tra lavoro pubblico e privato, e di recepire contestualmente, nel pubblico impiego, regole giuridiche e comportamentali tradizionalmente proprie degli operatori economici privati.

Questa *ratio* si è tradotta in un riassetto complessivo del sistema delle fonti del pubblico impiego, i cui caratteri salienti sono:

a) l'*assoggettamento dei pubblici dipendenti alla normativa di diritto comune*;
b) *la contrattualizzazione dei rapporti individuali di lavoro.*

A) Applicazione della normativa di diritto comune

Il secondo comma dell'art. 2 della normativa di riforma dispone che *i rapporti di lavoro e di impiego dei dipendenti delle amministrazioni pubbliche* — con le eccezioni di cui si è detto nel paragrafo precedente — *sono regolati dalle disposizioni dettate dal capo I, titolo II, del libro V del codice civile*, salvi i limiti stabiliti dal decreto per il perseguimento degli interessi generali cui l'organizzazione e l'azione amministrativa sono indirizzate.

In particolare, per quanto afferisce alla normativa codicistica, va rimarcato che è disposta l'applicazione diretta delle norme concernenti i collaboratori dell'imprenditore (artt. 2094-2095) ed il rapporto di lavoro (artt. 2096-2159, disciplinanti la costituzione del rapporto, i diritti e gli obblighi delle parti, la materia previdenziale ed assistenziale e l'estinzione), non è per contro prevista l'applicazione diretta delle disposizioni di cui al capo I del titolo II del libro V (artt. 2082-2095), concernente l'imprenditore e, segnatamente, il rapporto di gerarchia tra imprenditore e collaboratori.

La previsione dell'applicazione della normativa di diritto comune al pubblico impiego consente di risolvere la controversa problematica dei limiti di applicabilità dello *Statuto dei lavoratori* al pubblico impiego. Infatti, il carattere generale del suddetto richiamo alla normativa regolatrice del rapporto privato consente di concludere nel senso dell'integrale estensione dello Statuto alle pubbliche amministrazioni, senza limitazioni sotto il profilo dei soggetti destinatari e delle modalità di applicazione. In tal senso dispone anche l'art. 3, comma 32, della L. 537/93.

Va, comunque, segnalato che la normativa di diritto comune si applica ai rapporti di pubblico impiego solo *in quanto compatibile con la specialità del rapporto di lavoro e con gli interessi generali.*

Ciò vuol dire che occorrerà valutare di volta in volta se le singole disposizioni dettate dal codice civile o dalla legislazione speciale presentino dei profili di incompatibilità, parziale o totale, con i caratteri essenziali del pubblico impiego, e, quindi, possano vedere, in tutto o in parte, esclusa la loro applicabilità ai fini della regolamentazione dello stesso.

B) Contrattualizzazione del pubblico impiego

Il terzo comma dell'art. 2 della normativa di riforma dispone che i *rapporti di lavoro ed impiego pubblico sono regolati contrattualmente.*

I contratti collettivi sono stipulati secondo i criteri statuiti dal titolo III del decreto delegato (vedi par. successivo). I contratti individuali devono conformarsi ai principi della parità di trattamento e del rispetto dei minimi retributivi stabiliti in sede di contrattazione collettiva.

In buona sostanza, tale disposizione sancisce il principio della *contrattualizzazione del rapporto di pubblico impiego*: ad un sistema, quale quello previgente, in cui la regolamentazione del rapporto di lavoro, era principalmente riservata alle determinazioni unilaterali della Pubblica Amministrazione o alla legge, ne viene sostituito uno completamente nuovo, in cui la definizione del rapporto, con particolare riferimento ai profili economici, viene riservata alla contrattazione, individuale e collettiva.

Ciò premesso, va tuttavia ricordato che non tutti gli aspetti del rapporto di lavoro sono demandati alla disciplina contrattuale. In ossequio alla *riserva relativa di legge* di cui all'art. 97 Cost., ne sono escluse le materie più propriamente afferenti alla sfera dell'*organizzazione di pubblici uffici.*

7. LA CONTRATTAZIONE COLLETTIVA

Il regime della contrattazione collettiva è stato profondamente modificato dalla normativa di riforma.

La legislazione previgente (legge quadro n. 93/1983) prevedeva un sistema in forza del quale, una volta positivamente completata la fase delle trattative tra rappresentanze sindacali e rappresentanti della Pubblica Amministrazione, il testo finale dell'accordo non era immediatamente produttivo di effetti. L'efficacia dello stesso era, infatti, subordinata alla sua recezione ad opera di apposito decreto presidenziale, che pertanto diveniva fonte diretta di regolamentazione del rapporto.

Al fine di rivitalizzare il ruolo della contrattazione collettiva, il decreto delegato ha abolito il sistema della recezione dei contratti in atti a carattere normativo ed ha attribuito ai contratti collettivi il ruolo di *fonte diretta e primaria di regolamentazione del rapporto di lavoro.*

In ragione di tanto, il comma 2 bis dell'art. 2 del più volte citato D.Lgs. 29/93 come sostituito dall'art. 1 del D.Lgs. 546/93, prevede che nelle materie non soggette a riserva di legge, eventuali norme di legge, successive alla stipula di un contratto collettivo, cessano di avere efficacia, salvo che la legge non disponga espressamente in senso contrario, dal momento in cui entra in vigore il sucessivo contratto collettivo.

Punti qualificanti della disciplina dettata dagli artt. 50 e segg. del decreto legislativo in materia di contrattazione collettiva sono i seguenti:

a) la contrattazione collettiva è *nazionale* e *decentrata*;
b) essa *si svolge su tutte le materie relative al rapporto di lavoro* non riservate alla legge ovvero ad atti normativi od amministrativi;
c) i contratti collettivi nazionali sono stipulati per *comparti della pubblica amministrazione* comprendenti settori omogenei o affini;
d) i *comparti* sono determinati e possono essere modificati, sulla base di accordi stipulati tra l'*agenzia*, in rappresentanza della P.A., e le *confederazioni sindacali maggiormente rappresentative sul piano nazionale*, con decreto del Presidente del Consiglio dei Ministri;
e) finalità precipua della contrattazione collettiva decentrata è il contemperamento tra *esigenze organizzative, tutela degli utenti* ed *interessi dei dipendenti*;
f) i *contratti collettivi quadro* sono stipulati, per la parte pubblica, dalla sopramenzionata *agenzia* e, per la parte sindacale, dalle confederazioni sindacali maggiormente rappresentative sul territorio nazionale;
g) i contratti collettivi nazionali di comparto *sono stipulati tra l'agenzia di cui sopra* e, per la parte sindacale, *le confederazioni sindacali* maggiormente rappresentative sul piano nazionale nonché le organizzazioni sindacali maggiormente rappresentative sul piano nazionale nell'ambito del comparto;

h) i contratti collettivi decentrati *sono stipulati*, per la parte pubblica, da *una delegazione* composta dal titolare del potere di rappresentanza delle singole amministrazioni o da *un suo delegato*, che la presiede, e da *rappresentanti dei titolari degli uffici interessati* e, per la parte sindacale, da *una rappresentanza* composta secondo le modalità definite dalla contrattazione collettiva nazionale;
i) i contratti collettivi sono corredati da appositi prospetti contenenti la *quantificazione degli oneri* nonché l'indicazione della *copertura finanziaria* complessiva per l'intero periodo di validità contrattuale;
l) in caso di controversie interpretative concernenti i contratti collettivi, le parti che li hanno sottoscritti si incontrano per definire consensualmente il significato della *clausola controversa*.

Una delle principali novità introdotte nel settore in esame dalla normativa di riforma è data dall'istituzione della sopramenzionata *agenzia per la rappresentanza negoziale*.

Trattasi di un organo dotato della *personalità giuridica* e sottoposto alla vigilanza della Presidenza del Consiglio dei Ministri. A capo di tale struttura è collocato un *direttore*, nominato dal Presidente del Consiglio. Nell'espletamento delle attività di sua competenza, si avvale di pubblici dipendenti fuori ruolo o in comando, nonché di esperti e consulenti per i singoli comparti.

Compiti fondamentali dell'agenzia sono la rappresentanza delle pubbliche amministrazioni in sede di contrattazione collettiva nazionale e la formulazione delle direttive in materia di contrattazione collettiva decentrata.

8. STRUTTURA DEL PUBBLICO IMPIEGO

A) La dotazione organica

Ogni amministrazione ha un proprio *ruolo organico*, il quale consiste in una tabella in cui è determinato, distinto per *carriera* e *qualifiche*, il numero dei posti di cui dispone l'amministrazione (VIRGA).

La dotazione organica, ossia il numero complessivo dei posti di tutte le qualifiche di una *singola amministrazione*, è data da un precetto normativo-finanziario circa i posti di lavoro che al massimo possono essere ricoperti nell'ambito della singola amministrazione.

La determinazione della dotazione organica dei ruoli delle varie amministrazioni può essere stabilita o modificata solo con *legge*. Ciò sia perché il ruolo costituisce parte integrante dell'organizzazione dei Ministeri, in relazione ai quali esiste la riserva di legge (art. 97 Costituzione), sia perché ogni ampliamento dell'organico comporta un maggiore onere finanziario per il quale deve essere prevista la relativa copertura (art. 81 Cost.).

B) I ruoli unici

L'istituzione di *ruoli unici*, cioè [illegible] uno dei profili più importanti della riforma del pubblico impiego per realizzare una distribuzione funzionale del personale ed evitare che si verifichino disparità di trattamento fra i dipendenti.

La legge 11 luglio 1980, n. 312 ha ribadito *espressamente* la necessità dell'istituzione dei *ruoli unici nazionali*, attraverso l'emanazione di una *legge-quadro sul pubblico impiego* (art. 19).

L'esigenza che con tali istituti si tende a soddisfare è quella di pervenire ad una distribuzione funzionale del personale secondo meccanismi più sensibili alle diverse esigenze delle singole amministrazioni.

Da quanto detto gli impiegati si distinguono in impiegati:

— *di ruolo*: titolari di un posto organico caratterizzato dalla stabilità;
— *non di ruolo*: assunti cioè per esigenze temporanee; ed es.: supplenti, avventizi, etc.

C) Abolizione delle carriere

La carriera suole essere definita come: «un raggruppamento di qualifiche attinenti ad una determinata funzione ed ordinate gerarchicamente» (VIRGA).

A seguito della L. 11-7-1980, n. 312, il rapporto di pubblico impiego non è più ordinato in carriere (direttiva, di concetto, esecutiva, ausiliaria), ma secondo otto qualifiche funzionali, ad ognuna delle quali corrisponde un livello retributivo, distinte

secondo contenuti di professionalità costituiti dalla complessità del lavoro «in relazione ai requisiti culturali, al grado di responsabilità, alla sfera di autonomia che comporta, al grado di mobilità e ai requisiti di accesso alla qualifica».

L'esigenza dell'abolizione della «carriera» e, quindi, la relativa sostituzione con la c.d. qualifica funzionale, articolata in una pluralità di profili professionali, relativi a diversi livelli retributivi, è stata determinata dal fatto che le prestazioni del pubblico dipendente erano solo predeterminate in relazione al tipo di carriera ed al relativo titolo di studio richiesto per accedervi. Infatti la carriera era articolata per qualifiche solo *gerarchicamente e non funzionalmente ordinate* — c.d. principio della genericità o fungibilità delle mansioni — con la conseguenza che a qualifiche gerarchicamente diverse all'interno della carriera, non corrispondeva un diverso grado di professionalità e quindi di diversificazione e complessità delle mansioni espletate.

D) Creazione della qualifica funzionale secondo la L. 11-7-1980, n. 312 e la legge-quadro sul pubblico impiego: i livelli

La L. 11-7-1980, n. 312, come ricordato, ha classificato il *personale civile e militare dello Stato* in otto qualifiche funzionali ad ognuna delle quali corrisponde un determinato livello retributivo.

Per *qualifica funzionale* si intende, in base alla predetta legge, il *raggruppamento di più profili professionali allineati su uno stesso livello retributivo*.

Le qualifiche funzionali previste dalla legge in linea generale sono le seguenti (art. 2):

— *Prima qualifica*: attività semplici. Si tratta di attività elementari, manuali e non, per il cui esercizio non si richiede alcuna specifica preparazione.
— *Seconda qualifica*: attività semplici con conoscenze elementari.
— *Terza qualifica*: attività tecnico-manuali con conoscenze non specialistiche.
— *Quarta qualifica*: attività amministrative o tecniche con conoscenze specialistiche e responsabilità personali.
— *Quinta qualifica*: attività con conoscenza specialistica e responsabilità di gruppo.
— *Sesta qualifica*: attività con conoscenze professionali e responsabilità di unità operative.
— *Settima qualifica*: attività con preparazione professionale o con eventuale responsabilità di unità organiche.
— *Ottava qualifica*: attività con specializzazione professionale o con eventuale *responsabilità esterna*.

Ogni qualifica funzionale, quindi, comprende una pluralità di profili professionali che si fondano sulla tipologia della prestazione lavorativa, considerata per il suo contenuto, in relazione ai requisiti culturali, al grado di responsabilità, alla sfera di autonomia che comporta, al grado di mobilità ed ai requisiti di accesso.

E) La nona qualifica funzionale

Con D.L. 28-1-1986, n. 3, convertito con modifiche nella L. 24-3-1986, n. 78 è stata istituita la *nona qualifica funzionale*, i cui profili professionali sono stati individuati nel contratto collettivo per il triennio 1985-1987, recepito dal D.P.R. 8-5-1987 n. 266. Detto decreto prevede l'attribuzione agli impiegati della nona qualifica di funzioni sostitutive del dirigente, e di collaborazione con lo stesso di reggenza temporanea dell'ufficio, di direzione di uffici non riservati ai dirigenti, nonché di attività di ricerca e di carattere ispettivo.

L'accesso alla nona qualifica funzionale avviene nel limite dei posti vacanti, mediante concorso per esami riservato al personale appartenente all'ottava e settima qualifica funzionale in possesso di un'anzianità di servizio effettivo di almeno tre (per la 8ª qualifica) e cinque anni (per la 7ª qualifica).

9. LA DIRIGENZA PUBBLICA

Uno dei settori in cui la normativa di riforma ha introdotto le novità più rilevanti è indubbiamente quello della *dirigenza pubblica*.

Punti qualificanti di detto **riassetto** sono:

a) la sostituzione della previgente *tripartizione* delle qualifiche dirigenziali (*dirigente generale, dirigente superiore, primo dirigente*) con una *bipartizione (dirigente generale e dirigente)*. In particolare, le preesistenti qualifiche di dirigente superiore e primo dirigente sono state accorpate nell'unica qualifica di dirigente;
b) l'affermazione dell'integrale *autonomia decisionale ed operativa* dei dirigenti. I titolari dei dicasteri sono, infatti, quasi totalmente spogliati dei poteri gestionali loro precedentemente riservati e deputati, in ossequio al suesposto principio di separazione tra politica ed amministrazione, a funzioni propulsiva, programmatica e di controllo;

c) la *piena responsabilizzazione* del ceto dirigente.

In particolare i dirigenti generali e i dirigenti sono responsabili del risultato dell'attività svolta dagli uffici ai quali sono preposti, della realizzazione dei programmi e dei progetti loro affidati in relazione agli obiettivi dei rendimenti e dei risultati della gestione finanziaria, tecnica e amministrativa, incluse le decisioni organizzative e di gestione del personale.
Nelle amministrazioni pubbliche, ove già non esistano, sono istituiti servizi di controllo interno, o nuclei di valutazione, con il compito di verificare, mediante valutazioni comparative dei costi e dei rendimenti, la realizzazione degli obiettivi la corretta ed economica gestione delle risorse pubbliche, l'imparzialità ed il buon andamento dell'azione amministrativa. I servizi o nuclei determinano almeno annualmente, anche su indicazione degli organi di vertice, i parametri di riferimento del controllo (art. 20, 2° c., D.Lgs. 29/1993, come sostituito dall'art. 6 del D.Lgs. 470/1993);

d) la *modifica dei criteri di formazione*. Al fine di rendere possibile la sostanziale trasformazione dei dirigenti pubblici in *managers* di stampo privatistico, il legislatore ha previsto una revisione dei meccanismi di selezione e di formazione del personale, articolantisi in un *concorso per esami* o in un *corso-concorso selettivo di formazione professionale*, nonché, in particolare, una radicale riforma della *Scuola Superiore della pubblica amministrazione*, chiamata appunto a promuovere il cambiamento di mentalità necessario nel quadro di una così profonda reimpostazione dei profili struttural-funzionali dell'apparato amministrativo.

10. ACCESSO AL PUBBLICO IMPIEGO

A) Profili costituzionali

Ai sensi del dettato dell'art. 97 della Costituzione, *agli impieghi pubblici si accede mediante concorso, salvi i casi stabiliti dalla legge.*

Tale norma costituzionale è diretta all'assicurazione dell'*imparzialità* e della *efficienza* dell'azione amministrativa, in quanto il meccanismo concorsuale dovrebbe tendenzialmente garantire la selezione di personale qualificato e competente.

In ossequio a tale precetto, la riforma del 1993, sulle orme della normativa previgente, ha previsto un *sistema misto di accesso* al pubblico impiego, caratterizzato dalla prevalenza del sistema concorsuale e dal carattere eccezionale del ricorso a sistemi extraconcorsuali.

B) Accesso extraconcorsuale

Per quanto attiene alle ipotesi di *accesso extraconcorsuale*, il decreto n. 29/1993 non ha apportato novità sostanziali rispetto alla normativa previgente.

Rimangono quindi ferme:

— *la forma di assunzione obbligatoria dei soggetti appartenenti a categorie protette.*

Al riguardo, la legge 2 aprile 1968, n. 482 prevede una riserva percentuale di posti di lavoro in favore di soggetti appartenenti a determinate categorie svantaggiate (invalidi di guerra, invalidi civili di guerra, ciechi, sordomuti, orfani e vedove di caduti di guerra, coniuge o figli delle vittime del terrorismo, soggetti affetti da minorazione psichica) e l'assunzione degli stessi mediante *chiamata numerica degli iscritti nelle liste di collocamento*;

— *l'assunzione mediante liste di collocamento del personale delle qualifiche inferiori.*
Altra deroga al principio della obbligatorietà del concorso è prevista relativamente all'assunzione di personale per qualifiche e profili per i quali sia richiesto il solo requisito della scuola dell'obbligo. In ordine a detto personale, il decreto delegato, in conformità alla legge n. 56 del 1987, prevede l'assunzione mediante *reclutamento degli iscritti nelle liste di collocamento presenti negli uffici circoscrizionali del lavoro.*

C) Accesso concorsuale

Come si è già rilevato, la forma primaria di accesso al pubblico impiego resta, in ossequio al dettato dell'art. 97, comma terzo della Carta Costituzionale, quella del *pubblico concorso*.

Quanto ai principi generali, gli artt. 8 e 36 del D.Lgs. 29/1993 stabiliscono che il *concorso pubblico* deve svolgersi con modalità che ne garantiscano l'*imparzialità*, la *tempestività*, l'*economicità e la celerità* di espletamento, ricorrendo, ove necessario, all'ausilio di *sistemi automatizzati*, diretti anche a realizzare forme di preselezione, ed a selezioni decentrate per circoscrizioni.

Le novità più significative riguardano, peraltro, l'aspetto propriamente organizzativo.

Al riguardo, il legislatore ha dato vita al meccanismo dei c.d. *concorsi unici*, gestiti dalla Presidenza del Consiglio dei Ministri, e volti al reclutamento del personale, al quale, poi, attingono le varie amministrazioni in contingenti correlati alle necessità struttural-funzionali da soddisfare.

Punti salienti di detto meccanismo sono i seguenti:

a) le amministrazioni pubbliche, eccezion fatta per le regioni, le amministrazioni, aziende ed enti del servizio sanitario nazionale, gli enti locali e loro consorzi, le istituzioni universitarie e le istituzioni di ricerca e sperimentazione, reclutano normalmente il personale di cui necessitano mediante ricorso alle graduatorie dei vincitori dei concorsi unici, predisposte presso la Presidenza del Consiglio dei Ministri - Dipartimento per la funzione pubblica (art. 38, 1° c.);
b) dette amministrazioni comunicano alla Presidenza del Consiglio - Dipartimento per la funzione pubblica, le proprie necessità di personale per un biennio. La Presidenza del Consiglio, previa fissazione del contingente di posti da coprire mediante vincitori dei concorsi unici, definito per specifiche professionalità e sedi di destinazione, provvede a bandire concorsi unici e ad avviare le relative procedure, dichiarando vincitori i candidati utilmente collocati nelle graduatorie di merito che restano valide fino ad esaurimento (art. 39, commi primo, secondo e terzo);
c) con decreto del Presidente del Consiglio il personale utilmente collocato in graduatoria viene avviato alle singole amministrazioni richiedenti, che provvedono all'assunzione (art. 39, comma quinto);
d) dette amministrazioni possono, tuttavia, essere autorizzate dalla Presidenza del Consiglio a svolgere direttamente i concorsi volti al reclutamento del personale loro occorrente (art. 38, comma secondo);
e) le amministrazioni non ricomprese nell'ambito di applicazione del succitato comma primo dell'art. 38, possono bandire concorsi unici previe intese, anche ai fini della ripartizione degli oneri (art. 38, comma terzo);
f) per gli uffici aventi sede regionale, compartimentale o provinciale, possono essere banditi concorsi unici, secondo le modalità da stabilirsi in sede regolamentare, per l'accesso alle varie professionalità, salva la facoltà di partecipazione per tutti i cittadini.

La materia dell'accesso è stata oggetto della circ. n. 7 del 5 marzo 1993 della Presidenza del Consiglio dei Ministri, che ha puntualizzato le ipotesi in cui la P.A. potrà provvedere direttamente all'assunzione di personale senza autorizzazione della Presidenza del Consiglio, ovvero a seguito di detta autorizzazione.

D) Requisiti per l'ammissione all'impiego

La normativa di riforma rinvia in materia a norme regolamentari.

Tali sono quelle contenute nel D.P.R. 487/94 che disciplina l'accesso agli impieghi pubblici rendendo concrete le indicazioni di principio contenute nell'art. 41 del D.Lgs. 29/93, nonché i principi di fondo che animano la L. 241/90: *trasparenza, efficienza, semplificazione procedimentale, celerità.*

Ex art. 2 del D.P.R. 487/94 possono accedere agli impieghi civili delle Pubbliche Amministrazioni i soggetti che presentano i seguenti requisiti generali:

a) **cittadinanza italiana**: tale requisito non è richiesto per i soggetti appartenenti all'Unione Europea;
b) **età non inferiore a 18 anni e non superiore ai 40**: per talune categorie, leggi speciali consentono l'elevazione in corrispondenza di particolari situazioni (status di coniuge; figli a carico);
c) **idoneità fisica all'impiego**: l'amministrazione ha facoltà di sottoporre a visita medica di controllo i vincitori di concorsi;
d) **godimento dei diritti politici**: non possono accedere agli impieghi coloro che sono esclusi dall'elettorato politico attivo o coloro che siano stati destituiti dall'impiego presso una Pubblica Amministrazione;
e) **titolo di studio**: ad es. per l'accesso ai profili professionali di ottava qualifica funzionale è richiesto il diploma di laurea.

Il **requisito della condotta e delle qualità morali** è richiesto solo in taluni casi *per l'accesso alla*

strazioni che esercitano competenze istituzionali in materia di difesa e sicurezza dello Stato, di polizia e di giustizia.

E) Cause ostative all'accesso ai pubblici impieghi

Oltre ai requisiti generali lo stesso art. 2 T.U. imp. civ. enumera alcune **condizioni negative** la cui presenza esclude la capacità del cittadino:

a) non possono partecipare ai concorsi per pubblici impieghi coloro che siano stati *dispensati* o *destituiti* dall'impiego precedentemente assunto in una qualsiasi pubblica amministrazione; nonché coloro che siano *decaduti* da un precedente impiego statale per aver conseguito la nomina mediante documenti falsi o viziati da invalidità non sanabile;
b) per quanto riguarda il sesso l'art. 51 Costituzione proclama la *piena uguaglianza* delle donne e degli uomini nell'accedere agli uffici pubblici e alle cariche elettive (v. *ante* § 2).
Da ricordare in materia la legge 9-12-1977 n. 903 sulla *parità fra sessi in materia di lavoro*, la quale ha vietato qualsiasi discriminazione fondata sul sesso per quanto riguarda l'accesso al lavoro.

F) Il periodo di prova

L'impiegato che ha ottenuto la nomina ed ha assunto servizio, non consegue subito l'*iscrizione in ruolo*, e cioè la *stabilità*; ciò avverrà solo allorchè l'impiegato abbia superato con esito favorevole il *periodo di prova*, che ha normalmente la durata di *sei mesi*. Una volta superata la prova, il servizio prestato si ricongiunge a quello di ruolo e viene computato come servizio di ruolo a tutti gli effetti.

L'impiegato in prova ha gli stessi doveri dell'impiegato di ruolo e gode degli stessi diritti.

Nel caso di giudizio sfavorevole, il periodo di prova è prorogato per altri sei mesi, al termine dei quali, se il giudizio è nuovamente contrario, l'amministrazione dichiara risolto il rapporto di impiego. La prova si intende conclusa favorevolmente, se entro tre mesi dalla scadenza non sia intervenuto un provvedimento di proroga o un giudizio sfavorevole (art. 10 T.U. imp. civ.).

Nel caso che la prova si concluda sfavorevolmente, spetta un'*indennità di buonuscita* pari a due mensilità del trattamento del periodo di prova.

11. CONTROLLI DI SPESA

Nel quadro della visione efficientistico-manageriale che permea la normativa di riforma del pubblico impiego, un ruolo essenziale va ascritto alle disposizioni (artt. 63 e segg.) dirette al *contenimento della spesa pubblica in materia di personale.*

Al fine del conseguimento di detto obiettivo fondamentale, il legislatore ha disposto una serie di *controlli* particolarmente puntuali e rigorosi sull'utilizzazione dei fondi di bilancio e sull'effettivo rispetto dei tetti di spesa.

A tal fine, si stabilisce che:

a) le amministrazioni pubbliche individuano e trasmettono i singoli programmi di attività e comunicano ai Ministri del bilancio e del tesoro tutti gli elementi necessari ai fini della *rilevazione* e del *controllo dei costi*;
b) il Ministero del tesoro dispone, anche attraverso visite ispettive, i *controlli* necessari al fine di verificare il costo del lavoro ed il rispetto dei tetti prestabiliti;
c) nel caso di *scostamento* rispetto agli stanziamenti previsti per le spese relative al personale, il Ministro del tesoro, informato dall'amministrazione competente, ne riferisce al Parlamento, proponendo l'adozione di misure correttive idonee a ripristinare l'equilibrio di bilancio;
d) le pubbliche amministrazioni informano la Presidenza del Consiglio dei Ministri — Dipartimento per la funzione pubblica — il Ministro del tesoro e quello del bilancio, in ordine a decisioni giurisdizionali comportanti oneri a carico del bilancio, al fine di consentire l'approntamento, anche attraverso interventi di carattere legislativo, delle misure opportune al fine di farvi fronte;
e) i contratti collettivi devono essere corredati da prospetti contenenti la quantificazione degli oneri nonché l'indicazione della copertura finanziaria complessiva per l'intero periodo di validità contrattuale.

12. LA MOBILITÀ NEL PUBBLICO IMPIEGO

L'intento, perseguito dalla normativa di riforma, di razionalizzare l'organizzazione del pubblico impiego, non poteva non passare per la via di una ridefinizione complessiva della previgente disciplina in materia di mobilità del personale dipendente.

È infatti noto che uno dei fattori principali della cronica inefficienza del nostro apparato pubblico era costituito dal fatto che lo *stock* dei dipendenti, notevolmente superiore rispetto alle esigenze produttive, era assai irrazionalmente distribuito sul territorio nazionale.

In particolare, erano frequentemente ravvisabili fenomeni di sovrabbondanza di personale in determinati settori e zone, accompagnati a deficienze di organico in altri rami dell'organizzazione amministrativa.

La normativa dettata dalla legge quadro del 1983, eccessivamente garantista in tema di mobilità, non consentiva di porre rimedio a questo inconveniente.

Un passo in avanti è stato, invece, compiuto con l'emanazione del *decreto del Presidente del Consiglio dei Ministri del 5 agosto 1988, n. 325*, che ha ampliato notevolmente la possibilità di movimentazione d'ufficio del personale, disciplinando in modo minuzioso le relative procedure.

La normativa di riforma del 1993, sulla scia degli elementi di novità introdotti da tale decreto, ha coniato una disciplina tesa ad accentuare in modo considerevole il tasso di mobilità del personale dipendente.

Alla base di tale scelta milita l'acquisita consapevolezza di come il miglioramento dell'efficienza e della produttività, punto focale dell'articolato normativo, implichi in via necessaria l'ottimizzazione dell'allocazione delle risorse personali disponibili in relazione alle esigenze «aziendali» da soddisfare e, in via conseguenziale, il superamento del previgente *status* di immobilità semiassoluta del personale.

In particolare, la disciplina dettata dagli artt. 30-35 del più volte citato D.Lgs. 29/1993 prevede che:

a) le amministrazioni pubbliche definiscono le piante organiche e curano l'ottimale distribuzione delle risorse umane attraverso la coordinata attuazione dei processi di mobilità e di reclutamento del personale;
b) le amministrazioni attendono alla ricognizione e comunicazione alla Presidenza del Consiglio dei Ministri di carenze ed esuberi di personale. I dipendenti appartenenti a qualifiche o professionalità in esubero sono assoggettati a mobilità, per il trasferimento a domanda o d'ufficio, privilegiando la mobilità all'interno dello stesso compartimento;
c) i comitati provinciali di cui all'art. 17 della L. 203/1991 formulano, all'indirizzo della Presidenza del Consiglio dei Ministri - Dipartimento della Funzione Pubblica, proposte per una razionale redistribuzione del personale delle amministrazioni pubbliche presenti nella provincia, con l'indicazione dei trasferimenti di personale eventualmente necessari;
d) i comitati metropolitani istituiti sul territorio nazionale predispongono progetti per una razionale redistribuzione del personale nei rispettivi ambiti provinciali, con indicazione dei relativi trasferimenti, trasmettendoli alla Presidenza del Consiglio dei Ministri - Dipartimento della Funzione Pubblica;
e) con decreto del Presidente del Consiglio dei Ministri vengono adottati i provvedimenti di trasferimento del personale proposti dai comitati di cui alle lett. c) e d);
f) il personale che non ottemperi al trasferimento d'ufficio disposto a mente dell'art. 3, è collocato in disponibilità a norma del testo unico n. 3 del 1957;
g) con decreto del Presidente del Consiglio, previo eventuale esame con le confederazioni sindacali maggiormente rappresentative sul piano nazionale, sono individuati criteri e procedure di attuazione della mobilità volontaria e d'ufficio, criteri di coordinamento tra trasferimenti a domanda e d'ufficio, criteri di coordinamento fra le procedure di mobilità ed i nuovi accessi.

In ogni caso dovrà essere osservato il seguente ordine di priorità:

1) inquadramento nei ruoli del personale in soprannumero;
2) trasferimento a domanda a posto vacante dando priorità al personale in esubero;
3) trasferimento d'ufficio del personale in esubero a posto vacante;
4) assunzioni su posti che rimangano vacanti dopo l'espletamento delle summenzionate procedure.

Va da ultimo ricordato che la mobilità dei pubblici dipendenti può essere realizzata, ferme restando le norme vigenti in tema di mobilità volontaria e di ufficio, anche mediante accordi di mobilità tra amministrazioni pubbliche e organizzazioni sindacali, con il consenso dei singoli lavoratori interessati (art. 35, 8° c., D.Lgs. 29/93 come sostituito dall'art. 16, D.Lgs. 546/93).

13. MODIFICAZIONI DEL RAPPORTO DI PUBBLICO IMPIEGO

A) Specie di modificazioni

Il rapporto d'impiego, come tutti quelli a carattere continuativo, può subire durante il suo svolgimento diverse modificazioni: relative ai *soggetti*, o concernenti il *contenuto*.

a) **Modificazioni soggettive**

Il carattere strettamente personale del rapporto d'impiego e la fiducia nelle qualità specifiche dell'impiegato, sulla quale esso si fonda, *escludono qualunque possibilità di sostituzione nella persona fisica del titolare dell'impiego*. Tale cambiamento importa senz'altro l'estinzione del rapporto esistente e la formazione di un rapporto nuovo (ZANOBINI).
Modificazioni soggettive possono, invece, assumere rilevanza in relazione all'altro soggetto del rapporto e cioè alla *Pubblica Amministrazione* e, sotto questo profilo, viene in considerazione, in particolare, la successione di un ente ad un altro nel rapporto impiegatizio.

b) **Modificazioni oggettive**

Le modificazioni oggettive attengono alla prestazione dell'impiegato e sono distinte da VIRGA a seconda che comportino una *sospensione dell'obbligo dell'impiegato a prestare servizio* (aspettativa e disponibilità) ovvero comportino una *diversa modalità della prestazione* (comando, distacco, collocamento fuori ruolo).

B) Successione nel rapporto d'impiego. In particolare il passaggio di impiegati statali alla Regione

Nell'ipotesi di trasferimento di un settore di competenza da un ente ad un altro, il rapporto di impiego può permanere con il nuovo ente in una linea di sostanziale continuità lasciando invariate la qualifica, l'anzianità, i diritti e gli obblighi goduti dall'impiegato presso l'ente originario.
Così è avvenuto in seguito all'*attuazione dell'ordinamento regionale* previsto dalla nostra Costituzione agli artt. 117 e 118 che hanno disposto il *trasferimento di alcune categorie di impiegati dello Stato alle Regioni*.

C) Le modificazioni oggettive

Le modificazioni oggettive del rapporto di impiego sono:

a) **Aspettativa**

L'aspettativa è una *modificazione temporanea* del rapporto d'impiego, consistente nella sospensione dell'obbligo dell'impiegato di prestare servizio e di esercitare le funzioni connesse all'ufficio, a cui è addetto (VIRGA).
Essa, però, non fa venir meno gli altri diritti e doveri dell'impiegato; in particolare rimane fermo il diritto al posto.

L'aspettativa può essere concessa per varie cause (artt. 67 ss. T.U. imp. civ.):

- *aspettativa per infermità*;
- *aspettativa per motivi di famiglia*;
- *aspettativa per mandato parlamentare*;
- *aspettativa per mandato amministrativo*;
- *aspettativa per mandato sindacale*;
- *aspettativa per servizio militare*.

b) **Disponibilità** (artt. 72-77 T.U. imp. civ.)

La disponibilità è una *temporanea sospensione* dagli obblighi del servizio, con corresponsione dello stipendio e degli assegni familiari, che si applica allorchè sia stato soppresso l'ufficio o ridotto il ruolo organico, e l'impiegato non possa essere utilizzato presso un'altra amministrazione statale.

c) **Disposizione**

Il collocamento a disposizione dell'amministrazione di appartenenza è previsto per i *dirigenti generali* e qualifiche superiori.

d) **Comando**

Il comando è una modificazione del rapporto di impiego, in virtù della quale l'impiegato è destinato a prestare servizio presso un'amministrazione statale diversa da quella di appartenenza (VIRGA).

e) **Distacco**

L'impiegato statale, che presti servizio, anzichè presso una diversa amministrazione dello Stato, presso un ente pubblico diverso, viene posto in posizione di *distacco*.

f) **Collocamento fuori ruolo**

Il collocamento fuori ruolo può essere disposto per gli impiegati civili dello Stato per il disimpegno di funzioni (statali o di altri enti pubblici) attinenti agli stessi interessi dell'amministrazione.

14. ESTINZIONE DEL RAPPORTO DI PUBBLICO IMPIEGO

A) Le cause di estinzione

La normativa in tema di estinzione del rapporto di impiego non è stata oggetto di abrogazione ad opera del D.Lgs. 29/93.

Le cause che determinano l'estinzione del rapporto di impiego possono distinguersi in tre categorie fondamentali:

a) *fatti giuridici estranei alla volontà dei soggetti*:

- la *morte* dell'impiegato;
- l'*estinzione* dell'ente pubblico, se il dipendente non è trasferito (come di solito avviene) alle dipendenze di un altro ente;

b) *provvedimenti dell'amministrazione*:

- il *collocamento a riposo d'ufficio*;
- la *decadenza dall'impiego*;
- la *dispensa dal servizi*;

c) *provvedimenti su istanza dell'interessato*:

- le *dimissioni volontarie*;
- il *collocamento a riposo su domanda*;
- l'*opzione*;
- l'*esodo volontario*.

B) L'estinzione per volontà della pubblica amministrazione

Gli *enti pubblici non sono mai autorizzati a risolvere il rapporto d'impiego in modo arbitrario o anche puramente discrezionale*. La legge sullo stato giuridico del personale si ispira al principio di assicurare all'impiegato ampie garanzie di *stabilità*, compatibilmente con gli interessi della pubblica amministrazione e fonda, pertanto, la risoluzione del rapporto su cause tassativamente previste.

a) *Il collocamento a riposo d'ufficio*

Esso può aver luogo per raggiunti limiti di età e per motivi di servizio.

b) *La decadenza dall'impiego*

L'amministrazione fa cessare il rapporto per decadenza con un provvedimento esecutorio, il quale si limita a constatare il verificarsi di determinati fatti o comportamenti, che la legge considera incompatibili per la prosecuzione del rapporto (VIRGA).
La decadenza può essere dichiarata, ad esempio per incompatibilità con altre attività professionali.
In quest'ultimo caso, l'impiegato decaduto non può più concorrere ad impieghi dello Stato e conserva il trattamento di quiescenza.

c) *La dispensa dal servizio*

La dispensa, pur costituendo, come la decadenza, un provvedimento con il quale l'amministrazione risolve unilateralmente il rapporto d'impiego, ne differisce perchè è motivata da cause che richiedono un apprezzamento discrezionale da parte della stessa amministrazione (incapacità, scarso rendimento ovvero apprezzamento tecnico da parte di un organo sanitario).
All'impiegato devono essere previamente contestati i motivi della dispensa con la prefissione di un termine per presentare le deduzioni.

La dispensa dal servizio può aver luogo:

- per infermità, permanente ed assoluta;
- per incapacità professionale assoluta;
- per scarso rendimento, dovuto a negligenza nella prestazione di lavoro.
  L'impiegato dispensato conserva il diritto al trattamento di quiescenza e di previdenza ma non può accedere ad altro impiego statale.

C) L'estinzione del rapporto per volontà dell'impiegato

Le cause di cessazione del rapporto che si ricollegano ad una manifestazione di volontà dell'impiegato sono: *le dimissioni volontarie, il collocamento a riposo su domanda, l'opzione e l'esodo volontario.*

a) **Dimissioni**

Le dimissioni consistono in una dichiarazione scritta dell'impiegato, di voler recedere dal rapporto di impiego: tale dichiarazione non è efficace se non è accettata dall'amministrazione.

b) **Collocamento anticipato a riposo su domanda**

La domanda di collocamento a riposo è consentita quando l'impiegato si trovi nelle condizioni richieste per aver diritto a pensione.
Al fine di scoraggiare la corsa al prepensionamento, la L.25-3-1983 n. 79 ha disposto la *riduzione della indennità integrativa speciale* per coloro che chiedono l'anticipato collocamento a riposo e la corresponsione ritardata della pensione al compimento del termine di 20 anni dalla data di assunzione, per le donne coniugate che ottengono il collocamento a riposo allo spirare del 15° anno di servizio utile.

c) **Opzione ed esodo volontario**

Possono altresì considerarsi sottospecie delle dimissioni volontarie l'opzione (volontà di accettare un nuovo impiego e di far cessare il rapporto instaurato con la precedente nomina) e l'esodo volontario (previsto negli anni passati per favorire lo sfoltimento dell'organico).

D) In particolare: la decadenza di diritto (L. 18 gennaio 1992, n. 16

La legge 18 gennaio 1992, n. 16, che ha modificato, l'art. 15 L. n. 55/90, disponendo la *decadenza di diritto* dalla funzione o dall'ufficio nei confronti dei dipendenti delle PP.AA. che abbiano riportato condanna, o siano stati sottoposti a misure di prevenzione con provvedimento definitivo, per i seguenti reati:

— *associazione per delinquere di stampo mafioso*;
— *delitti contro la P.A.*;
— *delitti commessi con abuso di poteri o violazione di doveri inerenti ad una pubblica funzione o ad un pubblico servizio.*

La legge *de qua* ha altresì stabilito che laddove sia stato iniziato, a carico di un pubblico impiegato, un procedimento penale si provveda all'immediata sospensione dello stesso dalla funzione o ufficio ricoperto.

La normativa in parola è stata caducata per effetto della sentenza della *Consulta, del 27 aprile 1993, n. 197*, la quale ha dichiarato l'illegittimità costituzionale della medesima, nella parte in cui deroga alla disciplina dettata dalla L. n. 19/90, ed in violazione del principio di proporzionalità delle sanzioni disciplinari, prevede l'automatica destituzione del pubblico dipendente, senza subordinarlo ad apposito procedimento inteso a valutare la compatibilità della condotta dello stesso con le specifiche funzioni svolte nell'ambito del rapporto di impiego.

15. COMPETENZE AMMINISTRATIVE DEL CONSIGLIO DEI MINISTRI E SOTTOSEGRETARI

A) Generalità

L'amministrazione centrale dello Stato dipende e fa capo al *Consiglio dei Ministri* e poggia sui *singoli Ministri*.

La legge *ZANARDELLI* del 1901 attribuiva al Consiglio dei Ministri, oltre alle competenze costituzionali, tutta una serie di *competenze amministrative* riguardanti le questioni di ordine pubblico, le nomine dei funzionari più elevati, l'approvazione dei regolamenti, le deliberazioni riguardanti i provvedimenti per i quali il Ministro proponente non intende uniformarsi al parere

obbligatorio ma non vincolante del Consiglio di Stato, la richiesta di registrazione con riserva alla Corte dei Conti degli atti cui essa ha rifiutato il visto di legittimità e tutte le questioni internazionali.

La L. 400/88 ha confermato tali competenze, aggiungendone altre in materia di controllo delle regioni, annullamento d'ufficio degli atti amministrativi illegittimi di qualunque ente pubblico (sentito il Consiglio di Stato).

La *forma delle deliberazioni* del Consiglio dei Ministri è quella del *decreto del Capo dello Stato*, ma si tratta di provvedimenti imputabili esclusivamente al Governo.

B) Competenze e strutture dei vari Ministeri

Ciascun Ministero dirige un settore particolare della pubblica amministrazione.

Le *competenze dei singoli Ministri hanno carattere particolare, ma unitario*, nel senso che ognuno ha competenza in tutto il ramo di interessi pubblici che rientr nella competenza del suo dicastero.

Il Ministro sta al vertice della gerarchia del suo Ministero: è l'*organo esterno* che lo rappresenta di fronte ai terzi, provvede all'organizzazione degli uffici (mediante circolari e regolamenti interni), alla nomina, alle promozioni ed alle punizioni agli impiegati.

Come detto, è coadiuvato in tale compito da uno o più *sottosegretari di Stato*, delegati dal Ministro per gruppi di affari, da un *ufficio di Gabinetto*, e da una *segreteria particolare*.

L'organizzazione interna dei Ministeri è molto complessa: vi sono organi attivi, consultivi e di controllo, affiancati da uffici di informazione ed esecutivi.

Gli *uffici* **attivi** si suddividono in più direzioni generali, attinenti alle varie sottobranche del settore di attività di cui si occupa il Ministero; le direzioni a loro volta si dividono in divisioni e sezioni.

Gli *uffici* **consultivi** possono essere sia amministrativi che tecnici. All'esterno esistono organi consultivi a competenza generale, come il Consiglio di Stato, il C.N.E.L., l'Avvocatura dello Stato.

Gli *uffici di* **controllo** interni al Ministero, sono quelli della ragioneria centrale, distaccati presso ciascun Ministero.

Infine, si ricordi che, per motivi tecnici e di funzionalità, la cura di alcuni interessi pubblici è affidata alle *aziende autonome*, organi speciali del Ministero dotati di una particolare *autonomia*, che può essere solo *contabile-finanziaria* o anche maggiore, quando all'azienda è attribuita la *personalità giuridica*.

Tra le più importanti aziende autonome si ricordi l'azienda per i *monopoli di Stato* (presso il Ministero delle finanze).

16. I SINGOLI MINISTERI

Per l'art. 95 Cost., la legge determina il numero, le attribuzioni e l'organizzazione dei Ministeri (*riserva assoluta di legge*). Attualmente esistono in Italia i seguenti Ministeri:

1) Ministero degli Affari esteri;
2) Ministero dell'Interno;
3) Ministero di Grazia e Giustizia;
4) Ministero delle Finanze;
5) Ministero del Tesoro;
6) Ministero della Difesa;
7) Ministero della Pubblica Istruzione;
8) Ministero dei Lavori Pubblici;
9) Ministero delle risorse agricole, alimentari e forestali;
10) Ministero del Commercio, Industria e Artigianato;
11) Ministero del Lavoro e Previdenza Sociale;
12) Ministero delle Poste e Telecomunicazioni;
13) Ministero dei Trasporti e della navigazione;

14) Ministero della Marina Mercantile;
15) Ministero del Bilancio e della Programmazione economica;
16) Ministero della Sanità;
17) Ministero per i Beni culturali e ambientali;
18) Ministero per l'Ambiente (L. 34/1986);
19) Ministero per l'Università e la Ricerca Scientifica e tecnologica (L. 168/1989).

Il Presidente della Repubblica, su proposta del Presidente del Consiglio, può conferire al Presidente stesso o a un Ministro l'incarico di reggere ad *interim* un Dicastero (art. 9, comma 4, L. 400/1988).

Il numero dei Ministri che compongono il Governo è di regola *superiore* al numero dei Dicasteri previsti dalla legge, ciò perché ogni Consiglio dei Ministri prevede sempre un certo numero variabile di *Ministri senza portafoglio*.

Con tale espressione si indicano quei Ministri, i quali *sono tali quanto ai compiti* loro affidati (politici), ma *non sono* a capo di un dicastero particolare di cui siano responsabili, e quindi non hanno compiti amministrativi.

La Costituzione non prevede questa figura particolare di Ministro che invece è stata disciplinata dalla L. 400/1988 il cui art. 9 prevede che, all'atto della formazione del Governo, possono dal P.d.R. essere nominati, *presso la Presidenza del Consiglio*, Ministri senza portafoglio, i quali svolgono le funzioni loro delegate dal Presidente del Consiglio, sentito il Consiglio, dei Ministri.

Detti Ministri partecipano a pieno diritto alle deliberazioni del Consiglio dei Ministri, dei cui atti sono responsabili collegialmente al pari dei Ministri titolari di dicastero.

I motivi per cui vengono nominati i *Ministri senza portafoglio* possono essere:

— di *natura politica*: lo scopo è quello di allargare la base parlamentare su cui poggia il governo e garantire così gli equilibri politici;
— di *natura tecnica*: per la necessità di far fronte a specifici problemi servendosi della direzione e dell'opera di persone dotate di una particolare preparazione tecnica.

Ne sono esempi: il Ministro per i *rapporti* con il *Parlamento*, il Ministro per gli affari *regionali*, il Ministro per la *funzione pubblica*, il Ministro per la *protezione civile*, il Ministro per gli *affari sociali*, il Ministro per i *problemi delle aree urbane* e, l'ultimo nato, il Ministro per l'*immigrazione*.

17. AMMINISTRAZIONE STATALE PERIFERICA

Gli *organi periferici* dell'amministrazione statale hanno competenza in determinate *circoscrizioni*, che rappresentano porzioni nelle quali è suddiviso il territorio dello Stato. Alcuni di essi hanno *competenza generale*, altri *competenza particolare*.

A) Organi locali dello Stato con competenza generale

Essi sono:

— il *Commissario del Governo nelle Regioni*: «sovraintende alle funzioni amministrative esercitate dallo Stato e le coordina con quelle esercitate dalla Regione» (art. 124 C.);
— il *Presidente della Giunta Regionale*, che oltre ad esercitare le sue funzioni come capo di una circoscrizione di autonomia costituzionale «dirige le funzioni amministrative delegate dallo Stato alla Regione, (in aggiunta a quelle loro spettanti ai sensi della Costituzione) conformandosi alle istruzioni del Governo centrale» (art. 121 C.);
— il *Prefetto*, che gerarchicamente dipende dal Ministro dell'Interno, ma è un organo a competenza generale, con il compito di far nella provincia eseguire gli ordini di tutti i Ministeri: essi infatti sono normalmente diretti a lui, che provvede a diramarli.

I Prefetti sono nominati dal Presidente della Repubblica, su proposta del Ministro dell'Interno, previa deliberazione del Consiglio dei Ministri. Per almeno 3/5 essi devono provenire dalla carriera amministrativa del Ministero dell'Interno: i rimanenti 2/5 sono a disposizione del Governo, che può nominare i c.d. *Prefetti politici*, anche al di fuori della carriera amministrativa. In sua assenza è sostituito dal *vice Prefetto* «vicario», che è l'unico *organo attivo esterno* della provincia.

I poteri del Prefetto sono disciplinati da una legge del 1949: suo compito è quello di *dare impulso, coordinare e dirigere tutta la vita amministrativa della provincia*, assicurando l'unità di indirizzo e l'attuazione delle direttive inviate dal Governo.

Ha poteri di *controllo sostitutivo*, mediante l'invio di appositi commissari (commissioni *ad acta*) presso le amministrazioni comunali o provinciali in caso di ritardo od omissione nel compimento di atti obbligatori per legge o per sentenza.

Dispone della *forza pubblica* per tutelare la pubblica sicurezza e può richiedere l'intervento delle *forze armate*.

In ogni prefettura esistono *due organi consultivi* (presieduti dal Prefetto): il Consiglio di prefettura e la giunta provinciale amministrativa.

B) Organi locali con competenza particolare

Alcuni di questi organi hanno una competenza *coincidente* il territorio della Provincia o della Regione. Quelli provinciali sono:

— le **Questure**: sono gli uffici provinciali di pubblica sicurezza dipendenti dal Ministero dell'Interno tramite il Prefetto;
— le **Direzioni delle entrate**: sono uffici direttivi provinciali dell'amministrazione finanziaria, dipendenti dal Ministero delle Finanze;
— i **Provveditorati agli Studi**, dipendenti dal Ministero della Pubblica Istruzione;
— gli **Uffici del Genio Civile**, dipendenti dal Ministero dei lavori pubblici e in parte anche dalle Regioni.

Sono organi a competenza regionale (o ultraregionale):

— le *sovraintendenze alle antichità e alle belle arti*;
— le *direzioni compartimentali dell'amministrazione ferroviaria e quelle delle Poste e Telecomunicazioni*;
— i *Provveditorati Regionali alle opere pubbliche* (che dipendono in parte anche dalle Regioni);
— le *Sezioni Regionali della Corte dei Conti*;
— le *Sezioni distrettuali dello Stato*, che hanno circoscrizioni coincidenti con quelle delle Corti d'Appello.

Organo decentrato dell'Amministrazione statale è anche il **Comune**, che gestisce i servizi elettorali, di anagrafe, di stato civile, di statistica e di leva militare (L. n. 142/1990). Le relative funzioni sono affidate al *Sindaco*, che le esercita nella sua qualità di *ufficiale di Governo* e non in quella di capo dell'amministrazione autonoma comunale.

I compiti svolti dal Comune quale organo del decentramento burocratico sono:

— tenuta dei registri di stato civile (nascita, matrimonio, morte, cittadinanza) e celebrazione di matrimoni civili;
— tenuta del registro della popolazione ed esercizio delle funzioni che per legge spettano al Sindaco in materia di anagrafe e residenza;
— vigilanza sull'ordine pubblico;
— poteri del Sindaco di emanare«provvedimenti contingibili ed urgenti» in materia di sanità e igiene, edilizia e polizia locale;
— servizi elettorali (tenuta delle liste, consegna dei certificati di voto, tenuta degli albi dai quali sono sorteggiati presidenti di seggio e senatori).

Sezione Nona
La Corte Costituzionale

1. L'ESIGENZA DI UN ORGANO DI «GIUSTIZIA COSTITUZIONALE»

La Corte Costituzionale è un organo costituzionale introdotto *ex novo* dalla Costituzione Repubblicana. Esso non ha alcun precedente storico nella storia del nostro sistema perchè lo Statuto Albertino era una costituzione «*flessibile*», cioé modificabile dalla legge ordinaria.

La *Costituzione Repubblicana*, invece, è di tipo «*rigido*», pertanto il *legislatore ordinario* non può contravvenire ai principi sanciti dalla Costituzione e dalle leggi di rango costituzionale. Ciò postula l'esistenza di un *organo costituzionale* che possa sindacare l'operato del legislatore *ordinario* per

verificarne la conformità al dettato costituzionale. Tale organo, previsto nel Titolo VI della Costituzione, è la *Corte Costituzionale*.

Funzione principale della Corte è quella di *giudicare sulla legittimità costituzionale delle leggi* e degli atti aventi forza di legge; a questa funzione, tuttavia, la Costituzione e le leggi costituzionali successive hanno aggiunto altre competenze, assegnando alla Corte il compito di giudicare sui *conflitti* di attribuzione tra: poteri dello Stato, sulle *accuse* promosse contro il Presidente della Repubblica e sull'ammissibilità del *referendum abrogativo*.

2. DEFINIZIONE, COMPOSIZIONE E FUNZIONAMENTO

La Corte Costituzionale è *organo costituzionale*: sia per il tipo di *funzioni* che esercita (che incidono sulla funzione legislativa e politica dello Stato) sia per il *trattamento* riservatole dalla Costituzione. In quanto *superiorem non recognoscens* essa costituisce un potere dello Stato.

Pur svolgendo funzioni (essenzialmente) giurisdizionali, essa non fa parte dell'ordine giudiziario.

A) Composizione

Della Corte fanno parte 15 giudici eletti in quest'ordine:

— 5 delle supreme magistrature dello Stato di cui: 3 dalla Corte di Cassazione, 1 dal Consiglio di Stato e 1 dalla Corte dei Conti.
Sono proclamati eletti coloro che raggiungono la maggioranza assoluta dei voti: se ciò non avviene si fa ballottaggio fra i primi due;
— 5 dal *Parlamento*, che li elegge in seduta comune, con scrutinio segreto e con le stesse maggioranze previste per l'elezione del Presidente della Repubblica;
— 5 nominati dal *Presidente della Repubblica*. Tali nomine sono libere, svincolate cioé da ogni proposta governativa.

I giudici costituzionali in particolare sono scelti, senza limiti di età, fra le seguenti categorie: Magistrati (anche a riposo) delle giurisdizioni superiori (ordinaria e amministrativa), avvocati dopo almeno vent'anni di esercizio forense, professori ordinari di università in materie giuridiche.

La scelta dei giudici dovrebbe cadere su «tecnici» (e non politici), che vengono preposti alla direzione del supremo organo di controllo costituzionale.

Tutti i membri restano in *carica per 9 anni* (precedentemente la durata era di 12 anni). Tale termine è il più lungo previsto per gli organi costituzionali e mira ad evitare bruschi mutamenti di giurisprudenza. Alla scadenza dei nove anni i membri non sono immediatamente rieleggibili (così ha disposto la legge costituzionale n. 2 del 1967), ciò è stabilito al fine di «spoliticizzare» l'organo ed evitare la sua trasformazione in un «feudo politico» (BARILE).

L'art. 135 non prevede per i membri della Corte Costituzionale l'istituto della *prorogatio*, che consente di svolgere l'esercizio delle funzioni, pur dopo la scadenza dei termini di durata della carica fino alla concreta sostituzione. Tale norma è giudicata pericolosa da BARILE, perché l'inerzia degli organi competenti alla nomina potrebbe provocare la paralisi dell'organo.

La Corte elegge tra i suoi componenti il *Presidente*, che dura in carica tre anni ed ha importanti attribuzioni: in particolare quella di formare i *ruoli delle udienze*, decidendo discrezionalmente in quale ordine chiamare la cause in corso.

B) Funzionamento

I giudici della Corte Costituzionale godono dell'*insindacabilità* e dell'*immunità* come i parlamentari.

Non possono cumulare l'ufficio di giudice con quello di membro del parlamento o di consigliere regionale, con l'esercizio della professione forense o con ogni altra carica o ufficio indicati dalla legge.

Cessano dalla carica per termini del mandato o per le dimissioni.

Quando giudica sulle *accuse* promosse *contro il Presidente della Repubblica* dal Parlamento in seduta comune, la composizione della Corte è integrata: ai quindici giudici ordinari si aggiungono altri sedici membri, tratti a sorte da un elenco di cittadini aventi i requisiti per l'eleggibilità a senatore, che viene compilato ogni nove anni dal Parlamento in seduta comune (c.d. *giudici aggregati*).

Le udienze sono pubbliche, ma il Presidente può disporre che si svolgano a porte chiuse quando la pubblicità può nuocere alla sicurezza dello Stato, all'ordine pubblico o alla morale, ovvero quando la presenza del pubblico può turbare la serenità del giudizio.

Per la validità delle deliberazioni è necessaria la presenza di almeno *undici giudici*.

Le decisioni vengono prese a maggioranza assoluta: in caso di parità prevale il voto del Presidente.

Il procedimento si svolge secondo le norme per i giudizi dinanzi al Consiglio di Stato in sede giurisdizionale, integrate da quelle emanate dalla Corte nell'esercizio del suo potere regolamentare.

I provvedimenti della Corte hanno la forma della *ordinanza* o della *sentenza*, quelli del Presidente hanno la forma del *decreto*. Avendo natura giurisdizionale, i provvedimenti della Corte devono essere *motivati* (art. 111 Cost.).

3. PREROGATIVE E RAPPORTI CON ALTRI ORGANI

A) Prerogative

La Corte Costituzionale, per poter svolgere la sua attività in posizione di indipendenza, gode di varie prerogative:

a) **autonomia regolamentare**: la Corte è dotata di un *potere normativo autonomo* che le consente di articolare la sua organizzazione interna e *disciplinare i procedimenti che si svolgono dinanzi ad essa*. La Corte esercita tale potere emanando a maggioranza dei suoi membri, un *regolamento generale* e numerose *norme integrative* per i giudizi che si svolgono innanzi ad essa (artt. 14 e 22, L. 11-3-53, n. 87).
Si discute sulla *natura* del *regolamento* della Corte. Anche se vi è parallelismo con i *regolamenti parlamentari* (entrambi sono *intangibili* dalla legge ordinaria perché garantiscono l'autonomia operativa di organi sovrani) solo i primi sono previsti dalla Costituzione ed hanno forza pari alla *legge ordinaria* (CRISAFULLI). Non si può comunque fare a meno di notare (NOCELLA) che se esiste, rispetto alla legge ordinaria, una *riserva di competenza* dei regolamenti parlamentari a favore di ogni singola Camera, debba altresì parlarsi di «preferenza di competenza» rispetto alla legge ordinaria dei regolamenti degli altri organi sovrani.
b) **autonomia amministrativa**: la Corte ha il *potere* di organizzare autonomamente i propri *uffici e servizi amministrativi*, nonché di disciplinare il rapporto di *pubblico impiego* dei propri dipendenti e di decidere, in un'unica istanza, i ricorsi in materia d'impiego.
c) **autonomia finanziaria**: la Corte è dotata di bilancio autonomo. Ad essa, infatti, per legge è attribuito un *fondo speciale* a carico del bilancio statale; questo fondo viene gestito dalla stessa Corte sulla base di un proprio *regolamento contabile*.
L'*autonomia contabile* di cui gode la Corte, è pertanto, sottratta (come nel caso degli altri organi costituzionali di vertice) alle normali forme di controllo della Corte dei conti.
d) **particolare tutela penale**: gli artt. 289-290 cod. pen. puniscono l'attentato o il pubblico vilipendio della Corte.
Nelle norme regolamentari della Corte è previsto che, qualora siano commessi reati di oltraggio alla Corte o a taluno dei suoi componenti, il Presidente può ordinare l'arresto immediato del colpevole (CRISAFULLI).
e) **inviolabilità dell'edificio**: il Palazzo della Consulta è inviolabile; la forza pubblica può accedervi, per esercitare atti del proprio ufficio, soltanto su ordine del Presidente della Corte a cui spettano anche i *poteri di polizia*.

B) Rapporti con gli altri organi

Col *Governo* la Corte ha *pochi contatti*. Il Governo, infatti, non ha il potere di proporre al Presidente della Repubblica i nominativi dei 5 giudici che questi è tenuto ad eleggere, ma può solo essere parte nei giudizi di legittimità costituzionale o in quelli sui conflitti di attribuzione.

Sulla Corte influiscono invece, tramite il potere di nomina dei suoi componenti, il *Parlamento*, il *Presidente della Repubblica* e la *magistratura*. Col *Parlamento* la Corte ha poi numerosi contatti per il controllo delle leggi e per i giudizi di accusa. Con la *magistratura* ha contatti essenziali perché sono i giudici a rimettere alla Corte le questioni di legittimità costituzionale sollevate in via incidentale nel corso del processo e da essi ritenute non manifestamente infondate.

C) L'alta Corte della Regione Siciliana

Prima dell'istituzione della Corte Costituzionale, (la relativa legge, attuativa della Costituzione è del 1956) funzionava in Italia, con attribuzioni analoghe, l'Alta Corte della Regione Siciliana.

Le funzioni relative al controllo di costituzionalità delle leggi sono state assorbite automaticamente dalla Corte Costituzionale, ma l'organo *de qua* ha continuato a funzionare, con attribuzioni minori, fino al 1970, quando una sentenza della Corte Costituzionale l'ha dichiarato illegittimo per contrasto col principio di unitarietà dello Stato.

CAPITOLO TERZO
GLI ORGANI CON RILIEVO COSTITUZIONALE

Accanto ai cinque organi costituzionali esaminati nel capitolo precedente vi sono altri cinque *organi* detti di *rilievo costituzionale*, perché anche se previsti dalla Costituzione, non presentano i caratteri di sovranità e indefettibilità tipici degli organi costituzionali, essi sono: il *Consiglio Superiore della Magistratura, il Consiglio Nazionale dell'Economia e del lavoro, il Consiglio Supremo di difesa, il Consiglio di Stato e la Corte dei Conti.* Esaminiamoli:

Sezione Prima
Il Consiglio Superiore della Magistratura

1. DEFINIZIONE

È l'organo istituito per garantire l'*autonomia* e l'*indipendenza* dei giudici (art. 104 Cost.), cioé per sottrarli all'influenza che gli altri organi dello Stato e i gruppi politici e di pressione sono portati ad esercitare su di loro (BARILE).

Il C.S.M. non è il vertice della funzione giurisdizionale, ma solo un organo di garanzia della sua indipendenza. Tale non è neppure il Ministro di grazia e giustizia, che ha solo compiti organizzativi. In realtà il *carattere diffuso* della funzione giurisdizionale esclude per definizione l'esistenza di un vertice: la preminenza di grado tra uffici giudiziari non si traduce mai in preminenza gerarchica («I magistrati si distinguono tra di loro solo per diversità di funzioni»: art. 107[3] Cost.).

2. COMPOSIZIONE

In seno all'assemblea costituente vi fu un ampio dibattito sul problema della composizione del C.S.M..

Alcuni volevano che fosse composto di *membri eletti dal Parlamento*: ma si obiettava che, in tal modo, si sarebbe asservita la magistratura alle correnti politiche dominanti.

Altri volevano che fosse composto soltanto di *magistrati*: ma si temeva che ciò avrebbe trasformato l'ordine giudiziario in una *casta chiusa*, e isolata dal dialogo con gli altri poteri, dello Stato.

Si giunse pertanto ad una soluzione di *compromesso*, secondo la quale il C.S.M. è *presieduto* dal *Presidente della Repubblica* che ne garantisce, in veste di organo *super partes*, una conduzione equilibrata, e ne fanno parte, di diritto, il Primo Presidente e il Procuratore Generale della Corte di Cassazione. Dei *30 membri elettivi* 20 sono eletti dai magistrati nell'ambito degli appartenenti alla

loro categoria, e 10 dal Parlamento in seduta comune (con scrutinio segreto e a maggioranza dei 3/5), che li sceglie tra *professori universitari in materie giuridiche*, e *avvocati* con almeno 15 anni di esercizio forense. Un *vice presidente* viene eletto dal Consiglio fra i componenti di nomina parlamentare.

Tutti i componenti *durano* in *carica* 4 anni e non sono immediatamente rieleggibili.

I *membri elettivi* del Consiglio Superiore non possono fare parte del Parlamento, dei consigli regionali, della Corte Costituzionale, né assumere la carica di Ministro o di sottosegretario di Stato.

I *componenti eletti dal Parlamento*, finché sono in carica, non possono essere iscritti negli albi professionali, né essere titolari di imprese commerciali, né fare parte di consigli di amministrazione di società commerciali.

La legge n. 74 del 12-4-1990 ha dettato nuove norme sull'elezione dei *componenti togati* del C.S.M.; essi sono scelti: *due* tra i magistrati di Cassazione con effettivo esercizio delle funzioni di legittimità e *diciotto* tra i magistrati che esercitano funzioni di merito (art. 5). Alla elezione partecipano con voto segreto *tutti i magistrati ordinari*, compresi gli *uditori giudiziari* ai quali siano state conferite le funzioni giurisdizionali e che abbiano già preso possesso dell'ufficio di destinazione.

Secondo la Corte Costituzionale i componenti del C.S.M. *non sono* perseguibili per le *opinioni espresse* nell'esercizio delle loro funzioni e concernenti l'oggetto della discussione, per garantire loro la piena libertà di manifestazione del pensiero (sent. 148/83).

Organi interni del C.S.M. sono:

a) il *Comitato di presidenza*: è composto dal vicepresidente del C.S.M. che lo presiede, e dai membri di diritto. Ha compiti di *propulsione* dell'attività del C.S.M., e dà attuazione alle deliberazioni del C.S.M.. Gestisce i fondi stanziati dal bilancio dello Stato per il suo funzionamento;
b) le *Commissioni*: è prevista l'istituzione di commissioni interne al C.S.M. per preparare relazioni al Consiglio su argomenti oggetto di deliberazioni;
c) la *Sezione disciplinare*: istituita per la cognizione dei procedimenti disciplinari a carico dei magistrati, riveste carattere giurisdizionale.
L'*azione disciplinare* può essere proposta dal Ministro di grazia e giustizia o dal Procuratore Generale della Corte di Cassazione entro un anno dal giorno in cui costoro hanno avuto notizia del fatto che forma oggetto dell'addebito disciplinare;
d) la *Segreteria*: è diretta da un magistrato di Cassazione e assicura il normale funzionamento del C.S.M.;
e) l'ispettorato generale presso il Ministero di Grazia e Giustizia;
f) l'ufficio studi e documentazione.

3. ATTRIBUZIONI

Allo scopo di garantire il pieno *autogoverno* dei giudici il Consiglio Superiore della Magistratura è l'unico organo *competente* per:

— assunzioni, assegnazioni e trasferimenti, promozioni e provvedimenti disciplinari, nei confronti dei magistrati (art. 105);
— *designazioni* per la nomina a magistrati di Cassazione, di professori o avvocati forniti di meriti insigni (art. 1063);
— *nomina e revoca dei magistrati onorari*(conciliatori, vice pretori onorari, etc.) e dei giudici «*laici*» delle sezioni specializzate dei tribunali;
— *pareri al Ministro di grazia e giustizia*, se richiesti, sui disegni di legge riguardanti l'ordinamento giudiziario e l'amministrazione della giustizia e proposte sulle modificazioni delle circoscrizioni giudiziarie e dei servizi relativi alla giustizia.

Il C.S.M. non si occupa invece dell'organizzazione e del funzionamento dei servizi relativi alla giustizia, che sono di competenza del *Ministro di grazia e giustizia* (art. 110 Cost.), che può disporre in ogni tempo ispezioni negli uffici giudiziari per accertare la loro produttività e l'efficienza dei singoli magistrati.

L'ordine giudiziario non è costituito solo dalla magistratura ordinaria, ma comprende altresì alcune *giurisdizioni speciali*, Consiglio di Stato e altri organi di giustizia amministrativa (TAR), Corte dei Conti, tribunali militari.

L'art. 108 Cost., anziché estendere le guarentigie di indipendenza dei giudici ordinari ai giudici speciali, si limita a dire che la *legge ordinaria ne assicura l'indipendenza*.

Hanno provveduto ad istituire organismi a ciò finalizzati le leggi n. 186/82 per i magistrati amministrativi dei TAR e del C.d.S.; n. 117/88 per i magistrati della Corte dei Conti e n. 561/88 per i magistrati militari.

Sezione Seconda
Il Consiglio nazionale dell'economia e del lavoro

Il C.N.E.L. (Consiglio nazionale dell'economia e del lavoro: art. 99 Cost.) è un organo composto di esperti e rappresentanti delle categorie produttive, in misura che tenga conto della loro importanza numerica e qualitativa.

Il secondo e il terzo comma dell'art. 99 definiscono le funzioni del C.N.E.L.: «Esso è organo di consulenza delle Camere e del Governo per le materie e secondo le funzioni attribuitegli dalla legge» e «ha l'iniziativa legislativa», inoltre esso «può contribuire all'elaborazione della legislazione economica e sociale secondo i principi ed entro i limiti stabiliti dalla legge».

La legge istitutiva del C.N.E.L. (5-1-67) è stata, in seguito riformata (L. n. 936 del 1986). Essa prevede una composizione di 111 membri (12 esperti - 4 di nomina governativa e 8 del Presidente della Repubblica; 99 rappresentanti delle categorie - 37 imprenditori, 18 lavoratori autonomi e 44 lavoratori dipendenti dalle organizzazioni sindacali nazionali).

Il Presidente del C.N.E.L. è nominato, con decreto presidenziale su proposta del Consiglio dei ministri, ed è scelto, fuori dai componenti.

Oltre ad una vasta azione informativa e consultiva in materia economica, di mercato del lavoro e di politica comunitaria, il C.N.E.L. esprime proposte e valutazioni sui documenti e gli atti più importanti della programmazione e della politica economica.

Ha, inoltre, l'archivio dei contratti collettivi e la banca dati sui costi e le condizioni di lavoro.

Sezione Terza
Il Consiglio Supremo di Difesa

Il Consiglio Supremo di Difesa è menzionato nell'art. 87[7] Cost. che, nell'enumerare le funzioni del Capo dello Stato, gli assegna anche il compito di presiedere l'organo in esame. Circa la sua composizione e le sue attribuzioni la Costituzione nulla dice: la relativa disciplina è contenuta nella *legge istitutiva* (L. 28-7-1970, n. 624) della quale è stato recentemente emanato il *regolamento di attuazione* (D.P.R. 4-8-1990, n. 251).

Oltre al Presidente della Repubblica (che lo presiede), e al Presidente del Consiglio dei Ministri, ne fanno parte di diritto 5 ministri (Interni, Difesa, Affari Esteri, Tesoro, Industria e Commercio) e il Capo di Stato Maggiore della Difesa.

È prevista peraltro la possibilità di integrare tale composizione con altre persone, invitate dal P.d.R. previo accordo col Presidente del Consiglio (art. 7 D.P.R. n. 251/90): Ministri, Alti Commissari, Capi di S.M. delle tre Armi ed altri esperti in campo scientifico, militare, economico ed industriale (*composizione allargata*).

La legge istitutiva assegna al Consiglio due attribuzioni essenziali: l'*esame dei problemi generali politici e tecnici attinenti alla difesa nazionale* e la «*determinazione di criteri*» nonché la «*fissazione di direttive per l'organizzazione militare* e il *coordinamento delle attività riguardanti la difesa*» (art. 1).

Tali attribuzioni hanno fatto sorgere forti dubbi sulla legittimità costituzionale di quest'organo, che dovrebbe configurarsi come semplice organo tecnico-consultivo lasciando al Governo le scelte sostanziali in materia di politica militare.

Sezione Quarta
Il Consiglio di Stato e la Corte dei Conti

1. IL CONSIGLIO DI STATO

È *organo di consulenza giuridico-amministrativa* e di *tutela della giustizia nell'amministrazione* (art. 100 Cost.).

Esso è *diviso in sei* sezioni: tre con funzioni consultive, tre con funzioni giurisdizionali (ai sensi dell'art. 103 Cost. il C.d.S. è anche giudice amministrativo di secondo grado).

L'*attività consultiva* del Consiglio consiste nel dare *pareri* ai Ministri che ne facciano richiesta.

Vi sono casi in cui i *pareri* del Consiglio devono esser richiesti obbligatoriamente.

Tali casi sono:

— le proposte dei regolamenti destinati ad essere approvati dal Consiglio dei Ministri;
— i ricorsi straordinari al Capo dello Stato;
— il riconoscimento delle persone giuridiche. i cambiamenti di nomi o cognomi, etc.;
— i coordinamenti in testi unici di leggi e regolamenti;
— le convenzioni e i contratti da approvare con legge;
— l'annullamento d'ufficio degli atti amministrativi illegittimi.

Negli altri casi la richiesta di pareri al Consiglio è *meramente* facoltativa.

Raramente i pareri sono *obbligatori e vincolanti* (es. il riacquisto della cittadinanza da parte del cittadino che l'aveva perduta può essere negato dal Governo solo su parere conforme del C.d.S.).

Occorre, infine, ricordare che, se un atto, dev'essere emanato, con decreto del Presidente della Repubblica su parere del Consiglio di Stato, per discostarsi da tale parere è necessario una deliberazione motivata del Consiglio dei ministri.

2. LA CORTE DEI CONTI

A) Sezioni centrali e sezioni unite

L'ordinamento e la struttura della Corte dei Conti sono stati designati dal R.D. 1214/34, successivamente integrato da altre normative da ultimo con L. 20-12-1996, n. 639.

Con tale riforma si è inteso dare attuazione di principi di *efficenza, produttività* ed *economicità* dell'azione amministrativa di cui alla L. 241/91.

In particolare è stato ridisegnato l'assesso della Corte dei Conti che attualmente prevede:

— *sette sezioni di controllo* di cui quattro per la Regioni speciali, una per gli atti del governo e dell'amministrazione centrale, una per gli enti locali ed una per gli enti a contribuzione statale;
— *tre sezioni giurisdizionali centrali* per le materie di contabilità pubblica;
— *sezioni giurisdizionali regionali* in tutte le Regioni più due sezioni per le provincie di Trento e Bolzano.

In casi particolari la Corte dei Conti procede a sezioni riunite. In particolare secondo quanto previsto dall'art. 1, co. 7 della L. 14-1-1994, n. 19 essa è chiamata a pronunciarsi a sezioni riunite:

— sui conflitti di competenza;
— sulle questioni di massima deferite dalle sezioni giurisdizionali centrali e regionali;
— su ogni altra questione su richiesta del procuratore generale.

Le sezioni riunite sono presiedute dal presidente della Corte dei Conti o da un presidente di sezione, e giudicano con sette magistrati.

Le funzioni di pubblico ministero sono svolte, per i giudizi svolgentisi innanzi alle sezioni riunite o alle sezioni centrali della Corte, dal procuratore generale (o da un viceprocuratore generale).

Fra le molteplici e complesse attribuzioni della Corte dei Conti è possibile procedere ad una classificazione per tipi fondamentali distinguendo:

— attribuzioni in funzione di *controllo*;
— attribuzioni in funzione *consultiva*;
— attribuzioni in funzione *giurisdizionale*.

B) Funzione di controllo

In ragione delle diverse finalità perseguite, il *controllo* della Corte può essere *di legittimità*, oppure *finanziario*.

a) **Controllo preventivo di legittimità**. Finalizzato alla verifica del rispetto delle norme giuridiche sotto i profili dell'*incompetenza, eccesso di potere* e *violazione di legge*, prescindendo da qualsiasi implicazione di natura finanziaria. La L. 20/94 ha fortemente ridotto il numero degli atti assoggettabili a tale controllo e che possono così sintetizzarsi:
   1) provvedimenti emanati a seguito di deliberazione del Consiglio dei Ministri;
   2) atti del Presidente del Consiglio dei Ministri e atti ministeriali relativi alla definizione delle piante organiche, il conferimento di incarichi e funzioni dirigenziali e le direttive generali per l'indirizzo e lo svolgimento dell'azione amministrativa;
   3) provvedimenti dei comitati interministeriali di riparto o assegnazione di fondi;
   4) atti normativi a rilevanza esterna, atti di programmazione comportanti spese;
   5) provvedimenti di disposizione del demanio e patrimonio immobiliare;
   6) atti generali attuativi di norme comunitarie;
   7) autorizzazione alla sottoscrizione dei contratti collettivi ex art. 51 D.Lgs. 3-2-1993, n. 29 (di riforma del pubblico impiego);
   8) decreti che approvano contratti dello Stato: attivi di qualunque importo; di appalto d'opera se di importo superiore al valore in ECU stabilito dalla normativa comunitaria per l'applicazione delle procedure di aggiudicazione; altri contratti passivi se di importo superiore ad un decimo del valore suindicato;
   9) decreti di variazione del bilancio, di accertamento dei residui e di assenso preventivo del Ministero del tesoro all'impegno di spese correnti a carico di esercizi successivi;
   10) atti di notevole rilievo finanziario che il Presidente del Consiglio richieda di sottoporre temporaneamente a controllo preventivo nel caso di carenze settoriali dei controlli interni;
   11) atti per il cui corso sia stato impartito l'ordine scritto del Ministro.

b) **Controllo finanziario**. Trattasi di un controllo che riguarda i provvedimenti di carattere economico-finanziario ed è finalizzato a verificare se tali provvedimenti abbiano violato o meno la normativa di bilancio, predisponendo spese che superino le somme stanziate.
Il controllo finanziario può essere preventivo, come quello esercitato sui mandati di pagamento, o successivo, come quello sui rendiconti. In particolare, il controllo finanziario successivo è diretto a riesaminare la gestione finanziaria dello Stato e delle Aziende autonome, ha carattere contabile e si esaurisce nella verifica dei rendiconti che vengono trasmessi periodicamente alla Corte.

c) **Controlli di efficienza**. Non perfettamente inquadrabili negli schemi dei suesposti controlli di legittimità e finanziari sono, invece, i controlli di cui all'art. 3 4° c. L. 20/94. Trattasi di controlli

di efficienza per mezzo dei quali la Corte, sulla base di criteri di riferimento annualmente da essa stessa stabiliti, accerta la rispondenza dei risultati dell'attività amministrativa agli obiettivi stabiliti dalla legge, valutando comparativamente costi medi e tempi di svolgimento. Il successivo 5° c. prevede un controllo di gestione nei confronti delle amministrazioni regionali che concerne il perseguimento degli obiettivi stabiliti dalle legge di principio e di programma.
La Corte dei Conti partecipa, inoltre, al controllo sulla *gestione finanziaria degli enti a cui lo Stato contribuisce in via ordinaria*. Si tratta di quegli enti che ricevono dallo Stato apporti al loro patrimonio sotto forma di capitali, servizi, beni, contributi, etc. Il *controllo*, che si estende dalla *legittimità* al *merito*, viene esercitato attraverso l'*esame* dei *conti consuntivi* e dei *bilanci di esercizio* che gli enti sono tenuti a trasmettere alla Corte.

Il controllo preventivo della Corte sugli atti del Governo (art. 100 Cost.) si esercita con l'apposizione sull'atto, da parte del *consigliere delegato* addetto al riscontro, di un **visto** che ne attesta la legittimità.

L'esecuzione dell'atto rimane pertanto sospesa fino all'apposizione di tale visto, che è *condizione di efficacia* di esso. Al visto segue la *registrazione*, cioè l'inclusione di una copia dell'atto vistato negli appositi registri custoditi presso la Corte.

L'atto sottoposto a controllo, *qualora non sia ritenuto legittimo*, viene restituito, non registrato, all'amministrazione interessata e ad esso non può darsi esecuzione. In tali ipotesi, però, (ad eccezione di casi tassativamente indicati dalla legge per i quali il rifiuto di registrazione assume carattere assoluto) il ministro interessato, previa conforme deliberazione del Consiglio dei Ministri, ha il potere di chiedere la c.d. *registrazione con riserva* e questa richiesta fa sorgere l'*obbligo della Corte di procedere alla registrazione con riserva* e di *informarne il Parlamento*.

La Corte, infatti, deve trasmettere ogni 15 giorni alle Camere, l'elenco degli atti così registrati, affinché il *Parlamento* possa avere *cognizione* delle *infrazioni* imputate al Governo e deliberare (ove lo ritenesse necessario) gli eventuali provvedimenti in ordine alle persone dei ministri che vi sono incorsi.

L'atto registrato con riserva, comunque, segue il suo corso normale, in quanto il *giudizio del Parlamento* non importa un riesame della questione di legittimità, ma ha *per oggetto soltanto l'accertamento dell'eventuale responsabilità del Governo* (pur potendo concludersi anche con la sollecitazione di annullamento del provvedimento rivolta all'esecutivo).

Si ricordi, infine, che il Governo dimissionario, rimasto temporaneamente in carica per l'espletamento degli atti di ordinaria amministrazione, non ha il potere di chiedere alla Corte la registrazione con riserva.

C) Attribuzioni consultive

È obbligatorio il parere della C.d.C. a sezioni unite:

— su tutte le leggi che importino modifiche o conferimento di attribuzioni della C.d.C.;
— sulle norme che modificano la legge sulla contabilità generale dello Stato (ma solo per i disegni di legge governativi) (CHIESA).

D) Attribuzioni giurisdizionali

Le attribuzioni giurisdizionali della C.d.C. riguardano:

a) la *materia del* **contenzioso contabile**: nella *responsabilità* contabile possono incorrere tutti coloro che, a qualunque titolo, hanno la disponibilità di denaro o beni dello Stato.
Su tutte le irregolarità nella gestione del denaro e dei beni dello Stato, giudica *esclusivamente* la Corte dei Conti;

b) la *materia delle* **pensioni**: per tutti i ricorsi in materia di pensioni totalmente o parzialmente a carico dello Stato, è competente esclusivamente la Corte dei Conti;
c) la *materia della* **responsabilità** *civile dei* **funzionari** *dello Stato per* **danni** *allo Stato o ad altre pubbliche amministrazioni.*

Sezione Quinta
Organi consultivi e di controllo a competenza generale

1. L'AVVOCATURA DI STATO

È composta da un corpo di avvocati, legati allo Stato da rapporto di pubblico impiego, che assumono la *rappresentanza*, il *patrocinio e l'assistenza in giudizio* delle amministrazioni dello Stato e di altri enti pubblici. Essa può anche dare *pareri*. Si compone di un'*avvocatura generale* (Roma) e varie *avvocature distrettuali* (sedi coincidenti con quelle delle Corti d'Appello).

2. LE RAGIONERIE DELLO STATO

La *Ragioneria generale* e le *Ragionerie centrali* sono organi di *controllo esterno*. La prima è un *organo* del Ministero del Tesoro ed esercita una verifica generale sulla gestione finanziaria e su quella patrimoniale delle amministrazioni statali a mezzo delle seconde, che sono distaccate presso i vari ministeri.

CAPITOLO QUARTO
LE FUNZIONI PUBBLICHE

Sezione Prima
Generalità

1. LO STATO E LE SUE FUNZIONI: LA DIVISIONE DEI POTERI

Lo Stato, come *istituzione sovrana*, è preordinato alla realizzazione di molteplici fini diretti a garantire l'esistenza, la conservazione, il benessere ed il progresso dei suoi cittadini.

I tre momenti in cui si esplica il potere sovrano costituiscono le tre *funzioni fondamentali dello Stato* a cui tradizionalmente viene attribuito il nome di:

a) funzione *legislativa*, che mira alla instaurazione del diritto, in quanto è diretta a creare, mediante appositi procedimenti, le norme giuridiche;
b) funzione *giurisdizionale*, che mira alla conservazione del diritto, in quanto applica le norme giuridiche ai rapporti controversi;
c) funzione *esecutiva* (o amministrativa), che mira alla realizzazione concreta dei fini dello Stato.

Nello «*Stato assoluto*» queste tre funzioni sono accentrate nelle mani di un solo soggetto, per cui nessuna distinzione pratica può farsi tra esse.

Nello «*Stato di diritto*», invece, tale distinzione è possibile in quanto ciascuna «funzione» è demandata ad un soggetto, o ad un gruppo di soggetti, distinto ed indipendente dagli altri.

È, questo, il c.d. «*principio della divisione dei poteri*», che fu teorizzato in Francia da MONTESQUIEU il quale, partendo dal principio che «tutto sarebbe perduto se il medesimo uomo o il medesimo corpo facesse le leggi, ne eseguisse i comandi e giudicasse delle violazioni», vide nella ripartizione delle funzioni dello Stato il sistema migliore per realizzare l'equilibrio fra le differenti classi sociali.

Nello «*Stato di diritto*», dunque, a ciascuna «*funzione*» deve corrispondere un «*potere*», e cioé un soggetto, o un complesso di soggetti, cui tale funzione viene demandata.

Si distingue così un:

a) *potere legislativo*, che esercita la funzione legislativa;
b) *potere giudiziario*, che esercita la funzione giurisdizionale;
c) *potere esecutivo* o *amministrativo*, che esercita la funzione esecutiva.

Questa distinzione tuttavia, corrisponde solo approssimativamente all'effettiva ripartizione delle funzioni sovrane: essa, infatti, sta solamente a significare che a ciascun potere è demandata, in via principale, una data funzione, il che non esclude che il potere stesso eserciti, in alcuni casi *determinati tassativamente*, anche una funzione diversa.

2. IL SUPERAMENTO DEL PRINCIPIO DELLA TRIPARTIZIONE: IL CONCETTO DI «POTERE»

Negli Stati moderni una rigida applicazione del principio della tripartizione dei poteri non è attuabile perché i contatti e i contrasti tra le funzioni sono inevitabili. Nel nostro sistema, infatti, ciascun potere emana atti non solo della propria funzione, ma anche di funzioni diverse, così: la *funzione legislativa* è oggi esercitata anche dal Governo, che è pure il vertice della funzione amministrativa, emanando norme giuridiche primarie (decreti leggi e decreti legislativi).

I giudici, che svolgono istituzionalmente attività giurisdizionale, esercitano una funzione tipicamente amministrativa quando si occupano della c.d. *volontaria giurisdizione* (es.: autorizzazioni al compimento di atti relativi a minori).

Lo stesso Parlamento non si limita a fare le leggi ma svolge anche attività esecutive (di indirizzo politico-amministrativo) e persino giurisdizionali quando mette in stato d'accusa il P.d.R. ex art. 90 Cost.

Esistono, infine organi che, pur non avendo superiori gerarchici, non possono essere inquadrati tra i poteri tradizionali: tali sono il *Presidente della Repubblica*, la *Corte Costituzionale*, il *Consiglio superiore della Magistratura*, la *Corte dei Conti* nell'esercizio delle funzioni di controllo.

Si può, dunque, concludere che tra *poteri e funzioni* dello Stato *non* vi è una perfetta *corrispondenza*, di tal che oggi si intendono per «*potere dello Stato*» non solo i tre poteri tradizionali, bensì ogni organo «*superiorem non recognoscens*».

3. TIPOLOGIA DELLE FUNZIONI

La prima ripartizione tra le funzioni ricalca l'analoga classificazione degli organi:

— *funzioni attive*: raggruppano i *poteri* che giungono a decisioni produttive dei mutamenti nell'ordinamento;
— *funzioni consultive*: abbracciano i *poteri* tendenti a dare pareri, notizie, suggerimenti ai poteri delle funzioni attive;
— *funzioni di controllo*: comprendono i *poteri* tendenti all'*accertamento* della regolarità e convenienza delle decisioni adottate dai poteri attivi (BARILE).

Un'altra classificazione distingue tra:

— *funzioni vincolate*: sono quelle obbligate (dalla Costituzione, Legge, Regolamenti, etc.) a seguire un certo *iter*, e le norme che le regolano non lasciano nessun margine di scelta al titolare della funzione;
— *funzioni discrezionali*: quelle che, invece, prevedono varie possibilità per raggiungere un determinato fine, per cui le norme che le regolano lasciano una certa libertà di scelta all'operatore.

La discrezionalità viene definita da VIRGA come la «facoltà di scelta tra più comportamenti giuridicamente leciti per il soddisfacimento dell'interesse pubblico e per il perseguimento di un fine rispondente alla causa del potere esercitato».

Per BARILE scopo della discrezionalità è quello di mitigare l'invariabilità della norma astratta — che garantisce la certezza del diritto — rispetto ai casi concreti che, sono sempre diversi tra loro, onde raggiungere l'obiettivo della maggiore giustizia che è quella del caso concreto.

Discrezionalità, comunque, non equivale ad *arbitrio* in quanto l'attività amministrativa è sempre vincolata al fine pubblico per il quale il potere è stato concesso.

Sezione Seconda
Le singole funzioni: la funzione costituente e quella di revisione costituzionale

1. FUNZIONE COSTITUENTE

La *funzione costituente* è quella che pone in essere la *Costituzione*, cioé la legge politica fondamentale dello Stato e del regime: essa determina il sorgere dello Stato e lo caratterizza nei suoi elementi essenziali.

Essa non si esplica solo per mezzo di atti formali che nascono da votazioni (*referendum*, plebisciti), ma anche e soprattutto tramite *fatti normativi* cioé atti di instaurazione di un nuovo ordinamento giuridico da parte delle forze politiche di maggioranza.

Per BARILE tale funzione presenta un carattere peculiare: quello di essere, unica fra tutte le funzioni dello Stato, totalmente *libera nella causa*: perché nessun'altra preesistente regola la predetermina o la vincola.

Qui l'esplicazione della sovranità è piena, totale, mentre l'esplicazione della sovranità in costanza di regime è predeterminata nelle forme e nei modi (art. 1[2] Cost.).

Questo carattere trova conferma anche nella storia della nostra Costituzione Repubblicana, posta in essere dalle forze politiche che avevano combattuto il fascismo: l'Assemblea Costituente (espressione di tali forze) scelse in piena libertà le norme che dovevano regolare l'assetto politico del nostro Paese.

2. FUNZIONE DI REVISIONE COSTITUZIONALE

A) Generalità

Essa consiste nel potere di *emendare la Costituzione*: mutandone qualche disposizione, inserendovi regole precedentemente non costituzionalizzate o viceversa abrogando alcune norme in essa contenute.

A differenza della funzione costituente essa *non è del tutto libera nel fine* ed è anche proceduralmente *predeterminata dal diritto positivo*.

Tale funzione, in un regime democratico, deve essere affidata agli organi costituzionali, più rappresentativi del popolo, secondo modalità che garantiscano una revisione democratica della legge suprema dello Stato.

Nel nostro sistema essa è affidata al *parlamento* che rappresenta il popolo e al *popolo stesso*, in caso di *referendum* successivo alla deliberazione parlamentare (vedi *infra*).

Per l'importanza del fenomeno i procedimenti di revisione costituzionale assumono una *forma speciale* (c.d. «*aggravata*»), rispetto a quella prevista per il procedimento legislativo ordinario.

Più precisamente una funzione di revisione *formalmente* differenziata da quella legislativa ordinaria esiste solo in presenza di *costituzioni rigide*. Per le costituzioni flessibili esistono solo i *limiti sostanziali* al potere di revisione: tali limiti infatti — scritti o non scritti — esistono in ogni caso. Essi sono rappresentati dai c.d. *principi di regime*, cioé dall'insieme dei «principi supremi dell'ordinamento costituzionale», che possono essere modificati o soppressi solo con un sovvertimento del sistema.

B) Limiti e procedura

La Costituzione italiana prevede due *limiti espliciti* alla funzione di revisione: l'art. 139 stabilisce l'immodificabilità della forma repubblicana e l'art. 2 dichiara «inviolabili» i diritti dell'uomo, che gli spettano, sia come singolo sia nelle formazioni sociali ove si esplica la sua personalità.

Il potere di revisione nel nostro ordinamento non è stato attribuito ad un organo *ad hoc* ma al Parlamento, cioé all'organo che fa le leggi ordinarie, il quale però deve esplicarlo attraverso un procedimento speciale, previsto nell'art. 138 Cost.

Gli «aggravamenti» riguardano la *necessità di una doppia approvazione* del disegno di legge da parte di ciascuna Camera (al fine di garantire una maggiore ponderazione) e le *maggioranze qualificate* prescritte per la seconda votazione (le modifiche della legge fondamentale devono avvenire con un ampio consenso parlamentare).

Le due successive deliberazioni di ciascuna Camera devono aver luogo a distanza di non meno di tre mesi l'una dall'altra: esse devono riguardare il medesimo testo di legge (*principio della doppia votazione conforme*); se ci sono emendamenti tra le prima e la seconda votazione, il procedimento deve ricominciare (c.d. *navetta*).

Nella seconda votazione il progetto dev'essere approvato dalla *maggioranza assoluta* dei componenti di ciascuna Camera: non è sufficiente cioé la maggioranza semplice richiesta per l'approvazione delle leggi ordinarie.

A questo punto però la legge costituzionale non può ancora dirsi perfezionata nel suo *iter* formativo: il progetto viene infatti pubblicato nella *Gazzetta Ufficiale* ma non entra ancora in vigore. Tale «pubblicazione anomala» ha il solo scopo di portare a conoscenza dei cittadini il suo contenuto: entro tre mesi infatti può essere avanzata richiesta di *referendum* popolare da parte di 500.000 elettori, 1/5 dei membri di ciascuna Camera o 5 Consigli regionali. Se non viene avanzata alcuna richiesta di *referendum*, il progetto si intende tacitamente approvato dal corpo elettorale. In caso contrario il *referendum* è indetto con D.P.R. e il progetto si intende approvato del corpo elettorale se ottiene la *maggioranza dei voti validi* (esclusi cioé i voti nulli e le schede bianche). Se tale maggioranza non è raggiunta il progetto è respinto.

Una volta approvato, tacitamente o espressamente, dal corpo elettorale il progetto si trasforma in legge, che verrà promulgata e pubblicata nelle forme comuni.

Non si fa luogo a *referendum* solo quando la legge viene approvata nella seconda votazione da parte di ciascuna Camera a *maggioranza di 2/3* dei suoi componenti: in tal caso l'elevato *quorum* raggiunto testimonia un così ampio consenso dei rappresentanti del popolo da rendere superflua la consultazione popolare.

Fino all'entrata in vigore della legge di attuazione del *referendum* prevista dell'art. 75 Cost., (L. 25-5-1970, n. 352) questa seconda forma di approvazione fu la sola utilizzabile per attuare una revisione alla Costituzione.

Sezione Terza
La funzione di indirizzo politico

1. GENERALITÀ: FINI, LIMITI, INFLUENZE

La funzione di indirizzo politico consiste nell'attività di impulso della funzione legislativa che si sostanzia nella *preventiva determinazione e programmazione dei fini* che la stessa funzione legislativa deve porsi in corrispondenza alla valutazione dell'interesse generale (così BARILE).

I *fini* che la funzione di indirizzo politico persegue sono innanzitutto quelli che si ricollegano direttamente o indirettamente alle norme costituzionali: la *Costituzione* infatti ha un valore di impulso altroché normativo, *indica* cioé le *strade verso le quali le funzioni dello Stato devono procedere*.

La stessa funzione, però, persegue anche altri *fini di carattere contingenti*, secondari dal punto di vista costituzionale ma primari nella prospettiva storica.

La funzione in esame dunque sceglie i fini, li colloca in una graduazione di valore e ne programma, l'attuazione nel tempo, apprestando i necessari strumenti legislativi.

In tal modo essa segna la strada all'*attività del legislatore* ma influenza altresì l'*attività amministrativa*, che è essenzialmente attuativa della Costituzione e delle leggi esistenti.

Quella finora descritta è la funzione di *indirizzo politico centrale*, che si dice «*maggiore*» quando opera sulla formazione delle leggi e «*minore*» relativamente all'impulso e alla programmazione della funzione amministrativa.

Essa può ulteriormente dividersi in *funzione di indirizzo Costituzionale*, quando persegue i fini previsti dalla Costituzione, e funzione di *indirizzo di maggioranza* (o *funzione di governo*), quando si pone fini contingenti estranei al testo Costituzionale.

Questa distinzione (BARILE) è importante perché tutti gli organi costituzionali partecipano alla seconda ma solo alcuni alla prima: il Presidente della Repubblica, soprattutto mediante il potere di messaggio, e la Corte Costituzionale che cancella le norme costituzionali obbligando il Parlamento a porre nuove regole conformi alla Costituzione.

Il *corpo elettorale* è l'organo centrale del sistema, perché esso *dà le direttive fondamentali di carattere politico* a tutti gli altri organi dello Stato, ed è quindi titolare di entrambi gli aspetti dell'indirizzo politico: quello costituzionale e quello di maggioranza.

Tali direttive le esprime: in primo luogo eleggendo i propri rappresentanti in Parlamento, perché in tal modo opera delle scelte politiche ed in secondo luogo attraverso gli istituti di democrazia diretta previsti della Costituzione (iniziativa popolare e *referendum*); l'appello al popolo in questi casi serve a decidere questioni politiche fondamentali mediante l'espressione della sovranità di cui esso è titolare supremo (art. 1 Cost.).

2. PARLAMENTO E GOVERNO

In questa materia Governo e Parlamento operano in stretto collegamento per rendere concrete le indicazioni fornite dal corpo elettorale, che sono necessariamente generiche e dovranno poi essere sviluppate nelle assemblee rappresentative.

Il Parlamento esercita la funzione di indirizzo politico principalmente attraverso la motivazione delle mozioni di fiducia e di sfiducia votate al Governo in occasione delle crisi e in ogni caso in cui viene chiamato a verificarne l'operato.

Il Governo esprime il proprio indirizzo politico in primo luogo attraverso la *dichiarazione programmatica* che viene esposta alle Camere dal Presidente del Consiglio prima del voto di fiducia: prima di essere resa pubblica essa viene approvata dal *Consiglio dei Ministri*, che provvederà a darle concreta attuazione mediante la sua attività di iniziativa legislativa, cioé presentando disegni di legge al Parlamento.

Il Consiglio dei Ministri è un *organo a competenza generale*, perciò le sue attribuzioni non sono specificate dalla Costituzione. La legge n. 400/88 le ha così precisate:

a) funzione di **indirizzo politico** e **amministrativo del Paese**:
Il Consiglio dei Ministri «*determina la politica generale del Governo e, ai fini dell'attuazione di essa, l'indirizzo generale dell'azione amministrativa; delibera, altresì, su ogni questione relativa all'indirizzo politico fissato dal rapporto fiduciario con le Camere*» (art. 2).

Ciò, infatti, costituisce il logico e naturale presupposto dell'opera di direzione e coordinamento politico del Presidente del Consiglio, che deve mantenere l'unità di indirizzo politico e amministrativo del Governo e promuovere l'attività dei Ministri in attuazione delle deliberazioni del Consiglio.

Spetta, in particolare, al Consiglio:

— *approvare le dichiarazioni* che saranno rese note dal Presidente del Consiglio alle Camere all'atto della presentazione del Governo dinnanzi alle stesse;

— *esprimere l'assenso* alla iniziativa del Presidente del Consiglio di porre la questione di fiducia dinanzi alle Camere;
— *deliberare* sulle questioni di *ordine pubblico* e di *alta amministrazione* nonché sulle questioni *internazionali* e *comunitarie* in genere;
— *deliberare* sugli atti concernenti i rapporti tra lo Stato e la *Chiesa cattolica* (art. 7 Cost.) e tra lo Stato e le *altre confessioni religiose* (art. 8 Cost.).

b) decisioni sulla **politica normativa** del Governo:

spetta al Consiglio dei Ministri deliberare:

— sui *disegni di legge* di iniziativa governativa da presentare al Parlamento;
— sulle *comunicazioni* che il Governo intende fare alle Camere, in ordine a proposte di legge non governative;
— sui *decreti aventi valore o forza di legge* (decreti-legislativi e decreti-legge) e sui *regolamenti* (c.d. governativi) da emanare con decreto del P.d.R.

Per quanto concerne, invece, i *regolamenti ministeriali* (per lo più di esecuzione) ed anche quelli *interministeriali* (di carattere interno ed esecutivo), rientrando nella *competenza dei singoli Ministri*, non occorre per essi deliberazione del Consiglio dei Ministri; è opportuna, comunque, la loro comunicazione preventiva al Presidente del Consiglio il quale ne valuterà la corrispondenza alle direttive politico amministrative del Governo.

Vi sono inoltre numerose *manifestazioni della funzione di indirizzo politico affidata congiuntamente al Parlamento e al Governo*: le leggi di autorizzazione e di approvazione; le leggi che approvano i provvedimenti di emergenza adottati dal Governo in caso di guerra; le leggi di *delegazione atipica*; le leggi e le manifestazioni di volontà delle Camere in materia di *inchieste parlamentari*. Analizziamole partitamente.

3. Segue: LEGGI DI AUTORIZZAZIONE E DI APPROVAZIONE

Tali leggi appartengono alla categoria delle *leggi meramente formali* perché sono tali in quanto formate dal Parlamento secondo le norme ordinarie sul provvedimento legislativo ma prive di contenuto innovativo dell'ordinamento giuridico. Esse si limitano, infatti, ad attribuire efficacia ad atti già compiuti dagli organi competenti (leggi di approvazione) oppure a costituire presupposto di efficacia e di validità di atti non ancora compiuti ma soggetti all'autorizzazione delle Camere (leggi di autorizzazione).

Esse costituiscono atti di *direzione* e *partecipazione* all'indirizzo politico del Governo (MORTATI, SANDULLI).

A) La legge di bilancio

Ai sensi dell'art. 81 Cost. «le Camere approvano ogni anno il bilancio e il rendiconto consuntivo presentato dal Governo». Si tratta dunque di una legge la cui iniziativa è al contempo *vincolata* (deve verificarsi ogni anno) e *riservata* (solo il Governo può esercitare il relativo potere). L'approvazione della legge di bilancio da parte delle Camere autorizza il Governo a riscuotere le entrate (tributi, etc.) e a pagare le spese in esso previste, vale a dire a reperire e utilizzare i mezzi finanziari necessari per lo svolgimento della sua attività.

Se le Camere non riescono ad approvare il bilancio di previsione prima della data d'inizio dell'anno finanziario (che va dal 1 gennaio al 31 dicembre), esse possono autorizzare con legge l'*esercizio provvisorio* per un periodo non superiore complessivamente a quattro mesi: il Governo può riscuotere le entrate ed erogare le spese previste in bilancio per tanti dodicesimi quanto sono i mesi per i quali è concesso l'esercizio provvisorio (ciò al fine di evitare la totale paralisi della sua

Con la legge di approvazione del bilancio non si possono stabilire nuovi tributi e nuove spese (art. 81[3]): le previsioni contenute nel bilancio devono basarsi solo sulla legislazione preesistente (perciò la legge di bilancio ha carattere meramente formale). La L. 5-8-1978, n. 468 ha previsto tuttavia che il Governo presenti alle Camere, contemporaneamente al disegno di legge di approvazione del bilancio, un *disegno di legge finanziaria*, con la quale si possono operare le modifiche e integrazioni a disposizioni legislative aventi riflessi sul bilancio dello Stato, necessarie ad attuare la c.d. «*manovra di bilancio*», cioè a realizzare gli obiettivi di politica economica perseguiti dal Governo.

La materia è regolata, oltre che dalla legge generale sulla contabilità di Stato del 1924 e dalla legge sulla Corte dei Conti (che effettua il *giudizio di parificazione* del rendiconto: v. *supra*), dalla legge n. 468/1978, così come integrata e modificata dalla legge n. 382/1988.

È stata istituita un'apposita «*sessione di bilancio*», che dura 45 gg. alla Camera e 40 al Senato, durante la quale le Camere esaminano e approvano il disegno di legge di bilancio e la legge finanziaria secondo le disposizioni particolari dettate nei regolamenti parlamentari. Durante tale periodo è sospeso l'esame di ogni altra legge di spesa.

B) Leggi di autorizzazione dalla ratifica dei trattati internazionali

Ai sensi dell'art. 80 Cost. la ratifica dei trattati internazionali che «sono di natura politica, o prevedono arbitrati o regolamenti giudiziari, o importano variazioni del territorio, od oneri alle finanze o modificazioni di leggi», deve essere autorizzata dal Parlamento. L'intervento del Parlamento si giustifica proprio in ragione della loro influenza sull'indirizzo politico nel campo delle relazioni internazionali, alla cui definizione il Parlamento non può rimanere estraneo.

L'elencazione contenuta nel testo dell'art. 80 lascia ben pochi trattati fuori della norma che dispone l'esame del Parlamento: perciò meglio avrebbe fatto il legislatore a prescriverlo per i trattati internazionali *tout court* (BARILE).

4. Segue: I POTERI DI INCHIESTA PARLAMENTARE

Anche i *poteri di inchiesta* rientrano nel campo dell'indirizzo politico attuato congiuntamente del Parlamento e dal Governo.

Ai sensi dell'art. 82 Cost. «ciascuna Camera può disporre inchieste su materie di pubblico interesse. A tale scopo nomina tra i suoi membri una commissione formata in modo da rispecchiare la proporzione tra i vari gruppi. La commissione di inchiesta procede alle indagini e agli esami con gli stessi poteri e le stesse limitazioni dell'autorità giudiziaria».

Esempi recenti e assai noti di *commissioni di inchiesta* sono quelli della Commissione sul caso Moro, quello sulla P2, quello sul terrorismo, quello sulla mafia e quelli sull'attività del SIFAR.

La determinazione della materia da considerare di «pubblico interesse» è lasciata alla interpretazione discrezionale del Parlamento che, al limite, può considerare qualsiasi materia di pubblico interesse.

Anche se il potere d'inchiesta è *attribuito* alle Camere *separatamente* esse possono agire coordinando parallelamente la loro attività ma non possono riunirsi in seduta comune dato il carattere tassativo dell'elencazione contenuta nell'art. 55.

Terminati i lavori, la Commissione presenta all'Assemblea Plenaria una relazione che viene discussa e votata.

Nella prassi costituzionale si riscontrano due tipi di inchieste:

— *inchieste legislative o economiche* che portano alla conoscenza di determinate situazioni sulle quali il Parlamento dovrà legiferare: sono espressione del *potere investigativo* del Parlamento in quanto gli consentono un razionale esercizio della funzione legislativa;
— *inchieste politiche*: sono espressione del *potere ispettivo* e di *controllo politico* del Parlamento sull'attività del Governo.

Le commissioni, nello svolgimento delle inchieste, procedono con gli stessi poteri e i limiti dell'autorità giudiziaria.

Le commissioni però *non svolgono attività giudiziaria*, né vincolano l'autorità giudiziaria, ma consentono solo una cognizione su fatti di cui ciascuna Camera vuole venire a conoscenza; la norma che attribuisce alle Commissioni i poteri e le limitazioni proprie dell'autorità giudiziaria fu posta dal costituente per fissare un *limite* (in passato mai esistito) all'attività delle Commissioni. Si ritiene comunemente che una legge che riducesse i limiti o ampliasse i poteri della Commissione sarebbe illegittima per contrasto con l'art. 82 Cost.

Il BARILE, esaminando la prassi parlamentare, ritiene che a differenza di quanto accade negli Stati Uniti, il *potere di inchiesta* in Italia è stato utilizzato poco efficacemente: l'attività delle Commissioni trova un ostacolo invalicabile nel difetto di collaborazione fra Parlamento e amministrazione e nell'elefantiaca composizione delle Commissioni stesse, che per rispettare il principio di proporzionalità devono essere assai numerose.

5. Segue: ALTRE ATTIVITÀ CONGIUNTE DI INDIRIZZO POLITICO

I regolamenti parlamentari del 1979 hanno creato nuove strutture per lo sviluppo della funzione di indirizzo politico svolta congiuntamente dal Parlamento e dal Governo. Nella parte relativa alle «procedure di indirizzo, controllo e informazione» essi prevedono l'istituto della «*risoluzione*» che viene votato in commissione o in aula e serve a «manifestare orientamenti o a definire indirizzi su specifici argomenti» (es. deliberazioni degli organi comunitari, relazioni della Corte dei Conti, relazioni governative, etc.): essa è vincolante per *il Governo*, che è *tenuto a riferire in merito all'attuazione data alla risoluzione stessa*.

Attività marginali di indirizzo politico sono infine quelle che si manifestano attraverso le *interrogazioni* e le *interpellanze*.

L'interrogazione è una semplice domanda rivolta al Governo o ad un ministro per conoscere se un fatto sia vero, se sia noto al Governo e quali provvedimenti si intendano prendere al riguardo. Ha dunque uno scopo meramente informativo. La risposta può essere orale o scritta.

L'interpellanza invece è una domanda più approfondita sui motivi e gli intendimenti di determinati aspetti della condotta politica del Governo. Non è una semplice richiesta di informazioni ma tende a provocare una presa di posizione del governo e dà luogo ad una discussione in aula. L'interpellante alla fine dirà se è soddisfatto o meno delle dichiarazioni del governo. In caso negativo può trasformare l'interpellanza in *mozione* che è un atto col quale almeno 10 deputati o 8 senatori promuovono sulla questione una discussione parlamentare che dovrà concludersi con un voto.

Tra le funzioni politiche del Parlamento vanno infine ricordate quelle svolte attraverso gli *atti bicamerali non legislativi*: atti congiunti delle due assemblee, *diversi dalla legge* pur se identici tra loro.

Ne sono esempi quelli tendenti alla creazione di commissioni bicamerali e la deliberazione dello Stato di guerra ex art. 78 Cost.

6. IL PRESIDENTE DELLA REPUBBLICA

A) Generalità

Il P.d.R. partecipa alla funzione di indirizzo politico — limitatamente al profilo di *indirizzo costituzionale* — nella sua veste di rappresentante dell'«unità nazionale».

Taluno ritiene che il P.d.R. sia titolare di una funzione a sé stante, e costituisca un potere diverso o sovraordinato rispetto ai tradizionali poteri dello Stato.

Rimane indimostrata tuttavia l'esistenza di una reale differenziazione tra funzione presidenziale e funzione di indirizzo politico costituzionale (così BARILE): compito essenziale del P.d.R. è quello di *controllare l'indirizzo politico di maggioranza* ed eventualmente *correggerlo per allinearlo all'attuazione dei fini costituzionali*. Quel che è certo è che egli *non è portatore di un proprio indirizzo politico* ma, in quanto *organo super partes*, è titolare di una specie di *potere neutro* di garanzia costituzionale (MORTATI, GUARINO).

Non tutti i poteri del P.d.R. sono riconducibili alla funzione di indirizzo politico costituzionale, ma conviene ugualmente enumerarli tutti per comodità espositiva.

B) Poteri: schema generale

I **poteri presidenziali** si possono distinguere in vincolati e autonomi. Vincolati sono: quello di indire le elezioni generali e fissare la prima riunione delle nuove Camere (87[3]); quello di nominare i funzionari dello Stato (87[7]); quello di dichiarare la guerra (87[9], lo Stato di guerra viene deliberato dal Parlamento, al P.d.R. spetta solo dichiararlo); quello di indizione del *referendum* (87[6]).

Tali poteri pur se vincolati, sono attribuiti al P.d.R. in quanto organo di vertice che offre la massima garanzia di adempimento scrupoloso dei doveri costituzionali.

Più problematica la disamina dei *poteri presidenziali autonomi*, quelli cioè *ampiamente discrezionali* di cui il P.d.R. è sicuramente titolare sia pure in collaborazione con altri organi: si tratta appunto di acclarare se prevale il potere presidenziale o quello dei soggetti che con lui cooperano negli **atti complessi** che costituiscono l'estrinsecazione di questi poteri.

Ai sensi dell'art. 89 Cost. «nessun atto del Presidente della Repubblica è valido se non è controfirmato dai *ministri* proponenti, che *ne assumono le responsabilità*».

In realtà — malgrado la lettera apparentemente piana della norma — il valore della controfirma ministeriale degli atti presidenziali non è univoco, bisogna distinguere:

— per gli *atti sostanzialmente governativi* la firma del ministro ha valore determinante e implica assunzione di responsabilità, mentre la firma presidenziale ha un valore di mero controllo della legittimità formale dell'atto;
— per gli *atti presidenziali in senso stretto* invece, quelli cioè il cui contenuto è liberamente determinato dal P.d.R., il rapporto tra le due firme si inverte, ed è la controfirma ministeriale ad acquistare valore di autenticazione e controllo formale dell'atto.

Quanto alla *storia dell'istituto*, la sua origine risale al basso medioevo e si svolge poi nell'epoca delle Monarchie assolute e delle Costituzioni liberali, fino ad arrivare agli Stati democratici contemporanei.

La *controfirma* dei ministri o cancellieri regi in calce agli atti sovrani aveva inizialmente una duplice funzione: attestare la provenienza dell'atto e impegnare il controfirmante a dargli esecuzione. Più tardi si afferma una terza finalità: quella di far assumere al funzionario la *responsabilità* per l'assunzione e l'esecuzione dell'atto, a suggello dell'inviolabilità (e conseguente irresponsabilità) del Re.

Tale situazione originaria, che addossava al ministro le responsabilità di atti non suoi, diviene inaccettabile col passaggio dalla monarchia assoluta alle *monarchie limitate di stampo parlamentare*. A questo punto l'effetto in questione si giustifica in quanto autore materiale dell'atto non è più il sovrano bensì il ministro controfirmante: la direzione politica del Paese ricade sul raccordo Governo-Parlamento e il sovrano non è più in grado di imporre ai ministri le proprie decisioni.

A questa logica si ispira anche l'art. 89 Cost: tuttavia, benché quella degli atti adottati su *proposta vincolante* del Ministro costituisca senza dubbio la categoria più ampia di atti presidenziali, bisogna riconoscere che essa non è onnicomprensiva.

Secondo PALADIN si danno almeno 5 categorie di atti presidenziali:

— quelli *esenti da controfirma*: dimissioni, messaggi in forma libera e atti compiuti dal P.d.R. in veste di presidente di un collegio (es.: CSM e CSD);

— quelli *dovuti* per costituzione o per legge, per i quali nessuno dei due sottoscriventi assume una propria iniziativa: indizione delle elezioni e convocazione delle nuove Camere, promulgazione della legge riapprovata dopo il rinvio ex art. 74[2];
— quelli *di iniziativa presidenziale*: nomina dei senatori a vita (59[2]), dei 5 giudici costituzionali (135[1]); messaggi formali (87[2]); rinvio delle leggi in sede di promulgazione (74[1]);
— quelli *adottati su proposta* (vincolante) *del ministro controfirmante*;
— atti *complessi uguali*, alla determinazione dei quali concorrono Capo dello Stato e Presidente del Consiglio dei Ministri, senza che nessuno dei due possa imporre la propria volontà: nomina del Presidente del Consiglio (la designazione iniziale è sì operata dal P.d.R. ma occorre che ad essa si saldi l'*accettazione* dell'incaricato purché possa farsi luogo alla nomina) e scioglimento anticipato delle Camere.

7. I SINGOLI POTERI DEL PRESIDENTE DELLA REPUBBLICA

BARILE propone una *classificazione dei poteri presidenziali in relazione* non al grado della volontà ma *al fine che essi si propongono*:

— *poteri di controllo e di freno;*
— *poteri di stimolo e di impulso* all'attuazione della costituzione;
— *poteri tendenti alla copertura ed al regolare funzionamento* degli altri organi costituzionali;
— *poteri residuali*, che per ragioni di mera sopravvivenza storica rimangono affidati al P.d.R.

A) Poteri di controllo e di freno

Essi sono:

a) il potere di *convocazione straordinaria delle Camere* che — ex art. 62[2] — spetta al loro Presidente, ad un terzo dei componenti l'assemblea e al P.d.R.. Si tratta senza dubbio di un *potere presidenziale* e *non governativo* perché l'esigenza di una convocazione straordinaria delle Camere da parte del Capo dello Stato può nascere proprio dal fatto che la maggioranza parlamentare — e quindi il Governo che ne è l'espressione — non la vogliano;
b) la *promulgazione delle leggi*: dopo la conforme approvazione da parte dei due rami del Parlamento, la legge richiede ancora la promulgazione da parte del P.d.R. perché si realizzi la sua *perfezione formale* (PALADIN).
Secondo BARILE invece la legge a quel punto è già perfetta e la promulgazione attiene alla *fase di integrazione dell'efficacia* della stessa.
I due autori comunque concordano circa l'effetto dell'atto in esame che è quello di rendere la legge *obbligatoria* per tutti: cittadini e organi della P.A.
Quanto alla sua *funzione* secondo BARILE si tratta di un *atto di controllo*, volto ad accertare la regolarità del procedimento di formazione della legge e l'identità dei consensi delle due Camere.
Tale controllo peraltro non è limitato alla legittimità formale dell'atto ma si estende al *c.d. merito costituzionale*, cioè alla conformità e congruità del provvedimento legislativo in relazione ai principi costituzionali.
Esso si esercita nella forma della *richiesta motivata di riesame*: «il Presidente della Repubblica, prima di promulgare la legge, può con messaggio motivato alle Camere chiedere una nuova deliberazione» (art. 74 Cost.). A questo tipo di controllo si suole infatti ricorrere quando si vuole rispettare al massimo grado l'autonomia del soggetto controllato (BARILE).
Se le Camere riapprovano la legge dopo il veto sospensivo, il P.d.R. *deve promulgarla* (art. 74[2]): salvi i casi di nullità o inesistenza radicale dell'atto e quelli in cui così facendo il P.d.R. si esporrebbe al rischio di incriminazione per alto tradimento o attentato alla Costituzione. Il supremo *dovere di fedeltà* infatti prevale su quello di promulgazione.
I presidenti della Repubblica hanno fatto un uso parsimonioso di questo potere dal 1948 ad oggi e quasi tutti i rinvii sono stati motivati dalla violazione dell'*obbligo di copertura finanziaria* sancito dell'art. 81 Cost.;

c) ai sensi dell'art. 87[4] il P.d.R. autorizza la presentazione alle Camere dei disegni di legge di iniziativa governativa. Si tratta dei più autorevoli fra tutti i progetti di legge, perché vengono studiati dagli organi ministeriali e approvati dal Consiglio dei ministri: rispondono quindi in pieno all'indirizzo politico di maggioranza e costituiscono l'attuazione della piattaforma programmatica sulla cui base venne concessa la fiducia.
Il governo ne determina il contenuto e li sottopone al Capo dello Stato che esercita un controllo molto simile a quello esplicato in sede di promulgazione: quello è successivo mentre questo è preventivo. Il P.d.R. può rifiutare l'autorizzazione se ritiene che il disegno di legge sia costituzionalmente illegittimo o viziato nel merito costituzionale. Il Governo può aggirare l'ostacolo facendo presentare il progetto alle Camere da un parlamentare della maggioranza, ma la sua autorevolezza diminuirà notevolmente trasformandosi da *disegno di legge governativo in parlamentare*;

d) l'*emanazione degli atti del Governo*. Ai sensi dell'art. 87[5], il P.d.R. emana:

— *i decreti legge e i decreti legislativi* (norme primarie);
— *i regolamenti governativi* (norme secondarie).

Si tratta di un potere di controllo molto simile a quello effettuato in sede di promulgazione. Per quanto attiene al *merito* però bisogna distinguere: rispetto alle norme primarie il controllo è identico a quello svolto in sede di promulgazione delle leggi mentre è meno incisivo per le norme secondarie, che sono il campo d'azione tipico ed esclusivo del Governo.
Con *L. 12 gennaio 1991, n. 13* sono stati tassativamente elencati tutti gli atti che devono essere emanati nella forma di D.P.R.;

e) la *ratifica dei trattati internazionali*. Non si tratta di un potere presidenziale in senso stretto: esso infatti segue ad una legge di autorizzazione delle Camere nei casi previsti dall'art. 80 Cost. (trattati di natura politica: v. supra) oppure completa un potere governativo, ha valor di mero controllo di legittimità costituzionale. La relativa attività infatti rientra in quella di indirizzo politico di maggioranza, cui il P.d.R. rimane estraneo. La ratifica presidenziale non è necessaria quando il trattato o l'accordo vengono stipulati «in forma semplificata»;

f) il *comando delle Forze Armate*. Ai sensi dell'art. 87[9], il P.d.R. ha il comando delle FF.AA. e presiede il Consiglio Supremo di Difesa (v. supra).
Il solo contenuto possibile (in quanto compatibile con il nostro sistema costituzionale) del potere presidenziale di comando delle FF.AA. è quello che gli assegna il compito di assicurare l'imparzialità politica delle stesse, garantendo il non intervento delle FF.AA. nelle vicende politiche interne e il rispetto dei principi di libertà e uguaglianza della persona umana. In sostanza il P.d.R. dovrebbe vigilare *in limine* affinché sia osservato l'art. 52 Cost., che vuole che l'ordinamento delle FF.AA. «si informi allo spirito democratico della Repubblica».
Gli atti compiuti dal P.d.R. quale Presidente del C.S.D. sono esenti da controfirma perché da lui posti in essere quale presidente di un organo collegiale diverso da quello di cui è titolare.
I suoi compiti sono quelli tipici di ogni presidente di collegio: convocarlo, dirigere la discussione, redigere l'ordine del giorno (previa intesa con il Presidente del Consiglio dei Ministri);

g) la *presidenza del C.S.M.* La legge ordinaria che disciplina la costituzione e funzionamento dell'organo di autogoverno dei giudici (L. 24 marzo 1958, n. 159) affida al P.d.R. il potere di convocare e presiedere le sedute, sia del Consiglio che della sua sezione disciplinare, quello di indire le elezioni dei membri togati e di richiedere ai Presidenti delle Camere di provvedere all'elezione dei membri laici, e altre attribuzioni tra le quali quella di dirigere la discussione e fissare l'ordine del giorno. L'art. 4 del regolamento interno consente al P.d.R. di delegare istituzionalmente al vicepresidente la sue funzioni.
L'art. 31 della legge istitutiva conferisce al P.d.R. anche il potere di *scioglimento del Consiglio per impossibilità di funzionamento*: l'intervento del P.d.R. sarà legittimo solo in gravi casi di tentata violazione dei principi costituzionali che si traducano in impossibilità di funzionamento per gli insanabili contrasti sorti all'interno del Consiglio. In tal modo tale potere verrebbe ricondotto nell'ambito della funzione di indirizzo politico costituzionale;

h) lo *scioglimento anticipato delle Camere*. L'art. 88 Cost. attribuisce al P.d.R. il potere di scioglimento anticipato di una o entrambe le Camere, sentito il parere dei loro presidenti. Ci si è chiesti, innanzitutto, se tale *atto* sia *presidenziale, governativo o complesso eguale*. La risposta non è univoca, dipenderà volta per volta dalla situazione politica contingente.
La *proposta governativa* comunque non è indispensabile: potrà aversi come pure mancare. Necessaria è invece la *controfirma*, che naturalmente avrà diverso valore a seconda della paternità sostanziale dell'atto. Alcuni ritengono che si tratti di un *atto complesso*, dovuto cioè al contributo dei due organi, che dovrebbero agire d'accordo per evitare conflitti e mutamenti di potere.
Secondo la dottrina lo scioglimento dovrebbe sempre essere motivato, dal Capo dello Stato o dal Consiglio dei Ministri a seconda che l'iniziativa sia presidenziale o governativa. Nella prassi però ciò non è mai avvenuto.
Non è possibile elencare i possibili casi di scioglimento anticipato perché tali eventualità, in quanto straordinarie, non sono preventivabili.

Tuttavia si sogliono fare i seguenti esempi:

— *conflitto tra le Camere* (ipotesi meramente scolastica);
— *impossibilità di dar vita ad una stabile maggioranza che sostenga il Governo*;
— *bocciatura referendaria* di un importante atto legislativo approvato dalle Camere.

In generale può dirsi che lo scioglimento anticipato rappresenta il mezzo tipico per risolvere — mediante l'appello al corpo elettorale — ogni *impasse* nella quale si venga a trovare la vita costituzionale, ogni inceppamento o disfunzione del sistema. Tale potere è stato attribuito al Capo dello Stato nella sua qualità di *arbitro dei mutamenti dell'opinione pubblica* (BARILE).

I limiti di tale potere sono:

— parere obbligatorio — *ma non vincolante* — dei presidenti delle assemblee parlamentari;
— divieto di esercitarlo negli ultimi sei mesi del mandato presidenziale (c.d. *semestre bianco*) sempreché essi non coincidano in tutto o in parte con gli ultimi sei mesi della legislatura (ex art. 1, L. Cost. 4-11-1991, n. 1): durante tale periodo, sul presupposto di un *depotenziamento di rappresentatività* del Capo dello Stato, è stato ritenuto inopportuno affidargli le valutazioni di opportunità politica, necessarie a tale decisione.

Si è dubitato dell'opportunità di questa disposizione, che potrebbe indurre le Camere ad approfittare del periodo in esame per commettere impunemente comportamenti censurabili dal punto di vista costituzionale.
Sembra penare di ingenuità infatti la posizione di coloro che fanno appello al senso di responsabilità delle forze politiche, per invitarle ad astenersi da ogni comportamento che potrebbe dare adito ad una crisi ministeriale negli ultimi sei mesi del mandato.

Gli scioglimenti anticipati sono divenuti una costante degli ultimi decenni e costituiscono secondo PASQUINO «il più clamoroso sintomo di crisi» della situazione attuale italiana.
Gli atti di scioglimento dei consigli regionali provinciali e comunali sono pacificamente ritenuti *atti governativi*, soggetti a firma presidenziale per il solo controllo di legittimità costituzionale.

B) Poteri presidenziali di impulso e di stimolo

Viene di nuovo in considerazione il *potere di scioglimento anticipato* delle Camere, che può essere utilizzato anche al fine di rivitalizzare un parlamento inerte nell'attuazione dei principi costituzionali.

Quello che i costituenti hanno specificamente concepito in funzione di stimolo è il **potere di messaggio** alle Camere previsto in via generale del 2° comma dell'art. 87 Cost. (l'art. 74 contiene un riferimento specifico al messaggio motivato col quale il P.d.R. può rinviare la legge alle Camere in

fase di promulgazione). I problemi che la norma pone sono molteplici e rilevanti, e riguardano in particolare i *limiti* e i *destinatari* delle esternazioni presidenziali.

Secondo BARILE questa è una tipica esplicazione della funzione presidenziale di *indirizzo politico costituzionale*: il Capo dello Stato, pertanto non può invadere la sfera dell'indirizzo politico di maggioranza, ma deve limitarsi a controllarne l'aderenza ai principi costituzionali (ed eventualmente stimolarlo in tale direzione). Per quanto concerne l'individuazione dei possibili interlocutori delle esternazioni presidenziali, la norma parla solo delle assemblee parlamentari.

Sono tuttavia invalsi nella prassi i c.d. *messaggi liberi o informarli*, con i quali il P.d.R. si rivolge direttamente alla pubblica opinione o a qualunque altro destinatario, e che in quanto atti atipici sono *esenti da controfirma ministeriale*.

Per quanto concerne il contenuto di tali esternazioni valgono gli stessi limiti propri dei messaggi formali: con essi cioè il P.d.R. non può mai farsi promotore di un proprio indirizzo politico provocando un conflitto istituzionale con gli altri poteri dello Stato (Camere e Governo). Non può insomma crearsi per questa via ciò che il sistema parlamentare esclude per definizione, ossia un canale di comunicazione diretta tra il popolo e il Capo dello Stato. Egli non è organo rappresentativo e non può pertanto arrogarsi la funzione di interprete della volontà popolare che la Costituzione assegna in via esclusiva alle assemblee parlamentari.

Il potere presidenziale di esternazione è stato scarsamente esercitato tramite messaggi formali: si ricordano quello del Presidente Segni (del 1963) sull'abolizione del «semestre bianco» e la non rieleggibilità del Capo dello Stato e quello recente del Presidente Cossiga (giugno 1991) sulle *riforme istituzionali*.

Un larghissimo uso delle *esternazioni presidenziali in forma libera* in funzione di stimolo costituzionale si è registrata invece sin dai tempi della presidenza Gronchi. Particolarmente incisivi i messaggi del Presidente Pertini e quelli del Presidente Cossiga, che si sono spesso spinti al limite della legittimità costituzionale per il loro contenuto di critica verso la politica governativa.

Un terzo gruppo di poteri presidenziali raccoglie quelli che tendono alla copertura e al funzionamento degli organi costituzionali:

— la nomina dei *senatori a vita* (art. 59[2]), che il P.d.R. può scegliere, in numero non superiore a cinque, tra i cittadini che hanno illustrato la patria per altissimi meriti nel campo sociale, artistico scientifico e letterario.
Il Capo dello Stato ha in merito una sfera di discrezionalità piena e spetta solo a lui di decidere chi siano tali cittadini insigni — la controfirma ministeriale ha dunque valore meramente formale;
— la nomina dei *cinque giudici della Corte Costituzionale* (art. 135 Cost.). Dopo ampi dibattiti, la legge istitutiva dispose espressamente che la nomina non dovesse avvenire su proposta governativa e pertanto la scelta presidenziale è totalmente discrezionale (salva la controfirma governativa);
— la nomina del *Presidente del Consiglio dei ministri* ai sensi dell'art. 92 Cost. che, come si è visto, è piuttosto laconico al riguardo.
Secondo PALADIN si tratta di un atto complesso uguale: la designazione è libera ma per la nomina occorre l'accettazione del Presidente incaricato.

C) Poteri residuali

Vengono in considerazione infine i poteri attribuiti al P.d.R. solo per motivi di sopravvivenza storica, trattandosi di attribuzioni tradizionalmente assegnate al Capo dello Stato.

Il potere di *concedere la grazia e di commutare le pene* (si tratta di provvedimenti *ad personam*, emessi su richiesta dell'interessato) è attribuito al P.d.R. dall'art. 87[11] Cost.

Poteri meramente formali, che spettano al Capo dello Stato in qualità di rappresentante internazionale dello Stato, sono quello di *accreditamento dei diplomatici italiani* all'estero e di *ricevimento dei diplomatici esteri* accreditati in Italia (art. 87[8]).

È infine attribuzione meramente formale, che rientra nella sua funzione di rappresentanza della nazione, quella che attiene al *conferimento delle onorificenze* della Repubblica.

8. LA CORTE COSTITUZIONALE: GENERALITÀ

La *funzione di indirizzo politico costituzionale* è affidata anche alla Corte Costituzionale, cui spetta:

— controllare la *conformità alla Costituzione* del comportamento degli organi titolari della funzione legislativa;
— risolvere i *conflitti* tra i poteri dello Stato, tra Stato e Regioni o tra Regioni;
— giudicare sulle *accuse promosse contro il Capo dello Stato* dal Parlamento in seduta comune;
— giudicare sull'*ammissibilità delle richieste di referendum* abrogativo.

La Corte assolve in tal modo una essenziale *funzione di garanzia costituzionale* (BARILE).

9. IL SINDACATO DI LEGITTIMITÀ COSTITUZIONALE

La più importante attribuzione della Corte Costituzionale è quella che riguarda i *giudizi sulla legittimità costituzionale delle leggi e degli atti aventi forza di legge.*

A) Oggetto dell'impugnativa

Le *norme assoggettabili a giudizio* dinanzi alla Corte possono essere solo le leggi e gli atti aventi forza di legge dello Stato, delle Regioni e delle Province di Trento e di Bolzano: *mai* quindi le *norme secondarie*. Sono dunque sottoponibili al sindacato della C.C.:

— le *leggi ordinarie*: sia per vizi formali che per vizi materiali;
— le *leggi costituzionali*: sia sotto l'aspetto procedurale (rispetto del procedimento di revisione costituzionale) che su quello sostanziale (osservanza dei limiti impliciti ed espliciti: *supra*);
— le *leggi delegate*: sia per motivi di invalidità della legge di delegazione (ad es. approvata in commissione anziché in aula, in violazione dell'art. 72[4] Cost.) che per violazione dei limiti posti nella delega (in tal modo infatti si viola anche l'art. 76 Cost. che impone il rispetto di tali limiti);
— i *decreti legge*: sia sotto il profilo formale che sotto il profilo sostanziale. È dubbio se possa essere censurata la mancanza dei requisiti prescritti dall'art. 77 Cost. (*necessità e urgenza*), perché sono preclusi alla Corte «ogni valutazione di natura politica e ogni sindacato sull'uso del potere discrezionale del Parlamento» (art. 28 della legge n. 87/53 istitutiva della Corte Costituzionale);
— *le leggi regionali e le leggi delle due Province di Trento e Bolzano.*

Non possono invece essere oggetto di impugnativa:

a) *la Costituzione*, che rappresenta la fonte prima del potere della Corte ed il punto di riferimento del sindacato da essa esercitato;
b) i *regolamenti*: che sono atti amministrativi (e non legislativi) e costituiscono norme secondarie.

B) Vizi formali e materiali delle leggi

Poiché la legge è un atto giuridico, sottoposto a limiti formali e materiali, i vizi che possono inficiarla sono:

a) *vizi formali*: si concretano nella *violazione di norme* costituzionali che disciplinano il *procedimento legislativo* e la ripartizione di competenza fra gli organi legislativi. Possono essere:
   1. *incompetenza*, cioè usurpazione della sfera di competenza di altro organo legislativo (dato che la potestà legislativa è attribuita allo Stato, alle Regioni ed alle Province di Trento e Bolzano, si avrà vizio di incompetenza quando uno di questi tre soggetti invada la sfera di attribuzione dell'altro);

2. *violazione di legge*, si ha quando si sono violate le norme costituzionali che disciplinano il procedimento di formazione delle leggi;

b) *vizi materiali*: si sostanziano nella *violazione dei principi* sanciti dalla Costituzione; si ha cioè contraddizione fra norme poste in relazione di gerarchia.
Contrariamente all'opinione sostenuta da qualche autore (MORTATI, ABBAMONTE) non costituisce vizio materiale il c.d. *eccesso di potere legislativo*, in quanto la funzione legislativa è determinata discrezionalmente dallo stesso Parlamento, né costituiscono vizi materiali i *vizi della volontà* (errore, violenza e dolo).

10. IL PROCEDIMENTO PER IL SINDACATO DI COSTITUZIONALITÀ DELLA LEGGE

A) Fase dinanzi al Giudice «a quo»

I giudizi sulla costituzionalità delle leggi, di competenza della Corte, possono essere di due tipi, a seconda del soggetto che impugna la legge, e cioè a seconda che il processo sia attivato *in via principale o in via incidentale*.

Si parla di **processo principale** quando una Regione ritiene che una legge dello Stato o di un'altra Regione abbia invaso la sfera di competenza ad essa assegnata dalla Costituzione o v.v. quanto lo Stato impugna una legge regionale per straripamento di competenza.

Ai sensi dell'art. 127 infatti, se lo Stato ritiene che una legge approvata dal Consiglio regionale ecceda la competenza della Regione o contrasti con gli interessi nazionali o con quelli di altre regioni:

— la rinvia al Consiglio regionale
— se il Consiglio regionale la riapprova a maggioranza assoluta, il Governo ha 15 gg. di tempo per:
  a) promuovere la *questione di legittimità* davanti alla *Corte costituzionale*
  b) promuovere la *questione di merito* per contrasto di interessi davanti alle *Camere*.

Nel dubbio decide la Corte a chi spetti la competenza.

La *Regione* può impugnare una legge o un atto avente forza di legge dello Stato o la legge di un'altra Regione che reputi lesiva della propria competenza secondo il procedimento previsto e regolato dalla legge cost. n. 1 del 1948 (art. 2) e dalla legge n. 87 del 1953 (artt. 31-36).

Le due province di *Trento e Bolzano* possono ricorrere contro leggi statali per *violazione dello Statuto* o del *principio di tutela delle minoranze* linguistiche tedesca e ladina.

Quelli ora esposti sono gli unici casi di giudizio promosso in via di azione. Negli altri casi il **giudizio** di legittimità costituzionale si instaura in **via incidentale**: la questione deve cioè essere *sollevata* dalle parti o *rilevata d'ufficio* dal giudice *nel corso di un processo* civile, penale o amministrativo. Si noti che, a differenza di altri sistemi nei quali la Corte può attivarsi spontaneamente, nel nostro ordinamento l'attività della Corte deve essere sempre provocata da terzi (BOZZINI). Essa può tuttavia sollevare davanti a sé una questione di legittimità costituzionale *collegata* a quella di cui è stata investita.

Il giudice davanti al quale il giudizio è pendente (c.d. *giudice a quo*) o la stessa Corte Costituzionale nel caso appena menzionato, deve innanzitutto accertare la **rilevanza** e la **non manifesta infondatezza** della questione:

— la questione è *non manifestamente infondata* se il giudice ritiene possa sussistere anche solo un dubbio sulla costituzionalità della legge. Non è un giudizio approfondito bensì di mera deliberazione;
— è *rilevante* la questione dalla cui decisione dipende l'esito del giudizio. La questione cioè deve essere *pregiudiziale* rispetto al giudizio finale: ciò avviene quando la norma incriminata deve essere necessariamente applicata per decidere il processo in corso.

Se ritiene che la questione sia rilevante e non manifestamente infondata il *giudice a quo* emette un'*ordinanza motivata* con la quale trasmette alla Corte Costituzionale gli atti del *processo*, che *rimane sospeso* in attesa della sua decisione.

L'ordinanza di rimessione deve indicare puntualmente sia le norme ordinarie in presunto contrasto con le norme costituzionali sia queste ultime, affinché l'ambito del giudizio della Corte sia delimitato con chiarezza.

Essa viene notificata alle parti del processo, al Presidente del Consiglio dei Ministri (o della Giunta se si tratta di legge regionale) e comunicata ai Presidenti delle Camere (o del Consiglio regionale), nonché pubblicata sulla Gazzetta Ufficiale.

Si noti che:

— si tende a dare la *massima pubblicità* a questa ordinanza affinché eventuali altri *giudici a quo* possano, in attesa della decisione della Corte, sospendere il processo;
— la *sospensione di altri processi* dove si presentano casi *analoghi* non è dettata da nessuna norma giuridica, ma da motivi di opportunità e praticità per evitare giudicati contrastanti sullo stesso oggetto;
— possono, qualora si tratti di processi principali, intervenire il *Presidente del Consiglio dei Ministri o quello della Giunta regionale per difendere* dinanzi alla Corte la *norma ordinaria* della cui legittimità si dubita.

B) Fase dinanzi alla Corte Costituzionale

La Corte Costituzionale (c.d. *giudice ad quem*), decide preliminarmente sui seguenti problemi:

— **legittimazione del giudice a quo**: l'organo da cui proviene l'ordinanza deve
  — essere un'autorità giurisdizionale
  — pronunciarsi durante un giudizio
— **controllo sulla rilevanza** *della questione di costituzionalità* già valutata dal *giudice a quo*: se nell'ordinanza di rimessione non c'è alcuna motivazione su tale rilevanza, la Corte dichiara *inammissibile* il giudizio dinanzi a sé.
Se ritiene la questione *ictu oculi irrilevante* la Corte la dichiara parimenti *inammissibile*. In altri casi meno evidenti può invece restituire gli atti al giudice *a quo* per un *riesame della rilevanza*;
— **controllo della non manifesta infondatezza**: se la questione appare *palesemente infondata* la Corte può dichiararlo *in limine* con un provvedimento adottato in Camera di consiglio. Ciò accade inoltre quando *la stessa questione è già stata decisa* in precedenza dalla Corte *con sentenza di rigetto*. Se invece la Corte si è già pronunciata nel senso dell'accoglimento, la questione è più propriamente *inammissibile*.

Se reputa la questione rilevante e non manifestamente infondata, la Corte procede al **giudizio sul merito**: cioè sulla fondatezza o non fondatezza della questione proposta, decidendola quindi nel senso dell'*accoglimento* (declaratoria di illegittimità costituzionale della norma) o del *rigetto*:

— **accoglimento**: la norma dichiarata illegittima cessa di avere efficacia del giorno successivo alla pubblicazione della decisione (art. 136 Cost.). Nessun giudice può più applicarla, neppure ai *rapporti passati*, salvo che siano stati decisi con sentenza passata in giudicato o con negozi di accertamento preclusivo.
La declaratoria di illegittimità costituzionale ha dunque efficacia retroattiva (*ex tunc*) a differenza della legge abrogative, che di regola agisce *ex nunc*.
La Corte ha inoltre il *potere-dovere* (art. 27 L. n. 87/53) di dichiarare quali altre norme sono *travolte dalla declaratoria di incostituzionalità*, la cui illegittimità cioè deriva come conseguenza della decisione adottata, in deroga al principio della corrispondenza tra il chiesto ed il pronunciato. Occorre però che la Corte usi con *molta cautela* questo potere;
— **rigetto**: la Corte respinge l'eccezione di incostituzionalità. Tale decisione peraltro non ha effetto preclusivo e pertanto la questione potrà essere sollevata nuovamente, magari con altre argomentazioni.

C) Tipologia delle decisioni della Corte

All'interno dei due tipi delle sentenze della Corte di cui abbiamo parlato (di accoglimento e di rigetto) si possono distinguere i seguenti tipi (BARILE):

— **sentenze interpretative di accoglimento**: si limitano a precisare qual è l'interpretazione costituzionalmente illegittima e fanno salve le altre eventuali e diverse interpretazioni della norma;
— **sentenze interpretative di rigetto**: la Corte respinge la eccezione di incostituzionalità sulla base di *una determinata interpretazione della norma*: tra le varie interpretazioni possibili sceglie e fa salva solo quella conforme ai principi costituzionali.

Con questi due tipi di decisioni la Corte, mediante una *interpretazione adeguatrice*, annulla o mantiene in vita una norma nel suo significato *attuale*.
Il *limite* delle sentenze interpretative di rigetto risiede nel fatto che l'interpretazione proposta non è vincolante per i giudici comuni, ma solo per il giudice *a quo*, che non può decidere la causa utilizzando la norma nel suo significato incostituzionale (salva la possibilità di adottare un'interpretazione *ancora* diversa);

— **sentenze manipolatrici**: costituiscono, come nota BARILE, la punta più avanzata delle sentenze intepretative di accoglimento e consistono nell'*estrarre* dalla norma una interpretazione del tutto differente da quella tradizionale per adeguare la norma al dettato costituzionale senza dichiararla illegittima.

Un esempio è dato dalla sent. n. 190/70 con la quale la C.C. dichiarò l'illegittimità costituzionale dell'art. 304bis, primo comma, del c.p.p. previgente, limitatamente alla parte in cui escludeva il diritto del difensore di assistere all'interrogatorio dell'imputato. In realtà tale norma non era contenuta nell'art. 304bis, ma si poteva ricavare solo indirettamente dalla sua formulazione. La decisione della Corte è servita ad evitare la declaratoria di illegittimità costituzionale dell'intero articolo;

— **sentenze creative e sostitutive**: sono sentenze attraverso le quali la Corte si propone — entro limiti molto ristretti — di sindacare *omissioni legislative* che reputa lesive dei precetti costituzionali. In pratica si afferma la illegittimità di una norma «nella parte in cui *non dice* alcunché» (MARTINES).

Ad es. è stato dichiarato costituzionalmente illegittimo, per contrasto con l'art. 30 Cost., l'art. 467 C.C. nella parte in cui escludeva dalla successione per rappresentazione il figlio naturale in mancanza di discendenti legittimi. In tal modo la Corte ha introdotto una norma nell'ordinamento giuridico (i figli naturali succedono per rappresentazione in assenza di figli legittimi) traendola direttamente dall'art. 30 Cost.
La sentenza produce in sostanza *effetti creativi* o aggiuntivi. A questo tipo possono ricondursi anche le *c.d. sentenze sostitutive*, che colpiscono un frammento della disposizione, sostituendo (con l'uso della locuzione «anziché») la vecchia disciplina con una totalmente nuova (CRISAFULLI).
La Corte negli ultimi tempi si è rifiutata più volte di emanare sentenze aggiuntive o comunque *creative* in quanto ciò avrebbe comportato un'invasione della sfera di discrezionalità del legislatore.
Va ricordato inoltre *l'alto grado di politicità* delle sentenze della C.C.: per decidere infatti spesso non basta applicare le norme costituzionali, ma bisogna determinare e definire i principi fondamentali dell'ordinamento, che sono principi politici e quindi valutati da ciascuno secondo le proprie convinzioni (BRANCA).

D) Procedimento dinanzi alla Corte

Per i giudizi avanti alla Corte, trova applicazione, in mancanza di apposita normativa, il regolamento per la procedura innanzi al Consiglio di Stato, richiamato dall'art. 22 della legge del 1953 istitutiva della Corte Costituzionale. Pervenuta l'ordinanza di rimessione alla Corte e decorsi venti giorni dalla sua notifica, il Presidente nomina il giudice istruttore. Nel giudizio possono costituirsi le stesse parti del giudizio in cui è stata sollevata l'eccezione di incostituzionalità, nonché il Presidente del Consiglio dei Ministri ed il Presidente della Regione, se il giudizio verte sulla legittimità di una legge regionale. Non è ammesso intervento di altri soggetti. Terminata l'istruttoria, il procedimento può assumere due forme:

a) procedimento in camera di consiglio: se nessuna parte si è costituita o se la questione è manifestamente infondata;
b) procedimento in pubblica udienza: dopo la relazione dell'istruttore si ha la discussione, che si chiude con le conclusioni dei difensori delle parti (che debbono essere avvocati cassazionisti).

La decisione è deliberata dalla Corte in Camera di consiglio; la sentenza è redatta da un giudice nominato dalla Corte stessa (in genere è l'istruttore) ed il testo di essa (o dell'ordinanza, se la questione è stata decisa con ordinanza) deve essere approvato dal collegio in camera di consiglio. La data di tale approvazione si considera data della sentenza.

La sentenza va depositata nella Cancelleria della Corte che ne cura la trasmissione: all'autorità che ha sollevato la questione di legittimità; al Ministro di Grazia e Giustizia (o al Presidente della Giunta regionale, se si tratta di legge regionale) affinché la pubblichi; alla Camera (o al Consiglio regionale interessato).
Contro la decisione della Corte *non è ammessa* alcuna impugnazione.
Il giudizio in cui era stata sollevata la questione, e che nelle more del giudizio davanti alla Corte era rimasto sospeso, deve essere riassunto entro sei mesi dalla data della pubblicazione della sentenza.

E) Effetti della pronuncia della Corte

La norma di legge dichiarata incostituzionale «*cessa di avere efficacia dal giorno successivo alla pubblicazione della sentenza sulla Gazzetta Ufficiale*»: così dispone l'art. 136 della Costituzione. Se i rapporti sorti sulla base della legge, prima del giorno successivo alla pubblicazione della sua dichiarazione d'incostituzionalità, dovessero cadere *sotto la vigenza* della norma dichiarata «incostituzionale», data l'ovvia considerazione che nel processo «*a quo*» si discute sempre di rapporti realizzatisi antecedentemente alla dichiarazione d'incostituzionalità, la pronuncia di incostituzionalità sarebbe sempre *inutiliter data* rispetto al processo in cui la questione è sorta. Cosicché nessun effetto se ne trarrebbe per le parti e per il giudice. Perciò la declaratoria di incostituzionalità ha effetto retroattivo:

— per la **fattispecie in ordine alla quale è stata sollevata l'eccezione di incostituzionalità**: il giudice *a quo* che ha sospeso il giudizio in attesa della decisione della Corte dovrà attenersi alla decisione di questa nel definire la controversia oggetto del suo esame;
— per le **sentenze penali di condanna**: l'art. 30 L. 87/53 dice che «quando, in applicazione della norma dichiarata incostituzionale, è stata pronunciata sentenza irrevocabile di condanna, ne cessano l'esecuzione e tutti gli effetti penali» (principio del *favor libertatis*);
— per i **rapporti pendenti**: cioè non ancora esauriti.

Solo rispetto ai **rapporti esauriti** la pronuncia di incostituzionalità è destinata a non avere effetto: si tratta sicuramente dei *rapporti definiti con giudicati o transazioni*, ma l'effettivo ambito della categoria non è ancora stato individuato con certezza da giurisprudenza e dottrina.

11. RISOLUZIONE DEI CONFLITTI DI ATTRIBUZIONE

La Corte Costituzionale è chiamata a garantire che:

— lo Stato nei confronti delle Regioni
— le Regioni nei confronti dello Stato e tra di loro
— i poteri dello Stato verso gli altri poteri dello Stato
rispettino nello svolgimento delle loro funzioni, le sfere di competenza degli altri organi o poteri.

Il termine «*potere*» va inteso nel senso di «organo costituzionale».
Il conflitto sorge allorché un organo usurpi, o pretenda di usurpare, le funzioni spettanti ad altro organo.
Alla Corte Costituzionale, in particolare, non spetta la risoluzione di tutti i conflitti, bensì solo dei c.d. *conflitti costituzionali*, quelli, cioè, che sorgono fra organi costituzionali per l'applicazione o l'interpretazione di norme costituzionali.

Per essere di competenza della Corte Costituzionale i conflitti di attribuzione devono essere:

— di natura giuridica (non politica)

per esempio: un conflitto tra Parlamento e Governo in relazione all'indirizzo politico da seguire, essendo di natura politica, non è di competenza della Corte Costituzionale, mentre un conflitto tra Presidente della Repubblica e Governo per stabilire se per la concessione delle onorificenze da parte del Presidene sia necessaria o meno la proposta del Governo è di competenza della Corte Costituzionale.

— esterni (non interni)

esterni sono quei conflitti che avvengono tra «*poteri diversi*», non tra organi dello stesso potere (in questo caso, i conflitti verrebbero risolti dal potere stesso).

Sono di competenza della Corte solo i conflitti insorti tra organi competenti a dichiarare «*in via definitiva*» la volontà del potere cui appartengono (es.: il conflitto tra Pretore e intendente di Finanza non è di competenza della Corte, mentre lo è quello tra la *Corte di Cassazione ed il Ministro delle Finanze*).

Esaminiamo i tre tipi di conflitto di competenza della Corte Costituzionale:

a) **i conflitti fra i poteri dello Stato** (*interorganici*); non sono compresi:
   — *i conflitti fra organi amministrativi*, risolti dal superiore gerarchico in via amministrativa;
   — *i conflitti di giurisdizione*, rimessi alle Sezioni Unite della Cassazione;
   — *i conflitti di attribuzione fra pubblica amministrazione ed autorità giudiziaria* anch'essi rimessi alle Sezioni Unite della Cassazione;
b) **i conflitti fra Stato e Regioni** (*intersoggettivi*); tali conflitti possono riguardare solo atti amministrativi o di governo, mai atti legislativi, in relazione ai quali è invece ammessa l'impugnativa per incostituzionalità avanti alla stessa Corte da parte del Commissario di Governo;
c) **i conflitti fra Regioni**; tali conflitti possono avere ad oggetto solo la ripartizione di competenza non legislativa fra le varie Regioni.

La Corte può essere chiamata a risolvere il conflitto solo *su ricorso* proposto dai soggetti o dagli organi la cui sfera di attribuzione costituzionale sia stata invasa (**invasione di competenza** si ha quando viene rivendiata la titolarità di un potere altrui) o lesa (**lesione di competenza** si ha quando l'uso illegittimo, il «cattivo uso», del potere proprio ostacola o menoma l'esercizio delle attribuzioni altrui).

La Corte non può procedere d'ufficio e deve prendere atto delle eventuali rinunce al ricorso (*principio dispositivo*).

12. GIUDIZIO NEI CONFRONTI DEL PRESIDENTE DELLA REPUBBLICA

La Corte Costituzionale, ai sensi degli artt. 90 e 134 Cost., è investita del potere di giudicare il Presidente della Repubblica per i reati di *alto tradimento* e di *attentato alla Costituzione*, qualora questi venga posto in stato di accusa dal Parlamento in seduta comune.

Prima dell'entrata in vigore della legge di revisione costituzionale n. 1 del 1989, analogo potere spettava alla Corte anche nei confronti dei *membri del Governo* per reati co mmessi nell'esercizio delle loro funzioni (c.d. *reati ministeriali*). Oggi tali reati sono stati attribuiti alla competenza della *magistratura ordinaria*.

Ricevuto dal Presidente della Camera l'atto di messa in stato d'accusa deliberato dal Parlamento in seduta comune, il Presidente della Corte Costituzionale costituisce la Corte nella *formazione integrata* con i 16 giudici aggregati (v. *supra*), fa notificare l'atto di accusa all'interessato, poi nomina il giudice istruttore-relatore e, quando occorre, il difensore d'ufficio. La Corte può anche disporre la sospensione del P.d.R. dalla sua carica (art. 3 L. cost. n. 1/89).

La *sentenza* della Corte è inimpugnabile e irrevocabile, salva l'ipotesi eccezionale della revisione.

Nei confronti del Presidente della Repubblica la Costituzione non predetermina le figure degli «illeciti» che costituiscono «*alto tradimento*» e «*attentato alla Costituzione*»; data, infatti, l'impossibilità di fissare in un rigido schema legislativo la diversa gravità degli illeciti che può porre in essere il Presidente della Repubblica, la Corte gode della più ampia *discrezionalità* nel giudizio ed è libera di adeguare la misura della pena alla particolare gravità del fatto in relazione alle circostanze in cui si verifica.

Ricordiamo che la Corte, con sent. n. 25 del 1977 ha affermato la propria competenza a giudicare anche eventuali altri imputati che comunque sono *coinvolti* nei reati commessi dal P.d.R.

13. IL GIUDIZIO SULL'AMMISSIBILITÀ DEL REFERENDUM ABROGATIVO

Altra funzione spettante alla Corte Costituzionale è quella di giudicare sull'ammissibilità del *referendum* abrogativo. Il controllo della Corte si esplica nella fase successiva a quella della raccolta delle firme, e mira a garantire la regolarità formale delle operazioni già svolte nonché ad impedire che il referendum venga indetto su una delle leggi per le quali esso è vietato ai sensi dell'art. 75 Cost. (vedi *infra*).

Tale competenza della Corte si differenzia notevolmente dalle altre, che presentano tutte un più o meno *accentuato carattere giurisdizionale* (contenzioso). Quella in esame è, invece, una funzione che si esercita *ex officio*, attribuita alla Corte in virtù della sua collocazione costituzionale di organo *super partes*.

Ricevuta dall'ufficio centrale della Corte di Cassazione l'ordinanza relativa alla *richiesta di referendum*, la Corte è chiamata a pronunciarsi sulla sua legittimità costituzionale. È previsto un breve contraddittorio in quanto è accordata ai promotori del *referendum* ed al governo la possibilità di presentare memorie scritte. La Corte decide in *Camera di Consiglio*, senza la previa pubblica udienza, e qualora venga dichiarata l'ammissibilità del *referendum*, questo dovrà essere indetto dal Presidente della Repubblica; nell'ipotesi di affermata inammissibilità, invece, tutto il procedimento verrà definitivamente bloccato.

Tale funzione, secondo VIRGA, avrebbe *natura amministrativa*, poichè viene esercitata *automaticamente* e d'*ufficio* su tutte le richieste di *referendum* (dopo la verifica operata dall'*Ufficio centrale della Cassazione per il referendum*) indipendentemente dalla esistenza di una contestazione o di una lite in ordine ad esse.

Di contrario avviso è CARBONE, che ne afferma, invece, il *carattere giurisdizionale*.

Sezione Quarta
La funzione di indirizzo politico-economico-finanziario

1. GENERALITÀ

La funzione di indirizzo *politico-economico-finanziario* costituisce un aspetto fondamentale dell'indirizzo politico generale del Governo e consiste nella determinazione delle *linee fondamentali* dell'intervento statale in campo economico.

La definizione dell'indirizzo politico-economico-finanziario fa parte di quella serie di attività che si suole far rientrare nel campo del «*diritto pubblico dell'economia*», ramo che studia quegli *istituti di diritto pubblico che disciplinano eventi specificamente economici*.

I primi interventi nell'economia si verificano quando il legislatore prende atto che gli equilibri dell'economia di mercato sono «*meccanici*» e non tengono conto dei principali fattori di sviluppo, crescita e conservazione propri del modello dello «*Stato sociale*» che più che al profitto, tende alla *conservazione* del livello *occupazionale* e del *reddito* dei cittadini. Inoltre tale intervento si rende necessario perché la gestione privata mal si addice allo svolgimento di *servizi di pubblico interesse* (ferrovie, energia elettrica, etc.).

L'intervento in questo settore è definito «*governo dell'economia*» e trae il suo fondamento costituzionale dagli articoli 41 e 43 Cost. che riservano al legislatore la programmazione e il controllo sull'economia nonché la gestione di imprese di pubblico interesse.

2. ORGANI: I COMITATI INTERMINISTERIALI

Il governo dell'economia si serve soprattutto dell'attività dei *Comitati interministeriali*

Essi sono organi assai più duttili del Governo nel suo *plenum*: hanno meno impacci burocratici ed una composizione elastica, che è l'aspetto più significativo della loro funzionalità. Essa consente infatti, da un lato l'integrazione dei componenti con persone esterne di volta in volta interessate, e dall'altro permette ai ministri non coinvolti dalle singole decisioni di rimanere assenti dalle relative discussioni.

Gli unici Comitati ancora esistenti sono il C.I.P.E. (Comitato interministeriale per la programmazione economica); il C.I.C.R. (Comitato interministeriale per il credito e il risparmio) e il C.I.S. (Comitato interministeriale per le informazioni e la sicurezza).

Con legge 24-12-1993, n. 537 sono stati soppressi tutti i Comitati interministeriali (fatta eccezione, appunto, per quelli elencati): ciò in linea con un orientamento, anzitutto dottrinario, in base al quale tali organismi avrebbero dimostrato nel corso degli anni una scarsa integrabilità col nostro sistema anche perché in contrasto con l'art. 95 Cost. che affida la determinazione della politica generale del Governo esclusivamente al Consiglio dei Ministri, ovvero a una posizione precisa del legislatore che — ex art. 7, 1° c. della L. 400/1988, stabilisce che il Governo è delegato ad emanare norme volte a ridurre e riordinare i Comitati dei Ministri interministeriali esistenti.

a) Il C.I.P.E. è senza dubbio il più importante tra i Comitati interministeriali tuttora esistenti.

   1. *Composizione*: esso è costituito, come detto, dal Presidente del Consiglio dei Ministri; dai Ministri del Bilancio; delle Finanze; degli Esteri; dell'Industria; del Lavoro; del Commercio estero; dei Trasporti e della navigazione.
   2. *Votazione*: è un comitato a composizione elastica. Possono infatti intervenire ai suoi lavori anche altri ministri ed altri funzionari dello Stato (es. Governatore della Banca d'Italia), ma senza diritto di voto.
   3. *Compiti*:

   — predispone e dirige gli indirizzi della politica economica nazionale;
   — indica le linee generali per l'impostazione del bilancio dello Stato;
   — esamina la situazione economica generale per adottare eventuali misure anticongiunturali;
   — promuove l'armonizzazione della politica economica nazionale con le direttive comunitarie.

b) Il C.I.C.R., istituito con D.Lgs.C.P.S. 17-7-1947, n. 691 e successivamente riformato con D.Lgs. 385/1993 è un organismo collegiale a composizione rigida.

   1. *Composizione*: è costituito dal Ministro del Tesoro (che lo presiede ed ha il potere di convocazione e di proposta delle deliberazioni) e dai ministri dei lavori pubblici; dell'Industria; del Bilancio; del Commercio estero; per le risorse agricole, alimentari e forestali; delle Finanze; per il Coordinamento delle politiche comunitarie e dal Governatore della Banca d'Italia (che non ha diritto di voto).
   2. *Validità delle sedute*: per rendere valide le sedute è necessaria la maggioranza dei suoi membri; le deliberazioni vanno assunte con il consenso della maggioranza assoluta dei partecipanti.
   3. *Compiti*: il D.Lgs. 385/1993 affida al C.I.C.R. l'alta vigilanza in materia di tutela del risparmio di esercizio del credito e in materia valutaria.
      Per gli accertamenti nelle materie di propria competenza e per l'esecuzione delle proprie deliberazioni, il C.I.C.R. si avvale della Banca d'Italia.

3. Segue: ALTRI ORGANI

A) Il Ministero del bilancio e della programmazione economica

I *Ministri economici* in Italia sono sostanzialmente: il Ministro del bilancio e della programmazione economica, il Ministro delle finanze, il Ministro del tesoro, il Ministro dell'industria e del commercio, il Ministro per il commercio estero. In particolare il Ministro del bilancio provvede all'elaborazione dello schema del programma economico nazionale (P.E.N.) da sottoporre alla deliberazione del Consiglio dei Ministri e tutte le altre iniziative ad esso attinenti. Esso opera anche attaverso organismi collegati: l'ISPE (Istituto studi programmazione economica), l'ISCO (Istituto studio congiuntura), l'ISTAT (Istituto centrale di Statistica).

B) Le imprese pubbliche

Sono numerose e sono costituite da enti pubblici che svolgono attività di produzione in regime di diritto privato.

Tra esse ricordiamo: l'I.A.C.P. (*Istituto Autonomo Case Popolari*), l'E.I.M.A. (*Ente per l'intervento nel Mercato Agricolo*), l'E.G.A.T. (che opera nel campo delle acque termali).

La politica di tali imprese fino ad oggi si è svolta sotto la direzione ed il *controllo* del potere *esecutivo*; ciò è stato da più parti criticato, in quanto si è sostenuto che tali imprese dovrebbero raccordarsi anche al *Parlamento* che, nell'attuazione dell'attività di indirizzo politico, sarebbe l'*organo più idoneo* a tale controllo.

GALGANO, in particolare, ha sottolineato che l'indirizzo e il coordinamento dell'iniziativa pubblica non può essere affidato alla sola maggioranza di un governo, ma deve essere il risultato dell'impegno delle Camere ove c'è la presenza e il controllo anche delle minoranze.

MAZZONI ritiene utile la creazione di una commissione intercamerale di *controllo* a competenza generale per vigilare sia sulle imprese pubbliche che su quelle private.

Nel secondo dopoguerra il numero di imprese direttamente o indirettamente controllate dallo Stato si è notevolmente accresciuto, toccando quasi tutti i settori economici ed esorbitando notevolmente dalla mera funzione di indirizzo e coordinamento affidata ai pubblici poteri. Negli ultimi decenni lo Stato non ha semplicemente svolto una funzione «regolatrice» del sistema economico ma si è posto, attraverso le imprese pubbliche, come un diretto concorrente dell'iniziativa economica privata. Soltanto a partire dai primi anni '90 si è assistito ad un'inversione di tendenza: sotto l'incalzare dell'enorme deficit pubblico e pressato dall'esigenza di risanare i conti dello Stato, il Governo ha avviato un articolato piano di privatizzazione di diverse aziende statali (L. 29-1-1992, n. 35; L. 8-8-1992, n. 359; D.L. 29-11-1993, n. 486) che dovrebbe nel breve periodo consentire un progressivo disimpegno dello Stato nella gestione diretta dell'economia, una riduzione del debito pubblico, un recupero di competitività delle aziende interessate ad una maggiore diffusione del capitale azionario tra il pubblico.

4. LO SVOLGIMENTO DELLE FUNZIONI DI INDIRIZZO DELL'ECONOMIA

L'attività pubblica di «disciplina dell'economia» si attua attraverso:

A) La programmazione

In base ad un progetto mai realizzato, il «governo pubblico dell'economia» avrebbe dovuto realizzarsi attraverso l'attuazione, da parte dell'esecutivo, di un *programma economico* precedentemente approvato dal Parlamento. La situazione del nostro paese fino ad oggi, però, non ha permesso l'adozione di «*macrodecisioni*» per la pianificazione economica, per cui si è sempre proceduto con «*microdecisioni*» fuori da un organico programma, adottate spesso *in extremis* per motivi di urgenza o salvataggio (AMATO).

BARILE lamenta che, in materia di programmazione, poco o nulla si è finora concretamente realizzato; ancora oggi il Parlamento si limita ad approvare la legge di bilancio e la legge finanziaria.

Di vera e propria programmazione in Italia si è parlato una sola volta, quando fu approvata la legge n. 685/1967, peraltro rimasta totalmente inattuata.

Scaduta la durata di tale legge nel 1971, si abbozzò uno schema di nuova programmazione (c.d. «progetto 80») che fu poi abbandonato per lasciare il campo ad un tipo di «programmazione per obiettivi» rimasta anch'essa allo stadio di mera dichiarazione di intenti. Ulteriore problema è quello del coinvolgimento delle Regioni nella formulazione e attuazione della programmazione nazionale e del coordinamento tra programmazione nazionale e regionale.

B) Le partecipazioni statali

Attraverso tale forma d'intervento nell'economia è stato realizzato, non sempre con felici risultati, il governo pubblico dell'economia.

Le imprese pubbliche e le imprese ove partecipa il capitale dello Stato sono state distaccate (con la riforma del 1956 che istituì il «*Ministero delle partecipazioni Statali*») dalla direzione e dal controllo della *Confindustria* al fine di realizzare, attraverso il controllo e la partecipazione diretta dello Stato, le esigenze del c.d. «Stato sociale» (occupazione, sviluppo, etc.).

La legge di riforma, inoltre, stabilì che tali imprese avrebbero dovute essere gestite con «*criteri di economicità*», criteri che, invece, sono stati nella pratica completamente ribaltati tanto da trasformare tali aziende spesso in «carrozzoni» clientelari al solo fine di avvantaggiare i partiti di governo.

A partire dagli anni '80, il fallimento storico, sotto il profilo dei risultati ottenuti e, in certa misura, della filosofia ispiratrice del modello interventistico, ha dato il via ad una poderosa controtendenza, concretatasi in massicci fenomeni di privatizzazione ed in una continua spinta alla *deregulation*.

Ma soltanto a far data dal gennaio '92, come si è in precedenza ricordato, la legislazione italiana ha posto fine all'improduttivo «baraccone» delle partecipazioni statali, avviando un programma complessivo di trasformazione di enti economici ed aziende autonome in società per azioni.

Nel corso del 1993 e del 1994 è stato dapprima soppresso il Ministero delle partecipazioni statali (L. 202/93) ed in seguito è stata concretamente avviata la politica di privatizzazione con la dismissione di importanti istituti bancari.

C) La manovra monetaria e creditizia: le banche

Il «governo dell'economia» si attua, infine, attraverso la *manovra monetaria e creditizia*. Tale attività è svolta di concerto da:

— Ministero del Tesoro;
— Comitato Interministeriale Credito e Risparmio (C.I.C.R.);
— Banca d'Italia.

Il principio costituzionale più importante in materia è quello della *tutela del risparmio* (art. 47 Cost.).

La Banca d'Italia, istituto di diritto *pubblico*, costituita e disciplinata con legge, svolge fondamentali funzioni:

— è l'*istituto di emissione* delle banconote con valore legale;
— è il *cassiere dello Stato*;
— è la «*banca delle banche*» nel senso che non svolge funzioni di credito verso i privati, ma solo verso altre banche;
— ha *poteri di direzione, controllo* e *vigilanza* su tutti gli istituti di credito.

La Banca d'Italia è in posizione di *indipendenza* dal Governo. Il suo governatore è nominato e revocato dal Consiglio Superiore della Banca.

La disciplina valutaria è esercitata dall'*Ufficio Italiano Cambi* (U.I.C.) che, pur godendo di autonoma personalità giuridica, è sotto il *controllo* della Banca d'Italia.

D) Le operazioni di politica finanziaria

Le principali operazioni di politica finanziaria sono:

— gli *incentivi* che, in ossequio alle limitazioni previste dai trattati CEE, attraverso aiuti alle imprese, sgravi fiscali, etc. invogliano gli imprenditori ad assumere iniziative economiche in settori o aree determinati (senza far venir meno il principio di «*sana concorrenza*» stabilito dal trattato CEE, etc.);
— i *contingentamenti* (nei confronti dei paesi non appartenenti alla Comunità Europea), attraverso i quali vengono fissati autoritativamente la *quantità* delle *importazioni* ed *esportazioni* di determinati prodotti da paesi «*terzi*», mentre le tariffe doganali nei confronti di tali paesi sono stabilite in sede comunitaria e sono *comuni* a tutti i paesi comunitari;
— l'esercizio della *potestà tariffaria* in materia doganale (nei limiti previsti dai trattati comunitari).

Sezione Quinta
La funzione legislativa

Nel nostro ordinamento la regola è che la *funzione legislativa ordinaria è esercitata in via esclusiva dal Parlamento*, tuttavia sono previste alcune **eccezioni**:

— l'*attività legislativa straordinaria del Governo* (decreti-legge e decreti legislativi);

— l'*attività legislativa delle Regioni*;
— il *referendum*.

1. LA FUNZIONE LEGISLATIVA DELLE CAMERE

Ai sensi dell'art. 70 Cost. «la funzione legislativa è esercitata collettivamente dalle due Camere». Essa si estrinseca attraverso un *procedimento* cioè attraverso una serie di atti di diverso tipo e natura coordinati per il raggiungimento dello stesso fine, che è la creazione della legge.

Il procedimento legislativo è diverso per le leggi ordinarie e per le leggi costituzionali (del secondo già si è detto nella sez. II a proposito della funzione di revisione della Costituzione).

Il procedimento *legislativo* viene di regola distinto nelle seguenti *fasi essenziali*:

— fase **preparatoria**: suddistinta in fase di *iniziativa* e fase *istruttoria* (o preparatoria in senso stretto);
— fase **costitutiva** (o deliberativa);
— fase di **integrazione dell'efficacia**: suddistinta in fase di *controllo* e fase di *comunicazione*.

A) Fase preparatoria: l'iniziativa

L'iniziativa legislativa si esercita con la **presentazione** di *un progetto di legge* ad una delle Camere (indifferentemente prima alla Camera o al Senato: principio del *bicameralismo perfetto*).

La Costituzione usa il termine «*disegno di legge*» ma secondo il lessico ufficiale oggi in uso nel Parlamento, così si distingue:

— *progetto di legge*: indica *genericamente* tutti gli atti di iniziativa legislativa;
— *disegno di legge*: indica i progetti presentati dal *Governo* o dai *senatori*;
— *proposta di legge*: indica, invece i progetti presentati dai *deputati*, dal *C.N.E.L.*, dalle *Regioni* o per *iniziativa popolare*.

A seguito della presentazione la Camera è tenuta a deliberare sul progetto di legge.

Titolari del **potere di iniziativa legislativa** (art. 71 Cost.) sono:

a) *il Governo*: l'iniziativa governativa è la più importante, perchè il Governo in quanto principale titolare della funzione di indirizzo politico di maggioranza, ha il potere-dovere di pianificare l'attività legislativa. Poiché esso è espressione della maggioranza, del resto, le sue proposte sono quelle che hanno le maggiori possibilità di essere accolte.

   Essa si esercita mediante presentazione di *disegni di legge* (redatti in articoli), *deliberati dal Consiglio dei Ministri* e *autorizzati dal P.d.R.* (con decreto controfirmato).
   Si ricordi comunque che eventuali *dimissioni* del Governo *non* implicano il *ritiro automatico* di tutti i progetti di iniziativa governativa, salva la facoltà del nuovo Governo di ritirarli e di modificarli in conformità del suo nuovo indirizzo politico (VIRGA);

b) *i Parlamentari*: ciascun membro del Parlamento, da solo, o unitamente ad altri parlamentari (appartenenti allo stesso o a diversi *gruppi parlamentari*), può presentare una ***proposta di legge*** alla Camera a cui appartiene (il regolamento del Senato parla di «*disegno di legge*»).

   Anche in tal caso il testo deve essere redatto in articoli, ed accompagnato da una relazione che ne illustri gli scopi e le caratteristiche essenziali;

c) *il C.N.E.L.*: ha iniziativa legislativa solamente in *materia di economia e di lavoro*. Inoltre ad esso possono essere richiesti *pareri* da parte del Governo nell'esercizio dell'iniziativa governativa;
d) *il Corpo elettorale*: la Costituzione repubblicana ha introdotto per la prima volta nell'ordinamento Italiano l'istituto dell'*iniziativa legislativa popolare* (art. 71[2] Cost.).

   Il popolo esercita l'iniziativa legislativa mediante presentazione di un **progetto di legge** (redatto in articoli ed accompagnato da una relazione sulle finalità complessive delle singole norme), proveniente (cioè sottoscritto) da almeno **50.000 elettori**

(iscritti nelle liste per l'elezione alla Camera dei deputati: art. 48 L. 352 del 1970), le cui firme devono essere autenticate ed accompagnate da certificati elettorali (secondo le norme per la richiesta di *referendum*).
Secondo VIRGA, per *analogia* con l'istituto del *referendum*, sono sottratte all'iniziativa legislativa popolare quelle stesse leggi per le quali l'art. 75 Cost. espressamente esclude il *referendum* (leggi tributarie e di bilancio, di amnistia e di indulto, di autorizzazione a ratificare trattati internazionali).
Secondo MORTATI, invece, non valgono le limitazioni poste al *referendum abrogativo*: perché l'iniziativa popolare ha diversa funzione, e pertanto non può trovare applicazione il procedimento analogico, che postula l'*eadem ratio*. In particolare l'iniziativa popolare deve certamente ritenersi ammissibile per l'*amnistia*, l'*indulto* e le *leggi tributarie* (così pure BARILE).
Le *Camere* non *hanno* ovviamente l'*obbligo di* tradurre in legge ogni proposta di iniziativa popolare: sono tenute solamente a «*prenderla in considerazione*», cioè a deliberare su di essa.
Le proposte di iniziativa popolare non decadono allo scadere della legislativa (così dispongono i regolamenti parlamentari);

e) *i Consigli regionali*: il loro *potere di iniziativa* è limitato alle *materie che interessano direttamente le Regioni*, e che non siano tra quelle per le quali le Regioni hanno potestà legislativa autonoma (art. 121[2] Cost.);
f) *i Comuni*: ai sensi dell'art. 133 Cost. «il mutamento delle circoscrizioni provinciali e l'istituzione di nuove province nell'ambito di una regione sono stabiliti con leggi della Repubblica *su iniziativa dei Comuni*, sentita la stessa Regione».

La presentazione dei progetti di legge alle Camere (da qualsiasi iniziativa provengano) avviene mediante *deposito* del progetto presso le rispettive Presidenze. Queste ne danno avviso ai membri della Camera e ne curano al più presto la stampa e la distribuzione agli stessi.
L'obbligo del Presidente di dare comunicazione del progetto presentato è subordinato alla verifica dei requisiti formali richiesti per l'esistenza giuridica dell'atto di iniziativa.
Ciascuno dei soggetti prima esaminati che gode dell'iniziativa legislativa ha anche il *potere di ritirare il progetto* (MORTATI): il ritiro deve avvenire però prima che il progetto sia stato approvato da almeno una delle Camere.
In caso di ritiro, ciascun membro del Parlamento può sempre far proprio il progetto ritirato e ripresentarlo: in tal caso però si deve iniziare una nuova procedura (MORTATI).
Al *termine* di ciascuna *legislatura* tutti i *progetti di legge* ancora pendenti presso le Camere (qualunque sia lo stadio raggiunto dall'*iter* legislativo) *decadono* automaticamente (fatta eccezione per quelli di iniziativa popolare: v. punto d). Essi però, qualora risultino già approvati da almeno una Camera e vengano *ripresentati* entro i primi sei mesi della nuova legislatura, seguono un *procedimento accelerato* per la nuova approvazione (v. *infra*).

B) Segue: Istruttoria

La fase istruttoria (o preparatoria in senso stretto) abbraccia tutte le attività dirette a consentire all'organo deliberante l'*esame* e l'approfondimento del *progetto*.

Essa trova giustificazione nella convenienza di far precedere la discussione e votazione sul progetto da una *delibazione preliminare* da parte di organi interni delle Camere che, in quanto rispecchiano la proporzione dei vari gruppi, esprimono un primo orientamento indicativo al riguardo: **le commissioni parlamentari** di cui all'art. 72 Cost. Ogni progetto viene dunque assegnato dal Presidente della Camera alla commissione *competente per materia*, che lo esamina e riferisce all'Assemblea con una relazione scritta (orale quando si segue il procedimento abbreviato: v. infra).

C) Fase costitutiva

Il disegno di legge torna dunque al *plenum* per essere discusso nelle linee generali e quindi votato: prima articolo per articolo poi in blocco.

Questa doppia votazione, prima analitica poi globale, ha lo scopo di consentire la proposta e l'esame di **emendamenti** al testo originario, che vengono presentati in sede di votazione dei singoli articoli. In questo modo — fa rilevare BARILE — può accadere che chi ha votato favorevolmente nel

corso del procedimento si trovi in sede di votazione finale di fronte ad un testo diverso da quello originario.

Il risultato della votazione è proclamato dal Presidente, che trasmette il testo approvato *all'altra Camera* o al *Presidente della Repubblica per la promulgazione* se quest'ultima l'ha già approvato (si ricordi infatti che per dar vita ad una *legge* occorrono due deliberazioni conformi sul medesimo testo da parte delle *due Camere*: *principio bicamerale*, art. 70 Cost.).

Quello descritto è il **procedimento ordinario** di formazione della legge, nel quale la **Commissione** parlamentare agisce in funzione **referente**. L'art. 72[2] Cost. stabilisce peraltro che i regolamenti parlamentari disciplinino un **procedimento abbreviato** per l'approvazione dei *disegni di legge* dichiarati *urgenti*: esso è identico a quello ordinario ma *i termini procedurali sono ridotti* alla metà.

Sempre l'art. 72 Cost. al 3° comma, autorizza i regolamenti a «stabilire in quali casi e farne l'*esame e l'approvazione dei disegni di legge sono definiti a commissioni*, anche permanenti, composte in modo da rispecchiare la proporzione dei gruppi parlamentari». Le **commissioni** possono dunque funzionare oltre che in sede consultiva-referente, come accade nel procedimento ordinario, anche in **sede deliberante** o legislativa: si parla in questo caso di **procedimento decentrato**. La ragione di ciò è intuitiva: una discussione che coinvolge un numero limitato di persone dovrebbe essere *più rapida e agevole* di quella che avviene in assemblea.

In tale ipotesi tutte le quattro fasi del procedimento ordinario sono attribuite alla *Commissione permanente competente per materia*, la quale procede, pertanto:

— all'esame preliminare del progetto;
— alla sua discussione che non avviene, quindi, in assemblea;
— alla votazione dei singoli articoli;
— alla votazione finale e quindi all'approvazione della legge.

Il *regolamento del Senato* affida alla *valutazione discrezionale* del *Presidente* l'assegnazione dei progetti di legge alla Commissione in sede deliberante, per il procedimento *decentrato*.

Il *regolamento della Camera dei deputati*, invece, pone *maggiori limiti*, stabilendo che:

— non possono essere approvati con procedimento decentrato sia i progetti che hanno *speciale rilevanza* di ordine generale che i progetti che hanno *particolare urgenza*;
— l'assemblea può opporsi al decreto del suo Presidente che assegna la legge alla Commissione in sede deliberante.

In ogni caso il procedimento decentrato **non è ammesso** *per le leggi previsti* dall'art. 72, 4° comma (in materia *costituzionale*, *elettorale*, di *bilancio*, etc.), per le quali è sempre richiesto il *procedimento ordinario*.

Sono, inoltre, stabiliti a garanzia di eventuali abusi:

— la redazione e distribuzione obbligatoria a tutti i membri della Camera di *resoconti sommari* delle sedute delle commissioni in sede deliberante, consentendo così un controllo da parte dell'assemblea;
— la installazione di *impianti audiovisivi* per permettere al pubblico e alla stampa di seguire, in diretta, in locali separati, la attività della commissione (c.d. *pubblicità* delle sedute);
— il potere (riconosciuto ad un decimo dei componenti di ciascuna Camera, o a un quinto dei componenti la commissione), di chiedere che il *progetto sia rimesso alla assemblea plenaria*, per la sola votazione finale, o anche per la votazione e discussione dei singoli articoli. Tale potere può essere esercitato *finchè* non sia intervenuta l'*approvazione definitiva* da parte della commissione.

Esiste infine un altro **procedimento**, che non è previsto dalla Costituzione, ma è stato successivamente introdotto dai *regolamenti parlamentari* e rappresenta un procedimento **intermedio** fra

quello ordinario e quello decentrato: esso comporta una *collaborazione* dell'assemblea e delle **commissioni**, che agiscono **in sede redigente**.

Può svolgersi in due modi:

— alla *Commissione* può essere riservata l'*approvazione articolo* per *articolo* e all'*Assemblea* l'approvazione *finale*;
— all'*Assemblea* è riservata la fissazione dei criteri informatori della legge, mentre l'approvazione, sia per articoli, che finale, è riservata alla *Commissione*.

Questo tipo di procedimento si indirizza a quei *progetti di natura assai complessa e tecnica*, la cui approvazione, articolo per articolo, in assemblea plenaria richiederebbe particolari conoscenze specifiche e un enorme dispendio di tempo. Tuttavia esso è stato scarsamente applicato sinora.

La legge è un *atto complesso*: è cioè necessaria, perchè essa si perfezioni, l'approvazione dello stesso testo in entrambe le Camere. Il procedimento seguito da una Camera per l'approvazione *non vincola* l'altra, per cui può accadere che presso una Camera si segua il procedimento ordinario mentre presso l'altra il procedimento decentrato, o abbreviato etc.

Nei rapporti tra le due Camere può, inoltre, verificarsi:

— che il progetto di legge sia *respinto immediatamente* dalla *prima Camera* a cui è presentato: in tal caso esso *non* viene *trasmesso* all'altra Camera;
— che il progetto già *approvato da una Camera*, sia respinto dall'*altra*: anche in tal caso non si perfeziona l'*iter* formativo;
— che il progetto *approvato* da *una Camera* sia approvato dall'altra con *emendamenti*: in tal caso esso deve essere ripresentato alla prima Camera per l'approvazione degli emendamenti.

Per evitare il protrarsi eccessivo di questa «passeggiata» (c.d. **navetta**) del progetto da una Camera all'altra è stabilito che, quando lo stesso ritorna *modificato* alla Camera che già lo ha approvato, il riesame venga *limitato* ai soli articoli emendati.

In ogni caso, perchè la legge sia «perfetta» occorre che siano intervenute le approvazioni di entrambe le Camere, sul medesimo testo.

Un *iter accelerato* è previsto per l'approvazione di un progetto che, già approvato da una Camera, sia decaduto per *fine della legislatura*, qualora esso sia ripresentato *entro i primi sei mesi* della nuova legislatura (c.d. **répéchage**) (artt. 81 reg. Sen. e 107 reg. Cam. Deputati).

Un progetto *respinto* da una delle Camere non può essere ripresentato, con identico contenuto, prima che siano trascorsi *sei mesi dal rigetto* (artt. 76 reg. Sen., 72 reg. Cam. Dep.). In dottrina si è ritenuto, però, che tale divieto impedisca la ripresentazione del progetto solo dinanzi alla Camera che l'ha respinto e non anche all'altra.

D) Fase di integrazione dell'efficacia

La legge, una volta approvata dalle Camere, è *perfetta*, ma non ancora efficace. Per divenire efficace (e quindi obbligatoria per i suoi destinatari), essa deve superare la fase di *integrazione dell'efficacia*.

Tale fase, dettagliatamente regolamentata dal D.P.R. 28-12-1985, n. 1092, si compone di differenti atti, diretti a *controllare* la *legittimità* della legge, il *rispetto* delle *norme di procedura e a renderla pubblica*, comunicandone il testo, nelle forme previste, a coloro che sono tenute ad *osservarla* (*destinatari*).

a) **La promulgazione**: il Presidente della Repubblica è tenuto a *promulgare* la legge *entro un mese dall'approvazione* (art. 73 Cost.). Tuttavia se le Camere, ciascuna a maggioranza assoluta dei propri componenti, ne dichiarano l'*urgenza*, la legge è promulgata in un termine più breve da esse stabilito.

L'atto di promulgazione si compone di *quattro parti* che si compendiano ciascuna nelle formule rituali che riportiamo fra virgolette:

— *attestazione del procedimento seguito*: «la Camera dei deputati ed il Senato della Repubblica hanno approvato»;
— *intestazione*: «il Presidente della Repubblica promulga la seguente legge»;
— *ordine di pubblicazione*: «la presente legge, munita del sigillo dello Stato, sarà inserita nella Raccolta ufficiale degli atti normativi della Repubblica italiana»;
— *clausola esecutiva*: «È fatto obbligo a chiunque spetti di osservarla e di farla osservare come legge dello Stato».

Con l'atto di promulgazione, che è atto di **controllo** (sia di legittimità che di merito: VIRGA), la legge diviene **esecutoria**. Diviene invece *obbligatoria* per tutti i *cittadini* solo con la pubblicazione.

b) **Il visto del Guardasigilli**: il Guardasigilli (ossia il ministro di Grazia e Giustizia) è tenuto ad accertare che l'**atto non presenti irregolarità formali**: egli compie tale accertamento apponendo il proprio *visto sull'atto*. Si tratta quindi di un **controllo** limitato alla **forma** dell'atto.

Il Guardasigilli, se incontra difficoltà nell'accertamento della forma esteriore della legge, la comunica al Presidente del Consiglio dei Ministri. In tal caso può *sospendere* il visto e l'*apposizione* del sigillo facendone relazione al Consiglio dei Ministri.

Il Guardasigilli deve ancora:

— apporre il *sigillo* dello Stato all'atto che fa fede della sua autenticità;
— curare l'**inserzione della legge nella Raccolta Ufficiale** *degli atti normativi della Repubblica*: in tale raccolta viene inserito «l'originale» dell'atto, destinato a dare certezza della sua esistenza (VIRGA), e a costituire il testo ufficiale di *confronto* per tutti gli altri testi *legislativi*;
— curarne *la pubblicazione sulla Gazzetta Ufficiale* della Repubblica italiana;

c) **la pubblicazione**: la pubblicazione della legge nella G.U. ha lo scopo di diffonderne la *conoscenza* e di stabilire il momento della sua *entrata in vigore* che — di regola — avviene il 15° giorno successivo a quello della pubblicazione.
La Costituzione dice che le leggi devono essere pubblicate «subito dopo la promulgazione», il che peraltro non avviene quasi mai, a causa dell'affollamento di leggi che sommerge la redazione della Gazzetta Ufficiale. Ai frequenti refusi si pone rimedio con la pubblicazione di *errata corrige* ma nel frattempo si ritiene che faccia fede il testo sbagliato.
L'atto finale conclusivo è dunque quello della comunicazione della legge ai cittadini, avvenuta le quali si presume che tutti debbano conoscerla.
In realtà oggigiorno una presunzione assoluta di conoscenza non è più giustificabile: si ritiene realisticamente che la pubblicazione ha la più limitata funzione di *rendere possibile* la conoscenza di tutte le leggi da parte di ogni interessato.
Il principio dell'*inescusabilità dell'errore* di diritto è coessenziale ad ogni ordinamento giuridico, che non potrebbe negarlo senza negare se stesso. In campo penale, peraltro, tale principio è stato ridimensionato dalla Corte Costituzionale, che ha dichiarato (sentenza n. 364/8) l'illegittimità costituzionale dell'art. 5 cod. pen. («nessuno può invocare a propria scusa l'ignoranza della legge penale») nella parte in cui non fa eccezione per i casi in cui l'ignoranza sia obiettivamente «inevitabile».

E) Il problema della delegificazione

Di fronte all'inflazione e proliferazione legislativa, per cui il Parlamento produce molte leggi di pessima fattura, in modo disorganico e sotto la spinta di interessi di settore, si invoca da più parti una *delegificazione*, ossia l'*affidamento* da parte delle leggi *alla normazione secondaria di intere materie* finora disciplinate da norme primarie.

Per BARILE, una volta ammessa la legittimità dei *regolamenti delegati o autorizzati*, ciò non dovrebbe incontrare ostacoli di natura costituzionale, a patto che la legge autorizzatrice indichi con assoluta precisione le materie da trasferire alla competenza dell'esecutivo e non si tratti di materie oggetto di riserva di legge.

L'obiezione più frequente è che in tal modo si sottrarrebbe la disciplina delle materie delegificate al controllo del Parlamento e della Corte Costituzionale.

In realtà la legge autorizzativa rimarrebbe pur sempre sotto il controllo della Corte (soprattutto per quanto concerne la esatta indicazione delle materie), mentre il rispetto della legge autorizzatrice da parte del regolamento delegato sarebbe garantito dal controllo dei giudici comuni.

Tali esigenze hanno trovato risposta nella *legge n. 400/88* che ha previsto *in via generale* la possibilità di autorizzare con legge il Governo a disciplinare intere materie non coperte da riserva assoluta di legge (art. 17). Il legislatore deve individuare e dettare «norme generali regolatrici della materia» e disporre «l'abrogazione delle norme vigenti con effetto dall'entrata in vigore delle norme regolamentari».

2. LA CONCESSIONE DELL'AMNISTIA E DELL'INDULTO

Con legge costituzionale n. 1/1992 è stato riformulato l'intero testo dell'art. 79 Cost. in tema di concessione dell'amnistia e dell'indulto.

Prima della riforma l'art. 79 prevedeva che l'atto di concessione di tali benefici fosse sola prerogativa del P.d.R. previa legge di delegazione delle Camere.

Attualmente l'amnistia e l'indulto sono concessi con *legge deliberata a maggioranza dei due terzi dei componenti i due rami del Parlamento, sia nella votazione di ogni singolo articolo, che in quella finale.*

La legge cost. 1/92 prevede, tra l'altro, un termine per l'applicazione di tali benefici: in ogni caso l'amnistia e l'indulto non possono applicarsi ai reati commessi successivamente alla presentazione del disegno di legge in Parlamento.

3. L'ATTIVITÀ LEGISLATIVA ECCEZIONALE DEL GOVERNO

Il Governo, *in via di eccezione*, nei casi, modi e limiti stabiliti dalla Costituzione, può esercitare la funzione legislativa che istituzionalmente spetta al Parlamento.

Questa alterazione della normale ripartizione delle competenze può avvenire solo nelle due ipotesi tassativamente previste dalla Costituzione.

A) Decreti legislativi (o leggi delegate)

Ai sensi dell'*art. 76 Cost.* «*l'esercizio della funzione legislativa non può essere delegato al governo se non con determinazione di principi e criteri direttivi e soltanto per tempo limitato e per oggetti definiti*». La delega al Governo è conferita con legge formale ordinaria.

L'art. 76 pone **limiti molto chiari** al riguardo: sarebbe facile infatti per questa via aggirare il principio della separazione dei poteri.

a) **Limiti della delega.**

I limiti sono i seguenti:

— **limite di competenza**: *destinatario* della delegazione legislativa può essere *soltanto il Governo* e più precisamente l'organo collegiale «*Consiglio dei Ministri*»; non è consentita la delega ai singoli Ministri o ad organi diversi dal Governo; allo stesso modo è *vietata la sub-delegazione*, per cui il Governo non può, a sua volta, delegare altro organo;

— **limite di tempo** («*per tempo limitato*»): deve, cioè, esser fissato, nella stessa legge di delega, il *termine* entro il quale la legge delegata potrà essere emanata; trascorso tale termine infruttuosamente, il Governo decade dalla relativa potestà, salvo che una nuova legge di delegazione provveda a prorogare i termini;

— **limite di contenuto** («*per oggetto definito*»): l'oggetto della delegazione, cioè, deve essere determinato *specificamente* nella legge di delega;

— **limite di finalità** («*con determinazione di principi e di criteri direttivi*»): occorre cioè che nella legge di delega siano precisate le linee ed i principi generali che debbono guidare il Governo nel disciplinare la materia oggetto di delegazione;

— **limite di forma**: i decreti legislativi sono emanati con *decreto del presidente della Repubblica.* La legge n. 400/88 ha imposto la *menzione* nella premessa *dell'art. 76 Cost. e della legge di delegazione*: ciò serve a differenziare questi provvedimenti, che hanno forza di legge, dai decreti che rivestono la stessa forma ma hanno valore di regolamento.

Oltre a questi limiti, sempre obbligatori, la legge di delegazione può prevedere *ulteriori prescrizioni* che il Governo è tenuto a rispettare, quali, ad esempio, l'obbligo da parte del Governo di ascoltare il parere di una Commissione Parlamentare costituita *ad hoc* per la preparazione del testo del decreto legislativo.

b) **Materie non delegabili**

La Costituzione non contiene alcuna esclusione espressa nell'art. 76. Tuttavia da alcune esclusioni si ricava che altre disposizioni costituzionali: l'art. 72[4] Cost., ad es., impone la procedura normale di esame in aula da parte delle Camere per i disegni di legge in materia costituzionale, elettorale, di delegazione legislativa, di autorizzazione a ratificare trattati internazionali, di approvazione di bilanci e consuntivi (c.d. *riserva di legge di assemblea*). In questi casi è dunque implicitamente esclusa anche la potestà di delegazione.

c) **Efficacia dei decreti legislativi**

La legge con cui il Parlamento conferisce la «delega» al Governo deve essere approvata con il *procedimento ordinario* (art. 72, comma 4° Cost.).

Una volta concessa la delega, non occorre ulteriore ratifica da parte del Parlamento che, comunque, può sempre, con una successiva legge, abrogare o modificare la normativa posta in essere col decreto legislativo.

Il decreto legislativo ha efficacia e valore pari a quelli delle leggi formali, cioè poste in essere dal Parlamento col procedimento dianzi descritto.

I *decreti legislativi* (al pari dei decreti-legge), non essendo atti amministrativi bensì «*atti aventi forza di legge*», *non* sono soggetti al controllo preventivo di legittimità della Corte dei Conti previsto dalla Costituzione per gli atti del Governo (art. 100: v. *supra*). Ciò è quanto ha oggi sancito esplicitamente l'art. 16 della L. 400/1988, innovando la prassi precedentemente seguita, e confermando indirettamente che su tali atti il controllo di legittimità spetta esclusivamente alla Corte costituzionale (v. art. 134 Cost.).
Lo stesso art. 16 stabilisce, però, che il Presidente della Corte dei Conti, ove ne faccia richiesta la Presidenza di una delle Camere, anche su iniziativa delle Commissioni parlamentari competenti, è tenuto a trasmettere al Parlamento le valutazioni della Corte stessa in ordine alle «*conseguenze finanziarie che deriverebbero dalla conversione in legge di un decreto-legge o dalla emanazione di un decreto legislativo adottato dal Governo su delegazione delle Camere*».

d) **Casi di delegazione**

Le **materie** che più frequentemente formano oggetto di delegazione sono quelle *squisitamente* **tecniche** o *particolarmente complesse*, che quindi non si prestano ad una discussione in aula articolo per articolo: codici, norme sul rapporto di pubblico impiego etc.

Talvolta al Governo viene affidata la redazione dei c.d. **testi unici** che sono destinati a raccogliere in un unico contesto una congerie di disposizioni dettate in maniera disorganica e in tempi diverse sulla stessa materia, creando duplicazioni e conflitti.

Si distinguono:

— *T.U. di mera compilazione*, che si limitano a raccogliere in un unico testo norme preesistenti, senza apportarvi alcuna modifica;

— *T.U. innovativi*, quando le difficoltà di coordinamento sono tali per cui chi raccoglie deve avere anche il potere di modificare, sopprimere, precisare, armonizzare norme contrastanti facendo prevalere un concetto unitario.
In questo secondo caso è necessaria una vera e propria legge di delegazione, nel primo basterebbe una legge di autorizzazione.
BARILE ritiene peraltro che non esistano *T.U. di mera compilazione*, perché raccogliere senza coordinare non è possibile e quindi deve sempre essere emanata una legge di delegazione.

B) Decreti-legge

a) **Concetto e fondamento giuridico**

I «*decreti-legge*» sono provvedimenti *provvisori* (con forza di legge) che vengono adottati dal Governo, *di sua iniziativa e sotto la sua responsabilità*, in casi straordinari di necessità e di urgenza. Tali provvedimenti diventano «*definitivi*» solo dopo la conversione in legge formale effettuata dal Parlamento (art. 77 Cost.).
Il fondamento giuridico del decreto legge è costituito dalla «*necessità*» come *fonte* prevista e regolata dal diritto e non come fonte autonoma (BARILE). La **necessità** e l'**urgenza** costituiscono, dunque, il *presupposto indispensabile* per l'emanazione dei decreti legge.

b) **Titolarità**

Il potere di emanare decreti-legge spetta soltanto al Governo come organo collegiale (*Consiglio dei Ministri*) e non anche ai singoli Ministri o ad altri organi.
È controverso, data l'eccezionalità dell'istituto, se un *Governo dimissionario o in attesa di fiducia* possa adottare tali provvedimenti.

c) **Casi**

L'art. 77 esordisce dicendo che: «Il governo non può, senza delegazione delle Camere, emanare decreti che abbiano valore di legge ordinaria» (e fin qui ribadisce quanto espresso dall'art. 76). Poi aggiunge che: «Quando, in casi straordinari di necessità e urgenza, il governo adotta *provvedimenti provvisori con forza di legge*, deve il giorno stesso presentarli per la conversione alle Camere». Questa formulazione rispecchia lo sfavore dei costituenti verso l'emanazione di decreti governativi con valore di legge: essa infatti in linea di principio è vietata. Si può verificare, ma costituisce un'eventualità del tutto eccezionale. Il Governo agisce sotto la propria responsabilità e il suo operato viene sottoposto ad un pronto e rigoroso controllo parlamentare.

d) **Forme**

Anche i decreti-legge, come i decreti legislativi, sono decreti deliberati nelle forme delle norme secondarie del Governo, nonostante abbiano la stessa forza della legge. Essi infatti sono deliberati dal Consiglio dei Ministri, emanati dal capo dello Stato e pubblicati nella Gazzetta Ufficiale.
La l. n. 400/88 ha razionalizzato la forma e il procedimento per l'emanazione dei decreti-legge: essa ha imposto l'indicazione nel preambolo delle «*circostanze straordinarie di necessità e di urgenza*» che ne giustificano l'adozione ed ha prescritto che il *loro contenuto deve essere specifico, omogeneo, e corrispondente al titolo* (art. 15^3). Ha stabilito inoltre che il Governo *non può*, mediante decreto-legge (art. 15^2):

— conferire deleghe legislative ai sensi dell'art. 76 Cost.;
— provvedere nelle materie indicate dall'art. 72, comma 4° Cost. (*materia costituzionale ed elettorale, ratifica di trattati internazionali, approvazione di bilanci e consuntivi*), materie, cioè, di particolare delicatezza ed importanza per le quali la Costituzione *vieta* espressamente, in sede parlamentare, l'adozione di procedure diverse da quella ordinaria di esame e approvazione diretta da parte delle Camere;

— *rinnovare le disposizioni di decreti-legge* ai quali sia stata negata la conversione in legge **con il voto** di una delle due Camere: il Governo può dunque ripresentare, anche immediatamente, i decreti-legge non convertiti solo perché è intervenuta la *scadenza del termine*;
— regolare i rapporti giuridici sorti sulla base dei decreti non convertiti (art. 77, comma 3°, Cost.);
— ripristinare l'efficacia di disposizioni dichiarate illegittime dalla Corte Costituzionale per vizi non attinenti al procedimento.

e) **Controlli e responsabilità**

Per quanto riguarda i *controlli* sui decreti-legge e le *responsabilità* ad essi relativi si ricordi che i controlli sono effettuati:

— dal Presidente della Repubblica in sede di *emanazione*; si tratta, in questo caso, di *controllo preventivo di legittimità*;
— dal Parlamento in sede di *conversione* (è questo un controllo di *merito*);
— è escluso invece, anche per i decreti-legge, il controllo di legittimità della Corte dei Conti (v. *supra*);
— dalla Corte Costituzionale in via principale o incidentale secondo le regolari procedure.

Dopo aver negato, per diversi anni, la propria competenza in materia di decreti-legge, la Corte costituzionale con sentenza n. 29/95 ha sovvertito il precedente orientamento ritenendo che l'*evidente mancanza* di uno dei due presupposti costituzionali della *necessità* e dell'*urgenza* integra una invalidità di tipo costituzionale sia del decreto-legge che dell'eventuale legge di conversione.
I benefici effetti di tale sentenza, però, sembrano essere nuovamente vanificati da una più recente pronuncia, n. 330/96 in base alla quale l'*evidente mancanza* che giustificherebbe un intervento della Corte costituzionale *non sussiste* quando il decreto-legge è sostenuto da *specifica motivazione*, resa esplicita nella relazione governativa che accompagna il disegno di legge di conversione il che, invero, accade sempre.

Per quanto riguarda, invece, la *responsabilità politica*, essa ricade sul Governo: ma sia la mancanza che il rifiuto di conversione da parte delle Camere non equivalgono a manifestazione tacita di *sfiducia*, che obbliga il Governo a dimettersi (v. *supra*).

C) Atti legislativi per fronteggiare lo stato di guerra

Si tratta di atti legislativi che il Governo, in virtù della *delega* concessa dal Parlamento, pone in essere per *fronteggiare lo stato di guerra*. Infatti, a norma dell'art. 78 Cost., le Camere deliberano lo stato di guerra e conferiscono al Governo i «*poteri necessari*».
Si tratta di poteri *extra-ordinem*, attribuiti al Governo per far fronte a situazioni del tutto particolari e che possono giungere fino alla sospensione di talune garanzie costituzionali.
L'ambito dei poteri del Governo si dovrebbe determinare in *concreto* in stretta correlazione con l'effettiva gravità della situazione da affrontare: lo stato di guerra non deve essere un pretesto per accentrare ogni potere nelle mani dell'esecutivo.

Sezione Sesta
La funzione amministrativa

1. NORME AMMINISTRATIVE

A) Generalità

In materia di fonti BARILE distingue tra normazione primaria, subprimaria, e secondaria:

— la *prima* comprende ogni attività legislativa statuale e la normazione primaria esclusiva consentita alle regioni a statuto speciale;
— la *seconda* disciplina materie indifferenti per la normazione primaria creando diritto oggettivo nuovo (vi rientrano, oltre alle leggi regionali e provinciali, i regolamenti indipendenti);

— la *terza*, infine, regola materie che già formano oggetto di normazione primaria, allo scopo di definirne i dettagli di esecuzione (della categoria fanno parte gli atti legislativi regionali a carattere integrativo e i regolamenti e di esecuzione).

Alla funzione amministrativa fanno capo la normazione subprimaria e quella secondaria.

La potestà normativa dell'amministrazione, in particolare, trova la sua maggiore espressione nei regolamenti. Esaminiamoli.

B) Regolamenti governativi e di altre autorità statali

a) **Definizione**

Tali regolamenti rappresentano un'importante e vasta categoria di fonti che adempiono alla fondamentale funzione di stabilire le norme concrete necessarie perché i principi posti in essere dalla Costituzione o dalle leggi siano effettivamente portati ad attuazione.

b) **Tipi**

I regolamenti, in particolare, sono di vari tipi e si inseriscono, a diversi livelli, nella gerarchia delle fonti del diritto.

I *regolamenti parlamentari* (art. 64 della Cost.) sono di rango superiore alle leggi ordinarie, e possono essere modificati solo da leggi costituzionali.

I *regolamenti governativi* (*esecutivi, indipendenti, di organizzazione, delegati*) sono subordinati alla legge e non possono innovarla.

I *regolamenti ministeriali*, emanati per determinate materie dai Ministri, sono soggetti al parere del Consiglio di Stato ed alla registrazione della Corte dei conti, e sono pubblicati sulla Gazzetta Ufficiale.

I *regolamenti regionali*, nelle materie di competenza delle Regioni ex artt. 117-118-121 Cost.

I *regolamenti prefettizi*, emanati dai Prefetti che costituiscono, in sede locale, i rappresentanti del Governo.

I *Regolamenti degli enti autarchici territoriali* (Comuni, Province), adottati dai Consigli e sottoposti a vari ordini di controlli politici e di legittimità.

BARILE, per quanto riguarda la tipologia dei Regolamenti, propone la seguente classificazione:

1. **regolamenti di esecuzione** che, interpretando le linee direttive ed i principi di una norma primaria, attuano le sue disposizioni generali ed astratte dettando disposizioni di dettaglio;
2. **regolamenti indipendenti**, con rilevanza *interna* (qualora siano diretti solo ad organizzare gli uffici pubblici e garantirne il buon andamento), detti anche *regolamenti di organizzazione*; oppure *esterna*, laddove le loro prescrizioni operino anche nei riguardi dei soggetti che entrano in contatto con detti uffici;
3. **regolamenti delegati (o autorizzati, o liberi)** che abrogano o modificano una norma primaria in quanto a ciò autorizzati da altra norma di primo grado: in tal modo la legge degrada se stessa o altre norme primarie a regolamento. La *delegificazione* (v. *supra*) è sottoposta:
   — al limite della riserva assoluta di legge;
   — all'obbligo, per la legge che autorizza il regolamento, di indicare le disposizioni o le materie destinate alla degradazione, affinché il regolamento non esorbiti dai suoi fini, diventando in tal modo illegittimo per violazione dell'art. 4 delle preleggi.

C) Fondamento della potestà regolamentare

Il fondamento della potestà regolamentare non trova esplicita menzione nella Costituzione, che si limita solo, all'art. 87 comma quinto, ad affidare al Presidente della Repubblica l'emanazione dei regolamenti governativi.

Da ciò si desume che era rimasta — per il passato — in vigore la l. 31 gennaio 1926, n. 100, che affidava al Governo l'emanazione dei regolamenti esecutivi ed indipendenti.

Si affermava, del resto, prima dell'emanazione della L. 400/1988, che il potere regolamentare spettasse al potere esecutivo in considerazione del fatto che, come questo è legittimato ad adottare provvedimenti di carattere individuale e singolare in certe materie, così potesse esprimere tale potestà anche a livello generale, mediante — appunto — i regolamenti.

Altri sostenevano che tale potere fosse in realtà radicato in esigenze di imparzialità e buona amministrazione per cui, anziché agire volta per volta con comandi specifici per i casi concreti, conviene dettare norme generali ed astratte in attuazione delle scelte discrezionali dell'amministrazione.

Oggi, comunque, la potestà regolamentare del Governo, nella sua organizzazione centrale e periferica, è disciplinata dalla l. 400/1988 che ha abrogato la l. 100/1926. La nuova normativa, all'art. 17, elenca i seguenti tipi di regolamenti (che ricalcano in parte la classificazione proposta da BARILE) diretti a disciplinare:

1. l'esecuzione delle leggi e dei decreti legislativi;
2. l'attuazione e l'integrazione delle leggi e dei decreti legislativi recanti norme di principio, esclusi quelli relativi a materie riservate alla competenza regionale;
3. le materie in cui manchi la disciplina da parte di leggi o di atti aventi forza di legge, sempre che non si tratti di materie comunque riservate alla legge;
4. l'organizzazione e il funzionamento delle amministrazioni pubbliche secondo le disposizioni dettate dalla legge;
5. l'organizzazione del lavoro ed i rapporti di lavoro dei pubblici dipendenti in base agli accordi sindacali.

2. ORGANI DELL'ATTIVITÀ AMMINISTRATIVA

Gli organi cui è affidata l'amministrazione dello Stato sono numerosi. L'insieme di tali organi rappresenta l'*organizzazione amministrativa della Repubblica italiana* che, in linea generale si divide in:

— *amministrazione diretta*: composta da organi che fanno parte integrante dello Stato persona e che, pur essendo accentrati (es.: Ministero della Pubblica Istruzione), sono anche decentrati burocraticamente (es.: Provveditorato agli studi di Napoli);
— *amministrazione indiretta*: composta da organizzazioni autonome rispetto allo Stato (es.: Regioni).

All'organizzazione centrale sovraintende il Governo che è un organo complesso, composto da più organi (Consiglio dei Ministri, Presidente del Consiglio dei Ministri, Ministri).

Principale fra tali organi è il *Consiglio dei Ministri* che «dirige la politica generale del Governo e ne è responsabile» ed inoltre «mantiene l'unità di indirizzo politico e amministrativo promuovendo e coordinando l'attività dei Ministri» (art. 95 Cost.).

Esso è retto dal Presidente del Consiglio dei Ministri, organo disciplinato dalla l. 400/1988. Il Governo attua la funzione amministrativa normativa emanando, con deliberazione del Consiglio dei Ministri, i regolamenti elencati dall'art. 17 l. cit., in precedenza esaminati: essi entrano in vigore mediante decreto del Presidente della Repubblica.

Ciò avviene, alla luce della recente l. 13/1991, anche per alcuni provvedimenti amministrativi, quali quelli di nomina delle alte cariche dello Stato, o quelli di annullamento (governativo) di atti viziati; o ancora quello di decisione di ricorso straordinario al Presidente della Repubblica in discordanza col parere del Consiglio di Stato.

Come già detto, la potestà regolamentare spetta, inoltre, ad altre autorità nei limiti delle loro competenze (art. 3 preleggi), come previsto dalla l. 400/1988.

3. I BENI PUBBLICI

La P.A. per il raggiungimento dei suoi scopi, si avvale non soltanto di soggetti, ma anche di beni e di prestazioni.

I beni di cui si serve la P.A. costituiscono la categoria dei c.d. «*beni pubblici*» che si differenziano dai «*beni privati*» in quanto sono sottoposti ad un differente regime giuridico.

I beni pubblici si distinguono in: *demaniali e patrimoniali indisponibili*.

A) Beni demaniali

Possono essere solamente beni immobili e devono appartenere ad Enti Pubbici territoriali (Stato, Regioni, Province, Comuni). Si distingue:

a) **Demanio naturale**
I beni costituenti tale demanio sono di esclusiva proprietà dello Stato e non possono che appartenere ad esso.

Esso comprende:

— *demanio marittimo*. Ne fanno parte i beni indicati agli artt. 822 c.c. e 28 c. navig.: *il lido del mare, i porti, le lagune, la spiaggia, le rade, i canali, le pertinenze e le zone acquistate per uso demaniale*. Non sono beni demaniali il «mare territoriale» e lo «spazio aereo»;
— *demanio idrico*. Comprende i beni indicati dall'art. 822 c.c. e dall'art. 1 del T.U. sulle acque e cioè: i *fiumi, i laghi, i torrenti, le acque sorgenti, i ghiacciai*. Non ne fanno parte le «*acque minerali*» o «*termali*» che sono invece soggette al regime delle miniere;
— *demanio militare*. Comprende le opere permanenti destinate alla difesa nazionale, e cioè: *le fortezze, le piazzeforti, le istallazioni missilistiche, le linee fortificate e trincerate, i porti e gli aereporti militari, le ferrovie e funivie militari, i ricoveri antiaerei*. In tale demanio non rientrano le difese naturali. Non vi rientrano neppure le cose mobili o immobili che non servono in modo immediato alla difesa (es.: caserme, polveriere), beni che, invece, fanno parte del patrimonio indisponibile.

b) **Demanio eventuale**
I suoi beni possono anche appartenere a soggetti diversi dallo Stato e sono *demaniali* in conseguenza del fatto che appartengono allo Stato.

Esso si divide in:

— *demanio stradale*. Ne fanno parte le strade (di proprietà di enti territoriali) destinate al pubblico transito e le relative pertinenze (case cantoniere, aiuole, alberi, paracarri, etc.);
— *demanio ferroviario*. È costituito da tutto il materiale ferroviario di proprietà di enti territoriali e dalle relative pertinenze. Le ferrovie costruite da privati non ne fanno parte in quanto costituiscono beni d'interesse pubblico, non «beni pubblici»;
— *demanio aeronautico*. Ne fanno parte gli aeroporti e le relative pertinenze di proprietà di un ente territoriale;
— *acquedotti*. Ne fanno parte tutti gli acquedotti degli enti territoriali indipendentemente dal fatto che convoglino o meno acque pubbliche; essi non fanno parte del demanio idrico che come si è visto è «*demanio necessario*», in quanto possono appartenere anche a privati.
Sono demaniali anche le fontane, i laghi artificiali, i pozzi;
— *demanio storico, archeologico, artistico, culturale*. Ne fanno parte tutti gli immobili d'interesse storico, archeologico, etc. nonché i musei, le pinacoteche, gli archivi, le biblioteche con le relative pertinenze appartenenti ad enti territoriali.

B) Il regime dei beni demaniali

I beni demaniali:

— *non possono essere alienati*, pena la nullità dell'atto di trasferimento;
— *non possono essere usucapiti*, perché il loro possesso da parte di «terzi» non ha effetto a nessun titolo;
— *non sono suscettibili né di esecuzione forzata né di espropriazione per pubblica utilità* (sarebbe inconcepibile sottrarre per via giudiziaria o amministrativa il bene alla funzione che il legislatore intese, istituzionalmente, imprimergli);
— «*non possono formare oggetto di diritti a favore di terzi*, se non nei modi e nei limiti stabiliti dalle leggi che li riguardano» (art. 832 c.c.).
In particolare esiste un diritto a favore della collettività all'*uso generale* del demanio pubblico non militare.
Vi possono essere, inoltre, *usi speciali ordinari, o usi particolari* a favore di singoli costituiti sotto forma di decreto di concessione. Un bene demaniale può passare al patrimonio dello Stato (indisponibile o disponibile) con un decreto di sclassificazione (art. 829 c.c.).

C) Beni patrimoniali indisponibili

Possono essere tali tutti i tipi di beni (mobili, immobili, etc.) al contrario dei beni demaniali che devono essere sempre immobili (o universalità di mobili) ed appartenere ad enti pubblici territoriali.

Fanno parte del «patrimonio indisponibile»:

a) beni patrimoniali indisponibili per natura.
Essi appartengono istituzionalmente allo Stato, né potrebbero essere di altri.

Sono tali:

— *miniere*: diventano indisponibili solo al momento della scoperta in quanto prima, facendo parte del sottosuolo, appartengono al proprietario del fondo. Il loro sfruttamento è sottratto ai privati;
— *cave e torbiere*: passano allo Stato (o Regione) solo in caso di mancato e insufficiente sfruttamento da parte del proprietario (c.d. «*avocazione statale*»);
— *acque termali e minerali*: non fanno parte, al contrario delle altre acque, del demanio idrico;

b) beni indisponibili per appartenenza allo Stato o alle Regioni.
Tale indisponibilità non inerisce necessariamente alla natura della cosa (es.: *foreste* c.d. «*demaniali*» dello Stato);

c) altri beni infine, per essere considerati indisponibili, devono appartenere allo Stato e, inoltre, vantare una destinazione specifica, come:
— la dotazione del Presidente della Repubblica, costituita da beni statali (mobili e immobili) assegnati in «*uso*» al Presidente per la residenza della sua famiglia e per la sede della presidenza e del segretario, nonché una consistente somma annua per le spese presidenziali;
— i mobili e gli immobili non demaniali destinati alla difesa (es.: caserme, arsenali, aeromobili, navi, etc.).

D) Regime dei beni patrimoniali indisponibili

Essi, a differenza dei beni demaniali, sono:

— *alienabili*: per i beni del patrimonio indisponibile regola generale è l'alienabilità anche se va combinata col criterio della *non sottraibilità alla loro specifica destinazione*.
Per tali beni vi sono singoli casi di *inalienabilità*, come: per le miniere, cave e torbiere, i documenti e le scritture degli enti pubblici, le cose e beni di interesse artistico, storico e culturale di proprietà di Enti pubblici;
— *usucapibili* (l'ipotesi però è rara in pratica);
— *suscettibili di limitazione* a seguito dell'acquisto, da parte di terzi, di diritti reali diversi dalla proprietà (soprattutto servitù).

Viceversa, analogamente a quanto previsto per i beni demaniali, è da *escludere* anche nei confronti dei beni patrimoniali indisponibili l'ammissibilità dell'esecuzione forzata e dell'espropriazione per pubblica utilità.

E) Limiti e vincoli alla proprietà privata

L'azione amministrativa, secondo il dettato dell'art. 42[2] Cost., può imporre limiti e vincoli alla proprietà privata. Questi obblighi, già previsti dal c. civile (art. 839: beni di interesse storico e art. 869: piani regolatori), attengono alla vicinanza dei beni privati a beni demaniali, servizi di uso pubblico, etc.

Le principali limitazioni pubblicistiche oggi riguardano il c.d. *diritto urbanistico* in materia di piani regolatori, etc.

Si ricordi che la materia urbanistica è stata ridisciplinata dalla L. 28-1-77, n. 10 (cd. legge Bucalossi) in materia di edificabilità dei suoli. Il diritto ad edificare sul proprio suolo, a seguito di tale legge, ha assunto aspetti più precisi ed è soggetto ad una particolare

concessione amministrativa. Altre limitazioni possono derivare dalla vicinanza dei beni dei privati con beni demaniali, che può implicare divieti di costruire, etc.; o da scelte legislative di tutela di zone di interesse ambientale o culturale (es. l. 183/1989 e l. 253/1990 che hanno istituito i c.d. piani di bacino) con le quali si intende pianificare intere estensioni ed evitare abusivismi ed inquinamenti.

4. LE PRESTAZIONI IN NATURA

Per raggiungere i suoi scopi la P.A. impone ai privati delle prestazioni che possono essere in *natura o in denaro*. Esaminiamole.

Tali prestazioni, giusto il dettato dell'art. 23 Cost., devono essere imposte come la legge stabilisce e, pertanto, devono seguire una procedura prestabilita.

Quanto alle prestazioni in natura si ricordi che la P.A. può richiedere prestazioni di cose e di attività.

Principali prestazioni di cose sono: l'espropriazione per pubblica utilità e la confisca.

5. L'ESPROPRIAZIONE PER PUBBLICA UTILITÀ

A) Generalità e casi

Tale istituto è regolato da una legge del 1865 (l. 25 giugno 1865 n. 2359) ed è stato recepito dal codice civile del 1942 (art. 834, che prevede l'espropriazione per pubblico interesse contro il pagamento di una giusta indennità) e quindi costituzionalizzato dall'art. 42[3] Cost.: «la proprietà privata può essere, *nei casi preveduti dalla legge* e *salvo indennizzo*, espropriata per motivi di interesse generale». L'art. 43 Cost. prevede inoltre l'espropriazione di «imprese [...] che si riferiscono a servizi pubblici essenziali o a fonti di energia o a situazioni di monopolio ed abbiano carattere di preminente interesse generale».

L'art. 838 c.c. prevede a sua volta l'«espropriazione di beni che interessano la produzione nazionale o di prevalente interesse pubblico», in caso di trascuratezza da parte del proprietario.

Importanti innovazioni sono state apportate a tutta la materia dalla l. 22 ottobre 1971 n. 865.

La *proprietà privata* non è dunque *un diritto* soggettivo perfetto ma suscettibile *di affievolimento*, perché un atto pubblico può comprimerla o sopprimerla per motivi di interesse generale.

Il diritto in tale caso si trasferisce sull'*indennità* (v. *sub* C).

B) Oggetto

Oggetto dell'espropriazione per pubblica utilità, può essere un diritto di proprietà o altro diritto reale. Sono però sottratti all'espropriazione sia:

— i beni appartenenti alla Santa Sede;
— i beni demaniali e i beni patrimoniali indisponibili;
— le sedi di rappresentanze diplomatiche di Stati Stranieri.

C) L'indennizzo

L'indennizzo costituisce l'elemento dell'espropriazione tutelato direttamente dalla Costituzione e si pone, in relazione all'atto espropriativo come «presupposto di legittimità di esso».

L'indennizzo deve essere: *giusto*, secondo il dettato dell'art. 834 c.c. (termine non riportato nell'art. 42 della Costituzione).

Cosa si intende per «indennizzo giusto»? Per il SANDULLI il giusto indennizzo non deve tener conto del danno patrimoniale subito dall'espropriato (cioè aver carattere di ristoro del danno patrimoniale), ma deve esser commisurato all'effettivo valore che il bene avrebbe in una libera contrattazione di compravendita.

L'art. 42 Cost., pur prevedendo la *necessità* dell'indennizzo al fine della legittimità dell'espropriazione, non lo rapporta al valore del bene espropriato. La Corte Costituzionale è intervenuta più volte sullo spinoso problema della *quantificazione dell'indennità espropriativa* ed ha affermato che essa deve costituire in ogni caso un «*serio ristoro*» pur se nell'ambito di parametri fissati discrezionalmente dal legislatore (e quindi non deve essere necessariamente commisurato all'effettivo valore di scambio del bene).

Va da ultimo ricordato che la legge 359/1992 ha profondamente innovato la disciplina relativa all'indennità di espropro (di aree edificabili) determinando i parametri di commisurazione della stessain attesa dell'emanazione di una legge organica in materia. In particolare il provvedimento menzionato ha stabilità che l'indennità di espropriazione per le aree edificabili andrà computata in misura pari alla media tra valore venale del bene e reddito dominicale rivalutato dell'ultimo decennio, media ridotta in misura pari al 40%.

6. LA CONFISCA

È un atto ablativo a carattere sanzionatorio disciplinato dall'art. 240 del c.p. e pertanto non rientra nella categoria generica dell'espropriazione in senso lato.

Essa dunque non trova il suo fondamento nell'art. 42 Cost., ma nell'art. 25 della stessa che sancisce i due principi della riserva di legge e della irretroattività.

È di competenza del giudice penale e comporta l'avocazione allo Stato delle cose adoperate per commettere un reato o delle cose costituenti prodotto o profitto di reato.

7. LE PRESTAZIONI DI ATTIVITÀ

Quanto alle prestazioni di attività ricordiamo il servizio militare obbligatorio di cui all'art. 52 Cost.

Riconosciuto il principio di obiezione di coscienza come libera esplicazione della propria personalità, si è provveduto, con legge 15-12-72, n. 772 a consentire agli obiettori di coscienza la prestazione di un servizio sostitutivo civile per un tempo superiore di 8 mesi alla durata del servizio militare. Questo prolungamento è stato dichiarato incostituzionale (C. Cost. sentenza n. 470/1989).

Da ultimo la Corte cost. si è pronunciata (sent. n. 343/1993) in merito ad un altro articolo della stessa legge che non prevedeva l'esonero dal servizio di leva per coloro che, sulla base di motivazioni diverse da quelle espressamente dalla L. 772/1992 (fondate su una concezione della vita basata su profondi convincimenti religiosi, filosofici o morali professati dal soggetto) si fossero rifiutati di adempiere agli obblighi di leva.

E ancora, con sent. 3-12-1993, n. 422, la stessa Corte ha dichiarato l'illegittimità costituzionale dell'art. 8, 3° c. della L. 772/72, nella parte in cui non prevede l'esonero dalla prestazione del servizio di leva a favore di coloro che, avendo in tempo di pace rifiutato totalmente la prestazione del servizio stesso, anche dopo averlo assunto, sulla base di motivi diversi da quelli indicati dalla legge citata o senza aver addotto motivo alcuno, abbiano espiato per quel comportamento la pena della reclusione quanto meno in misura complessivamente non inferiore alla durata del servizio militare.

Altre prestazioni di attività sono:

— prestare soccorso a vittime di calamità pubbliche;
— esercitare l'ufficio di giudice popolare nelle Corti d'Assise;
— l'obbligo di denuncia, referto e testimonianza nei casi previsti dal codice penale, di procedura penale e di procedura civile.

8. PRESTAZIONI DI DENARO

Possono essere:

— *volontarie*: tra di esse rientrano i prestiti pubblici con cui lo Stato si procura, dietro corresponsione di un interesse, del denaro dai privati;
— *obbligatorie*: costituiscono le c.d. *obbligazioni* tributarie.

L'*obbligazione tributaria*, in particolare, consiste in un obbligo, posto a carico dei singoli, di pagare ad una pubblica amministrazione una somma di danaro, sul fondamento di una imposizione operata dalla P.A. stessa o da altro ente nell'esercizio della c.d. «*potestà tributaria*».

La *potestà tributaria*, a sua volta, consiste nella potestà d'imporre agli amministrati (cittadini o stranieri) obblighi tributari al fine di farli contribuire alla soddisfazione delle spese pubbliche; essa si basa sui seguenti principi costituzionali:

a) **principio della capacità contributiva** (art. 53), secondo cui il prelievo tributario deve tener conto della capacità contributiva dei singoli contribuenti;
b) **principio della progressività** (art. 53) riguarda le sole persone fisiche che sono tenute al pagamento di aliquote sempre maggiori per classi di reddito più elevate;
c) **principio di legalità** (art. 23) secondo cui tutti i tributi devono essere previsti dalla legge.

Si noti che la materia tributaria non fa parte del diritto amministrativo in senso stretto, ma del diritto tributario che ha una propria autonomia legislativa, scientifica e didattica. Pertanto in questa sede si esporranno solo le principali nozioni.

Quanto alla **classificazione dei tributi** nel nostro sistema si distinguono:

a) **imposte**: sono prestazioni obbligatorie in danaro dovute allo Stato o ad altro ente pubblico indipendentemente da qualsiasi rapporto tra il contribuente e la P.A.;
b) **tasse**: sono prestazioni in danaro dovute allo Stato o ad un ente pubblico per il godimento di un pubblico servizio. Esse si distinguono dai «prezzi» in quanto sono inferiori al costo di produzione del servizio stesso (es.: tassa per usufruire del servizio postale). Tale servizio grava solo in parte sui soggetti che singolarmente godono di esso, mentre la maggior parte del costo si riserva sulla collettività;
c) **contributi speciali**: sono prestazioni obbligatorie dovute dai soggetti che traggono indirettamente una particolare utilità da una attività svolta dalla P.A. nell'interesse generale (contributo di utenza stradale, di fognature etc.).

Le imposte sogliono suddividersi in *dirette* (che colpiscono un bene produttivo di reddito o il soggetto che lo produce, per il solo fatto dell'esistenza del bene o dell'attività: imposte sui redditi, sui fabbricati, sui terreni) e *indirette* (che colpiscono non il reddito bensì il consumo di determinati beni in misura eguale, quale che sia la persona che lo effettua). Quindi, solo per le imposte dirette è applicabile il principio, ex art. 53 Cost., di progressività.

Il sistema tributario riduce sostanzialmente le imposte a tre gruppi principali: l'imposta sul reddito (generale e locale), l'imposta sul valore aggiunto e quella comunale sull'incremento di valore degli immobili. Il sistema è, comunque, in continua evoluzione.

Sezione Settima
La funzione giurisdizionale

1. GENERALITÀ

La giurisdizione è quella *funzione* dello Stato che garantisce la risoluzione delle controversie da parte di organi statuali secondo i principi e le norme dell'ordinamento, attraverso atti chiamati «*sentenze*».

La *giurisdizione*, in particolare, *presuppone*:

— l'instaurazione di un *giudizio* dinanzi ad un apposito organo statale (giudice).
— una *controversia* demandata ad organi dello Stato.

Essa, per il CARNELUTTI, si distingue dall'amministrazione:

— per la *posizione di terzo del giudice*: che è «*super partes*» in quanto non è cointeressato ed è estraneo alla controversia che è chiamato ad esaminare e giudicare;
— per il *vincolo dell'esercizio del diritto d'azione* che mette in moto il processo. Il giudice, al contrario dell'amministrazione, deve attendere l'impulso *di parte* per poter instaurare il processo.

(Si noti che il *processo civile* si instaura su istanza di parte privata, mentre il processo penale prende le mosse dall'iniziativa della *parte pubblica o Pubblico Ministero*).

Un problema sempre più attuale è quello della politicità del ruolo dei magistrati. Quando, infatti, la valenza politica dei processi è notevole, possono aversi, da parte dei magistrati, letture della legge conservatrici, avanzate o, addirittura, alternative. La certezza del diritto diviene sempre più irraggiungibile: occorrerebbe quindi secondo BARILE, introdurre un sistema efficiente di responsabilità del magistrato, responsabilità disciplinare e non per danno.

Di converso, il legislatore, su impulso del *referendum* svoltosi nel 1987, ha introdotto la responsabilità dei magistrati per dolo o colpa grave per diniego di giustizia. L'azione risarcitoria va proposta contro lo Stato che, a sua volta, può rivalersi, parzialmente sul giudice. All'azione di rivalsa si accompagna quella disciplinare.

2. PRINCIPI COSTITUZIONALI RELATIVI ALLA GIURISDIZIONE

a) **Principio del giudice naturale** (25 Cost.) e del **divieto di istituire giudici speciali** *(102 Cost.)*: nessuno può essere sottratto al giudice precostituito per legge. Nessun individuo, cioè, può essere giudicato da giudici straordinari o speciali, *ma solo dal giudice ordinario competente.*
Questa norma è un corollario del *principio di unità di giurisdizione*: il giudice deve essere uno solo e astrattamente determinato in base a criteri prefissati (es.: è competente il giudice del luogo dove è avvenuto un certo fatto).
Il principio del divieto delle giurisdizioni speciali rappresenta una conquista dello Stato democratico ed una garanzia per il cittadino mettendolo al riparo da eventuali scelte su misura di giudici per pervenire ad una certa decisione (esempio: condanna dell'imputato). Un caso storico di «*Tribunale speciale*» fu quello istituito dalla Repubblica Sociale Italiana a Verona nell'autunno del 1943 per giudicare i membri del Gran Consiglio del fascismo che votarono a favore della caduta di Mussolini.

In applicazione della VI disposizione transitoria della Costituzione (sia pure con un ritardo di circa quarant'anni) si è provveduto ad un riordino del sistema di giustizia militare: in particolare la l. 180/1981 ha statuito circa:

a) lo stato giuridico, la carriera e la posizione di indipendenza dei giudici, stabilendo che per essi si applicano le stesse norme che disciplinano la magistratura ordinaria;

b) la composizione della Corte giudicante di primo e secondo grado;
c) l'istituzione di una sezione di sorveglianza presso la Corte militare d'appello;
d) l'istituzione presso la Cassazione di un autonomo ufficio di procura, composto da magistrati militari;
e) la ricorribilità in Cassazione contro i provvedimenti giurisdizionali militari;
f) la sorveglianza (di dubbia legittimità costituzionale) del Presidente della Corte militare di appello e del procuratore generale militare presso la Cassazione sui giudici sottoposti.

Si noti, infine, che la creazione di *sezioni specializzate* presso i tribunali ordinari non viola il divieto di istituire giudici speciali.

b) **Principio dell'amministrazione della giustizia in nome del popolo** (101 Cost.): il richiamo al popolo è lo stesso contenuto nell'art. 1² Cost. («la sovranità appartiene al popolo») e vuole sottolineare l'esigenza che la giustizia non sia *giustizia di classe* ma uguale per tutti, secondo il disposto dell'art. 3 Cost.

c) **Motivazione dei provvedimenti** (111 Cost.): secondo tale principio tutti i provvedimenti giurisdizionali (*sentenze, ordinanze, decreti*) devono essere motivati.
La motivazione in particolare dimostra e garantisce che il giudice, nell'emanazione del provvedimento di sua competenza, applica la legge, non la crea, mettendo in rilievo da un lato la responsabilità del giudice e dall'altro la legittimità delle pronunzie giurisdizionali.

d) **Sindacato della Corte di Cassazione** (111 Cost.): contro le sentenze riguardanti la libertà personale è sempre ammesso il ricorso per Cassazione per violazione di legge.

e) **Obbligo del P.M. all'esercizio dell'azione penale** (112 Cost.): si noti che il P.M. nel nostro sistema pur rivestendo la qualifica di magistrato (107 Cost.), gode di uno *status* particolare che lo configura come organo imparziale, distaccato dall'esecutivo, che rappresenta la pubblica accusa nel processo penale.

f) **Diritto di azione e di difesa** (24 Cost.): ognuno può agire in giudizio per la tutela dei propri diritti e interessi legittimi dinanzi agli organi della giurisdizione ordinaria o amministrativa. Il diritto alla difesa è inviolabile in ogni stato e grado del procedimento.

Il diritto alla difesa, in particolare si concreta:

— da un lato nel diritto alla assistenza tecnico-professionale che viene assicurata alla parte nel corso del giudizio a mezzo di avvocati o procuratori.
Anche ai non «abbienti» devono essere assicurati i mezzi per difendersi dinanzi ai giudici (c.d. *gratuito patrocinio:* l. 30-7-1990 n. 217) con i cd. «difensori d'ufficio» (avvocati e procuratori che prestano l'opera gratuitamente);
— dall'altro nella garanzia del «*contraddittorio*».

g) **Il principio della irretroattività delle leggi penali** sancito dall'art. 25 Cost., a meno che non si tratti di leggi più favorevoli al reo.

h) **Il principio del divieto dell'estradizione per motivi politici** (ex. art. 26 Cost.), eccetto che per delitti di genocidio.

i) **Il principio della personalità della responsabilità penale** (ex art. 27 Cost.). Un soggetto, cioè per essere chiamato a rispondere di un fatto davanti alla legge penale deve aver sempre posto in essere una *condotta* a lui referibile.
Secondo tale principio è in contrasto con la Costituzione ogni norma che stabilisca una responsabilità oggettiva.

k) **Il principio della presunzione di innocenza** dell'imputato fino alla condanna definitiva (art. 27).

l) **Il divieto** di far consistere le **pene** in trattamenti contrari al senso di umanità (art. 27).

3. I RAMI DELLA GIURISDIZIONE

La giurisdizione si divide in:

— **penale**: se ha per oggetto l'accertamento di un reato e l'applicazione di una pena.
Il processo penale, in particolare, viene instaurato su iniziativa del Pubblico Ministero cui spetta il compito di promuovere l'*azione penale*.

I principi informatori del nuovo codice di procedura penale possono così sintetizzarsi:

1. partecipazione di accusa e difesa al processo su un piano di parità;
2. garanzie di libertà per il difensore;
3. configurazione dell'interrogatorio quale strumento di difesa;
4. abolizione dell'assoluzione per insufficienza di prove;
5. disciplina della polizia giudiziaria e sua ripartizione in sezioni e servizi;
6. assistenza del difensore al compimento degli atti più rilevanti compiuti dall'accusa.

L'impianto codicistico, se pure è allineato ai principi costituzionali, risente dei vizi dipendenti dalla ancora incerta prassi applicativa e dalla recente introduzione.

— **civile**: se ha per oggetto la regolamentazione e la tutela di diritti soggettivi.
Il processo civile, al contrario di quello penale, viene instaurato dalla parte privata (*principio dispositivo*) e il giudice deve giudicare solo sulle domande ed eccezioni a lui poste dalle parti (*principio della corrispondenza tra il chiesto e il pronunciato*).

4. GIUDICI ORDINARI E GIUDICI AMMINISTRATIVI

Sono giudici ordinari:

— il *Giudice di pace*, il *Pretore*, il *Tribunale*, la *Corte d'Appello*, la *Corte d'Assise*, la *Corte d'Assise d'Appello* e la *Corte di Cassazione*: ad essi spetta l'amministrazione della giustizia nella materia civile e penale (a tutela di diritti soggettivi).

Sono giudici amministrativi:

— i *Tribunali Amministrativi Regionali*, il *Consiglio di Stato*, la *Corte dei Conti*, i *Tribunali delle Acque*: ad essi spetta la risoluzione delle controversie amministrative (a tutela, prevalentemente, di interessi legittimi).

5. POSIZIONE DELLA MAGISTRATURA

I principi in materia sono i seguenti:

— **autonomia** (art. 104 Cost.: la magistratura costituisce un ordine autonomo e indipendente da ogni altro potere). Essa cioè non è subordinata (in virtù del principio della separazione dei poteri) a nessun'altra autorità;
— **inamovibilità**: i magistrati, infatti, non possono essere dispensati dal servizio o trasferiti in altra sede senza il consenso dell'interessato o previa delibera del Consiglio Superiore della Magistratura;
— **nomina per concorso** dei magistrati.

CAPITOLO QUINTO

RIMEDI AMMINISTRATIVI E GIURISDIZIONALI CONTRO L'ATTIVITÀ ANTIGIURIDICA DELLA P.A.

1. CONCETTO DI GIUSTIZIA NELL'AMMINISTRAZIONE

Col termine *giustizia amministrativa* si indica il complesso di mezzi e di istituti destinati a regolare l'attività dei cittadini per la tutela dei loro diritti ed interessi legittimi di fronte all'operato della pubblica amministrazione (GALANTE GARRONE).

Occorre dunque, sia pure in sintesi, richiamare le nozioni di *diritto soggettivo, interesse legittimo e figure affini.*

Il **diritto soggettivo** è la posizione di vantaggio riconosciuta dall'ordinamento ad un soggetto in ordine ad un certo bene della vita: tale posizione è garantita in modo *pieno* ed *immediato.*

L'**interesse legittimo** (o *occasionalmente protetto*) non è contemplato in via primaria dalla norma di diritto, ma solo di riflesso ed indirettamente. Ciò avviene quando la norma di diritto pubblico oggettivo è rivolta alla cura di un interesse pubblico generale quale finalità primaria, e solo di conseguenza tutela le posizioni del privato, in quanto compatibili con lo scopo primario.

A tali figure, positivamente disciplinate, la dottrina (SANDULLI) affianca:

— **i diritti suscettibili di affievolimento,** e cioè quelle posizioni soggettive che, nello scontro con l'interesse pubblico primario, «*degradano*» e spesso vedono mutare l'oggetto del rapporto prima esistente (es. il diritto di proprietà, degradato dal potere espropriativo in interesse legittimo alla regolarità e non invalidità della procedura, diventa diritto all'indennizzo);
— **i diritti che nascono affievoliti**, e che restano diritti fino a quando non subiscano una degradazione, che qui non implica sostituzione dell'oggetto del rapporto, ma la sua soppressione (es. pubblico impiego);
— gli **interessi semplici** o di mero fatto, di cui il diritto non si cura in via immediata, coincidendo, tra l'altro, con l'interesse pubblico oggettivo. A loro tutela, a volte, sono predisposti strumenti particolari, quali le c.d. azioni popolari (es. elettorali), previste, da ultimo, dalla L. 142/1990 sulla riforma degli enti locali.

Nel nostro ordinamento la tutela delle posizioni giuridiche soggettive nei confronti della P.A. si attua in due diverse sedi: *in sede amministrativa e in sede giurisdizionale.*

Nel *primo caso* il soggetto si rivolge alla stessa P.A. (autorità che ha emanato l'atto, autorità gerarchicamente superiore o Presidente della Repubblica che, nell'esercizio di tali funzioni, svolge attività di carattere amministrativo) e chiede che l'atto stesso venga annullato, modificato o revocato.

Nel *secondo caso*, invece, ci si rivolge all'autorità giudiziaria (giudice ordinario o amministrativo) chiedendo o la disapplicazione dell'atto ed il risarcimento del danno (davanti al giudice ordinario) o l'annullamento, la revoca o la modifica dell'atto stesso (davanti al giudice amministrativo).

2. I RIMEDI AMMINISTRATIVI

A) Generalità

I ricorsi amministrativi possono essere presentati soltanto da coloro che abbiano un **interesse** *diretto ed attuale* alla rimozione di un atto amministrativo illegittimo o inopportuno.

Essi possono poggiare su *diritti soggettivi, interessi legittimi* e figure affini e possono contenere censure di legittimità e di merito.

I ricorsi amministrativi sono sottoposti a *termini precisi di decadenza*, perentori, e le autorità che li ricevono hanno l'*obbligo di prenderli in considerazione.*

Le autorità cui i ricorsi sono presentati emanano pronunce o *decisioni motivate* che possono *accoglierli* (annullamento, revoca o riforma del provvedimento impugnato) o *respingerli.*

B) I singoli ricorsi amministrativi

Sono:

a) **opposizione**: essa è diretta alla stessa autorità che ha emanato il provvedimento impugnato. È un rimedio di *carattere eccezionale*, previsto solo in determinate materie. Estraneo al concetto di opposizione è il *potere di denuncia*, che spetta sempre al soggetto che si ritiene leso, ma non comporta per la P.A. l'obbligo di provvedere;
b) **ricorso gerarchico**: è diretto all'autorità gerarchicamente superiore all'autorità inferiore che ha deciso.

È un rimedio di carattere generale concesso:

— contro un atto *non definitivo* (emanato cioè da un'autorità che abbia superiori gerarchici, che sia tale per legge, etc.);
— davanti all'*organo gerarchicamente superiore* (si ricordi che un rapporto di gerarchia si ha solo fra organi individuali appartenenti allo stesso ramo della P.A.).

In via eccezionale sono esperibili anche i *ricorsi gerarchici impropri* nei quali, cioè, è previsto dalla legge il ricorso rivolto ad un'autorità che non riveste la qualifica di superiore gerarchico rispetto a quella che ha emanato l'atto.

Quanto alla posizione della P.A. nei confronti dei ricorsi si ricordi che l'*inerzia* dell'amministrazione, trascorso il termine di 90 gg., equivale, per legge, a rigetto del ricorso (*silenzio-rigetto*).

Nel caso in cui il ricorso è rigettato, l'interessato può agire in via *giurisdizionale*, poiché è messo di fronte ad un provvedimento definitivo della P.A.

Il ricorso gerarchico è comprensivo di ogni reclamo attinente sia a diritti che interessi e può comprendere *censure sia di legittimità* (eccesso di potere, incompetenza, violazione di legge) che di *merito* (sull'opportunità cioè del provvedimento).

c) **ricorso straordinario al Presidente della Repubblica**: è

— un *rimedio generale* che costituisce un mezzo di tutela contro tutti i provvedimenti amministrativi a tutela sia di interessi legittimi che di diritti soggettivi;
— *di natura amministrativa*;
— *di competenza del Presidente della Repubblica* che decide su proposta del Ministro competente;
— *dato solo contro provvedimenti definitivi* in quanto presuppone che non sia più esperibile nessun'altra forma di tutela amministrativa;
— *per soli motivi di legittimità* ed ha un termine di decadenza assai lungo (120 giorni).

È straordinario perché costituisce un mezzo di decisione «*extra ordinem*» fuori, cioè, dall'ordinamento amministrativo in senso stretto, e costituisce un retaggio degli ordinamenti giuridici precostituzionali ove il *Capo dello Stato* era considerato al vertice dei poteri nella posizione di *sommo giudice.*

Si ricordi che il D.P.R. n. 1199 del 1971 ha disciplinato compiutamente questo istituto, che prevede tra l'altro l'intervento obbligatorio del *Consiglio di Stato* in sede consultiva, il cui parere è vincolante: per discostarsi da esso occorre una decisione del Consiglio dei Ministri.

3. I RIMEDI GIURISDIZIONALI CONTRO GLI ATTI DELLA P.A.

Con gli artt. 24, 103, 111, 113 e 125[2] Cost. il costituente ha inteso far salvo il sistema giurisdizionale preesistente nel suo insieme salvo poi, come è avvenuto nel 1971, con legge ordinaria procedere ad un generale riassetto della giustizia amministrativa.

Abolito nel 1865 il sistema del contenzioso amministrativo (in virtù del quale ogni questione di diritto o interesse in qualche modo collegata a rapporti di diritto pubblico veniva devoluta a speciali tribunali amministrativi) la L. n. 2248 allegato E del 1865 provvide ad attribuire alla **giurisdizione ordinaria** le materie in cui si facesse questione (art. 1) «*di un diritto civile o politico, comunque vi possa essere interessata la P.A., e ancorché siano emanati provvedimenti del potere esecutivo o dell'autorità amministrativa*»; alla **autorità amministrativa** tutte quelle *materie dalle quali nascessero* quelli che oggi vengono definiti *interessi legittimi*.

Ciò comportava la mancanza di tutela giurisdizionale in materia di interessi; a ciò si ovviò fin dal 1889 istituendo una sezione (la IV) del Consiglio di Stato con funzioni giurisdizionali; oggi, a seguito dell'adozione della cd. legge TAR, n. 1034 del 1971, il sistema di tutela è completo e garantistico.

4. Segue: LA COMPETENZA DELL'AUTORITÀ GIUDIZIARIA ORDINARIA

Tale competenza è regolata dagli artt. 4 e 5 della legge 20 marzo 1865 secondo la quale per potersi rivolgere al giudice ordinario:

— si deve trattare di un atto amministrativo che violi un *diritto soggettivo perfetto* (e non un interesse legittimo o un diritto affievolito);
— i tribunali sono tenuti a conoscere la *legittimità* del comportamento della P.A.;
— i tribunali si limitano a *dichiarare l'atto illegittimo e a disapplicarlo* (cioè non possono annullarlo: ciò, per il principio della divisione dei poteri, spetta solo all'autorità amministrativa);
— il privato può, poi, rivolgersi all'autorità amministrativa, che ha l'*obbligo di conformarsi al giudizio dei tribunali* (c.d. giudizio di ottemperanza);
— i tribunali, nel giudicare, devono riconoscere la *preminenza delle norme primarie sulle secondarie* (cioè gli atti amministrativi e i provvedimenti devono essere *conformi alle leggi*);
— la P.A., nel caso di atto giudicato illegittimo, può essere tenuta al *risarcimento del danno* verso il privato o, comunque, al pagamento di un'indennità o essere condannata a restituire cose illegalmente possedute, etc.

Concludendo il privato può ricorrere al giudice *ordinario* se lamenta nella *causa petendi* la lesione di un suo diritto soggettivo da parte di un provvedimento della P.A. e se egli, contestualmente, chieda nel *petitum* al giudice ordinario esclusivamente l'accertamento dell'illegittimità del comportamento della P.A. (sentenza di mero accertamento) e la condanna della medesima al pagamento di una somma di danaro e a non fare o a sopportare la distruzione di quanto fatto (sentenza di condanna) (così BARILE).

5. Segue: LA COMPETENZA DELLA GIURISDIZIONE AMMINISTRATIVA

L'accertamento della violazione da parte della P.A. degli *interessi legittimi* è affidata alle seguenti giurisdizioni amministrative:

a) *giurisdizione generale di legittimità* composta dai Tribunali Amministrativi Regionali e dal Consiglio di Stato (vedi *infra* §§ 6 e 7);
b) *giurisdizioni speciali* (vedi *infra* § 10).

6. I TRIBUNALI AMMINISTRATIVI REGIONALI (T.A.R.)

A) Generalità, sedi e composizione

Con la legge 6 dicembre 1971, n. 1034, sono stati istituiti i Tribunali Amministrativi Regionali, in attuazione del disposto dell'art. 125 della Costituzione per creare organi locali di giustizia a base regionale, quali **giudici di primo grado.**

Essi sono in numero di *venti*, uno per ogni Regione, con sede nel capoluogo regionale.

Ogni T.A.R. è formato da un Presidente e da almeno cinque magistrati amministrativi regionali.

Il Presidente deve rivestire la carica di presidente di sezione del Consiglio di Stato o di consigliere di Stato; i magistrati debbono appartenere all'apposito ruolo dei T.A.R.

A tale ruolo si può accedere solo per pubblico concorso e di esso possono far parte solo giudici *togati*.

Sia il Presidente che gli altri magistrati vengono assegnati a ciascun Tribunale con decreto del P.d.R., su proposta del Presidente del Consiglio dei Ministri, sentito il Consiglio di presidenza dei T.A.R. (art. 9). La nomina, la carriera, le funzioni e le altre vicende concernenti i magistrati dei T.A.R. sono regolate dagli artt. 11-18 della legge citata.

B) La giurisdizione dei T.A.R.

I T.A.R. hanno tre diverse specie di giurisdizione:

a) una **giurisdizione generale di legittimità** (artt. 2, 3 e 4) che ha un'attrazione generale su tutti gli atti e provvedimenti (che non siano di competenza di altri giudici amministrativi) che risultino viziati da incompetenza, eccesso di potere, violazione di legge;
b) una **giurisdizione di merito** *per materie tassativamente determinate* (art. 7);
c) una **giurisdizione esclusiva,** anch'essa per *materie tassativamente determinate* (art. 7, 2° e 3° comma), fra cui emerge *quella del pubblico impiego* (almeno per quanto riguarda alcune categorie di personale tra cui: magistrati ordinari, amministrativi e contabili; avvocati e procuratori dello Stato; personale delle forze di polizia e militare; personale delle carriere diplomatiche e prefettizia; dirigente generali; dipendenti che svolgono la loro attività in settori quali risparmio, tutela della concorrenza e del mercato, valori mobiliari) *dove non si fa distinzione tra diritti ed interessi.*

Nelle materie in cui non ha competenza esclusiva, il T.A.R. è autorizzato a decidere su tutte le questioni incidentali o pregiudiziali relative a diritti, la cui soluzione sia necessaria per decidere sulla questione principale, escluse quelle concernenti lo stato e la capacità delle persone, la falsità di atti o documenti.

Si ricordi che:

— di regola il giudice amministrativo giudica su atti o provvedimenti amministrativi: se però l'atto impugnato si fonda su un regolamento, allora il T.A.R. giudica anche della legittimità di questo;
— per il principio di *esecutorietà* degli atti amministrativi di regola questi non vengono sospesi al momento della presentazione del ricorso. Tuttavia può essere chiesta la sospensione dell'esecuzione per gravi ragioni (possibilità di danno grave e irreparabile);
— gli atti di governo, cioè quegli atti politici emanati dagli organi titolari della funzione di indirizzo politico nell'esercizio di tale funzione, sono insindacabili.

7. IL CONSIGLIO DI STATO

Svolge funzioni duplici:

— come *organo consultivo*: dà pareri al Consiglio dei Ministri o ai singoli ministri (v. *supra*);
— come *organo giurisdizionale*:

1. *è giudice d'appello contro le sentenze dei T.A.R.*
   A norma del secondo comma dell'art. 28 della legge sui T.A.R., contro le sentenze da essi pronunciate è ammesso ricorso al Consiglio di Stato, in sede giurisdizionale: per effetto di questa disposizione il Consiglio di Stato (ad eccezione di alcune competenze in unico grado) è diventato, nel sistema della giustizia amministrativa, **giudice di secondo grado.**

2. *conserva per alcuni casi tassativi, una competenza in unico grado.*
   Tali casi sono:

   a) il giudizio di ottemperanza, nei casi in cui l'autorità tenuta all'esecuzione del giudicato del giudice ordinario è un'autorità centrale ovvero per l'esecuzione delle decisioni dello stesso Consiglio di Stato che abbiano riformato la decisione in primo grado del T.A.R. (art. 37);
   b) ricorsi avverso gli atti delle autorità centrali aventi efficacia nella regione siciliana e per i quali sia esclusa la competenza del T.A.R. della Sicilia (art. 40);
   c) caso previsto dall'art. 33 del T.U. sul C.d.S. e cioè quando, al fine di evitare l'impugnativa successiva, il Governo, col preventivo assenso scritto di tutti coloro ai quali l'atto si riferisce, provoca la decisione del Consiglio di Stato su un provvedimento non ancora emanato.

Contro le decisioni pronunziate dal C.d.S. è ammesso il ricorso alle sezioni unite della Corte di Cassazione per soli motivi inerenti alla giurisdizione (art. 111 Cost. e 36 L. 1034/1971).

8. LE IMPUGNAZIONI

Contro le decisioni dei T.A.R. è ammesso:

a) ricorso in appello al Consiglio di Stato entro 60 gg. dalla notifica della sentenza di primo grado (c.d. *termine breve*) o entro 1 anno dalla sua pubblicazione (c.d. *termine lungo*): in secondo grado il C.d.S. esercita gli stessi poteri spettanti al giudice di prima istanza, con l'eccezione della potestà di sospendere l'esecuzione delle sentenze impugnate in caso di danno grave ed irreparabile;
b) ricorso per revocazione ex artt. 395 e 396 c.p.c.

Contro le decisioni del C.d.S. è ammesso:

a) ricorso per revocazione ex artt. 395 e 396 c.p.c.;
b) ricorso alle sezioni unite della Corte di Cassazione per motivi inerenti alla giurisdizione (art. 111 u.c. Cost.).

9. IL REGOLAMENTO DEI CONFLITTI DI GIURISDIZIONE

I conflitti di giurisdizione **tra più giudici speciali** o **tra uno di essi ed altro ordinario**, siano essi **positivi** (entrambi si affermano competenti) o **negativi** (ambedue ricusano la propria giurisdizione) sono rimessi per la loro decisione, alla **Corte di Cassazione** (art. 396 c.p.c.).

10. LE GIURISDIZIONI SPECIALI

Malgrado la VI norma transitoria della Costituzione avesse disposto la revisione *entro 5 anni* degli organi speciali di giurisdizione esistenti (fatta eccezione per il C.d.S., la Corte dei Conti ed i tribunali militari), ancor'oggi — data la inattuazione concreta del precetto — esistono numerosi organi la cui attività si pone in contrasto con la carta fondamentale, come non manca di rilevare di sovente la Corte Costituzionale.

Si esamineranno di seguito le più importanti tra le giurisdizioni speciali esistenti:

A) La Corte dei Conti

La giurisdizione della Corte verte sulle seguenti materie:

1. **contabilità pubblica**: cc.dd. *giudizi di conto su coloro che maneggiano «pubblico denaro»*;

2. **giudizi di responsabilità**: *a carico di pubblici ufficiali non contabili, per danni recati all'amministrazione dello Stato*;
3. **giudizi sulle pensioni** e sul collocamento a riposo;
4. **giudizi relativi al pubblico impiego** degli impiegati della Corte medesima.

Contro le decisioni della C.d.C. è ammessa la revocazione e il ricorso alle sezioni unite della Cassazione (per motivi di giurisdizione).

Inoltre all'interno della Corte esiste il doppio grado di giurisdizione, per cui si può proporre appello alle sezioni unite contro le pronunzie in materia di giudizi sui conti e di responsabilità.

Le decisioni del C.d.C. possono essere di accertamento, di condanna e costitutive; per essa non vale il principio di corrispondenza tra il chiesto e il pronunciato. Per tale motivo esiste presso la Corte la procura generale, che amplia il campo dei giudizi iniziati da privati, o inizia giudizi nuovi quasi sempre di responsabilità a carico di pubblici funzionari ed impiegati.

B) La giurisdizione in materia tributaria

L'art. 30 della L. 30-12-1991, n. 413 ha fissato i principi informatori della *riforma del contenzioso tributario*, poi attuata con i decreti legislativi nn. 545 e 546 del 31-12-1992.

Il rito tributario acquisisce, così, numerosi connotati che lo avvicinano al *processo civile*, pur mantenendo agli aspetti peculiari propri di un procedimento di *giurisdizione amministrativa speciale*.

Il sistema previgente prevedeva *Commissioni tributarie locali* di 1° e 2° grado ed una *commissione tributaria centrale*, con sede in Roma.

La nuova disciplina dispone — ex art. 1 del D.Lgs. 546/1992 — che la giurisdizione tributaria debba essere esercitata dalle *Commissioni tributarie regionali*, aventi sede nel capoluogo di ogni Regione, e dalle *Commissioni tributarie provinciali*, con sede nel capoluogo di ogni Provincia.

Sono soggette alla giurisdizione delle Commissioni tributarie le controversie concernenti: le imposte sui redditi, l'IVA, l'INVIM, l'imposta di registro, l'imposta sulle successioni e donazioni, le imposte ipotecarie e catastali, l'imposta sulle assicurazioni, i tributi comunali e locali, ogni altro tributo attribuito dalla legge alla competenza giurisdizionale delle commissioni.

La competenza delle Commissioni si estende inoltre: alle controversie concernenti le sovraimposte e le imposte addizionali, nonché le sanzioni amministrative, gli interessi e gli accessori nelle materie di cui sopra; alle controversie promosse dai singoli possessori, concernenti l'intestazione, la delimitazione, l'estensione, il classamento dei terreni e la ripartizione dell'estimo tra i compossessori a titolo di promiscuità della stessa particella; alle controversie relative alla consistenza, al classamento delle singole unità immobiliari urbane ed all'attribuzione della rendita catastale.

Il processo di primo grado è introdotto dal ricorso dell'interessato alla Commissione provinciale entro 60 gg. dalla data di notificazione dell'atto impugnato.

Il Presidente della Commissione provinciale, verificata la regolare costituzione delle parti, laddove non reputi inammissibile il ricorso, fissa la trattazione della controversia e provvede alla nomina del relatore.

La trattazione della causa avviene di norma in camera di consiglio, salvo che almeno una delle parti abbia chiesto la discussione in pubblica udienza.

Il collegio giudicante, subito dopo l'esposizione del relatore, delibera la decisione nel segreto in camera di consiglio. Il dispositivo della sentenza è comunicato alle parti costituite entro 10 gg. dal deposito.

Contro la decisione di primo grado della Commissione sono esperibili i seguenti mezzi di impugnazione:

— *appello*, presso le Commissioni regionali;
— *ricorso per Cassazione*;
— *revocazione*.

C) La giurisdizione sulle acque pubbliche

Vi sono due specie di tribunali delle acque pubbliche:

— *Tribunali Regionali*, istituiti presso 8 Corti d'Appello, essi fanno parte della giurisdizione ordinaria e giudicano su controversie di carattere patrimoniale relative a diritti soggettivi;
— *Tribunale superiore, che giudica in grado d'Appello* sulle questioni di diritti soggettivi e in unico grado su questioni di interesse legittimo.

CAPITOLO SESTO
GLI ATTI PUBBLICI

1. GENERALITÀ E CONCETTO DI ATTO PUBBLICO

Gli avvenimenti che hanno rilevanza per il diritto si chiamano fatti giuridici.

I *fatti giuridici*, in particolare, possono essere *naturali* o *umani* a seconda che l'uomo intervenga o meno (es. è fatto naturale un terremoto, è fatto umano un contratto).

Tra i *fatti giuridici naturali* assume particolare importanza il tempo; infatti il decorso del tempo può produrre l'acquisto o la perdita di gran parte dei diritti (es. usucapione, prescrizione, decadenza).

L'immemorabile (o immemoriale, così SANDULLI) è un altro *istituto* che si basa sul decorso del tempo ed è preso in considerazione dal diritto pubblico (es. usi civici, demanialità delle acque e personalità giuridica di certe istituzioni).

I *f.g. umani* vengono detti anche *atti*, e possono essere *involontari* (es. reati colposi), oppure frutto di un'espressione di *desiderio* (es.: istanze), di *conoscenza* (es. pareri) oppure di *volontà* (*negozi giuridici*).

Gli atti che esamineremo in questa sede sono i c.d. **atti pubblici** ossia gli *atti giuridici volontari provenienti dallo Stato, da enti pubblici o da privati che esercitano una pubblica funzione.*

2. ATTO PUBBLICO: PRESUPPOSTI

A) Presupposti soggettivi

Il soggetto che emana l'atto deve essere un **organo della P.A.,** regolarmente costituito e dotato di competenza in ordine all'atto da emanare.

B) Presupposti oggettivi

Sono quei fatti che è necessario siano già avvenuti al momento dell'emanazione dell'atto (*autorizzazioni, richieste, istanze, fatti naturali*). La *valutazione dei presupposti* oggettivi viene fatta dall'ufficio pubblico prima di emanare l'atto, e può essere *vincolata o discrezionale.*

Tale processo psicologico, coincidente con la c.d. *fase istruttoria* del procedimento, è il momento più delicato ai fini della formazione dell'atto pubblico: la l. 241/1990 ha reso tale fase pubblica, aprendola alla partecipazione degli interessati.

3. FORMAZIONE DELLA VOLONTÀ

Se l'atto pubblico è un *negozio* si deve guardare alla *determinazione della volontà.* Tale volontà può provenire da un organo *semplice o collegiale*: nel secondo caso, nella *deliberazione* le volontà

individuali scompaiono fondendosi nella volontà collegiale, salvo il diritto dei dissenzienti di far dare atto della propria opinione nel processo verbale.

La **causa del negozio** è la *funzione economico-sociale* di esso (es. causa della compravendita è il trasferimento di una cosa dietro corrispettivo), ed ha quindi carattere oggettivo, essendo comune a tutti gli atti dello stesso tipo.

La causa si distingue dal motivo pratico della volontà, volta alla soddisfazione di un interesse pubblico. Ma, mentre in diritto privato i **motivi** che hanno portato al negozio sono irrilevanti, in diritto pubblico acquistano rilevanza le ragioni specifiche che, nel caso singolo, hanno portato all'emanazione dell'atto: l'*illiceità o la distorsione* dei motivi rendono l'atto illegittimo per violazione di legge o per eccesso di potere (sviamento di potere).

Così la concessione di un pubblico servizio ha per causa l'affidamento di una funzione pubblica ad un privato e per motivi deve avere quelli di convenienza tecnica per l'amministrazione; se il motivo è estraneo alla convenienza tecnica, la concessione è annullabile per sviamento di potere.

Elementi accidentali sono:

1. il *termine*: può essere iniziale o finale ed è apposto solo a quegli atti per i quali la legge non prescrive un diverso termine;
2. la *condizione*: è l'evento al cui avveramento o alla cui mancanza è subordinata l'efficacia dell'atto;
3. il *modo*: è la subordinazione dell'efficacia dell'atto ad un futuro comportamento del soggetto.

4. EMANAZIONE DELL'ATTO

Nei negozi questa fase è quella della **dichiarazione della volontà.**

Nel diritto pubblico le dichiarazioni possono essere *formali o non formali*, a secondo che una **forma** (es. quella scritta) sia o meno richiesta *ad substantiam*, cioè per la validità dell'atto.

Nel campo degli atti amministrativi, di regola, la forma non è richiesta *ad substantiam* anche quando essi hanno forma scritta (per una eccezione si pensi al matrimonio).

Fra le dichiarazioni non formali assume particolare importanza la *dichiarazione tacita*, e in particolare il **silenzio**, che in diritto pubblico spesso assume rilevanza (si ricordi in particolare il c.d. *silenzio-rigetto* e gli altri casi di c.d. *silenzio-assenso* o di *silenzio-rifiuto*).

Il *luogo di emanazione* dell'atto ha talvolta importanza: si discute, ad esempio, se il Presidente della Repubblica possa emanare atti in luogo diverso dal territorio nazionale.

5. STRUTTURA FORMALE DELL'ATTO AMMINISTRATIVO

Ciascun atto amministrativo presenta una struttura formale generalmente composta dalle seguenti parti:

a) **intestazione**: cioè l'indicazione dell'*autorità da cui l'atto promana*;
b) **preambolo**: in cui sono indicate le *norme* di legge o di regolamento *in base alle quali l'atto* stesso *è stato adottato* nonché le attestazioni relative agli atti preparatori (audizione di pareri etc.);
c) **motivazione**: consiste nell'esposizione delle ragioni, di diritto e di fatto, in base alle quali si è pervenuti all'adozione dell'atto, nonché nella sua giustificazione.
   Prima dell'introduzione, con la l. 241/90, dell'*obbligo generale di motivazione*, questa poteva essere imposta dalla natura dell'atto (atti della funzione consultiva, atti decisori, atti negativi, atti ablativi, atti di ritiro, atti di scelta comparativa, atti difformi dal parere obbligatorio);
d) **dispositivo**: è la parte precettiva dell'atto e costituisce la *dichiarazione di volontà vera e propria*;
e) **luogo**: l'indicazione del luogo in cui è stato emanato;
f) **data**;
g) **firma o sottoscrizione**: cioè la firma dell'autorità che emana l'atto o di quella a tal fine delegata.

6. I CONTROLLI

I controlli in genere sono *successivi ed esterni*; possono, però anche far parte del *procedimento di formazione* dell'atto, o *paralizzarne l'efficacia, o provocare il ritiro dell'atto*, quando esso già è entrato in vigore.

Le principali categorie di controlli sono:

— di **legittimità** e di **merito** (espressi nel «visto»);
— **impeditivi** (impediscono che l'atto abbia o continui ad avere efficacia);
— **repressivi** (annullano l'atto con efficacia retroattiva);
— **sostitutivi** (spostano la competenza in caso d'inerzia dell'organo competente);
— **mediante richiesta di riesame** (veto presidenziale, ad esempio, in sede di promulgazione delle leggi).

7. COMUNICAZIONE ED ESECUTORIETÀ DELL'ATTO

Costituisce la fase finale del procedimento di emanazione degli atti pubblici, attraverso la quale si dà *pubblicità alla deliberazione*. La comunicazione può avvenire attraverso **pubblicazione sui giornali,** *ufficiali* (quali la Gazzetta Ufficiale, i bollettini regionali) o *privati* (si pensi alla pubblicazione di una sentenza su un quotidiano); **affissione; notificazione** *da parte di un ufficiale giudiziario*; *lettera* semplice o raccomandata.

La comunicazione ha carattere *dinamico*: è diretta ai destinatari interessati e opera sull'efficacia dell'atto.

Ricordiamo che l'atto pubblico si dice:

— **perfetto**, quando il suo procedimento di formazione è esaurito;
— **efficace**, quando ha superato i controlli, non è paralizzato da clausole accessorie ed è stato comunicato;
— **valido**, quando è immune da vizi.

L'esecutorietà dell'atto pubblico è l'efficacia particolarissima di cui sono dotati gli atti della P.A. Essa opera sotto due profili:

— impedisce ai destinatari degli atti e a tutti coloro che sono chiamati a darne esecuzione di *sospendere* l'efficacia dell'atto per qualsiasi motivo, anche se è in corso una impugnazione, a meno di uno specifico provvedimento in tal senso;
— *permette l'esecuzione diretta dell'atto* da parte della P.A. senza bisogno di ricorrere all'autorità giudiziaria: è dunque un'esigenza di carattere organizzativo.

8. CLASSIFICAZIONE OGGETTIVA DEGLI ATTI PUBBLICI

A) Meri atti

Sono **atti** di semplice **accertamento**: manifestazioni di giudizio o apprezzamento (pareri), di desideri (voti, proposte, designazione), di conoscenza (certificati, registrazioni).

B) Negozi

Sono provvedimenti che manifestano la volontà dello Stato o di un altro ente pubblico. I negozi di diritto pubblico si caratterizzano per avere per lo meno un *soggetto* con la qualifica di *ente pubblico* e per il fatto che la *volontà è diretta immediatamente al raggiungimento di un fine pubblico*, per il cui conseguimento si giustifica l'attribuzione all'ente pubblico di poteri di supremazia.

Per BARILE non si può configurare un'autonoma categoria di contratti di diritto pubblico, essendo una *species* del *genus* negozio:

— nel caso di *contratti di diritto privato stipulati da enti pubblici con privati*, il rapporto resta regolato dal diritto privato senza che l'ente pubblico goda di poteri di supremazia;
— nei casi di *contratti di concessione*, non si può parlare propriamente di contratto, in quanto le parti non sono su un piano di parità a causa della supremazia che in questo caso assume l'ente pubblico nei confronti del privato;
— nel caso di *contratti tra due enti pubblici*, di regola manca il requisito prevalentemente patrimoniale che caratterizza la «categoria dei contratti»: neanche in questo caso dunque, si può parlare di «*contratti*».

C) Negozi che ampliano le facoltà dei privati

Tra di essi ricordiamo:

— **autorizzazioni**: con esse la P.A. rimuove un limite o un divieto all'esercizio di un diritto (es.: porto d'armi). Sono atti permissivi;
— **concessioni**: la P.A. attribuisce al privato un particolare diritto; sono *traslative* quando trasferiscono al privato diritti dello Stato (es.: concessione esattoriale d'imposta), *costitutive* se costituiscono, per la prima volta, dei diritti per il privato (es.: cittadinanza). Sono atti che conferiscono diritti;
— **ammissioni**: la P.A. ammette i privati a partecipare ad alcuni diritti o vantaggi o al godimento di certi servizi (es.: frequenza di una scuola). Esse sono atti costitutivi di *status*;
— **sovvenzioni**: la P.A. eroga contributi in denaro ai privati che esercitano attività che rivestono anche un interesse pubblico;
— **dispense**: la P.A. esonera il privato dall'adempimento di obblighi stabiliti in via generale (es.: dispensa dal servizio militare). Sono atti discrezionali che operano sui diritti;
— **nomine**: la P.A. chiama il soggetto privato a ricoprire determinati uffici o ad assolvere funzioni pubbliche.

D) Negozi che limitano le facoltà o i poteri del privato:

— **ordini**: possono essere *positivi* (*comandi*, ad esempio: pagare una multa) o *negativi* (*divieti*, ad esempio: censura di uno spettacolo);
— **atti di espropriazione** (di cui già ci siamo occupati);
— **atti punitivi**: *sanzioni amministrative o disciplinari*.

E) Atti non negoziali:

— *manifestazioni di giudizio* o di apprezzamento (pareri);
— *manifestazioni di desiderio* (voti, proposte, designazioni);
— *manifestazioni di conoscenza* (certificati, attestazioni, registrazioni, comunicazioni, notificazioni).

9. CLASSIFICAZIONE SOGGETTIVA DEGLI ATTI PUBBLICI

Rispetto ai soggetti che li pongono in essere, gli atti pubblici possono essere:

— *Atti semplici*, emanati dall'organo semplice;
— *Atti collegiali*, emanati dagli organi collegiali;
— *Atti continuati o reiterati*, quando uno stesso soggetto deve ripetere più di una volta la sua manifestazione di volontà (es.: procedimento di revisione cost.);
— *Atti congiunti o plurisoggettivi* che sono emanati da più organi.

Nell'ambito degli *atti plurisoggettivi* si distinguono:

a) *atti collettivi*, costituiti da una pura somma di volontà distinte (es.: atti dei comitati interministeriali) il vizio di una di tali volontà non implica la nullità dell'atto finale;

b) *atti composti*, che risultano dall'accordo di volontà di soggetti portatori di interessi diversi (es.: contratti fra Stato e privati; gli accordi previsti dall'art. 11 L. 241/1990; le intese tra Stato e confessioni acattoliche ex art. 8 Cost.);
c) *atti complessi*, risultanti dall'accordo di soggetti portatori di interessi omogenei o, per lo meno, aventi un'unica causa, ed emanati in un unico contesto: possono essere *uguali o disuguali*, a seconda che prevalga o meno la volontà di uno dei soggetti (es.: atti risultanti dall'unione delle volontà del Presidente della Repubblica e del Governo, atti scaturenti dalle c.d. conferenze di servizi ex art. 14 L. 241/1990).

Si ricordi che tali categorie di atti sono state superate dalla dottrina e dalla pratica moderna per l'introduzione del concetto di **procedimento** inteso come insieme di atti rivolti ad un fine comune. L'istituto è stato finalmente codificato con la **legge n. 241/90,** che ha fissato delle *regole generali che valgono per tutti i procedimenti amministrativi* per i quali non sia prevista una disciplina specifica. Da tale normativa sono, altresì, esclusi i procedimenti diretti all'emanazione di atti normativi, amministrativi generali, di pianificazione di programmazione nonché i procedimenti tributari.

Tali regole generali possono così sintetizzarsi:

a) *semplicità e speditezza delle forme* (art. 1);
b) *celerità di svolgimento*, nel senso che ogni amministrazione deve determinare, se non è già previsto dalla legge, il termine entro cui il procedimento deve svolgersi; in mancanza di tale determinazione, la durata del procedimento non può comunque superare i trenta giorni (art. 2);
c) *obbligo di motivazione* del provvedimento terminale (art. 3);
d) *obbligo di indicare* in ogni atto notificato al destinatario il *termine e l'autorità cui è possibile ricorrere*;
e) l'*obbligo di determinare* per ciascun tipo di provvedimento, *e di rendere pubblica, l'unità organizzativa responsabile* della istruttoria e di ogni altro adempimento procedimentale nonché dell'adozione del provvedimento finale;
f) l'*obbligo di far partecipare al procedimento i soggetti nei confronti dei quali il provvedimento finale è destinato a produrre effetti diretti nonchè quelli che per legge debbono intervenire*;
g) la *facoltà di intervenire nel procedimento riconosciuta a qualunque soggetto, portatore di interessi pubblici o privati, nonché ai portatori di interessi diffusi costituiti in associazioni o comitati, cui possa derivare un pregiudizio dal provvedimento* (art. 9);
h) *il diritto degli interessati* (*supra*, lettera f) *e degli intervenuti* (*supra*, lettera g) di *prendere visione* degli atti del procedimento, salvo quelli esclusi dal diritto di accesso (art. 10);
i) la *possibilità di concludere accordi con gli interessati sul contenuto del provvedimento* (art. 11);
l) la *massima semplificazione dei procedimenti che coinvolgono vari interessi pubblici*;
m) la *generalizzazione della figura del c.d. silenzio-facoltativo* per cui in tutti i casi in cui debba essere obbligatoriamente sentito un organo consultivo e questo non ha espresso il suo parere nei termini fissati dalla legge o, in mancanza, nei novanta giorni dalla richiesta, l'amministrazione ha la facoltà di procedere prescindendo dalla acquisizione del parere (art. 16);
n) la *generalizzazione della figura del c.d. silenzio-devolutivo* per cui ove per disposizione espressa di legge o di regolamento sia previsto che per l'adozione di un procedimento debbano essere preventivamente acquisite le valutazioni tecniche di organi od enti appositi e tali organi non provvedano nei termini prefissati dalla disposizione stessa o, in mancanza, entro i novanta giorni dalla richiesta, il responsabile del procedimento deve chiedere le suddette valutazioni tecniche ad altri organi della P.A. o ad altri enti pubblici che siano dotati di qualificazioni e capacità tecnica equipollenti, ovvero ad istituti universitari (art. 17);
o) *una più completa ed efficace attuazione dei principi dell'autocertificazione* (art. 18) del *provvedimento implicito* (art. 19) e del *silenzio-assenso* (art. 20).

10. L'INVALIDITÀ DEGLI ATTI PUBBLICI: GENERALITÀ

Per GUICCIARDI bisogna distinguere tra:

— *illegittimità*, se l'atto viola le norme d'azione;
— *illiceità* (se l'atto viola le norme di relazione).

Le **norme di azione** regolano l'attività della P.A. per il raggiungimento dell'interesse pubblico, le **norme di relazione** regolano, invece, i rapporti tra la P.A. e i cittadini fissando obblighi e diritti per tali soggetti.

Si distingue poi:

— **vizio di legittimità**, che ricorre se l'atto non è conforme alle leggi;
— **vizio di merito**, che si ha quando l'atto è inopportuno, in relazione alle norme non giuridiche del *buon andamento della P.A.* (art. 97 Cost.).

L'*atto illegittimo*, in particolare, può essere *nullo o annullabile*.

11. Segue: NULLITÀ ED ESISTENZA

Si hanno per **difetto** *assoluto* **di un elemento essenziale del procedimento,** cioè per mancanza:

— del **soggetto**: ad esempio l'atto emanato da un funzionario di fatto o da un governo insurrezionale;
— della **volontà**;
— del **contenuto**: ad esempio l'atto con contenuto impossibile;
— della **forma essenziale.**

La nullità opera *ipso iure* e può essere dichiarata in ogni tempo, con *sentenza di mero accertamento*.

12. Segue: ANNULLABILITÀ

I vizi sono gli stessi che possono portare alla nullità, ma sono meno gravi. Sebbene tradizionalmente i **vizi di legittimità** si distinguano in: *incompetenza, violazione di legge, ed eccesso di potere,* BARILE ritiene che le tre figure esaminate possano essere tutte ricondotte alla figura più generale della *violazione* di *legge*, in quanto l'incompetenza consiste nella violazione di norme distributive della competenza tra organi diversi e l'eccesso di potere nella violazione del fine posto dalla norma che ha concesso il potere discrezionale.

BARILE, pertanto, così distingue i vizi di legittimità dell'atto amministrativo:

A) Vizi del soggetto:

— **incompetenza assoluta** (che per alcuni autori causerebbe la nullità e l'inesistenza) che si ha quando un organo titolare di una funzione esercita i poteri deferiti ad un'altra funzione (*straripamento di potere*).

Esempio: l'intendente di finanza rilascia un certificato di studio in luogo del Provveditore agli studi;

— **incompetenza relativa** che si ha quando un organo invade la sfera di competenza di un altro quando un organo invade la sfera di competenza di un altro organo della stessa funzione.

Esempio: la Giunta Comunale rilascia un atto di competenza del Consiglio Comunale.

I *conflitti di competenza* sono risolti:

— in *campo amministrativo* dal superiore gerarchico;
— in *campo governativo* dal Presidente del Consiglio dei Ministri;
— in *campo giurisdizionale*, nei modi previsti dai codici di procedura.

I conflitti tra le funzioni supreme dello Stato (detti di attribuzione) sono risolti dalla Corte Costituzionale. I conflitti sono positivi se due uffici si dichiarano entrambi competenti, negativi se si dichiarano, invece, entrambi incompetenti.

B) Vizi della volontà e del contenuto

La deviazione dei motivi dal fine dell'atto porta al vizio dell'**eccesso di potere**, che investe la causa e i motivi dell'atto stesso.

Esso consiste nella *violazione dello spirito della legge* e presuppone un *potere discrezionale* (altrimenti si avrebbe il vizio di violazione di legge propriamente detto) usato non conformemente ai principi che regolano l'azione della P.A.

Le *modalità con cui si rileva l'eccesso di potere*, si distinguono (BARILE):

1. **Fattispecie reali**, in cui c'è la prova rigorosa dell'eccesso di potere; es.: lo *sviamento di potere*, che ricorre quando il motivo dell'atto risiede in un interesse privato invece che pubblico oppure se, invece di poggiare su di un fine pubblico essenziale, il motivo poggia su un fine pubblico collaterale.
2. **Fattispecie sintomatiche**, nelle quali il vizio si desume per presunzione nel senso che da un «sintomo» si deduce l'invalidità dell'atto; esse sono:
   a) **errore o travisamento dei fatti**: se la volontà si è determinata sulla base di una falsa valutazione di errati presupposti (es.: l'atto considera assente ingiustificato un impiegato quando è accertato che tale assenza deriva, invece, da infermità);
   b) **illogicità manifesta**: contrasto tra la motivazione e il dispositivo di un atto (es.: adozione di una misura disciplinare grave per una infrazione di modeste entità);
   c) **contraddittorietà**: si afferma di voler raggiungere un determinato fine, poi, invece, si tende a raggiungerne un altro; oppure l'atto è inconciliabile con un altro che lo precede, senza adeguata giustificazione (es.: si nega la licenza edilizia quando precedentemente era stata approvata la lottizzazione relativa allo stesso suolo);
   d) **ingiustizia manifesta**: derivante, ad esempio, da disparità di trattamento (es.: si accerta l'identica responsabilità di due impiegati, ma solo uno di essi viene condannato).

Il vizio di eccesso di potere si può riscontrare anche nella funzione giurisdizionale (quando i giudizi hanno potere discrezionale) e in quella legislativa (es.: per disparità di trattamento in violazione dell'art. 3 Cost.).

C) Violazione di legge

In questa figura rientrano tutti i vizi che non fanno parte delle due categorie precedenti (categoria residuale).

Tutti i *vizi di forma*, in particolare, si risolvono in *violazione di legge*.

Diversi dagli atti viziati sono gli **atti irregolari,** che presentano una violazione di legge di grado minore (ad esempio solo fiscale): essi sono validi ma restano paralizzati, temporaneamente, nell'efficacia fino al momento in cui non vengono regolarizzati (viene cioè assolto l'obbligo o l'onere fiscale).

D) Invalidità sopravvenuta

Gli atti nascono validi, ma poi diventano viziati per «*ius superveniens*» (cioè per la legge nuova). Se la legge nuova è processuale allora vale il principio *tempus regit actum* (cioè gli atti del procedimento o del processo svoltisi sotto la legge precedente restano validi), se invece la legge nuova è sostanziale, allora gli atti anteriori che contrastano con essa divengono invalidi. Esiste anche l'*inopportunità sopravvenuta* per i vizi di merito.

13. I RIMEDI CONTRO I VIZI DEGLI ATTI PUBBLICI

A) Ratifica

Con questo provvedimento il vizio di incompetenza (relativa) viene sanato dall'*autorità competente che fa proprio l'atto viziato*: il provvedimento di ratifica opera con efficacia retroattiva (*ex tunc*).

B) Conferma

È un *provvedimento nuovo*, con il quale *vengono eliminati i vizi* di legittimità di un atto invalido precedentemente emanato *dalla stessa autorità*. La convalida è ammissibile solo per gli *atti annullabili*, non per quelli radicalmente nulli. La convalida opera *ex nunc*.

C) Sanatoria

Si ha quando l'atto è viziato per mancanza di uno dei presupposti oggettivi (proposta o autorizzazione). Questo presupposto, emesso tardivamente, può sanare il vizio quando ciò non sia espressamente vietato da una norma.

D) Conservazione

È un procedimento con cui si stabilisce che gli atti di un procedimento, anteriori a quello viziato restano validi (viene sostituito, perciò, solo l'atto invalido).

E) Conversione

«Il contratto nullo può produrre gli effetti di un contratto diverso, del quale contenga i requisiti di sostanza e di forma, qualora, avuto riguardo allo scopo perseguito dalle parti, debba ritenersi che esse lo avrebbero voluto se avessero conosciuto la nullità»; tale principio, stabilito dall'articolo 1424 c. civile, vale anche per il diritto pubblico. Secondo alcuni autori occorrerebbe comunque, per aversi conversione, una manifestazione di volontà *ad hoc*.

14. L'AUTOTUTELA AMMINISTRATIVA

Di regola è il privato che fa valere l'invalidità dell'atto pubblico davanti ai giudici ordinari e amministrativi (vedi ante cap. 5). Esistono tuttavia anche dei rimedi messi a disposizione della stessa P.A. per consentirle di provvedere spontaneamente alla eliminazione o correzione dei propri atti viziati (c.d. *autotutela amministrativa*).

L'atto di **ritiro** è un provvedimento amministrativo a contenuto negativo, emanato sulla base di un riesame dell'atto da parte della stessa autorità che l'ha adottato e volto all'eliminazione dell'atto stesso; si distingue:

a) **annullamento d'ufficio:** è un provvedimento amministrativo di secondo grado (che cioè opera su un provvedimento precedente) col quale viene ritirato, *con efficacia retroattiva* (ossia dal momento della sua emanazione), un *atto amministrativo illegittimo*;
b) **revoca:** è un provvedimento amministrativo di secondo grado con cui la P.A. ritira, con *efficacia non retroattiva*, un atto affetto da *vizi di merito* (inopportuno, non conveniente, etc.) sulla base di una nuova valutazione degli interessi;
c) **abrogazione**: è un atto di ritiro dall'identità incerta; in assenza di concrete diversità giuridiche sembra preferibile evitare distinzioni artificiose e assimilarlo senz'altro alla revoca.

Con la **disapplicazione** l'atto resta in vita, ma non viene applicato: ad es. il giudice ordinario non può annullare l'atto amministrativo illegittimo, ma deve disapplicarlo, cioè decide la controversia come se non esistesse.

PARTE TERZA

LO STATO COMUNITÀ

INTRODUZIONE

LE AUTONOMIE

1. SIGNIFICATO ED IMPORTANZA DEL CONCETTO DI AUTONOMIA

La parola «autonomia» nell'uso attuale ha un'accezione negativa: essa, infatti, indica l'assenza di limiti posti da un'«autorità» che sta al di sopra.

L'«autonomia», secondo GIANNINI:

— non ha valore giuridico preciso;
— è spesso usata in senso improprio;
— è confusa con fenomeni analoghi (autarchia, autoamministrazione, etc.).

BARILE osserva, al riguardo, che lo sviluppo delle «*autonomie*» costituisce un ottimo termometro per misurare il grado di democraticità del sistema.

Partendo, infatti, dal presupposto che lo Stato-apparato, per definizione, è tendenzialmente autoritario ed accentratore, il grado di autonomia raggiunto dallo Stato-comunità costituisce la misura della democraticità del regime nel senso che un maggior rispetto delle autonomie assicura una *più ampia sfera di libertà* ai singoli cittadini e alle comunità intermedie.

2. TIPI

Secondo una tripartizione ormai consolidata distinguiamo:

— *autonomia normativa*: è il potere attribuito ad enti non sovrani (es: *Regioni*) di emanare norme giuridiche *equiparate* (cioè aventi lo *stesso valore*, anche se non lo stesso grado) alle norme dell'ente sovrano (Stato). La loro normazione comunque è sempre soggetta ai controlli degli enti sovrani;
— *autonomia istituzionale*: è quella attribuita da un ordinamento primario ad uno derivato (esempio: l'ordinamento di un ente pubblico rispetto a quello statuale);
— *autonomia organizzatoria*: consiste nella capacità di un ente o di un organo di determinare autonomamente il proprio assetto organizzativo.

3. TITOLARITÀ

Le manifestazioni dell'autonomia sono raggruppabili in due categorie:

— **autonomie pubbliche**: sono quelle *politiche* e quelle proprie degli *enti pubblici non territoriali* e degli *enti locali*;
— **autonomie dei privati**: sono quelle degli *individui singoli* e quelle dei *gruppi intermedi*.

A rigore tutte le autonomie costituzionalmente rilevanti sono *autonomie pubbliche*, ma qui il termine pubblico è usato in senso restrittivo, per indicare quelle che contengono una frazione delle funzioni di indirizzo politico.

Le autonomie dei privati (libertà civili e autonomie collettive) si distinguono dalla c.d. **autonomia privata** (cioè di diritto privato) proprio perché a differenza di questa sono costituzionalmente garantite.

CAPITOLO PRIMO

LE AUTONOMIE POLITICHE

1. PREMESSA

Sono manifestazioni dell'*autonomia politica* spettante allo Stato comunità:

a) l'attività del *Corpo elettorale* tendente all'elezione del Parlamento;
b) il *referendum* e gli istituti di democrazia diretta (iniziativa legislativa popolare e diritti di petizione).

   Più precisamente, il *popolo* può partecipare alla funzione di indirizzo politico:

   — *direttamente*: se esercita esso stesso il potere sovrano attraverso gli istituti di democrazia diretta;
   — *indirettamente*: se lo esercita, invece, attraverso gli organi che ha eletto.

c) i *partiti politici*.

Della prima abbiamo già parlato. Analizzeremo ora gli istituti di democrazia diretta e l'attività dei partiti.

2. GLI ISTITUTI DI DEMOCRAZIA DIRETTA: IL REFERENDUM

A) Nozione e portata

Il *referendum*, nella sua accezione più lata, è la richiesta fatta al corpo elettorale di pronunziarsi su una norma giuridica già emanata o da emanarsi.

Esso è stato accolto nella nostra Costituzione come il più importante *istituto di democrazia diretta* in quanto prevede l'*intervento diretto* del popolo nell'esercizio della funzione di indirizzo politico senza il tramite dei suoi rappresentanti (BARILE).

In sede di assemblea costituente si affermò che l'istituto del *referendum* serviva ad attuare in maniera più piena il *principio della sovranità* popolare e si presentava necessario per «*togliere al Parlamento il carattere di solo organo sovrano*», al fine di garantire gli equilibri costituzionali.

Esso rappresenta, inoltre, uno strumento di *verifica*, nell'ambito del sistema parlamentare, della conformità dell'azione della maggioranza alla effettiva volontà popolare (CUOCOLO).

Il *referendum costituisce, inoltre, un'efficace arma politica delle minoranze, nonché uno strumento di educazione politica necessario all'attuazione stessa della democrazia* (PASQUINO).

B) Tipi

Il nostro ordinamento prevede diversi tipi di **referendum**:

a) **costituzionale** (detto anche *sospensivo*), previsto per le leggi di revisione della Costituzione e le altre leggi costituzionali (art. 138 Cost.);

b) **abrogativo**, previsto per le leggi e gli atti aventi forza di legge dello Stato (art. 75 Cost.) e per le leggi e i provvedimenti amministrativi regionali (art. 123 Cost. e singoli Statuti regionali);
c) **territoriale**, previsto obbligatoriamente per le modificazioni territoriali di Regioni, Province e Comuni (artt. 132 e 133 Cost,);
d) **consultivo**, su questioni di particolare interesse, previsto solo a livello regionale e comunale.

In questa sede ci occuperemo solo del referendum *abrogativo* di leggi *statali*, mentre per gli altri tipi si rinvia alla parte relativa alle autonomie territoriali e a quella sul procedimento di revisione costituzionale.

C) Il referendum abrogativo di leggi statali

a) *Concetto e limiti*

L'art. 75 Cost. prevede che possa essere indetto *referendum popolare* per deliberare *l'abrogazione totale o parziale di una legge o di un atto avente forza di legge*, quando lo richiedono *500.000 elettori o 5 consigli regionali.*

Tale tipo di *referendum*, essendo diretto ad abrogare norme, a modificare cioè l'ordinamento giuridico esistente, viene considerato una vera e propria *fonte* di diritto (CRISAFULLI).

Non possono essere sottoposte a **referendum** abrogativo a norma dell'art. 75[2] Cost.:

— le leggi di **bilancio**;
— le leggi di **amnistia** e di **indulto**;
— le leggi di autorizzazione a **ratificare trattati internazionali**;
— le leggi **tributarie**.

L'inammissibilità per i primi tre tipi di leggi è dovuta alla considerazione che si tratta di atti di indirizzo *politico*. Per la *quarta*, invece, l'inammissibilità è dovuta — come nota BARILE — alla necessità di frenare una eventuale richiesta popolare volta ad abrogare leggi contro cui è facile e demagogico opporsi perché gravano direttamente sul patrimonio dei cittadini.

Poiché non è sempre facile distinguere le leggi tributarie dalle altre si è ritenuto necessario introdurre un sindacato sull'ammissibilità del *referendum*: tale compito è stato affidato (come già si è visto) alla Corte Costituzionale con l'art. 2 della l. cost. n. 1/1953.

È sorta questione in dottrina se i casi di esclusione del *referendum* abrogativo previsti dall'art. 75 Cost. debbano considerarsi *tassativi* o meramente *esemplificativi*.

Il problema non concerne ovviamente le **leggi costituzionali** (pur non elencate nell'art. 75) la cui non assoggettabilità a *referendum* è sancita dall'art. 138, che prevede per la modifica di questo tipo di leggi una procedura particolare che deve ritenersi *esclusiva*.

L'art. 75 Cost. non esclude il *referendum* abrogativo sulle *leggi elettorali*, anche se dai lavori preparatori emerge una tendenza prevalente in tal senso in seno all'assemblea costituente.

L'interprete tuttavia non può, secondo BARILE, ampliare l'**elencazione** contenuta nell'art. 75 Cost. perché essa **ha carattere tassativo**.

Altri autori propendono invece per la natura meramente esemplificativa della disposizione *de qua*.

La **Corte Costituzionale** con le sentenze n. 16 del 1978 e nn. 22-31 del 1981 ha mutato il proprio precedente orientamento e si è espressa nel senso della **non tassatività** delle esclusioni elencate nell'art 75. La Corte ha indicato **le regioni di inammissibilità** specificandole come segue:

— quesito riferito ad una pluralità eterogenea di disposizioni legislative;
— proposta referendaria relativa a leggi costituzionali o ad atti legislativi di rilevanza o copertura costituzionale;
— proposta relativa a leggi ordinarie a contenuto costituzionalmente vincolato;
— materie espressamente escluse dall'art. 75.

È stato osservato che la estrema latitudine interpretativa dei criteri adottati attribuisce ai giudici costituzionali un potere di scelta sostanzialmente illimitato e praticamente incontrollabile. Con queste sentenze dunque è stato inferto un duro colpo all'istituto referendario, limitandone la praticabilità futura.

Anche i giudici costituzionali, dunque, si sono schierati con coloro che vedono nel *referendum* un possibile veicolo di crisi istituzionali, che porterebbe alla ribalta elementi conflittuali e di tensione sociale e che, conseguentemente, bisogna attivare con la maggiore cautela possibile e nei soli casi in cui non si riesca a trovare un espediente legislativo per evitarlo.

Deve ricordarsi, al contrario, che la Costituzione ha previsto il *referendum* non in alternativa o in contrapposizione all'istituto parlamentare, ma come mezzo idoneo ad integrare e stimolare l'attività del Parlamento. Può accadere, infatti (ed i *referendum* sul divorzio e l'aborto lo hanno in passato evidenziato chiaramente) che talvolta non vi sia coincidenza, su singoli problemi, tra le opinioni degli elettori e quelle dei loro rappresentanti in Parlamento.

Il *referendum* può costituire un efficace canale di trasmissione di istanze politiche che altrimenti non troverebbero una adeguata espressione a livello istituzionale: l'istituto, invero, non tende soltanto ad abrogare le leggi vigenti ed a creare di conseguenza pericolosi vuoti legislativi, ma è rivolto soprattutto, a provocare e stimolare eventuali riforme in un sistema normativo che non si muove al passo con le necessità dello Stato-Comunità.

Le vicende del giugno '90, relative ai *referendum* sulla caccia e sui pesticidi, boicottati dai partiti maggiori (tanto che non hanno raggiunto il *quorum*) hanno ancora una volta dimostrato come lo Stato-persona non veda di buon occhio, questo istituto. Esso, infatti, in una democrazia partitocratica interferisce negli equilibri politici delle classi al potere che «*non gradiscono*» interferenze da parte dei cittadini nel merito delle leggi vigenti.

Nel giugno 1991 gli elettori sono stati nuovamente chiamati alle urne per esprimersi sul congegno elettorale previsto per la Camera dei deputati. Malgrado gli appelli al non-voto provenienti da qualche settore della maggioranza governativa, in questo caso ha prevalso il senso di responsabilità dei cittadini e la loro autonomia di pensiero. Il *quorum* dunque è stato raggiunto e un'alta percentuale di «si» ha decretato l'abrogazione della norma sul voto plurimo di lista per l'elezione dei deputati, consentendo un primo timido passo verso la successiva *riforma elettorale* (sancita dalle leggi 276 e 277 del 4 agosto 1993), e la *trasparenza* nella designazione ed elezione dei candidati precedentemente monopolio delle segreterie dei partiti.

Lo strumento referendario si è rivelato ancor più destabilizzante per il regime partitocratico in occasione della consultazione popolare del *18 aprile 1993*, quando sono stati promossi ben *dieci quesiti referendari* (poi ridotti ad otto) di cui almeno sei incidevano in maniera determinante sull'assetto istituzionale. Sono così stati soppressi tre ministeri (Turismo, Agricoltura e Partecipazioni Statali) ed è stato abrogato il finanziamento annuale pubblico ai partiti. Ancora più importanti sono risultati altri due referendum: quello per la modifica della legge elettorale per i comuni e quello per l'elezione del Senato. Nel primo caso il corpo elettorale non ha avuto modo di esprimersi in quanto il Parlamento, incalzato dalla scadenza referendaria, ha approvato la nuova legge elettorale per Comuni, Province e Circoscrizioni (L. 25-3-1993, n. 81); nel secondo caso il referendum ha ottenuto una schiacciante maggioranza (l'82,2% dei voti favorevoli all'abrogazione) rendendo improcrastinabile l'emanazione di nuove leggi elettorali (appunto le citate LL. 276 e 277 dell'agosto '93).

b) *Procedimento referendario*

L'art. 75[3-4] Cost. stabilisce che «hanno diritto di partecipare al *referendum* tutti i cittadini chiamati ad eleggere la Camera dei deputati» e che la proposta soggetta a *referendum* è approvata se ha partecipato alla votazione la maggioranza degli aventi diritto e se è raggiunta la maggioranza dei voti validamente espressi».

Il *quorum* di partecipazione è molto elevato perché l'abrogazione della legge deve avvenire con un ampio consenso popolare.

La **legge di attuazione del referendum** prevista dall'ultimo comma dell'art. 75 Cost. è stata approvata con molto ritardo dal legislatore. Le modalità di attuazione del *referendum* infatti sono state stabilite con *la legge 25 maggio 1970, n. 252*.

Il *referendum* si svolge attraverso le seguenti **fasi** principali:

— **fase dell'iniziativa**: che può provenire da 500.000 elettori o da 5 Consigli Regionali.
Nel caso di iniziativa popolare, i *promotori* devono presentarsi, muniti di certificato di iscrizione nelle liste elettorali, alla *cancelleria della Corte di Cassazione* indicando la legge (o l'articolo) in ordine alla quale si intende promuovere la raccolta delle firme. La *cancelleria*, preso atto, con verbale, della richiesta, provvede a darne annuncio ufficiale nella Gazzetta Ufficiale;
— **fase della raccolta delle firme**: a tal uopo devono essere usati fogli del tipo «carta bollata» ma non bollati, preventivamente *vidimati* dalle segreterie comunali o dalle cancellerie degli uffici giudiziari.
In ogni facciata dei fogli devono essere indicati, all'inizio, sia il *quesito* da sottoporre a votazione sia la *legge* di cui si propone l'abrogazione.

Le firme, accompagnate dall'indicazione delle generalità dei sottoscrittori, devono essere *autenticate* da un notaio o da un funzionario abilitato a conferire pubblica fede ai documenti. Tale raccolta deve avvenire *entro tre mesi* dalla presentazione dell'iniziativa;

— **fase del deposito delle sottoscrizioni**: raccolte le firme, la richiesta di *referendum*, corredata dei certificati elettorali dei sottoscrittori, va depositata *entro il 30 settembre di ogni anno all'Ufficio centrale per il referendum*, costituito presso la Corte di Cassazione e composto da tutti i presidenti di sezione della Corte stessa.
Va precisato che *non può essere depositata* richiesta di *referendum* nell'anno anteriore alla scadenza della legislatura e nei sei mesi successivi alla data di convocazione dei comizi elettorali per evitare una sovrapposizione tra elezioni e *referendum* con la conseguenza che di fatto risultano pochi gli intervalli di tempo utili per presentare le richieste di *referendum*;

— **fase del controllo di legittimità**: entro *il 31 ottobre* l'Ufficio centrale deve rilevare, con *ordinanza*, le eventuali irregolarità delle singole richieste, assegnando ai presentatori un termine (non oltre il *20 novembre*) per sanarle (se è possibile) o presentare memorie difensive.
Scaduto tale termine, e comunque *non oltre il 15 dicembre*, l'Ufficio decide, *con ordinanza definitiva*, sulla legittimità di tutte le richieste presentate provvedendo alla *riunione* di quelle che presentano *analogie* o *uniformità di materie*;

— **fase del controllo di legittimità costituzionale**: successivamente la Corte costituzionale deve decidere, *con sentenza da pubblicarsi entro il 10 febbraio*, quali delle richieste siano da ammettersi e quali da respingersi perchè contrarie al disposto dell'art. 75, comma 2°, Cost.
Ricordiamo, a tal proposito, che la più recente giurisprudenza della Corte ha affermato la *inammissibilità* anche di quesiti formulati con una *pluralità di domande eterogenee e carenti di una matrice razionale unitaria*. Secondo la Corte, infatti, i quesiti referendari devono essere *omogenei* e l'omogeneità deve essere vagliata con riferimento alle norme che ne formano oggetto, considerate nella loro struttura e nella loro finalità per evidenziare un comune principio, la cui eliminazione o permanenza nell'ordinamento possa dipendere dalla risposta del corpo elettorale.
La domanda, conseguentemente, dovrà articolarsi in maniera chiara ed inconfondibile, oltre che semplice ed univoca.
Secondo qualche autore (MODUGNO), la Corte — enunciando l'imprescindibile esigenza della univocità, chiarezza e semplicità del quesito — ha «apparacchiato un'enorme scatola vuota nella quale in futuro potrà a piacimento (e ad arbitrio) mettere tutte le richieste referendiarie che per qualsiasi ragione essa ritenga di non far passare».

— **dell'indizione**: per le richieste ammesse, il Presidente della Repubblica, su deliberazione del Consiglio dei Ministri, indice il *referendum* fissando la convocazione degli elettori in una delle domeniche comprese tra il 15 aprile e il 15 giugno.
Nel caso di scioglimento anticipato delle Camere, il *referendum* già indetto si intende automaticamente sospeso e il procedimento riprenderà *dal 365° giorno successivo alla data delle elezioni*;

— **fase della votazione e dello scrutinio**: le modalità della consultazione popolare sono quelle prescritte per le elezioni politiche.
La proposta di referendum si intende approvata se ha riportato la maggioranza assoluta dei voti validamente espressi (non si tien conto delle schede bianche e di quelle nulle);

— **fase della proclamazione dei risultati**: terminate le operazioni l'Ufficio centrale del *referendum*, eseguiti gli opportuni controlli, procede alla proclamazione ufficiale dei risultati.

Nel caso che il **risultato** sia **contrario all'abrogazione** della legge, ne è data semplice *notizia* sulla Gazzetta Ufficiale e il *referendum non può essere riproposto prima che siano trascorsi cinque anni*.

Se, invece, il **risultato è favorevole all'abrogazione**, il Presidente della Repubblica, con proprio decreto, dichiara l'avvenuta *abrogazione* della legge; l'abrogazione ha effetto a decorrere dal giorno successivo a quello della pubblicazione del decreto sulla Gazzetta Ufficiale. Il P.d.R., nel decreto stesso, su proposta del Ministro interessato, previa deliberazione del Consiglio dei Ministri, può *ritardare* l'entrata in vigore dell'abrogazione fino a 60 giorni dalla data della pubblicazione e ciò per consentire al Parlamento di sostituire eventualmente le norme abrogate, evitando così un pericoloso vuoto legislativo.

Se prima della data dello svolgimento del *referendum*, la legge o le singole disposizioni cui il *referendum* si riferisce, siano state *abrogate*, l'Ufficio centrale per il *referendum* dichiara che le operazioni relative non devono più aver corso, essendo già stato rappresentato per altra via l'obiettivo che il *referendum* intendeva raggiungere.

La Corte Costituzionale, onde evitare abrogazioni solo «formali», ha precisato, con sent. 17-5-1978 n. 68, che «*se l'abrogazione delle norme soggette a referendum viene accompagnata da altra disciplina della stessa materia, senza però modificare né i principi ispiratori della complessiva disciplina preesistente né i contenuti normativi essenziali dei singoli precetti, il referendum si deve effettuare sulle nuove disposizioni legislative*».

c) *Efficacia del referendum*

Il *referendum* ha la *stessa* **efficacia** *della legge formale*, anche se procede «*a senso unico*» (PIZZORUSSO), in quanto esso **può solo abrogare** una disposizione legislativa ma **non introdurre precetti nuovi.**

Se dopo un *referendum* abrogativo il Parlamento emanasse una legge di uguale contenuto il Presidente della Repubblica sarebbe tenuto a *sciogliere* le Camere, perché esse si porrebbero in contrasto con la volontà popolare che dovrebbero istituzionalmente esprimere (BARILE).

Ad analoga conclusione si dovrebbe pervenire anche nella ipotesi in cui il Parlamento abrogasse o reintroducesse una legge costituzionale rispettivamente approvata o respinta dal corpo elettorale con il *referendum costituzionale*.

3. Segue: IL DIRITTO DI INIZIATIVA LEGISLATIVA POPOLARE

Il *popolo* può esercitare direttamente l'iniziativa legislativa proponendo al Parlamento, a mezzo di almeno 50.000 elettori, un *progetto di legge* redatto per articoli (art. 71, comma 2° Cost.).

Si ritiene in dottrina che all'iniziativa popolare siano sottratte quelle stesse leggi per le quali l'art. 75, 2¶ comma esclude il *referendum abrogativo*.

Le modalità di attuazione sono disciplinate dalla legge sul *referendum* (l. n. 352 del 1970), che ben poco aggiunge alla normativa costituzionale. È previsto in particolare che la proposta deve essere «accompagnata da una relazione che ne illustri le finalità e le norme».

Le *Camere* non hanno ovviamente l'obbligo di *approvare* ogni proposta di iniziativa popolare: *sono* soltanto *tenute a deliberare su di essa*. Il Presidente che la riceva non potrebbe archiviarla senza sottoporla all'assemblea. Tali proposte — come già si è detto — non decadano allo scadere delle legislature.

4. Segue: IL DIRITTO DI PETIZIONE POPOLARE

Attraverso la petizione popolare i cittadini portano a conoscenza delle Camere situazioni ed esigenze particolari, affinché le Camere stesse vi provvedano attraverso lo strumento legislativo (art. 50 Cost.).

In particolare secondo i regolamenti parlamentari, le Camere attraverso le *Commissioni* competenti sono tenute a prendere in considerazione tali petizioni per abbinarle ad un eventuale progetto di legge sulla stessa materia, invitare il Governo a presentare un progetto di legge sulla materia oggetto della petizione, oppure archiviarla. Le Camere quindi non sono tenute a provvedere sulle stesse e ciò spiega perchè questo istituto sia scarsamente utilizzato.

La petizione, sia essa esercitata *collettivamente* o *individualmente*, deve rappresentare un *interesse pubblico* e, pertanto, non è ammissibile far ricorso ad essa per rivendicare *diritti soggettivi* o *interessi legittimi* la cui tutela è affidata all'autorità giudiziaria ordinaria o amministrativa.

Il *diritto di petizione* può essere azionato *più facilmente* della iniziativa legislativa popolare perchè:

a) spetta a *tutti i cittadini* (*non* invece agli *stranieri* o agli *apolidi*) *anche se non elettori* e quindi anche ai minori di età, agli interdetti, agli indegni, etc.;
b) *non richiede particolari formalità*, eccettuata l'autenticazione della firma del proponente;
c) può essere esercitato da una singola persona, o da gruppi di più persone, senza limiti di numero;
d) anche se rivolta ad ottenere provvedimenti legislativi, *non richiede la formulazione di un disegno di legge vero e proprio*, come invece è prescritto per l'esercizio dell'iniziativa popolare, ma può essere generica e approssimativa.

5. I PARTITI POLITICI

A) Nozione e funzioni: i partiti come «gruppi intermedi»

I partiti politici sono associazioni di persone con comuni ideologie ed interessi che, attraverso una stabile organizzazione, mirano ad esercitare una influenza fondamentale sulla determinazione dell'indirizzo politico del Paese (VIRGA).

La presenza del partito nel sistema politico è, dunque, essenziale affinchè il *popolo*, per esercitare concretamente la *sovranità* attribuitagli dalla Costituzione, possa trasformarsi *«da massa indifferenziata in organismo capace di volontà consapevole»* (MORTATI); ciò spiega la presenza di *gruppi organizzati* (partiti, sindacati etc.) che si pongono come **«corpi intermedi»** fra la società e le istituzioni e che rientrano nel novero delle *«formazioni sociali»* espressamente previste dalla Costituzione (art. 2).

I partiti in veste di *«corpi intermedi»* fra la società e le istituzioni, si fanno carico dei problemi e degli interessi *della collettività nel suo complesso* (anche se le soluzioni concrete proposte per la risoluzione dei singoli problemi di solito variano da partito a partito).

Inoltre, i partiti, pur non essendo gli unici operatori politici dello Stato democratico *pluralista* (pensiamo ad esempio ai sindacati), svolgono una funzione esclusiva in quanto sono legittimati a partecipare alla *competizione elettorale* per la formazione degli organi elettivi dello Stato e di quegli enti pubblici elettivi chiamati ad esprimere indirizzi politici (Camere, Governo, Regioni, Comuni e Province).

È su questa base che possiamo distinguere i *partiti* come *movimenti politici* da altre associazioni che pur impegnate politicamente (esempio: *Italia Nostra*, etc.) non sono portatrici di progetti politici generali, ma perseguono *obiettivi politici specifici*, e *non si pongono direttamente in competizione* per la direzione politica del paese.

B) I rapporti tra Stato e partiti in Europa

L'atteggiamento dello Stato nei confronti dei partiti ha subito un'evoluzione storico-politica che ha attraversato, nella storia delle democrazie europee, *quattro distinte fasi*:

1. *opposizione*;
2. *indifferenza*;
3. *legittimazione*;
4. *incorporazione o rilevanza costituzionale*.

La *fase* dell'opposizione si può far risalire agli *albori* dello *Stato liberale*: l'ideologia individualista allora imperante mal si conciliava con l'organizzazione dei cittadini in partiti.

La *seconda e la terza fase* seguono progressivamente il passaggio dalla forma dello Stato liberale puro a quella dello *Stato democratico* e *partecipativo* che prima accetta e poi favorisce la presenza nel sistema dei partiti composti prima dai rappresentanti dei soli *«notabili»* e poi (con il progressivo ampliamento del suffragio) delle diverse *classi sociali* (c.d. *partiti di massa*).

La *quarta fase* viene vissuta in due modi diversi: da un lato vi sono gli Stati che, dopo la prima guerra mondiale, mantengono le *strutture democratiche* e sentono la necessità di attribuire rilievo e tutela costituzionale ai partiti, e dall'altro vi sono gli Stati *totalitari* che finiscono per considerare il *partito unico* come vero e proprio *organo dello Stato* mettendoli al centro delle istituzioni (così si verificò in diversa misura sia in *Unione sovietica* che nei paesi con regimi dittatoriali come l'Italia, la Germania, la Spagna).

L'evoluzione del *fenomeno dei partiti* si riflette parallelamente anche nella disciplina ad essi riservata dalle singole Carte Costituzionali.

Così, mentre tutti gli *Statuti ottocenteschi* di solito ignorano tale organismo di base, nelle *Costituzioni* più moderne essi sono, invece, previsti anche se in modo diverso, in rapporto alle vicende storiche di ciascun paese: così nella Costituzione della *Germania federale* vi è una spiccata tendenza alla *istituzionalizzazione* dei partiti per impedire il formarsi di partiti *«anti-sistema»* (si parla, con riferimento a tale situazione, di *«democrazia protetta»*).

Viceversa, nella Costituzione della *V Repubblica francese*, i partiti sono pressochè *ignorati* in quanto si ritiene sufficiente per la loro sopravvivenza il riconoscimento del *diritto d'associazione*.

Anche la nostra Costituzione che pur disciplina in due *articoli diversi* il diritto d'*associazione* (art. 18) e i *partiti politici* (art. 49) non si distacca di molto dal modello francese.

C) Gli artt. 18 e 49 Cost.: l'espressione «con metodo democratico»

Il fenomeno *associativo* in generale è disciplinato dall'art. 18 e dall'art. 49 che, senza quasi nulla aggiungere, fa esplicito riferimento alla libertà di associazione ai *partiti* politici. In particolare:

— l'art. 18, a proposito delle associazioni, afferma che *«i cittadini hanno diritto di associarsi liberamente, senza autorizzazione, per fini che non sono vietati ai singoli dalla legge penale»*;
— l'art. 49 dispone che *«tutti i cittadini hanno il diritto di associarsi liberamente in partiti, per concorrere con metodo democratico a determinare la politica nazionale»*.

Sul significato dell'espressione **«con metodo democratico»**, contenuta nell'art. 49 Cost., occorre precisare che:

— essa implica il **divieto assoluto** del ricorso a qualsiasi forma di **violenza**, fisica o morale, diretta a imporre determinate idee o scelte politiche di partito (MORTATI);
— **non** sembra, invece, che tale norma imponga di adottare una **struttura** effettivamente **democratica** anche all'*interno dei partiti*, tale cioè da consentire a tutti gli associati una eguale partecipazione all'attività di partito (MORTATI).

Dai *lavori preparatori* della Costituzione risulta infatti che furono rigettate le proposte che sancivano l'*obbligo della democrazia interna* dei partiti per due motivi essenziali:

— innanzitutto per la *difficoltà* di accertare e controllare la struttura democratica interna dei partiti, *senza lederne* l'autonomia;
— in secondo luogo, per la *volontarietà dell'adesione* ad un partito. Ciò comporta una libera scelta del soggetto, che se non condivide più la struttura organizzativa cui aderisce, può, di sua iniziativa, allontanarvisi in qualsiasi momento.

Secondo VIRGA, comunque, sarebbe auspicabile e non potrebbe esser tacciata di incostituzionalità una legge che prevedesse la *registrazione* dei partiti e un *controllo* sulle norme organizzative, per garantirne la *democraticità* dell'organizzazione interna e la *genuinità dell'elezione alle cariche interne e della designazione dei candidati*.

Tuttavia la *libertà di associazione* subisce un **controllo ideologico** riguardo al **programma** di partito; tale controllo è previsto dalla stessa Costituzione (*disp. trans. XII*) al fine di *impedire* la **ricostruzione del partito fascista.**

La disp. trans. XII della Costituzione ha lo scopo di vietare la creazione di *partiti* che, ispirandosi alla ideologia fascista, rinneghino il *metodo democratico* e attentino alle libertà fondamentali garantite dalla Costituzione.

La *difficoltà più seria* per il legislatore ordinario, all'atto dell'emanazione della legge di attuazione della disp. XII Cost. (c.d. legge Scelba), fu la definizione di *«fascismo»*, fenomeno che secondo tale legge si basa sui seguenti elementi:

— perseguimento di finalità antidemocratiche;
— esaltazione di esponenti, principi, metodi e fatti propri del disciolto partito fascista;
— compimento di manifestazioni esteriori di carattere fascista (ad esempio saluto romano, etc.).

D) Posizione dei partiti politici nella Costituzione

Se si guarda complessivamente al disegno costituzionale i caratteri essenziali che attualmente i partiti presentano nel nostro sistema sono quelli di essere:

— *operatori politici*;
— *in competizione fra loro*;
— *vincolati al metodo democratico*.

I partiti sono indubbiamente i principali, anche se non unici, *operatori politici*; ad essi sono attribuite *di fatto* numerose *funzioni pubbliche* come la presentazione di *liste alle elezioni* e la *designazione*, tramite i gruppi parlamentari, dei titolari d'importanti cariche pubbliche.

Tuttavia, tali funzioni di *carattere pubblicistico* si sovrappongono ad una natura *privatistica*: giuridicamente infatti i partiti sono *associazioni non riconosciute* disciplinate dagli artt. 36 ss. c.c.

I partiti, dunque, appaiono come organismi *«a doppia faccia»*, per un verso immersi nella società e per un altro nelle istituzioni (in particolare attraverso l'adesione dei loro eletti ai *gruppi parlamentari*).

Si può quindi affermare che la nostra Costituzione ha adottato una soluzione *intermedia* fra quella caratterizzata da una completa *indifferenza* (come la Costituzione della IV Repubblica francese) e quella connotata da una eccessiva *«istituzionalizzazione»* dei partiti (come, ad esempio, la Costituzione della Germania federale).

Tuttavia, la soluzione adottata, pur avendo il pregio di evitare sia un *sostanziale disinteresse* da parte delle *istituzioni* nei confronti dei partiti, che un'*eccessiva compressione* della libertà di associazione in partiti, dà inevitabilmente luogo a numerose incertezze interpretative (quando, ad esempio, si tratti di ammettere o meno, e in che termini, il *finanziamento pubblico dei partiti*, o il controllo sull'attività interna dei partiti stessi) (CHIMENTI).

E) L'attuale situazione del finanziamento pubblico dei partiti

I partiti politici costituiscono gli *strumenti attraverso i quali i cittadini concorrono alla determinazione della politica nazionale* (vedi art. 49 Cost.). Per svolgere tale azione, essi necessitano di una certa *disponibilità economica,* che copra le spese di organizzazione, propaganda, etc.

In «*teoria*» il finanziamento del partito può avvenire:

— attraverso le *sovvenzioni dei singoli iscritti* e *simpatizzanti* che, in tal modo, hanno anche la possibilità di controllare l'operato del loro partito;
— attraverso l'adozione di un sistema di *finanziamento statale*;
— attraverso l'esercizio diretto e indiretto di attività economiche a scopo di lucro, per mezzo di *società commerciali*, di *assicurazione*, etc. create e gestite da membri del partito, e i cui utili sono, in tutto o in parte, devoluti per sovvenzionare le attività del partito.

Fino a qualche tempo fa il problema del finanziamento pubblico ai partiti non si era posto nel nostro ordinamento. Successivamente a seguito di numerosi scandali suscitati da gravi fenomeni di corruzione da parte di centri di potere nonché di enti pubblici e privati e di partiti di Governo (scandali Montedison e Lockeed), fu varata la legge 2-5-1974, n. 195 detta «legge Piccoli» (modificata dalle leggi n. 11 del 1978, n. 659 del 1981 e n. 22 del 1982) per determinare una forma di contributo *generalizzato, proporzionale e trasparente* da parte dello Stato a *tutti* i partiti politici.

La legge prevedeva due forme di finanziamento pubblico:

— **annuale**, mediante uno stanziamento erogato ai gruppi parlamentari (che doveva essere poi devoluto per il 90% al partito di riferimento in proporzione al numero di deputati e senatori di ciascun gruppo) per l'esplicazione dei propri compiti istituzionali;
— **saltuario**, quale contributo per le spese elettorali, erogato dal Presidente della Camera direttamente ai *segretari dei partiti politici* in occasione di ogni tornata elettorale (regionale, nazionale, europea).

La legge Piccoli ha, tuttavia, avuto vita travagliata specie perché i partiti politici non hanno rinunciato a finanziamenti illeciti (come dimostrano le varie inchieste in corso). Essa fu sottoposta ad un primo *referendum* abrogativo nel 1978, promosso dal Partito Radicale, che però non ebbe successo (il 56,4% dei votanti risultò contrario all'abrogazione della legge).

Un nuovo *referendum*, proposto sempre dallo stesso partito, si è tenuto il 18 aprile 1993. Questa volta, in un mutato clima politico e con l'opinione pubblica particolarmente sensibilizzata ai fenomeni di corruzione e finanziamenti illeciti ai partiti, la proposta referendaria ha ricevuto una schiacciante maggioranza: il 90,2% dei votanti si è espresso a favore della parziale abrogazione della legge. Conseguentemente è *scomparso* il finanziamento pubblico annuale per i partiti mentre *permane* quello straordinario, corrisposto in occasione di consultazioni elettorali.

Il contributo statale in occasione dello svolgimento di elezioni è stato in seguito disciplinato dalla L. 10-12-1993, n. 515. Punti cardine della normativa sono:

— l'istituzione di due fondi (uno per la Camera e l'altro per il Senato) con una dotazione complessiva di circa 90 miliardi (somma ottenuta moltiplicando per 1.600 lire il numero degli abitanti del nostro Paese quale risulta dall'ultimo censimento) per il rimborso delle spese elettorali;
— la ripartizione di tale somma tra i diversi partiti secondo diverse modalità. In particolare:
  a) al Senato potranno partecipare al rimborso i partiti che abbiano ottenuto almeno 1 eletto ed il 5% dei voti o i candidati indipendenti che siano stati eletti o abbiano ricevuto almeno il 15% dei voti. La ripartizione avviene su base regionale;
  b) alla Camera concorreranno alla ripartizione i partiti che ottengono, in sede nazionale, almeno il 4% dei voti o il 3% ed 1 eletto.

Il finanziamento dei partiti è stato nuovamente oggetto di riforma con L. 2-1-1997, n. 2 in base alla quale:

— 110 miliardi annui si ricaveranno dai contribuenti che potranno sbarrare, all'atto della dichiarazione dei redditi, una apposita casella con cui destinare il 4 per mille dell'IRPEF a tale fine.
  Il ricavato verrà distribuito fra i partiti in proporzione dei voti ricevuti in ambito nazionale sempre che abbiano almeno 1 eletto alla Camera dei Deputati o al Senato;
— le persone fisiche e giuridiche potranno, inoltre, effettuare erogazioni a titolo di liberalità in favore di singoli partiti, godendo, in tal caso, di una detrazione di imposta pari al 22% per importi compresi fra 500.000 e 50 milioni di lire.

F) Divieti

Ai sensi dell'*art. 18 Cost.*, il partito politico *non necessita di autorizzazione e non può essere segreto*: «partito segreto» del resto è una contraddizione in termini, perché *in democrazia* il partito deve vivere alla luce del sole per perseguire i suoi scopi.

L'art. 18 vieta altresì le associazioni che perseguono, anche indirettamente, scopi politici mediante *organizzazioni di carattere militare*. Questa norma, oltre a bandire la presenza delle armi nelle associazioni, sancisce l'illiceità di quelle che prevedano al loro interno rapporti gerarchici troppo marcati, sì da non apparire più come associazione di *liberi cittadini* ma come strutture militarizzate.

Le disposizioni in materia di elezioni della Camera e del Senato impongono ai partiti che si presentano alle elezioni di depositare un *contrassegno* che riproduca il loro simbolo abituale e vietano la presentazione di simboli confondibili con quelli altrui o contrassegni riproducenti immagini o soggetti religiosi.

L'*art. 98*[3] *Cost.* consente al legislatore di stabilire limitazioni al diritto di iscriversi a partiti politici per i *magistrati*, i *militari di carriera in servizio permanente effettivo*, i *funzionari ed agenti di polizia*, i *magistrati*, i *rappresentanti diplomatici e consolari* all'estero.

La legge di attuazione esiste solo per gli appartenenti alla polizia; per le altre ipotesi il legislatore non ha ancora provveduto (un *decreto legge* emanato dal Governo nel maggio 1991 è stato lasciato decadere senza essere reiterato).

Per i *giudizi della Corte Costituzionale* la L. n. 87/1953 non vieta l'iscrizione ai partiti politici ma soltanto la militanza politica attiva. La legge n. 74/1990 vieta ai *membri del C.S.M.* lo svolgimento di «attività proprie degli iscritti ad un partito politico».

CAPITOLO SECONDO
LE AUTONOMIE TERRITORIALI

Sezione Prima
Le Regioni

1. LO STATO REGIONALE E LA REPUBBLICA ITALIANA

Per *Stato regionale* (v. *supra*) si intende — in linea teorica — quella forma di Stato che, accanto al soggetto Stato inteso come ente sovrano, prevede altri soggetti (enti territoriali autonomi) dotati, oltre che di potestà amministrativa, anche di limitata potestà legislativa (CUOMO).

Lo *Stato regionale* in particolare:

— attua, mediante appositi organi decentrati, un sistema più rispondente alle esigenze particolari dei cittadini volto a tutelare meglio e più dettagliatamente gli interessi dello Stato-comuntà e a realizzare appieno il principio della divisione dei poteri;
— costituisce una garanzia del cittadino che, attraverso il corpo elettorale regionale, può concorrere direttamente e «più da vicino» alla vita dello Stato.

Dall'analisi degli *artt. 114, 115, 116 Cost.* («La repubblica si riparte in regioni, province e comuni». «Le regioni sono costituite in *enti autonomi* con *propri poteri e funzioni* secondo i principi fissati nella Costituzione. Alla Sicilia, Sardegna, Trentino Alto-Adige, Friuli-Venezia Giulia e Val d'Aosta sono attribuite *forme e condizioni particolari* di autonomia, secondo gli statuti adottati con leggi costituzionali») e dell'art. 128 («le province e i comuni sono *enti autonomi* nell'ambito dei principi fissati dalle leggi generali della repubblica che ne determinano le funzioni»), si evince che il Costituente ha disciplinato differentemente:

— le **autonomie regionali**, ponendole su un *piano costituzionale* anche in merito alla disciplina di dettaglio (BARILE);
— le **altre autonomie locali**, che rappresentano solo degli enti autonomi territoriali.

2. IL REGIONALISMO

Al termine della grande guerra il tema del *regionalismo* acquistò nuovo vigore e venne affrontato da più parti con maggiore incisività.

I partiti che si erano inseriti nello schieramento politico nazionale (Radicale, Popolare, Repubblicano, Socialista) cominciarono, infatti, a formulare proposte più concrete e con prospettive di immediata realizzazione.

In realtà, il regionalismo rappresentava la logica reazione al *regime fascista* che, assunto il potere nell'ottobre del '22, avversò energicamente qualsiasi programma, regionalistico e, nella sua opera di accentramento, in base al criterio «tutto nello Stato, niente fuori o contro lo Stato», finì per ridurre le autonomie locali già esistenti — Comuni e Province — ad una forma di amministrazione «indiretta» dello Stato.

Dopo la caduta del fascismo, il movimento culturale e politico favorevole allo sviluppo delle autonomie locali, riprese vita assieme al problema di un riassetto istituzionale dello Stato su base regionalistica, che peraltro venne riproposto nei programmi politici di alcuni partiti (DC) che lo consideravano essenziale per la democratizzazione della politica del Paese.

Il *Regionalismo, come ideologia*, per VIRGA tende a:

— assicurare, una *migliore* rispondenza dell'*azione statale* alle necessità e caratteristiche locali;
— consentire, in un sistema policentrico di Governo, la *partecipazione di organi locali all'esercizio della funzione legislativa* e alla formulazione dell'*indirizzo politico*.

3. ATTUALE ORDINAMENTO ITALIANO

La Costituzione Repubblicana del 1948 — in aderenza con la corrente di pensiero favorevole al decentramento e in contrasto con il centralismo del precedente regime dittatoriale — configura un sistema ispirato al **principio pluralistico** sotto ogni aspetto e ad ogni livello: *pluralismo ideologico, sociale, istituzionale*.

Tale pluralismo è fondato sui principi fondamentali dell'**autonomia** e del **decentramento**, ossia sulla sostituzione di una molteplicità di centri decisionali ad un unico apparato posto al centro del Sistema.

L'**art. 5 Cost.**, infatti, proclama il riconoscimento e la *promozione di tutte le autonomie locali* e sancisce il *principio del decentramento amministrativo* nell'ambito dell'apparato statale; invita inoltre il legislatore ordinario ad adeguare i principi e i metodi della sua legislazione alle esigenze dell'autonomia e del decentramento.

Il tutto è dominato da una chiara e puntuale **riaffermazione del principio unitario** caratterizzante la nostra Repubblica, come a individuare il limite estremo oltre il quale il cosiddetto «*decentramento autonomistico*» non è più consentito perché produrrebbe il mutamento della struttura dello Stato prevista dal legislatore repubblicano.

In virtù di questi due opposti principi la Regione è al tempo stesso *ente autonomo ed organo dello Stato*.

4. NATURA, CARATTERI E AUTONOMIA DELLE REGIONI

Tenuto conto di quanto previsto dall'art. 5 Cost., per il quale la Repubblica, una e indivisibile, riconosce e promuove le autonomie locali, il successivo art. 114 stabilisce che la Repubblica si ripartisce in *Regioni, Province* e *Comuni*, mentre l'art. 115 precisa la *natura* delle Regioni, affermando che si tratta di enti *autonomi, con propri poteri e funzioni, nell'ambito dei principi fissati dalla Costituzione*.

La legge 142/90 ha però stabilito che anche Province e Comuni sono enti locali autonomi titolari di proprie funzioni ed esercitano, altresì, secondo le leggi statali e regionali, le funzioni attribuite o delegate dallo Stato e dalla Regione.

Le **Regioni**, in quanto enti **autonomi territoriali** sono dotate di:

— **autonomia statutaria**: cioè della possibilità di adottare un proprio *statuto* avente per oggetto la disciplina dell'*organizzazione e del funzionamento* dell'ente per tutte le attività non regolate direttamente dalla Costituzione;
— **autonomia d'indirizzo politico**: tali enti sono costituiti ed organizzati in modo da *rappresentare*, mediante propri consigli o assemblee a carattere elettivo, le esigenze e la volontà delle *rispettive collettività* e, pertanto, sono in grado di esprimere un *indirizzo politico* eventualmente *diverso* da quello del Parlamento e del governo nazionale.
Il limite fondamentale di tale autonomia d'indirizzo politico consiste nel rispetto da parte della Regione, dei *principi generali* dell'*ordinamento costituzionale dello Stato, degli interessi economici generali della comunità nazionale e della potestà politico-amministrativa spettante a ciascuna regione* (ad es.: sarebbe illegittima una legge che vietasse la vendita di prodotti provenienti da una determinata Regione);
— **autonomia legislativa**: a tutte le Regioni è riconosciuta la potestà di emanare leggi aventi valore di legge ordinaria. Tale potestà può essere esercitata dalle Regioni ordinarie nelle materie

tassativamente indicate negli artt. 117 e 118 Cost. e dalle Regioni ad autonomia speciale in quelle materie previste dai *rispettivi statuti*. L'efficacia di tali leggi è limitata al solo territorio regionale;
— **autonomia amministrativa**: ciascuna Regione è dotata di un proprio apparato amministrativo e le è riconosciuta la potestà di emanare atti amministrativi (c.d. *autarchia*);
— **autonomia finanziaria**: le Regioni godono di autonomia finanziaria nelle forme e nei limiti stabiliti dalle leggi della Repubblica in coordinamento con la finanza dello Stato.

Le regioni, ex art. 131 Cost., avrebbero dovuto essere diciannove. Con legge costituzionale n. 3 del 27-12-1963, si ebbe, invece, la creazione per distacco dall'Abruzzo della ventesima Regione: il Molise.

Ogni regione è retta da uno **statuto** a norma dell'art. 116 Cost..

Gli statuti delle *regioni speciali* sono adottati con leggi costituzionali in quanto derogano o possono derogare alle norme costituzionali regolatrici delle *regioni di diritto comune*.

La deroga più rilevante riguarda la funzione legislativa delle regioni a statuto speciale: esse, infatti, possono escludere, in taluni campi, la funzione legislativa statale.

Gli **statuti speciali** sono stati adottati, tutti con leggi costituzionali (nn. 2, 3, 4, 5 del 26 febbraio 1948; L. Cost. 31 gennaio 1963, n. 1; D.P.R. 31 agosto 1972, n. 670).

Di converso, per le **regioni di diritto comune**, l'art. 123 Cost. si limita a stabilire che «ogni regione ha uno statuto il quale, in armonia con la Costituzione e con le legge della Repubblica, stabilisce le norme relative all'organizzazione interna della regione».

L'armonia con la Costituzione e con le leggi della Repubblica pone non pochi problemi. Ci si chiede anzitutto se, in considerazione del fatto che in molti casi è la stessa Costituzione a prevedere l'emanazione di leggi in materia regionale, esistano o meno altri *limiti* nascenti da leggi ordinarie non previste dalla Carta Costituzionale.

BARILE sostiene che una risposta in senso positivo sarebbe inconcepibile: ciò significherebe, infatti, che gli statuti regionali non potrebbero essere in contrasto con alcuna legge dello Stato (ovviamente il Parlamento potrebbe rendere vana, con legge, l'autonomia regionale).

L'interpretazione più ragionevole dell'art. 123 è nel senso che *gli statuti devono essere in armonia con le sole leggi di riserva costituzionale*.

Tra queste **riserve costituzionali** ricordiamo:

— quelle ex art. 119 Cost., in materia di autonomia finanziaria delle regioni;
— quelle attinenti al controllo degli atti della regione, esercitato da un organo dello Stato (ex art. 125 Cost.);
— quelle in materia di sistema elettorale della regione (ex art. 122 Cost.).

Concretamente il problema *de quo* si pose in relazione alla L. 62/53 la quale aveva previsto tutta una serie di norme tese a delimitare l'autonomia regionale. Dopo lunghe discussioni sulla costituzionalità di questa legge, il legislatore — con L. 1084/1970 — abrogò alcuni articoli della legge 62/53 stabilendo da un lato che il controllo parlamentare degli statuti venisse effettuato mediante rinvio con richiesta di riesame, dall'altro che le disposizioni riguardanti la struttura interna delle regioni dovessero avere un valore transitorio fino al giorno dell'entrata in vigore degli statuti delle singole regioni.

Il 2° comma dell'art. 123 Cost. afferma, poi, che «lo statuto è deliberato dal Consiglio Regionale, a maggioranza assoluta, ed è approvato con legge della Repubblica».

Il Parlamento (L. 1084/1970) non può direttamente sostituire norme deliberate dalle Regioni, ma deve limitarsi a rifiutare l'approvazione, motivando il suo atto.

La dottrina dominante (MORTATI-VIRGA) è concorde nel ritenere la prevalenza degli statuti nelle leggi regionali successive.

Soltanto con *L. n. 281 del 16 maggio 1970* venne introdotta una normativa di *attuazione delle regioni a statuto ordinario*.

L'art. 17 di tale legge delegò il governo per il passaggio delle funzioni e del personale statale alle regioni.

La delega venne attuata mediante l'emanazione di 11 decreti delegati, tutti datati 14 gennaio '72, entrati in vigore il 1° aprile '72.

I *principi direttivi dettati* dati dal Parlamento al governo furono i seguenti:

— il trasferimento alle regioni delle funzioni doveva avvenire per settori organici di materie e tramite il trasferimento degli uffici periferici statali;
— sarebbe rimasta allo Stato la funzione di indirizzo e coordinamento delle attività delle regioni attienenti ad esigenze di carattere unitario;

— avrebbero dovuto essere delegate alle regioni le competenze residuali dello Stato, quando le funzioni trasferite fossero risultate prevalenti.

Nel 1975 venne invece emanata la l. n. 382, contenente norme sull'ordinamento e sull'organizzazione della P.A., che delegava il governo ad emanare decreti delegati volti a:

— completare il trasferimento alle regioni delle funzioni amministrative inerenti alle materie indicate nell'art. 117 Cost.;
— trasferire alle singole Regioni le funzioni esercitate da enti pubblici nelle materie di cui all'art. 117 Cost., disponendo il passaggio dei singoli uffici e beni;
— delegare le funzioni amministrative atte a mettere le Regioni in condizioni di funzionare;
— attribuire alle province e ai comuni le funzioni di interesse locale di cui all'art. 118 1° comma;
— sopprimere, a seguito del trasferimento, i capitoli del bilancio dello Stato attinenti alle spese assunte dalle Regioni.

Dopo più di due anni, il 29 agosto 1977 vennero emanati 3 decreti del P.D.R. (nn. 616, 617, 618) con i quali si è eseguita la delega concessa al governo dal Parlamento con la legge 382. Di tre decreti, in particolare:

— il n. *616*: attua la delega di cui all'art. 1 della L. 382;
— il n. *617*: sopprime gli uffici centrali e periferici delle amministrazioni statali;
— il n. *618*: istituisce, presso la Presidenza del Consiglio dei Ministri, i ruoli organici degli impiegati.

La legge n. 142/1990, sull'ordinamento delle autonomie locali, assegna al legislatore regionale la funzione di disciplinare la cooperazione di province e comuni tra loro e con la regione, «al fine di realizzare un efficiente sistema delle autonomie locali al servizio dello sviluppo economico, sociale e civile».

5. ORGANI DELLA REGIONE

Tali sono, secondo l'art. 121 della Costituzione:

A) Consiglio (o Assemblea) Regionale

Esercita le potestà *legislativa e regolamentare* attribuite alla Regione e le altre funzioni conferitegli dalla Costituzione e dalle leggi.

Presenta numerosi punti di contatto con il *Parlamento* in quanto:

— è eletto periodicamente (ogni 5 anni) dal Corpo elettorale regionale;
— pone in essere le leggi regionali;
— elegge e controlla la Giunta regionale (funzione ispettiva);
— al contrario del Parlamento, i Consiglieri non godono dell'immunità penale, ma solo dell'*insindacabilità* per cui nessuno di essi può esser chiamato a rispondere delle opinioni e voti espressi nell'esercizio delle sue funzioni;
— la carica di consigliere è *incompatibile* con quella di deputato o senatore e con quella di consigliere di altra regione.

Il *numero* dei consiglieri, ex art. 2 legge n. 108/1968, è il seguente:

— 80 membri per le Regioni con popolazione superiore a *6 milioni* di abitanti;
— 60 membri per quelle con popolazione superiore a *4 milioni*;
— 50 membri per quelle con popolazione superiore a *3 milioni*;
— 40 membri per quelle con popolazione superiore a *1 milione*;
— 30 membri per le altre.

Il sistema elettorale regionale adottato con la L. 17-2-1968, n. 108 era, al pari di quello per l'elezione della Camera e del Senato, rigidamente proporzionale. Dopo il varo delle nuove leggi

elettorali nazionali e di quelle per Comuni e Province (L. 81/93) era ormai necessario adeguare anche il sistema elettorale regionale: a ciò si è provveduto con la **L. 23-2-1995, n. 43** che però ha introdotto un sistema ancora diverso da quelli prima citati.

La nuova legge elettorale infatti ha conservato *la disciplina della L. 108/68 inserendovi dei correttivi maggioritari.*

I punti salienti della nuova disciplina, infatti, sono:

— il sistema proporzionale sopravvive per l'elezione dei 4/5 dei consiglieri (80% dei seggi) sulla base di liste provinciali concorrenti. Non saranno però assegnati seggi alle liste che a livello regionale non hanno superato il 3% dei voti, a meno che non risultino collegate ad una lista regionale che ha ottenuto più del 5% dei voti;
— il sistema maggioritario è stato introdotto per l'elezione di 1/5 dei consiglieri (20% dei seggi) che però saranno assegnate sulla base di liste regionali e non provinciali.

Con la nuova legge sono, inoltre, stati introdotti diversi meccanismi che mirano ad assicurare una maggiore stabilità del Consiglio regionale come il premio di maggioranza, il premio di «governabilità» ed una norma che prevede la cessazione anticipata della legislatura se nei primi due anni del mandato consiliare viene meno il rapporto fiduciario tra il Consiglio regionale e la Giunta.

B) Giunta regionale

È l'**organo esecutivo** della Regione, è eletto dal Consiglio ed ha funzioni di governo. Presenta punti di contatto con il Governo in quanto:

— gli *assessori* hanno caratteristiche simili a quelle dei Ministri, e a ciascuno sovrintende ad un ramo dell'attività amministrativa regionale;
— benché gli statuti regionali non prevedano un «*rapporto di fiducia*» tra Consiglio e Giunta, tale rapporto sussite (come tra Parlamento o Governo) perché se la Giunta non si adegua alle direttive del corpo elettorale regionale è costretta a dimettersi per mozione di sfiducia del Consiglio regionale.

C) Segue: tipo di Governo

Problema dibattuto è quello della esatta identificazione del tipo di Governo esistente nelle regioni di diritto comune.

In ciascuna regione, infatti, nel silenzio della Costituzione, è stato affidato al legislatore regionale il compito di determinare, in concreto, i rapporti tra potere esecutivo (Giunta) e legislativo (Consiglio).

Ciò ha fatto sì che ciascuna Regione adottasse una struttura di governo propria.

Per BARILE il tipo di governo di ciascuna Regione si avvicina alla forma di governo c.d. «*parlamentare*», anche se i poteri di *indirizzo politico* sono di competenza del *Consiglio* (e non della Giunta come è invece nel sistema nazionale: in quanto si ricordi che la *Giunta* equivale, come organo, al *Governo*).

Ciò trova conferma:

— nell'art. 21 dello Statuto della Regione Toscana secondo cui «il Consiglio (*e non la Giunta*) esprime l'indirizzo politico e amministrativo della regione e ne controlla l'attuazione»;
— nel fatto che il Consiglio (e non la Giunta) delibera sulla programmazione, sul piano regionale di sviluppo economico, sul piano urbanistico, etc.

D) Presidente della Giunta regionale

Il Presidente ha una duplice veste:

— da un lato è **capo della Regione**, rappresentando e promulgando i regolamenti regionali
— dall'altro **rappresenta il governo** e, come il Sindaco, «dirige le funzioni amministrative delegate dallo Stato alla regione conformandosi alle istruzioni del potere centrale».

Esso, in particolare, presenta molti punti di contatto con:

— *il Presidente del Consiglio dei Ministri*, perché
  — dirige e coordina l'attività della Giunta Regionale;
  — è, rispetto agli assessori, in posizione di *preminenza politica*, ma non in posizione di supremazia gerarchica;
— *il Presidente della Repubblica*, perché gli spettano alcune funzioni che esercita in posizione autonoma rispetto alla Giunta. In questi casi rappresenta l'unità regionale ed è garante dell'organizzazione costituzionale.

In realtà è difficile che egli riesca a mantenersi imparziale, alla stessa stregua del Presidente della Repubblica, perché troppo vincolato alla maggioranza elettorale della Regione.

Tra le **funzioni principali** del Presidente della Regione ricordiamo:

— la promulgazione delle leggi regionali;
— l'indizione delle elezioni per l'assemblea regionale;
— la partecipazione al Consiglio dei Ministri con voto deliberativo per materia di interesse regionale.

6. L'AUTONOMIA FINANZIARIA

A) L'art. 119 della Costituzione

Secondo l'art. 119 Cost.: «le Regioni hanno autonomia finanziaria nelle forme e nei limiti stabiliti dalle leggi della Repubblica, che la coordinano con la finanza dello Stato, delle province e dei comuni».

Questa *autonomia*, per essere efficace, postula:

— l'attribuzione alle regioni, «in relazione ai bisogni», di «tributi propri e quote di tributi erariali» (art. 119, 2° comma);
— l'assegnazione di «contributi speciali» a singole Regioni (specialmente meridionali) per «provvedere a scopi determinati» (art. 119, 3° comma).

B) La legislazione ordinaria

Oltre all'importante legge n. 335/76 in tema di contabilità e bilancio regionale, nel 1990 è intervenuta la legge n. 158, che ha confermato, pur con alcune importanti modifiche, il sistema delineato dalla l. n. 281 del 1970: l'**autonomia finanziaria delle regioni** è garantita da:

a) tributi propri e quote di tributi erariali, accorpati in un fondo comune per lo svolgimento delle funzioni normali;
b) trasferimenti dallo Stato per investimenti, accorpati in un fondo per il finanziamento dei programmi regionali di sviluppo;
c) eventuali contributi speciali per provvedere a scopi determinati e per le regioni meridionali;
d) ricorso, nei limiti delle vigenti leggi, all'indebitamento.

In relazione al fondo comune, di cui al punto *sub a*, va ricordato che esso viene ripartito tra le regioni di diritto comune secondo il seguente sistema:

a) per *sei decimi* in proporzione diretta alla popolazione residente in ciascuna regione;
b) per *un decimo* in proporzione diretta alla superficie di ogni regione;
c) per i rimanenti *tre decimi*, in base ai criteri del grado di disoccupazione, del tasso di emigrazione e del carico (pro capite) dell'imposta complementare progressiva sul reddito complessivo.

La Corte Costituzionale ha fissato, in tema di autonomia finanziaria delle regioni, alcuni fondamentali, principi:

a) lo Stato non è vincolato ad attribuire alle Regioni tributi determinati o quote di tributi erariali a condizione che non venga sensibilmente alterato il rapporto di corrispondenza tra bisogni delle regioni e mezzi per farvi fronte;
b) non è legittimo il ricorso a misure e strumenti di organizzazione, controllo e coordinamento della gestione finanziaria della regione (anche se predisposti *ex lege*), i quali violino competenze e

c) neanche l'emergenza economica può incidere negativamente su aree di interessi e competenze costituzionalmente garantiti alle regioni (307/1983 e 245/1984).

Il sistema delle entrate illustrato in precedenza, che ha interessato il periodo tra il 1970 e il 1992, è stato caratterizzato dalla costante ed incombente presenza dello Stato, che ha sopperito alle carenze degli enti territoriali finanziando, mediante *fondi speciali*, il loro fabbisogno.

Nel 1992, appunto, la profonda crisi economica che ha interessato il nostro Paese, ha reso improcrastinabile una sostanziale inversione di tendenze. Di qui l'emanazione della L. 23-10-1992, n. 421 che ha, tra l'altro, delegato il Governo a modificare il meccanismo delle entrate delle Regioni (delle province e dei comuni): ciò è avvenuto con il *D.Lgs. 30-12-1992, n. 504*. La scelta del legislatore è stata estremamente chiara: limitare il flusso incontrollato di denaro dalle casse dello Stato agli enti locali, assicurando a questi ultimi *autonome entrate di carattere tributario*.

Per quanto concerne in particolare le Regioni (a statuto ordinario), le disposizioni di maggior rilievo riguardano l'attribuzione alle stesse dell'intero ammontare delle tasse automobilistiche (con facoltà di rideterminarle di anno in anno).

C) La legge 549/95 e il fondo perequativo

Con l'approvazione della legge finanziaria 1996 si può dire avviato, seppure timidamente, il processo di *riforma fiscale in senso federale* da più parti auspicato. In particolare la legge 549/95 ha previsto:

— la cessazione dell'erogazione Stato-regione (circa 11.000 miliardi) per le funzioni assegnate *in toto* alle Regioni;
— il versamento in favore delle Regioni di una quota (fissata in lire 350) dell'accisa sulla benzina erogata all'interno del proprio territorio;
— il versamento in favore delle Regioni dell'imposta sulla benzina per autotrazione.

Per sopperire agli eventuali squilibri derivanti dal fatto che i nuovi gettiti fiscali non riusciranno a compensare la riduzione dei trasferimenti, a partire dal 1997 è istituito un **fondo perequativo**.

Vengono inoltre istituiti nuovi tributi regionali:

— la tassa per il diritto allo studio universitario;
— la tassa per il deposito in discarica dei rifiuti solidi.

D) Il demanio e il patrimonio regionale

Ai sensi dell'art. 119, infine «*la regione ha un proprio demanio e patrimonio, secondo le modalità stabilite con legge della Repubblica*».

7. FUNZIONI DELLE REGIONI: PARTECIPAZIONE ALL'ATTIVITÀ STATALE; LA CONFERENZA PERMANENTE

Le Regioni, nel nostro ordinamento, vengono in rilievo:

— *come enti che partecipano*, accanto agli organi costituzionali, ai cittadini etc., alla vita e all'*attività dello Stato*;
— come enti *dotati di particolari competenze*.

Sotto il primo profilo:

— godono del *potere di iniziativa legislativa* (art. 121 Cost.);
— partecipano all'*elezione del presidente della repubblica* (art. 83 Cost.);
— possono richiedere il *referendum* (art. 183 Cost.);
— i presidenti delle *regioni a statuto speciale* hanno il diritto di partecipare alle sedute del consiglio dei ministri quando si discutono questioni relative alle loro regioni.

In tema, sempre più attuale, di **coordinamento** e raccordo **tra Stato e regioni di diritto comune** la legge n. 400 del 1988 (sulla presidenza del Consiglio), ha istituito la **Conferenza permanente** per

i rapporti tra lo Stato e le regioni e le province autonome, in tema di indirizzi di politica generale incidenti su materie di spettanza regionale.

La conferenza, convocata dal Presidente del Consiglio ogni sei mesi, vede la partecipazione, di diritto, dei Presidenti delle regioni e delle province autonome, mentre possono essere invitati i ministri interessati agli argomenti in discussione.

Importanti novità in tema di attività della conferenza Stato-regioni sono state introdotte:

— con la c.d. riforma Bassanini sul decentramento amministrativo (legge 15-3-1997, n. 59) che prevede che gli *atti di indirizzo e coordinamento* delle funzioni amministrative regionali e le *direttive relative all'esercizio delle funzioni delegate* siano adottate dal Governo previa intesa con la Conferenza Stato-regioni;
— con il D.Lgs. 28-8-1997, n. 281 con cui sono state ulteriormente ampliate le competenze della Conferenza con particolare attenzione per l'*attività consultiva* in ordine a schemi di disegni di legge, di decreti legislativi o di regolamenti governativi in materie di interesse regionale.

Vengono poi, nel medesimo provvedimento, regolati i rapporti fra Regioni e Unione Europea.

8. AUTONOMIA NORMATIVA E REGOLAMENTARE DELLE REGIONI

L'attribuzione alle Regioni della *potestà legislativa* costituisce la caratteristica peculiare dell'ordinamento regionale italiano, e conferisce alle stesse Regioni ben altra dignità ed importanza rispetto agli enti autarchici istituiti a scopo di mero decentramento amministrativo.

A) Caratteri generali

Si distinguono *tre diversi tipi di competenza legislativa regionale*:

a) **potestà primaria ed esclusiva**
Spetta soltanto alle *Regioni a Statuto speciale e limitatamente alle materie tassativamente* elencate nei rispettivi Statuti. Allo Stato viene ad essere inibito ogni intervento legislativo per la disciplina di tali materie, anche nel caso che la Regione non faccia uso di tale sua potestà legislativa.

Tale competenza è:

— *primaria*: perché ha lo stesso grado della legge statale;
— *esclusiva*: perché prevale su quella statale.

b) **potestà concorrente** (con quella dello Stato) o *ripartita o complementare o suppletiva*.
Spetta tanto alle Regioni *ordinarie* quanto a quelle a *Statuto speciale*.
Nelle materie oggetto di tale competenza (elencate nell'art. 117 Cost.) la Regione legifera nell'ambito dei principi fondamentali stabiliti dallo Stato con leggi statali, dette *leggi-quadro o cornice*. La legge-quadro, però, deve limitarsi a dare le «*direttive fondamentali*», lasciando alla «*legge concorrente*» regionale la disciplina specifica ed integrale della materia, nell'ambito territoriale della Regione.

Tale competenza è:

— *primaria*: perché ha lo stesso grado della legge statale;
— *concorrente*: perché subordinata alle leggi cornice o in mancanza, ai principi fondamentali della legislazione statale.

c) **potestà integrativa o di attuazione** (delle leggi statali).
Tale competenza, che inerisce a materie diverse da quelle indicate nell'art. 117 Cost., trova il suo fondamento nell'ultimo capoverso dell'art. 117 stesso, il quale, testualmente, dispone: «*Le leggi della Repubblica possono demandare alla Regione il potere di emanare norme per la loro attuazione*». Le norme integrative e di attuazione delle leggi statali esistono, dunque, solo se lo Stato delega alle Regioni la potestà di emanarle.

Per VIRGA strettamente connesse e derivanti dalla potestà legislativa risultano altresì:

— *la potestà di determinare l'indirizzo politico regionale*: tale indirizzo può anche essere divergente da quello statale se la *coalizione governativa regionale* è diversa da quella statale;
— *la potestà di programmazione*: i programmi della Regione possono essere anche diversi (e contrari?) da quelli statali.

B) Limiti alla legislazione regionale

a) *I limiti generali*

Nell'esercizio della sua potestà legislativa, sia *essa esclusiva, concorrente* o *integrativa*, la Regione incontra i seguenti limiti:

1) *Il limite costituzionale*

Il limite costituzionale si specifica innanzitutto nel *principio di uguaglianza*.
L'individuazione di tale limite appare particolarmente difficile in riferimento alla legge regionale, poiché nell'ambito di una stessa materia è possibile che tale fonte possa dettare una disciplina differenziata, introducendo trattamenti discriminatori tra i cittadini, a seconda della loro appartenenza a questa o a quella Regione.

2) *Il limite territoriale*

Questo limite discende dalla *natura territoriale* dell'ente ed in base ad esso, ciascuna Regione può legiferare nell'ambito del proprio territorio. Tale limite deve essere inteso nel senso che ad ogni Regione *non* è consentito di *interferire* negli affari interni di altre Regioni, né di *estendere* la propria influenza al di fuori della propria estensione territoriale, ma non anche nel senso di non consentire l'emanazione di atti legislativi il cui effetto si manifesti legittimamente anche al di fuori di detta estensione.

3) *Il limite degli obblighi internazionali*

La Corte costituzionale ha precisato che solo lo Stato può dare esecuzione, nell'ambito del suo territorio, ai trattati internazionali, e che le Regioni sono tenute ad uniformarsi a tale disciplina. Ad esse non è impedito di legiferare in materie rientranti in accordi internazionali, *ma è solo impedito di prevaricare le norme dei trattati e del diritto internazionale in genere*.
Infatti, poiché alla base dell'ordinamento regionale vi sono interessi regionalmente localizzati, le relative competenze sono finalizzate alla cura di interessi territorialmente circoscritti, cosicché sono *esclusi dalle attribuzioni regionali gli apprezzamenti di politica estera e la formulazione di accordi* con soggetti propri di altri ordinamenti, compiti questi spettanti nel nostro sistema costituzionale esclusivamente agli organi dello Stato.
La **L. 86/89** (Legge La Pergola), modifica la posizione delle regioni a statuto ordinario, consentendo loro di dare attuazione alle direttive comunitarie «dopo l'entrata in vigore della prima legge comunitaria successiva alla notifica delle direttive», cioè quella che ogni anno le Camere adottano per adeguare l'ordinamento interno a quello comunitario.

4) *Il limite dei principi generali e dell'unità dell'ordinamento giuridico*

La Corte costituzionale ha precisato che sono *principi generali dell'ordinamento giuridico* quegli «*orientamenti e quelle direttive di carattere generale e fondamentale che si possono desumere dalla connessione sistematica delle norme che concorrono a formare, in un dato momento storico, il tessuto dell'ordinamento vigente*» quali, ad esempio, il principio della libera concorrenza, dell'irretroattività delle leggi penali e finanziarie, della legalità dell'azione amministrativa e del giusto procedimento, etc. Non appartengono, pertanto, alla predetta categoria i principi fissati dalle leggi statali per singoli settori o materie; ne fanno parte, invece, quei criteri generali cui è informata la legislazione statale che disciplina quei settori e quelle materie.
Il limite dei principi generali va comunque integrato con quello dell'*unità dell'ordinamento giuridico*.
Questo ha una portata più generica, e tende a sottolineare il carattere di unità e di indivisibilità del nostro ordinamento politico e giuridico, sancito dall'art. 5 Cost., nei confronti della potestà normativa regionale.

b) *Altri limiti*

1) *Le materie attribuite alla potestà legislativa ripartita*

Le Regioni a statuto ordinario hanno competenza legislativa nelle sole *materie tassativamente ad esse assegnate*, ed il cui elenco è contenuto nell'*art. 117* della Costituzione.
La Corte costituzionale ha, nel corso degli anni, elaborato una serie di principi di *carattere oggettivo* che, pur dopo l'avvento dell'ordinamento regionale, costituiscono un valido criterio di orientamento.

2) *Le materie attribuite alla potestà legislativa primaria*

Le Regioni a Statuto speciale trovano nei propri Statuti l'elenco delle materie per le quali esse hanno potestà legislativa primaria.
Invero, le materie contenute in tali Statuti sono analoghe a quelle indicate dall'art. 117 Cost.

La differenza tra le due potestà legislative regionali, primaria e ripartita, è da ricercare, più che nelle materie, nei limiti (la potestà legislativa primaria non deve osservare i principi indicati nelle leggi-cornice) e nel diverso grado di intangibilità di leggi esclusive e leggi ripartite.

3) *Il limite della riserva di legge*

In tema di riserva di legge, salvo alcune materie riservate certamente alla legge dello Stato (si pensi ad esempio alla riserva di legge in materia penale — art. 25 Cost. — o in materia economica — art. 41, 2° comma, Cost.) è necessario stabilire in via interpretativa quali riserve soddisfino una esigenza di uniformità di disciplina, e quali invece consentano una normazione differenziata da parte della Regione.
La presenza di una riserva di legge non viene considerata come limite preclusivo nei confronti della Regione, bensì come un segnale eloquente della possibile esistenza di principi che prevedano la competenza statale e la relativa *contrazione* di quella regionale.

c) *Altri obblighi delle regioni*

1) *L'obbligo di copertura finanziaria per le leggi regionali importanti nuove spese*

L'art. 20 della legge n. 281 del 1970 stabilisce che le leggi regionali che importino *nuove o maggiori spese*, ovvero *minori entrate*, debbano necessariamente *indicare i mezzi* per farvi fronte.
È fatto inoltre divieto alle Regioni che, con la legge di approvazione del bilancio, stabiliscano nuove o maggiori entrate o dispongano nuove o maggiori spese.
Queste regole, rispondenti ai principi contenuti nell'art. 81 Cost., sono state ritenute applicabili anche alle *Regioni a statuto speciale*.

2) *Il divieto di ostacolare la libera circolazione delle persone e delle cose da Regione a Regione*

Tale divieto è espressamente previsto dall'art. 120 Cost. che detta: «La Regione non può istituire dazi d'importazione o esportazione o transito fra le Regioni.
Non può adottare provvedimenti che ostacolino in qualsiasi modo la libera circolazione delle persone e delle cose fra le Regioni.
Non può limitare il diritto dei cittadini di esercitare in qualunque parte del territorio nazionale la loro professione, impiego o lavoro».

3) *L'armonia con l'interesse nazionale e con quello delle altre Regioni*

Tale obbligo sancito dall'art. 117 Cost., attiene al merito della legge e viene garantito dall'attribuzione allo Stato di una *funzione di indirizzo e coordinamento*.
La *funzione di indirizzo e coordinamento*, a sua volta, è prevista dall'art. 17 della L. 281 del 1970, e disciplinata dall'art. 3 della L. 22-7-1975, n. 382.
Tale funzione, fuori dei casi in cui sia espressa con legge o con atto avente forza di legge, deve essere esercitata mediante deliberazioni del Consiglio dei Ministri su proposta del Presidente del Consiglio d'intesa coi Ministri competenti, ovvero può essere delegata di volta in volta al C.I.P.E. (Comitato Interministeriale per la Programmazione Economica) nelle materie di sua competenza, o, per affari particolari, allo stesso Presidente del Consiglio.

Del resto, alla posizione assunta dalla Corte, si affianca quella del D.P.R. 616/77, che non trasferisce ma delega alle Regioni le funzioni amministrative concernenti le persone giuridiche private (diverse dalle società) operanti nell'ambito delle materie elencate dall'art. 117 Cost. e i cui fini sono delimitati nel territorio regionale.

C) L'efficacia della legge regionale: rapporti con le leggi dello Stato

Riassumendo i *rapporti* tra *leggi statali e leggi regionali* nelle materie attribuite alla legislazione esclusiva o concorrente delle Regioni, si può dire anche che:

1) fino al momento in cui la *Regione non abbia fatto uso* della propria *potestà legislativa*, trova applicazione nel suo territorio, come in tutto il territorio dello Stato, la *legislazione statale* che disciplina quella particolare materia;
2) con l'emanazione della *legge regionale* si verifica il c.d. *effetto ghigliottina*: la legge statale che regola la materia disciplinata dalla nuova legge regionale, pur continuando ad applicarsi in tutte le altre parti del territorio in cui non viga una diversa normativa regionale, *non trova più applicazione* nel territorio della Regione che ha diversamente disciplinato la materia. L'*effetto ghigliottina* tuttavia non comporta l'abrogazione della legge statale, ma solo una sua *inapplicabilità*;
3) il *concreto esercizio* della *potestà legislativa* nelle singole materie da parte della Regione non comporta una perdita di potestà legislativa nelle materie stesse da parte dello Stato. Questo, quale ente sovrano, pur dopo l'emanazione delle singole leggi regionali *conserva la potestà di legiferare* nelle materie attribuite alla competenza delle Regioni, e può

concretamente esercitarla, con l'unica conseguenza che, fino a quando in quelle materie continueranno ad aver efficacia le leggi regionali, la normativa statale sarà in concreto *inapplicabile* nel territorio delle Regioni che legiferano nella materia medesima.

Inoltre, lo Stato, appunto perché conserva la potestà legislativa, può dettare *nuovi principi generali* che regolano le materie stesse; in tal caso, per il limite alla legislazione regionale costituito dai principi generali dell'ordinamento giuridico dello Stato, la *nuova normativa di principio* dettata dallo Stato *abroga* quella parte delle norme regionali che risultino con essa in *contrasto e vi si sostituisce* fino a quando il legislatore regionale, facendo uso del suo potere, non abbia provveduto ad adeguare le proprie norme ai nuovi principi.

D) Le singole materie in cui si esplica la potestà legislativa regionale

Tutte e cinque le Regioni a Statuto speciale hanno potestà legislativa esclusiva in determinate materie espressamente previste dai rispettivi Statuti.

Solo per *quattro* delle cinque Regioni a Statuto speciale (Sicilia, Sardegna, Trentino-Alto Adige e Friuli-Venezia Giulia) è prevista, accanto alla potestà legislativa esclusiva, *anche un'ampia potestà legislativa concorrente*, da esercitarsi «entro i limiti dei principi ed interessi generali cui si informa la legislazione dello Stato»; per la Valle d'Aosta tale tipo di competenza legislativa è prevista solo per la disciplina dei *controlli* sugli atti degli enti locali (art. 43 dello Statuto).

La potestà legislativa integrativa, cioè la potestà di emanare norme legislative di completamento e di attuazione delle leggi dello Stato, è attribuita, tra le *Regioni a Statuto speciale*, solo alla Sardegna, al Trentino-Alto Adige, alla Valle d'Aosta ed al Friuli Venezia Giulia, mentre non è attribuita alla Sicilia.

La potestà legislativa è riconosciuta, nel nostro ordinamento, anche alle Province autonome di Trento e Bolzano, le due Province in cui si suddivide la Regione Trentino-Alto Adige: si distingue una potestà *esclusiva*, una potestà *concorrente*, ed una potestà *integrativa*.

Ai sensi del primo comma dell'art. 117 della Costituzione, le Regioni ordinarie hanno la potestà di emanare norme legislative «*nei limiti dei principi fondamentali stabiliti dalle leggi dello Stato, sempreché le norme stesse non siano in contrasto con l'interesse nazionale e con quello di altre Regioni*» (potestà legislativa concorrente), nelle seguenti materie:

1) ordinamento degli uffici e degli enti amministrativi dipendenti dalla Regione;
2) circoscrizioni comunali;
3) polizia locale urbana e rurale;
4) fiere e mercati;
5) beneficenza pubblica ed assistenza sanitaria ed ospedaliera;
6) istruzione artigiana e professionale e assistenza scolastica;
7) musei e biblioteche di enti locali;
8) urbanistica;
9) turismo ed industria alberghiera;
10) tranvie e linee automobilistiche d'interesse nazionale;
11) viabilità, acquedotti e lavori pubblici di interesse regionale;
12) navigazione e porti lacuali;
13) acque minerali e termali;
14) cave e torbiere;
15) caccia;
16) pesca nelle acque interne;
17) agricoltura e foreste;
18) artigianato;
19) altre materie previste in leggi costituzionali.

Ai sensi dell'ultimo comma dello stesso art. 117, infine, le leggi della Repubblica possono demandare alle Regioni il potere di emanare norme per la loro attuazione (c.d. potestà legislativa *integrativa* o di *attuazione*).

E) La potestà regolamentare regionale

a) *Fondamento, attribuzione, tipologia*

Le materie nelle quali si esplica la potestà regolamentare delle Regioni sono, ovviamente, quelle amministrative ad esse attribuite, e quindi, per le *Regioni a Statuto ordinario*, quelle elencate nell'art. *118 Cost.* La legge statale può, tuttavia, attribuire alla Regione altri poteri regolamentari (art. 117, 2° comma, Cost.).

La potestà regolamentare delle Regioni, a differenza della potestà regolamentare di qualsiasi altra autorità amministrativa (Governo compreso), trova il suo *fondamento* direttamente *nella Costituzione*: essa è infatti attribuita alle Regioni, come già detto, dall'art. 121 Cost.

Essa è attribuita, nelle Regioni a Statuto ordinario nonché in Sardegna ed in Valle d'Aosta, *non all'organo esecutivo della Regione, ma* allo stesso *organo legislativo*.

Anche i regolamenti regionali, come quelli statali, possono distinguersi in:

— *regolamenti di esecuzione*, contenenti le norme di dettaglio per l'esecuzione delle leggi regionali;
— *regolamenti di organizzazione*, emanati per disciplinare l'organizzazione degli uffici e degli enti dipendenti dalla Regione;
— *regolamenti indipendenti*, emanati per disciplinare materie attribuite alla competenza amministrativa regionale.

b) *Criteri di scelta tra potestà regolamentare e legislativa*

La sfera di competenza dell'autonomia regolamentare *coincide* con quella della potestà legislativa della Regione, ed è assoggettata agli stessi limiti: nelle materie di sua competenza, quindi, la Regione può *far uso indifferentemente* sia dei suoi poteri legislativi sia di quelli regolamentari per la disciplina delle varie fattispecie. Ma tra legge e regolamento regionale esiste un'equiparazione solo per contenuto, e non per disciplina, poiché diverso rimane il regime giuridico cui sono rispettivamente assoggettati.

Infatti, solo le *leggi* e non i regolamenti possono introdurre nell'ordinamento regionale una *diversa disciplina giuridica* in grado di *abrogare la preesistente legislazione*, sia essa regionale che statale.

Ne discende che *difficilmente* si riscontrano nella *pratica regolamenti regionali indipendenti*. È raro anche il ricorso ai *regolamenti di organizzazione*: infatti, poiché l'art. 97 Cost. pone una *riserva di legge* in materia di organizzazione dei pubblici uffici, la relativa disciplina dev'essere adottata con legge regionale.

c) *La potestà regolamentare della Sicilia, del Friuli-Venezia Giulia e delle Province di Trento e Bolzano*

Mentre per la *Sardegna* e la *Valle d'Aosta* vige un *regime analogo* a quello delle *Regioni ordinarie*, per la *Sicilia* ed il *Friuli-Venezia Giulia* e per le province di *Trento e Bolzano* le norme statutarie attribuiscono alla *Giunta regionale* anziché al Consiglio la potestà regolamentare, specificando però che si tratta esclusivamente di *un potere regolamentare avente funzione esecutiva rispetto alle leggi deliberate dal Consiglio*; tali Regioni, nonché le due Province, hanno dunque soltanto potestà regolamentare di *esecuzione*, e non anche indipendente: il che si traduce in una *riserva relativa di legge regionale* nelle materie di loro competenza.

9. I CONTROLLI STATALI SU ATTI E ORGANI DELLE REGIONI

A) Il controllo sulle leggi regionali: generalità

Secondo l'art. 127 Cost., il Governo esercita un *controllo preventivo* sulle leggi approvate dai Consigli regionali. A tal fine, la legge regionale va comunicata al **Commissario del Governo**, il quale deve al più presto trasmetterla al Governo perché questo ne valuti la *legittimità*, ed entro trenta giorni dalla comunicazione, deve apporvi il *visto*: decorso il termine senza che il visto sia stato apposto, esso si ha per concesso.

Se invece il Governo ritiene che la legge *manchi dei necessari requisiti di legittimità*, la rinvia al Consiglio regionale con *richiesta di riesame*.

La legge regionale è:

1) *illegittima*, quando eccede la competenza legislativa regionale, ovvero viola uno qualsiasi dei limiti imposti alla legislazione regionale;

2) *inopportuna*, e cioè viziata nel merito, quando sia in contrasto con gli interessi nazionali o con quelli di altre Regioni.

B) Il commissario del Governo

a) *Previsione costituzionale e natura giuridica*

L'art. 124 della Costituzione ha previsto la figura del Commissario di Governo che riveste il ruolo di organo *burocratico locale* dello *Stato-persona* legato da un rapporto di *stretta* subordinazione gerarchica al governo (da cui è nominato su proposta del Presidente del Consiglio).
La L. 400/88, (sull'ordinamento della Presidenza del Consiglio), impegna il Commissario alla ricerca di *intese con il Presidente della Regione* in vista del *coordinamento* delle funzioni amministrative regionali e limita tale *coordinamento* ai soli fini del *buon andamento della P.A. e al raggiungimento degli obbiettivi della programmazione* (art. 13 L. 400).

b) *Istituzione e attribuzioni*

Il *Commissario di Governo*, istituito in ogni capoluogo di Regione, è nominato con decreto del Presidente della Repubblica, su proposta del Presidente del Consiglio dei Ministri, previa deliberazione del Consiglio dei Ministri, di concerto col Ministro dell'Interno. Viene scelto tra i prefetti, i magistrati amministrativi, gli avvocati dello Stato ed i funzionari dello Stato con qualifica non inferiore a dirigente generale (art. 13 L 400/1988).
Inoltre dipende funzionalmente dal Presidente del Consiglio dei Ministri.

Il Commissario del governo *non ha alcun potere diretto sull'amministrazione regionale*. Egli oltre ad esercitare i compiti previsti dall'art. 127 Cost. (*visto sulle leggi regionali*):

- *sovrintende*, con la collaborazione dei prefetti, *alle funzioni degli organi amministrativi decentrati* dello Stato, al fine di garantire l'unità di indirizzo e l'adeguatezza dell'azione amministrativa;
- *coordina*, di intesa con il presidente della Regione, *le funzioni amministrative* esercitate dallo Stato con quelle esercitate dalla Regione;
- *cura la raccolta delle notizie utili* allo svolgimento delle funzioni degli organi statali e regionali;
- *segnala al Governo la mancata attuazione*, da parte delle Regioni, *degli atti delegati e prevede il compimento dei relativi atti sostitutivi*, in esecuzione delle deliberazioni del Consiglio dei Ministri;
- *propone* al Presidente del Consiglio dei Ministri *iniziative* relative ai rapporti tra Stato e Regioni;
- *trasmette* periodicamente al Presidente del Consiglio *notizie circa la propria attività*, con particolare riguardo all'attuazione coordinata dei programmi statali e regionali, anche in funzione delle verifiche periodiche da compiere in seno alla Conferenza.

Anche nelle Regioni a Statuto speciale esiste un organo con funzioni in gran parte analoghe a quelle del Commissario di Governo delle Regioni ordinarie. In particolare:

- in **Sicilia** è previsto il *Commissario dello Stato per la Regione siciliana*;
- in **Sardegna** è previsto un *Rappresentante del Governo*, il quale non ha alcun potere rispetto alle leggi regionali;
- in **Trentino-Alto Adige** esiste un *Commissario del Governo* per ciascuna delle due Province, che sostituisce il Prefetto;
- in **Valle d'Aosta** è previsto un *Rappresentante del Ministero dell'interno*, che ha la funzione di presiedere la Commissione di coordinamento;
- in **Friuli-Venezia Giulia**, infine, è istituito un *Commissario di Governo*, che ha funzioni analoghe a quelle del corrispondente organo istituito presso le Regioni a Statuto ordinario.

C) Il controllo sugli atti amministrativi delle Regioni ordinarie

a) *La Commissione statale di controllo*

Il controllo sugli atti amministrativi, compresi i regolamenti emanati in esecuzione delle leggi regionali, viene esercitato da un organo apposito dello Stato, istituito presso ogni Regione (art. 125 Cost.) e denominato *commissione statale di controllo* (art. 3 D.Lgs. 479/93 ad integrazione e modifica del D.Lgs. 40/93).

Ciascuna *commissione* è composta:

- dal *commissario del Governo* presso la stessa Regione, che la presiede;
- da un *magistrato* della *Corte dei Conti*;
- da un dirigente della Presidenza del Consiglio dei Ministri;
- da un dirigente della Ragioneria generale dello Stato;
- da un dirigente dell'Amministrazione civile dell'Interno;
- da un esperto scelto in una terna di nomi designati dal Consiglio regionale.

b) *Ambito del controllo sugli atti amministrativi*

Il controllo sugli atti amministrativi è *un controllo di legittimità*, in seguito al quale tali atti diventano *esecutivi*, a meno che la Commissione di controllo non li annulli *nei venti giorni* successivi alla comunicazione degli stessi.

Per *alcuni atti tassativamente indicati dalla legge* (art. 46 L. 62/53), si prevedeva *anche un controllo di merito* al fine di promuovere, con richiesta *motivata*, il *riesame* della deliberazione da parte del Consiglio Regionale (art. 125 Cost.). Tuttavia va rilevato che il testo del D.Lgs. n. 479/93 ad integrazione e modifica del D.Lgs. 40/93 prevede all'art. 4 l'abrogazione del combinato disposto degli artt. 46, 47, 48 della L. 62/53 laddove si faceva cenno agli atti suscettibili di essere sottoposti al controllo di merito e al procedimento svolgentesi innanzi alla Commissioni. L'operato della Commissione si sostanzia, pertanto, nel solo sindacato di legittimità.

La disciplina dei controlli è stata radicalmente ridisegnata dalla L. 15-5-1997, n. 127 (c.d. *Bassanini bis*) che ha assoggettato a sindacato esclusivamente due categorie di atti:

— i *regolamenti regionali*, ad esclusione di quelli in materia di autonomia organizzativa, funzionale e contabile dei Consigli regionali;
— gli *atti di adempimento* agli obblighi imposti alle regioni da parte della Comunità Europea.

La delibera deve essere trasmessa alla Commissione di controllo che nel termine di venti giorni dal ricevimento è tenuta ad annullarla se illegittima; decorso tale termine senza che la Commissione si sia pronunciata la delibera diventa autonomaticamente efficace, senza necessità di un apposito visto della Commissione.

D) Il controllo sugli atti amministrativi delle regioni a statuto speciale

Per gli atti amministrativi delle Regioni a Statuto speciale era già previsto *esclusivamente un controllo di legittimità*, che è esercitato:

1) in *Val d'Aosta* da una *Commissione di coordinamento*;
2) nelle *altre quattro Regioni* a Statuto speciale dalla *Corte dei Conti*, e più precisamente:
   — in Friuli-Venezia Giulia e in Sardegna da una *Delegazione* della Corte stessa;
   — in Sicilia ed in Trentino-Alto Adige da una *Sezione della Corte*.

Mentre nella Val d'Aosta il controllo ad opera della Commissione di coordinamento avviene nelle stesse forme del controllo di legittimità sugli atti delle Regioni ordinarie, il controllo esercitato dalla Corte dei Conti si svolge negli stessi modi previsti per il controllo sugli atti del Governo, e cioè nelle forme usuali del *visto* e della *registrazione*, con l'unica differenza che per gli atti amministrativi delle quattro Regioni suddette *non è ammessa la registrazione con riserva*.

E) I controlli sugli organi regionali nelle regioni ordinarie

Il controllo statale sugli organi delle Regioni ordinarie è disciplinato dall'art. 126 della Costituzione, e consiste nello *scioglimento del Consiglio regionale*, che può essere disposto quando:

1) compia atti contrari alla Costituzione o gravi violazioni di legge di comportamenti inequivoci) che mirino ad *infrangere* l'unità nazionale o a *violare* i principi fondamentali cui si ispira il nostro ordinamento;
2) non risponda all'invito del Governo di sostituire il Presidente o la Giunta che abbiano compiuto analoghi atti o violazioni;
3) per dimissioni o per impossibilità di formare una maggioranza, non sia in grado di funzionare;
4) lo richiedano ragioni di *sicurezza nazionale*.

Lo scioglimento è disposto con *decreto motivato* del Capo dello Stato, sentita la Commissione parlamentare per le questioni regionali, formata da 20 deputati e 20 senatori.

Col decreto di scioglimento viene nominata una Commissione di tre cittadini, scelti tra gli eleggibili a Consigliere regionale, col compito di indire, *entro tre mesi*, le elezioni per il nuovo Consiglio, e di provvedere all'ordinaria amministrazione nonché al compimento degli atti improrogabili, che dovranno poi essere sottoposti per la ratifica al nuovo Consiglio.

Ai sensi dell'art. 113 Cost., i decreti di scioglimento dei Consigli regionali sono impugnabili davanti all'autorità giurisdizionale.

F) I controlli sugli organi regionali nelle regioni a statuto speciale con particolare riguardo alla Sicilia

Per la Sardegna, la Val d'Aosta, il Trentino-Alto Adige e il Friuli-Venezia Giulia, è previsto un sistema di controllo sugli organi regionali (e cioè lo *scioglimento dei Consigli regionali*) pressoché identico a quello previsto per le Regioni ordinarie, diverso è, invece, il sistema previsto per la Sicilia dall'art. 8 del suo Statuto.

In tale Regione, infatti, spetta al Commissario dello Stato di proporre al Governo lo scioglimento dell'Assemblea regionale, e ciò può avvenire per *un solo motivo*, e cioè per *persistente violazione dello Statuto*.

Sezione Seconda
Le altre autonomie territoriali

Premessa

Accanto alla Regioni considerate — ex artt. 114 e segg. Cost. — *enti autonomi costituzionali*, esistono altri enti pubblici territoriali, menzionati dallo stesso articolo 114 Cost.: il **Comune** e la **Provincia**.

La disciplina di tali enti è rinviata dalla Costituzione alla *legge ordinaria*, cosicché essi non sono garantiti costituzionalmente quanto ai loro poteri. Sono, quindi, oggetto di studio del diritto amministrativo. A tali enti si affiancano anche: *comunità montane, circondari* ed *aree metropolitane* (ex artt. 17 e segg. L. 14-2-90); *municipi* (ex art. 12, L. 142/90); *circoscrizioni; consorzi, aziende speciali e istituzioni* (ex art. 23 L. 142/90).

A seguito di un lungo *iter* parlamentare ha trovato finalmente attuazione la riforma degli enti locali che ha radicalmente rivoluzionato tutta l'organizzazione amministrativa periferica dello Stato italiano. Ne discende, pertanto che allo stato attuale, Comuni e Province non debbono intendersi più disciplinati dal R.D. del 3 marzo 1934, bensì dalla nuova **L. 8 giugno 1990, n. 142 — «Legge di riforma delle autonomie locali»**.

1. IL COMUNE

A) Definizione

È un **ente territoriale di base**, con autonomia statutaria e finanziaria che *rappresenta, cura* e *promuove* lo sviluppo della comunità locale: posizione dunque primaria e globale che trova conferma nelle funzioni che ad esso sono attribuite dalla legge 8 giugno 1990, n. 142, di riforma delle autonomie locali (v. *infra* lettera c).

B) Organi del Comune

a) **Consiglio comunale**: che è l'organo di indirizzo e di controllo politico-amministrativo (e non più organo a competenza generale «per tutto quanto non espressamente attribuito agli altri»).

La *legge di riforma delle autonomie locali* fissa talune competenze esclusive del consiglio, per le quali sono aprioristicamente esclusi interventi sostitutivi in via d'emergenza da parte di organi differenti (tranne per le variazioni di bilancio).

Spetta invece agli *statuti*: sia definire le norme fondamentali per determinare le attribuzioni di tale organo, sia dettare norme integrative ed ampliative delle competenze obbligatorie del Consiglio stesso.

Le competenze riservate in via prioritaria al Consiglio sono fondamentalmente di tre ordini:

— spetta ad esso la *potestà normativa e pianificatoria generale* con l'*approvazione degli statuti, dei regolamenti, dei bilanci, dei piani e programmi di carattere finanziario* (con complementari competenze in ordine a tributi, contrazione di mutui, spese pluriennali, acquisti, alienazione e appalti) *a territoriale urbanistico*;

— ha competenza in merito all'*assetto istituzionale degli enti*, sia dal punto di vista *associazionistico* che da quello del *decentramento* e della *partecipazione*;

— sono ad esso, infine, attribuiti *i poteri generali in materia di personale, di gestione dei pubblici servizi*, con complementari competenze riguardanti gli enti, le aziende e le società che svolgono la loro attività in ambito comunale, compresi gli indirizzi e le nomine in essi dei loro rappresentanti (ITALIA, MARZANATI, ZUCCHETTI).

La *durata del Consiglio* (fissata dalla L. 81/93 in 4 anni) è limitata espressamente dalla legge di riforma fino all'elezione del nuovo, ovvero non cessa più — come avveniva in passato — dall'esercizio delle sue funzioni a partire dal 45° giorno precedente le elezioni mantenendo, anche in questo periodo, la competenza ad emanare gli atti urgenti e improrogabili. Il numero di consiglieri e la loro posizione giuridica sono regolati dalla legge.

b) **Giunta comunale**: cui è affidata la competenza generale per tutto quanto non sia attribuito espressamente dalla legge o dallo statuto agli altri organi (sindaco, presidente della provincia, segretario, etc.).

In questo modo il legislatore ha voluto drasticamente ridurre il ricorso alle deliberazioni d'urgenza in via surrogatoria del consiglio che molto spesso in passato hanno rappresentato una «scappatoia» per consentire una facile gestione di un'amministrazione sempre più sovraccaricata di nuovi compiti talvolta impossibili da svolgere in maniera dettagliata da parte del Consiglio.

La Giunta, inoltre, proprio per la sua nuova veste di *organo a competenza generale*, ha l'obbligo di riferire annualmente al Consiglio sulla propria attività svolta, fungendo, tra l'altro, anche da *organo propositivo* e di *impulso* nei confronti di quest'ultimo.

La giunta è un organo collegiale (dura in carica quattro anni) ed è composta dal Sindaco che la presiede e da un numero di assessori, stabilito dallo Statuto, non superiore a 2 per i Comuni con popolazione fino a 3.000 abitanti, non superiore a 4 per i Comuni con popolazione da 3.001 a 10.000 abitanti, non superiore a 6 per i Comuni con popolazione da 10.001 a 100.000 abitanti, non superiore a 8 per i comuni con popolazione superiore a 100.000 abitanti e nelle città metropolitane.

c) **Sindaco**: è organo individuale del comune. Nella sua persona si realizza un'ipotesi di *unione reale di uffici*, essendo investito di una duplice funzione in qualità di:

— *capo dell'amministrazione comunale*;

— *ufficiale di Governo*, cioè organo periferico dell'amministrazione statale e rappresentante del Governo in sede locale. Con l'entrata in vigore della legge 81/1993 si è operata una rilevante riforma istituzionale del nostro ordinamento con la previsione dell'*elezione diretta del Sindaco* (oltre che da Presidente della provincia e del Consiglio comunale e provinciale). Ciò allo scopo di evitare la strumentalizzazione ad opera dei partiti e soprattutto per responsabilizzare in maniera diretta i Sindaci che, alla scadenza del mandato rispondono del proprio operato e di quello degli assessori da essi stessi nominati.

L'*elezione* del Sindaco, appunto, avviene con il *suffragio universale diretto*. In particolare, nei Comuni con popolazione *sino a 15.000 abitanti*, è proclamato eletto il candidato che ha ottenuto il maggior numero di consensi. Si procede ad eventuale *ballottaggio* in caso di parità di voti tra i due candidati più votati. Nei comuni con popolazione *superiore a 15.000 abitanti*, invece, viene eletto al primo turno il candidato che ottiene più suffragi, pari ad almeno il 50% più uno dei voti validi (*maggioranza assoluta*). Qualora questo *quorum* non venga raggiunto da alcuno dei concorrenti, si va al ballottaggio tra i due candidati più votati. Dopo l'elezione il Sindaco, che è membro del Consiglio, nomina i componenti della Giunta.

d) **Segretario comunale**: è un funzionario pubblico, iscritto ad apposito Albo nazionale, operante in ogni Comune con funzioni di *consulenza giuridico-amministrativa* dell'ente locale, in ordine alla conformità dell'azione amministrativa alle leggi, allo Statuto ed ai regolamenti; assiste inoltre alla seduta del Consiglio comunale e della Giunta di cui cura la verbalizzazione e roga i contratti dell'amministrazione locale.

Il segretario comunale dipende solo in via funzionale dal Sindaco: questa novità è stata introdotta dalla L. 127/97 (c.d. Bassanini bis): in precedenza il Segretario comunale dipendenva dal Prefetto.

e) **Difensore civico**: è facoltativo; il Comune, infatti, può prevedere con lo Statuto l'istituzione di tale figura, già esistente in molte regioni.

La legge 127/97 (c.d. Bassanini bis) ha attribuito al Difensore civico alcune funzioni di controllo

C) Attribuzioni del Comune

In virtù della definizione data dall'art. 2 della L. 142/90, emerge il carattere primario che il Comune ricopre oggi nell'ambito dell'organizzazione amministrativa dello Stato italiano. Tale posizione di rilievo è tra l'altro confermata dalle stesse funzioni ad esso attribuite dalla legge in parola.

Dal disposto dell'art. 9 si evince che i settori organici conferiti al Comune sono sostanzialmente tre, ovvero:

— *servizi sociali*;
— *assetto e utilizzazione del territorio*;
— *sviluppo economico*.

Per l'esercizio di tali funzioni — oltre quelle aggiunte dalla Regione con apposite leggi — è previsto il ricorso a *forme di decentramento* per i Comuni da 30.000 a 100.000 abitanti mentre, per i Comuni con popolazione superiore il decentramento diventa obbligatorio perché è la stessa legge di riforma a stabilirlo.

Il Comune, tra l'altro, gestisce i *servizi elettorali*, di *anagrafe*, di *stato civile*, di *statistica* e di *leva militare*.

Allo scopo di svolgere in maniera coordinata le funzioni ed i servizi loro demandati, i comuni e le province possono stipulare tra loro apposite **convenzioni**; possono altresì costituire fra loro un **consorzio** per la gestione associata di uno o più servizi attraverso il sistema della **azienda speciale** (ente strumentale del Comune: c.d. «municipalizzata» dotato di personalità giuridica, di autonomia imprenditoriale e di proprio statuto approvato dal Consiglio comunale).

Inoltre — nell'intento di definire ed attuare le opere, gli interventi o i programmi di intervento che richiedano, per la loro completa realizzazione, un'azione integrata di una pluralità di istituzioni — è stata prevista l'adozione dei c.d. **accordi di programma** (art. 27 L. 142/90).

Tale strumento dovrebbe in pratica consentire il definitivo scioglimento di un «*nodo gordiano*» dell'amministrazione locale: le annose lungaggini burocratiche che accompagnano quasi sempre l'attuazione delle grandi opere di carattere pubblico.

Infine, l'art. 19 della L. 142/90 più volte citata stabilisce quali siano le funzioni dei comuni da ripartire con le *aree metropolitane* quando tali compiti abbiano precipuo carattere sovracomunale (v. *infra*).

2. Segue: LA PROVINCIA

A) Definizione

A norma dell'art. 2 della L. 142/90, la provincia è definita un **ente locale intermedio** tra Comune e Regione, *con il precipuo compito di curare gli interessi e promuovere lo sviluppo della comunità provinciale*: come per il Comune anche la Provincia gode di autonomia statutaria e finanziaria e concorre alla determinazione degli obiettivi contenuti nei piani e nei programmi dello Stato e delle regioni, provvedendo, per quanto di propria competenza, alla loro specificazione ed attuazione.

B) Organi della Provincia

1) **Consiglio provinciale**: così come per quello comunale, ha funzioni di indirizzo e di controllo politico-amministrativo, anche per tale organo valgono le competenze fissate per il consiglio comunale, così come anche in questo caso spetta agli statuti stabilire in maniera dettagliata le attribuzioni. La durata in carica è di 4 anni.
2) **Giunta provinciale**: cui è affidata — così come per la giunta comunale — la competenza generale per tutto ciò che non è attribuito espressamente dalla legge o dallo statuto agli altri organi, deve anch'essa riferire annualmente al Consiglio sulla propria attività svolta.

È composta dal **Presidente** che la presiede e da un *numero pari di* **assessori**, stabilito dallo statuto, non superiore ad un *quinto* dei consiglieri assegnati all'ente, con arrotondamento all'unità per eccesso al fine di ottenere un numero pari e comunque non superiore ad *otto* (art. 33 2° comma).

3) **Presidente della provincia**: così come il Sindaco per il Comune *rappresenta l'ente, convoca e presiede* il Consiglio e la Giunta e *sovraintende al funzionamento dei servizi e degli uffici* nonché all'*esecuzione degli atti*. Esercita le funzioni attribuitegli dalle leggi, dallo Statuto e dai regolamenti e sovrintende all'espletamento delle funzioni statali e regionali attribuite o delegate alla provincia.
   È eletto a suffragio universale e diretto, contestualmente all'elezione del Consiglio.
4) **Segretario provinciale**: così come per il segretario comunale, anche a quest'organo la L. 127/97 (c.d. Bassanini bis), riconferma la natura di funzionario dipendente dall'ente locale, prefigurando un rapporto di dipendenza funzionale dalla provincia. Anche per quest'ultimo è prevista l'iscrizione all'*albo nazionale* così come identiche sono le attribuzioni ed i compiti che abbiamo visto valere per il segretario comunale.
5) **Difensore civico**: anche per la Provincia la sua istituzione è una scelta meramente facoltativa.

C) Attribuzioni della Provincia

Secondo quanto disposto dall'art. 14 della legge di riforma delle autonomie locali (L. 142/90) alla Provincia spettano innanzitutto le funzioni amministrative e di interesse provinciale che comprendono vaste zone intercomunali o l'intero territorio provinciale in determinati settori quali:

— difesa del suolo, tutela e valorizzazione dell'ambiente e prevenzione delle calamità naturali;
— tutela e valorizzazione delle risorse idriche ed energetiche;
— valorizzazione dei beni culturali;
— viabilità e trasporti;
— protezione della flora e della fauna, parchi e riserve naturali;
— caccia e pesca nelle acque interne;
— organizzazione dello smaltimento dei rifiuti a livello provinciale, rilevamento, disciplina e controllo degli scarichi delle acque e delle emissioni atmosferiche e sonore;
— servizi sanitari, di igiene e profilassi pubblica, attribuiti dalla legislazione statale e regionale;
— compiti connessi alla istruzione secondaria di secondo grado e artistica e alla formazione professionale, compresa l'edilizia scolastica, attribuiti dalla legislazione statale e regionale;
— raccolta ed elaborazione dati, assistenza tecnico-amministrativa agli enti locali.

Inoltre alle Province sono delegati compiti di promozione, coordinamento di attività, nonché la realizzazione di opere di rilevante interesse provinciale nel settore economico, produttivo, commerciale, turistico, sociale, culturale e sportivo (art. 14 2° comma).

Ulteriore specifico compito delle Province è quello della **programmazione** il cui procedimento viene delineato dal I comma dell'art. 15 della L. 142/90 (raccolta e coordinamento delle proposte avanzate dai comuni, concorso alla determinazione dei programmi regionali, formulazione e adozione di propri programmi pluriennali, generali e settoriali; promozione del coordinamento delle attività programmatorie dei comuni). Tale compito si svolge secondo norme dettate dalla legge regionale, mentre è la stessa provincia a predisporre e ad adottare il **piano territoriale di coordinamento** che determina gli *indirizzi generali di assetto del territorio*, ovvero le diverse destinazioni del territorio, la localizzazione delle maggiori infrastrutture e delle principali vie di comunicazione, gli obiettivi e i modi di intervento per la sistemazione idrica, idrogeologica ed idraulico-forestale.

3. Segue: I CONTROLLI SUGLI ATTI DEI COMUNI E DELLE PROVINCE

In base all'art. 130 Cost., il controllo sulle province e sui Comuni non viene più esercitato dallo Stato, bensì dalle regioni. Infatti, per l'esercizio del controllo di legittimità (e non più anche di merito, perché inconciliabile con i nuovi principi autonomistici) degli atti di comuni e province, è istituito, con decreto del presidente della giunta regionale, il **Comitato Regionale di Controllo** (CO.RE.CO.),

La legge 127/97 (c.d. Bassanini bis) ha profondamente rinnovato il sistema del controllo sugli atti amministrativi degli enti locali (già ridotto peraltro al solo controllo di legittimità dalla legge 142/90).

Il **controllo di legittimità preventivo** ed **obbligatorio** viene, adesso, esercitato esclusivamente:

— sugli Statuti;
— sui regolamenti di competenza del consiglio;
— sui bilanci;
— sul rendiconto di gestione.

Il **controllo di legittimità eventuale**, invece, può essere attivato dalla Giunta o da minoranze significative di consiglieri per delibere aventi ad oggetto:

— appalti ed affidamenti di servizi o forniture superiore ad un certo importo;
— assunzioni di personale e variazione di piante organiche.

In questi casi però la competenza non è più del CO.RE.CO., ma del *Difensore civico*.

4. Segue: MODIFICAZIONI TERRITORIALI, FUSIONE E ISTITUZIONI DI NUOVI COMUNI

In virtù degli artt. 117 e 133 Cost., le Regioni possono modificare le circoscrizioni territoriali dei comuni, sentite le popolazioni interessate. L'art. 11 della L. 142/90 ha voluto affrontare in maniera drastica il **problema della dimensione dei Comuni** dettando norme specifiche dirette a favorire — anche mediante *incentivi finanziari* — la **fusione** dei piccoli comuni.

Viene infatti stabilito il limite minimo di 10.000 abitanti, limite che chiaramente non può essere considerato valido per il caso di fusioni (comunque incentivate).

A tale scopo è prevista (art. 25 L. 142/90) una fase intermedia, la c.d. «**unione di comuni**» per l'esercizio di una pluralità di funzioni o di servizi, che dovrebbe poi portare alla definitiva fusione, nel giro di dieci anni successivi alla sua costituzione.

5. Segue: I MUNICIPI

Nell'ambito dei nuovi comuni risultanti da fusione di più enti territoriali, l'articolo 12 della L. 142/90, ha previsto l'istituzione dei **municipi**. Scopo della creazione di tali organismi — da effettuarsi con legge regionale — è proprio quello di favorire le fusioni di enti piccoli o piccolissimi, assicurando comunque una specifica rappresentanza delle loro collettività. Chiaramente tali municipi non godono di personalità giuridica.

I **compiti** affidati ai municipi sono la gestione dei servizi di base e l'esercizio di altre funzioni loro delegate dal Comune.

Tale forma di decentramento, stabilita autonomamente dal nuovo comune nello statuto, presenta numerose analogie sia con la *frazione* sia con le *circoscrizioni di decentramento* istituite nei grandi e medi comuni, con propri consigli circoscrizionali.

Allo stesso statuto comunale spetta stabilire le modalità per l'elezione — da parte dei cittadini residenti nel municipio — di un **pro-sindaco** e di **due consultori** scelti tra candidati ivi residenti e in possesso dei requisiti per l'elezione a consigliere comunale.

6. Segue: CIRCOSCRIZIONI COMUNALI

L'art. 13 della L. 142/90 di riforma delle autonomie locali, detta norme sostitutive della disciplina di cui alla L. 278/76 (istitutiva delle circoscrizioni) che pertanto viene contestualmente abrogata.

La nuova normativa ha introdotto l'*obbligo* da parte dei Comuni con popolazione superiore ai 100.000 abitanti o capoluogo di provincia, e la *facoltà* per i Comuni con popolazione tra i 30.000 e i 100.000 abitanti, di deliberare il decentramento in **circoscrizioni**.

I **compiti** ad esse attribuiti sono la partecipazione, la consultazione e la gestione dei servizi di base, nonché l'esercizio delle funzioni delegate loro dal comune.

Tali attribuzioni sono disciplinate dallo Statuto comunale e da un apposito regolamento.

Gli **organi** della circoscrizione sono:

— il *Consiglio Circoscrizionale* (è eletto a suffragio universale diretto; il sistema elettorale è scelto in base allo statuto ed è disciplinato dal regolamento. L'elezione deve aver luogo contestualmente all'elezione per il rinnovo del Consiglio comunale);
— il Presidente (cui si applicano gli istituti della rimozione e della sospensione provvisoria prevista dall'art. 40 della L. 142/90 cui si rinvia).

7. Segue: CIRCONDARI E CIRCOSCRIZIONI PROVINCIALI

I **Circondari** sono delle suddivisioni, delle articolazioni della Provincia, in relazione al territorio, che la stessa provincia può stabilire in base all'ampiezza e alle caratteristiche del territorio, alle esigenze della popolazione ed alla funzionalità dei servizi (ITALIA).

Le **Circoscrizioni** rappresentano la suddivisione dell'ambito territoriale della Provincia, ossia esprimono le dimensioni ed i confini delle province (ITALIA).

8. LE COMUNITÀ MONTANE

A) Definizione e istituzione

L'art. 28 della L. 142/90 ribadisce in maniera esplicita che le **comunità montane** sono **enti locali**, con popolazione inferiore ai 5.000 abitanti, che finora erano genericamente qualificate «*enti di diritto pubblico*».

Esse si collocano in posizione intermedia tra gli enti territoriali minori (comuni e province) e gli enti strumentali della regione. Si tratta in pratica di enti dotati di ampia autodeterminazione e di autonomia rispetto agli organi regionali, essendo «*diretta espressione dei comuni ricadenti nel rispettivo territorio*».

La loro **istituzione** è riservata — a norma del 3° comma dell'art. 28 citato — a *legge regionale* che chiamerà a farne parte *comuni montani* e *parzialmente montani* della stessa provincia con esclusione di comuni con popolazione superiore a 40.000 abitanti e di comuni parzialmente montani nei quali la popolazione residente nel territorio montano sia inferiore al 15% della popolazione complessiva.

B) Funzioni

A norma dei commi 1° e 2° dell'art. 29, le funzioni delle Comunità montane sono — oltre a quelle attribuite loro da leggi statali e regionali — gli **interventi speciali per la montagna** stabiliti dalla CEE, nonché l'**esercizio associato di funzioni proprie dei comuni** o a questi delegati dalla regione.

Tra l'altro le comunità montane: approvano i piani pluriennali di opere e di interventi e concorrono alla formazione del piano territoriale di coordinamento.

C) Trasformazione e controllo

La comunità montana può essere trasformata in *unione di comuni* (art. 29 8° comma) svolgendo anche le funzioni a quest'ultima attribuita in vista della fusione, senza che per questo essa perda l'esercizio delle funzioni sue «proprie».

Per quanto riguarda il **controllo** sulla comunità montana, l'art. 49 della L. 142/90, ha disposto l'applicabilità anche per tali enti delle norme sul controllo valide per i comuni e le province che, per quanto attiene al controllo sugli organi, riservano allo stato il relativo esercizio.

9. AREE METROPOLITANE

A) Definizione e istituzione

Tale figura di ente locale rappresenta la risposta più avanzata ai numerosi e difficili problemi che l'ormai diffuso fenomeno delle «conurbazioni» pone a chi voglia farsi carico di amministrare realtà territoriali estese e sempre più ingovernabili con i soli strumenti che l'ordinamento italiano ha finora messo a disposizione.

In base a tali presupposti il legislatore ha voluto disciplinare in maniera particolareggiata la struttura organizzativa e funzionale di grandi comuni i quali, non trovando più spazi per un maggiore sviluppo socio-economico, hanno progressivamente limitato e per certi versi soffocato quello dei comuni limitrofi, sfruttando il territorio di questi per la localizzazione di servizi «*sgraditi*» (impianti di depurazione, discariche, carceri, etc.) accentuando i loro già gravi problemi di carattere sociale (ITALIA).

L'art. 17 della L. 142/90, di riforma delle autonomie locali, considera «*aree metropolitane*» le zone comprendenti i comuni di: Torino, Milano, Venezia, Genova, Bologna, Firenze, Roma, Bari e Napoli. Il V comma dello stesso articolo dà facoltà inoltre alla Regione Sardegna di procedere, con legge, alla delimitazione dell'area metropolitana di Cagliari.

B) Funzioni

La *ripartizione* di funzioni amministrative tra comuni e città metropolitane viene effettuata con *legge regionale*: ne discende che la città metropolitana non può essere ricondotta ad un modello standardizzato, bensì a diversificate strutture mutevoli da regione a regione.

Oltre alle funzioni di competenza provinciale, agli enti in esame sono affidate le funzioni normalmente di competenza del Comune quando rivestano un carattere sovracomunale o debbano, per ragioni di economicità e di efficienza, essere svolte in forma coordinata nell'area metropolitana. Tali attribuzioni rientrano in un elenco tassativamente indicato dalla legge e che riguarda:

— la pianificazione territoriale dell'area metropolitana;
— la viabilità, il traffico e i trasporti;
— la tutela e la valorizzazione dei beni culturali e dell'ambiente;
— la difesa del suolo, la tutela idrogeologica, la tutela e la valorizzazione delle risorse idriche, lo smaltimento dei rifiuti;
— la raccolta e la distribuzione delle acque e delle fonti energetiche;
— i servizi per lo sviluppo economico e la grande distribuzione commerciale;
— i servizi di area vasta nei settori della sanità, della scuola e della formazione professionale e degli altri servizi urbani di livello metropolitano.

Per la realizzazione di opere e per la prestazione di servizi spettano, alle città metropolitane, le *tasse*, le *tariffe* e i *contributi necessari*.

Ai Comuni, invece, spettano funzioni di carattere residuale, ovvero quelle che rientrano nell'ambito strettamente municipale (regolamenti edilizi, amministrazione di beni di uso civile, opere pubbliche di interesse comunale, etc.).

C) L'amministrazione locale nell'ambito dell'area metropolitana: la città metropolitana

Secondo quanto disposto dall'art. 18 della L. 142/90, all'interno dell'area metropolitana sono previsti due livelli di governo: la **città metropolitana** e il **comune**.

In pratica, una volta istituita l'area metropolitana, le funzioni amministrative sono attribuite alla provincia, che prende il nome di *città metropolitana*, con potestà statutaria. È chiaro che alle competenze della provincia vadano aggiunte quelle di dimensione sovracomunale per evitare — nel rispetto dell'art. 114 Cost. — il moltiplicarsi degli enti territoriali.

Inoltre, coerentemente col dettato dell'art. 133 Cost. l'istituzione del *governo metropolitano* viene rimessa alla legge dello Stato o meglio ai decreti legislativi, per i quali l'art. 21 della L. 142/90 conferisce apposita delega al Governo.

I *Comuni* svolgono, come abbiamo precedentemente accennato le funzioni loro proprie ma in modo residuale e pertanto si trovano in una posizione virtualmente indebolita rispetto alle più concrete attribuzioni delegate dalla legge alle aree metropolitane.

Per quanto concerne infine gli **organi** della città metropolitana, il 3° comma del citato art. 18 li identifica in:

— *consiglio metropolitano*;
— *giunta metropolitana*;
— *sindaco metropolitano*.

In relazione alle funzioni di tali organi l'articolo di legge in esame si limita ad attribuire al *Sindaco metropolitano* la presidenza del Consiglio e della Giunta metropolitana.

10. FORME ASSOCIATIVE E DI COOPERAZIONE

A) Le Convenzioni

Le **Convenzioni** consistono in un «accordo» attraverso il quale comuni e province possono svolgere determinate funzioni e servizi in maniera coordinata.

A norma dell'art. 24 della L. 142/90, le convenzioni possono essere:

— **obbligatorie** (ad es. la realizzazione di un'opera di interesse pubblico, etc.): in questo caso lo Stato o la Regione possono stabilire la determinazione di un *disciplinare-tipo* ossia un atto destinato a disciplinare in generale gli aspetti delle future convenzioni (ITALIA- MARZANATI-ZUCCHETTI);
— **facoltative**, con apposito atto, cioè, comuni e province stabiliranno i servizi e le funzioni da svolgere in regime convenzionale e disciplineranno le modalità della loro gestione.

B) I Consorzi

Al fine di disciplinare le forme associative, il legislatore non ha voluto creare figure «nuove», ma ha preferito avvalersi di un istituto già «in auge» ovvero il **consorzio**, del quale ha voluto tuttavia rinforzarne la duttilità e l'efficienza modellando la sua struttura a quella delle aziende speciali.

Il Consorzio gode di personalità giuridica ed ha uno statuto adottato dai consigli degli enti locali che ad esso partecipano.

Gli **organi** del consorzio sono:

— l'assemblea;
— il consiglio di amministrazione;
— il presidente;
— il direttore (cui compete la responsabilità gestionale).

Se da un lato comuni e province possono dar vita ad *un solo* consorzio, anche per gestire una pluralità di servizi, dall'altro — in presenza di un rilevante interesse pubblico — con legge dello Stato può essere prevista la costituzione di **consorzi obbligatori** per l'esercizio di determinate funzioni e servizi. Tale ultima legge ne demanderà l'attuazione alle leggi regionali.

C) L'Unione di Comuni

L'istituzione di tale organismo (che non è un ente) ha come obiettivo la «fusione» dei Comuni, specie dei comuni c.d. «polvere» che a detta di molti rappresentano un ingiustificato onere per le finanze pubbliche. L'unione di Comuni è dotata di soggettività giuridica e può durare per *dieci anni* dalla sua costituzione. Se, decorso il decennio, la fusione dei comuni non si è realizzata, l'Unione è sciolta.

L'**Unione di comuni** contermini — appartenenti alla stessa provincia ciascuno con popolazione non superiore a 5000 abitanti — è preposta alla gestione di una pluralità di funzioni e di servizi.

Per la creazione dell'unione devono provvedervi i singoli consigli comunali mediante un'*unica ed identica deliberazione*, che stabilisca sia l'*atto costitutivo*, sia il *regolamento* (e non lo statuto poiché, è un organismo temporaneo) dell'Unione stessa.

Gli **organi** dell'Unione sono:

— il consiglio;
— la Giunta;
— il Presidente.

L'elezione avviene a norma delle leggi che si applicano ai comuni con popolazione equivalente a quella complessiva dell'Unione.

Il regolamento può prevedere, tra l'altro, un *forma di rappresentatività* che sia relazionata all'importanza — economica, turistica, culturale — o alla popolazione superiore ai 10.000 abitanti.

All'Unione competono altresì le *tasse*, le *tariffe* nonché i contributi sui servizi da essa gestiti.

Al fine di incentivare l'accorpamento dei comuni, un ruolo importante viene assegnato alla regione che può erogare contributi aggiuntivi a quelli normalmente previsti per i singoli comuni.

Nel caso in cui tali contributi aggiuntivi vengano erogati per 10 anni, la fusione viene deliberata con legge regionale anche senza l'istanza dei comuni interessati: c.d. *fusione coattiva*.

D) Gli Accordi di programma

Con gli **accordi di programma** non solo viene integrato l'ultimo strumento di coordinamento offerto dalla riforma agli enti locali, ma il legislatore ha voluto eliminare i «*tempi morti*» che caratterizzano l'esecuzione di interventi, di opere o di programmi coinvolgenti più livelli di governo (statale, regionale, provinciale e comunale).

L'art. 27 della L. 142/90, prevede l'indizione di una **Conferenza** tra i vari rappresentanti delle amministrazioni interessate per la preparazione dell'accordo che conterrà «precisi vincoli» per tutte le amministrazioni nonché interventi di carattere surrogatorio per gli inadempienti.

L'accordo, per cui è richiesto il *consenso unanime* dei partecipanti, potrà stabilire le modalità di coordinamento delle iniziative, fissare i tempi di realizzazione, regolare i finanziamenti, etc.

La vigilanza sull'esecuzione dell'accordo è affidata ad un **Collegio** di composizione variabile, del quale sono chiamati a far parte anche il Commissario di Governo nella Regione o il prefetto nella provincia interessata se all'accordo partecipano amministrazioni statali o enti pubblici nazionali.

Qualora, invece, in questo programma vi sia il concorso di due o più regioni confinanti la *Presidenza del Consiglio dei Ministri* convoca la conferenza di cui sopra, ed in tal caso il collegio di vigilanza è presieduto da un rappresentante della Presidenza del Consiglio dei Ministri ed è composto dai rappresentanti di tutte le regioni che hanno preso parte all'accordo.

11. IL FEDERALISMO AMMINISTRATIVO INTRODOTTO DALLA LEGGE BASSANINI

La legge 15 marzo 1997, n. 59 (cd. *Legge Bassanini*) ha inteso realizzare un progetto molto ambizioso: decentrare un ampio spettro di funzioni amministrative a Regioni ed enti locali senza

A questo scopo la legge indica le materie che restano riservate allo Stato.

Entro il 31-3-1998 (termine così sostituito dalla legge 15-5-1997, n. 127) il Governo è chiamato ad emanare uno o più decreti legislativi, indicando le funzioni da conferire agli enti locali (cioè quelle di *interesse esclusivamente locale*, ex art. 118, comma 1 Cost. e quelle ritenute *proprie* di Province e Comuni ai sensi dell'art. 128 Cost.) e quelle che vanno invece conferite alle Regioni. Queste ultime, nelle materie elencate nell'art. 117 Cost., trattengono a sè solo quelle che richiedono un unitario esercizio a livello regionale e trasferiscono le altre agli enti locali, sentite le loro rappresentanze ed eventualmente gli organi rappresentativi delle autonomie locali, ove costituiti da leggi regionali.

A garanzia degli enti locali l'art. 4, comma 5, innovando rispetto al sistema dell'art. 3 della legge 142/1990, prevede una forma di *intervento sostitutivo* qualora le Regioni, entro sei mesi dall'emanazione di ciascun decreto, non provvedano ad emanare la legge di puntuale individuazione delle funzioni trasferite o delegate agli enti locali: entro 90 giorni il Governo può emanare decreti legislativi contenenti norme «cedevoli», destinate, cioè, a perdere efficacia all'entrata in vigore della legge regionale.

Sia il Governo, in sede di attuazione della delega, che le Regioni, in fase di conferimento di funzioni agli enti locali, devono osservare alcuni **principi fondamentali** elencati nell'art. 4, comma 3:

— il *principio di sussidiarietà*, in base al quale i compiti amministrativi vanno allocati presso l'autorità più vicina dal punto di vista territoriale e più idonea a recepire le istanze ed i bisogni della comunità di riferimento. L'intervento dei livelli superiori di governo viene allora giustificato quando gli enti territoriali minori non siano idonei, a causa delle rispettive dimensioni territoriali, associative ed organizzative, di svolgere determinate funzioni, o in caso di inadempienza;
— il *principio di completezza*, per cui alla Regione sono conferite tutte le funzioni non attribuite agli enti locali, comprese quelle di programmazione;
— il principio di *cooperazione* fra gli enti, anche al fine di garantire una partecipazione piena alle iniziative dell'Unione europea;
— i principi di *responsabilità* ed *unicità* dell'amministrazione che, affermatisi all'interno di ciascun ente, trovano oggi accoglimento anche nei rapporti intersoggettivi, per cui ad un unico soggetto devono essere attribuite tutte le funzioni connesse, strumentali e complementari e la responsabilità di ciascun servizio o attività amministrativa;
— i principi di *omogeneità, adeguatezza* e *differenziazione*, per cui le funzioni omogenee fra loro devono essere tendenzialmente affidate allo stesso livello di governo, tenendo presente, però, sia l'idoneità organizzativa dell'amministrazione ricevente, sia le diverse caratteristiche, associative, demografiche, territoriali e strutturali dell'ente;
— il principio della *copertura* finanziaria e patrimoniale dei costi;
— il principio di *autonomia organizzativa* e *regolamentare* e di *responsabilità degli enti locali* nell'esercizio delle funzioni e dei compiti amministrativi a essi conferiti.

Il Governo, nei decreti legislativi di conferimento, fissa anche i criteri di conseguente e contestuale attribuzione e ripartizione tra le Regioni, e tra queste e gli enti locali, dei beni e delle risorse finanziarie, umane, strumentali e organizzative prima in dotazione allo Stato. A dare attuazione a tali decreti, individuando puntualmente i beni e le risorse da trasferire e ripartendoli tra i diversi enti interessati, provvedono **decreti del Presidente del Consiglio**, sentiti i Ministri interessati e il Ministro del Tesoro e previo parere della Commissione parlamentare istituita dalla legge 59/97, della Conferenza permanente Stato-Regioni e della Conferenza Stato-città allargata ai rappresentanti delle Comunità montane. Sono inoltre sentiti gli organismi rappresentativi degli enti locali funzionali ed è assicurata la consultazione delle organizzazioni sindacali maggiormente rappresentative.

Il conferimento di funzioni a Regioni ed enti locali implicherà, poi, in modo naturale una profonda *ristrutturazione* dell'amministrazione centrale e periferica dello Stato. A tal proposito il Governo è delegato a sopprimere, trasformare o accorpare le strutture interessate dal conferimento; prevedere le

modalità e le condizioni con le quali l'amministrazione statale può avvalersi di uffici regionali e locali per la cura di interessi nazionali; individuare le modalità e le condizioni per il conferimento a idonee strutture organizzative di compiti e funzioni che non richiedono l'esercizio esclusivo da parte delle Regioni e degli enti locali.

12. LA LEGGE 127/1997 («C.D. BASSANINI BIS»)

La legge 15 maggio 1997, n. 127, recante «Misure urgenti per lo snellimento dell'attività amministrativa e dei procedimenti di decisione e controllo», ha completato il quadro delineato dalla legge 59/1997, anche se il disegno definitivo di riordino dello Stato e delle autonomie sarà ultimato soltanto con l'adozione dei decreti delegati della legge 59/1997.

In particolare la «legge Bassanini 2» — accanto ad una fondamentale opera di snellimento di molti procedimenti e di delegificazione — introduce importanti riforme tese ad aumentare l'autonomia degli enti locali.

In primo luogo, la legge attribuisce agli enti locali rilevanti poteri in materia di potestà autoorganizzativa, che oggi può dirsi pressoché completa, e di gestione del personale. Viene rafforzata anche la dirigenza degli enti locali e viene generalizzata la figura del Direttore generale, del quale potranno dotarsi tutti i Comuni con popolazione superiore ai 15.000 abitanti (o i consorzi di Comuni che, insieme, superino tale popolazione).

Inoltre, si ha una decisa riduzione dei controlli di legittimità, sia interni, con l'abolizione del visto di legittimità del Segretario comunale e provinciale sulle deliberazioni, sia esterni, con la riforma dell'attività dei CORECO di cui si è già detto nei paragrafi precedenti. Nel contempo, alcune funzioni di controllo sono state attribuite ai Difensori civici comunali (e provinciali) ed a quelli regionali.

Altre rilevanti innovazioni sono introdotte in materia di funzionamento dei Consigli comunali e provinciali; in materia di aziende speciali e società per azioni a partecipazione comunale; in materia di semplificazione dei procedimenti di gestione del patrimonio comunale e provinciale ed in materia contabile (completando il disegno tracciato dal D.Lgs. 25 febbraio 1995, n. 77).

Infine, la legge 127/1997, riforma radicalmente il ruolo e le funzioni dei Segretari comunali e provinciali.

CAPITOLO TERZO

LE AUTONOMIE DEI PRIVATI

1. INTRODUZIONE

La Costituzione della Repubblica italiana dedica numerose disposizioni alla tutela delle libertà individuali e ai *diritti* dell'uomo, e precisamente:

— nella *prima parte*, ove enuncia i «principi fondamentali» (artt.1-12) nella loro portata più ampia e generale;
— nella *seconda parte* (artt. 13-54), ove ne ribadisce il contenuto in relazione agli *specifici rapporti* che interessano la società: rapporti *civili* (artt. 13-28), *etico-sociali* (artt. 29-34), *economici* (artt. 35-47), *politici* (artt. 48-54).

2. IL PRINCIPIO DI UGUAGLIANZA

A) Definizione e applicazione

L'art. 3 della Costituzione, stabilendo al **primo comma** che «*tutti i cittadini hanno pari dignità sociale e sono uguali davanti alla legge senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche e di condizioni personali e sociali*» pone il principio della **uguaglianza giuridica** dei cittadini (*uguaglianza formale*).

Il **secondo comma**, assegnando «*allo Stato il compito di rimuovere gli ostacoli di ordine economico e sociale che 'di fatto' limitano la libertà e l'uguaglianza dei cittadini*» considera, invece, l'**uguaglianza di fatto** (o *uguaglianza sostanziale*).

Anche se l'art. 3 si riferisce a «*tutti i cittadini*» è ormai pacifico che destinatari della disposizione devono considerarsi anche gli *stranieri* e gli *apolidi* (come la stessa Corte costituzionale ha affermato con sentenza n. 54/79) e le *persone giuridiche* e gli altri *enti* anche se sforniti di personalità giuridica.

B) Il principio di uguaglianza formale

In applicazione di tale principio il legislatore non può *discriminare gli individui* in base al *sesso*, alla *razza*, alla *lingua*, alla *religione* o in ordine alle loro *opinioni politiche* o alle *condizioni personali e sociali*.

La Corte Costituzionale utilizza il principio di eguaglianza come *parametro* per valutare la *legittimità costituzionale* delle leggi.

C) L'uguaglianza sostanziale

Il *principio di uguaglianza formale* resterebbe una pura enunciazione teorica se non fosse integrato da quello di *uguaglianza sostanziale*.

Il Costituente ha giustamente riconosciuto che non ha alcun valore sostanziale stabilire e garantire il principio di uguaglianza tra i cittadini, quando si frappongono ostacoli di carattere economico-sociale che *di fatto* ne limitano la libertà ed uguaglianza ponendoli in una posizione di *disuguaglianza originaria*.

La nostra Costituzione affida alla *Repubblica* il compito di *intervenire per rimuovere siffatti ostacoli*, affinchè tutti i cittadini siano *posti inizialmente* su di un *piano di sostanziale parità*.

Il principio di uguaglianza, come nota BARILE, è rivolto a tutte le funzioni dello Stato e impone l'*imparzialità* del legislatore, dell'amministratore e del giudice nei loro rapporti con i privati (artt. 97 e 101 Cost.).

3. APPLICAZIONI CONCRETE DEL PRINCIPIO D'UGUAGLIANZA

Il principio di **uguaglianza giuridica dei sessi** ha avuto talvolta una applicazione immediata in alcuni campi, come nel caso dell'estensione del *diritto di voto alle donne* (art. 48 Cost.), diritto che esse hanno potuto esercitare immediatamente dopo l'entrata in vigore della Costituzione.

Altre volte l'attuazione non è stata immediata, infatti:

— l'*uguaglianza morale e giuridica dei coniugi* pur prevista dall'art. 29 Cost., ha trovato effettivo riconoscimento e attuazione solo con la riforma del diritto di famiglia, entrata in vigore nel 1975;
— la *parità di trattamento economico e giuridico* tra lavoratori e lavoratrici è stata attuata progressivamente, spesso in seguito a lunghe lotte sindacali. Una prima applicazione si è avuta con la legge 2 dicembre 1977 n. 903 ove tale uguaglianza è stata affermata *giuridicamente* e in *via generale*.
Solo con L. 125/91 la parità tra uomo e donna in ambito lavorativo è stata finalmente e definitivamente sancita.

La norma sul divieto di discriminazione in base alla **razza**, come nota BARILE, fu una chiara presa di posizione nel senso del ripudio dell'antisemitismo introdotto dal regime fascista.

Al fine di scongiurare recenti fenomeni di associazionismo a scopo antirazziale, il legislatore è intervenuto con una specifica normativa — D.L. 26-4-1993, n. 122, convertito in L. 25-6-1993, n. 205 — contenente una dettagliata individuazione dei comportamenti punibili (compresa la diffusione di idee basate sulla superiorità e sull'odio razziale ed etnico) e aggravando le sanzioni penali già stabilite dalle normative previgenti (es. L. 13-10-1975, n. 654 di ratifica della convenzione internazionale sull'abrogazione di tutte le manifestazioni di discriminazione razziale).

Dal divieto di discriminazione in base alla **lingua** (art. 3) combinato con il dettato dell'art. 6 Cost., deriva che le minoranze *alloglotte* (soprattutto nel Trentino, Val d'Aosta e Friuli-Venezia Giulia) non possono essere discriminate, e vanno *tutelate*. Tale principio trova conferma nell'autonomia degli *Statuti speciali* di tali Regioni.

La disciplina dei **rapporti tra lo Stato e la Chiesa cattolica**, già fissata nei Patti Lateranensi del 1929 richiamati dall'art. 7 della Costituzione, è stata modificata a seguito del *Concordato* stipulato tra il Governo italiano e la Santa Sede il 18 febbraio 1984, col quale sono state apportate *modifiche* ai Patti Lateranensi del 1929.

Col Nuovo Concordato si è *abbandonato il principio* della *religione cattolica* come *religione dello Stato*, attenuando così quella posizione di *privilegio*, in passato riconosciuta alla religione cattolica. Pertanto, il nuovo Concordato ha contribuito a rafforzare i principi costituzionali di libertà in materia religiosa.

L'**uguaglianza in materia di opinioni politiche** sancita dall'art. 3, si collega al disposto dell'art. 22 Cost. secondo cui «*nessuno può essere privato per motivi politici, della capacità d'agire, della cittadinanza, del nome*».

La *ratio* di queste due norme sta nell'aver voluto impedire agli organi dello Stato di operare delle discriminazioni a danno degli oppositori politici del regime, come invece avveniva nel periodo fascista.

Le condizioni *personali* e *sociali* non possono essere motivo di discriminazione tra i cittadini.

4. I DIRITTI INVIOLABILI DELL'UOMO

A) Nozione

L'art. 2 Cost. stabilisce, nella prima parte, che «*la Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità*».

Per «*diritti inviolabili*» si intendono quei diritti e quelle *libertà essenziali*, che costituiscono la base e il fondamento del nostro regime politico.

Il riconoscimento dei diritti inviolabili è *finalizzato allo sviluppo della persona umana* e, pertanto, tali diritti sono:

— *indisponibili* e *intrasmissibili*, cioè non suscettibili di atti di disposizione da parte del titolare;
— *irrinunciabili*, cioè non suscettibili di rinuncia da parte del titolare;
— *imprescrittibili*, nel senso che il mancato esercizio di essi, anche per lungo tempo, non ne comporta la perdita.

B) Tutela dei diritti

I principi fino a questo momento esaminati si pongono come limite materiale per il legislatore, il quale nel legiferare deve seguire le loro direttive.

La violazione di un principio costituzionale determina l'*illegittimità costituzionale* della legge, che può essere fatta valere innanzi alla Corte Costituzionale.

La caratteristica del nostro ordinamento non sta, dunque, nel riconoscimento, ma nella *tutela costituzionale* di tali diritti.

In particolare i cittadini sono tutelati attraverso:

a) *garanzie giurisdizionali*: tutti i cittadini hanno *il diritto di agire in giudizio* per la tutela delle loro posizioni soggettive, che si distinguono essenzialmente in:
   — *diritti soggettivi*, che sono tutelati innanzi alla *giurisdizione ordinaria*;
   — *interessi legittimi*, che sono tutelati con *ricorso* alle autorità amministrative, o *giurisdizionalmente*, innanzi alla *giurisdizione amministrativa*;
b) *garanzie non giurisdizionali di natura costituzionale* che sono:
   — il sistema stabilito per la revisione della Costituzione;
   — le Convenzioni internazionali esistenti in materia di diritti dell'uomo e di libertà fondamentali;
   — il diritto di *resistenza* riconosciuto al cittadino nei confronti degli atti illegittimi della Pubblica Amministrazione.

5. LA PRESUNZIONE DI ESPANSIONE DELLE LIBERTÀ COSTITUZIONALI

I diritti di libertà previsti dalla Costituzione possono essere *limitati* sempre e solo in *sede costituzionale*:

— **direttamente**: dalla stessa norma che li pone in essere (es. l'art. 8 afferma l'*eguaglianza* delle confessioni religiose restringendola solo in materia di «*libertà*» di esercizio);
— **indirettamente**: da altre norme costituzionali che, nel disciplinare *altri diritti fondamentali*, limitano i primi (così, in deroga all'art. 18, l'art. 39 prevede che le associazioni sindacali debbano presentare un *ordinamento interno a base democratica*);
— **indirettamente**: da altre norme costituzionali che pongono *obblighi costituzionali o situazioni soggettive passive* incompatibili con i primi: così la libertà garantita dall'obbligo di imporre prestazioni personali o patrimoniali **solo** attraverso legge (art. 23 Cost.) è limitata dall'obbligo dei cittadini a concorrere alla spesa pubblica secondo la propria capacità contributiva (art. 53).

L'importanza di tali diritti nei paesi democratici è sottolineata dalla «*Convenzione di salvaguardia dei diritti dell'uomo e delle libertà fondamentali*» del 1948, sottoscritta dai paesi facenti parte del Consiglio d'Europa nel 1950 e ratificata dall'Italia nel 1955: essa fu preceduta dalla «Dichiarazione universale dei diritti dell'uomo» espressa dalle Nazioni Unite che contiene una lunga elencazione dei diritti individuali (soprattutto civili e politici) tendente a tutelare l'individuo contro eventuali abusi da parte dello Stato cui appartiene.

6. SIGNIFICATO DI «DOVERI INDEROGABILI»

L'art. 2 Cost. accanto ai diritti inviolabili richiede l'adempimento dei «*doveri inderogabili di solidarietà politica, economica e sociale*».

Per «doveri inderogabili» si devono intendere quei doveri dal cui adempimento nessun soggetto può essere esentato.

L'art. 2 della Cost. va interpretato nel senso che ogni uomo deve esercitare i suoi diritti e difendere le proprie libertà nel rispetto *dei diritti e delle libertà altrui.*

I suddetti doveri sono contenuti nei seguenti articoli della Costituzione:

— art. 52: che definisce «*sacro*» il *dovere di difendere la patria* imponendo, poi, ai cittadini il servizio militare obbligatorio, fatta salva la possibilità di avvalersi del diritto all'obiezione di coscienza, prestando *servizio civile sostitutivo*, laddove si sia contrari all'uso personale delle armi per imprescindibili motivi di coscienza;
— art. 53: che obbliga i cittadini e gli *stranieri* (che hanno interessi economici in Italia) a *concorrere alle spese dello Stato* in ragione della capacità contributiva di ognuno di essi;
— art. 54: che impone il c.d. «*dovere di fedeltà*» secondo cui «*tutti i cittadini hanno il dovere di essere fedeli alla Repubblica e di osservarne la Costituzione e le leggi*».

7. I DIRITTI DELLA PERSONALITÀ

A) Generalità

Come abbiamo visto l'art. 2 della Costituzione sancisce che «*La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove svolge la sua personalità*».

Come si può notare, il riconoscimento dei diritti inviolabili è strettamente collegato al concetto di «*personalità*» che viene ribadito e rafforzato anche nel secondo comma dell'art. 3 il quale afferma il principio di «*pari dignità sociale*» ed attribuisce alla Repubblica il compito di rimuovere gli ostacoli di natura economica e sociale che impediscono il pieno sviluppo della *persona umana.*

Questo significativo riconoscimento, che si riscontra anche in molte altre disposizioni della Costituzione, consente di ricomprendere nell'ambito dei *principi fondamentali* anche il *principio* generale che garantisce la *libertà sia fisica che spirituale della persona.*

Tale garanzia è resa concretamente operativa attraverso la previsione da parte della Costituzione, di una serie di diritti tra i quali assume una posizione prioritaria quello relativo alla «*libertà personale*» sancito dall'art. 13.

Occorre inoltre rilevare che la *persona umana* è tutelata da una molteplicità di norme di natura pubblicistica tra cui particolare importanza rivestono quelle di *diritto penale* che sanzionano ogni tipo di attentato o aggressione alla persona (es.: delitti contro la persona).

I diritti della *personalità* sono *diritti assoluti*, inerenti a prerogative essenziali della persona; sono caratterizzati dalla *necessarietà*, in quanto non possono mai mancare, e dalla *indisponibilità*, in quanto tali diritti non si possono perdere né sono trasmissibili: essi, infatti, si acquistano al momento della nascita e fanno capo a tutti (*cittadini, stranieri, apolidi*).

B) Tipologia

Tra i diritti della personalità si possono annoverare:

— **il diritto alla vita ed all'integrità fisica** riconosciuto, anche se in via indiretta, dall'art. 27 della Costituzione che vietando la pena di morte, attribuisce alla vita umana il carattere di *intangibilità* ponendola al di sopra della potestà punitiva dello Stato. Sotto il profilo sostanziale tale diritto riceve tutela sia dalla legislazione civile che da quella penale.

  Per quanto riguarda in particolare i *limiti* alla possibilità di poter *disporre* liberamente del *proprio corpo*, l'art. 5 c.c. stabilisce che «sono vietati gli atti di disposizione del proprio corpo quando cagionino una diminuzione permanente della integrità fisica o quando siano contrari alla legge, all'ordine pubblico o al buon costume»;

— **il diritto all'integrità morale**, che consiste nel complesso delle prerogative che costituiscono la personalità di un individuo: il *decoro*, *l'onore*, *il prestigio*, e la *reputazione* dell'individuo.

Per la tutela di questo diritto il legislatore ha previsto specifiche norme penali incriminatrici quali l'*ingiuria* e la *diffamazione*, e, sul piano civilistico, l'obbligo di risarcimento dei danni, compresi quelli morali (art. 2059 cod. civ., art. 185 cod. pen);

— **il diritto all'immagine**, viene tutelato dall'art. 10 cod. civ. che riconosce all'individuo la possibilità di vietare che altri facciano abuso della propria immagine.

Infatti, l'utilizzazione o la pubblicazione dell'immagine altrui, senza che il soggetto coinvolto vi abbia consentito, è vietata quando non risulti giustificata dalla notorietà o dall'ufficio pubblico ricoperto, da scopi scientifici, culturali, dal collegamento a fatti di interesse pubblico o da esigenze di giustizia o di polizia (vedi L. 22-4-1941 n. 663) ed, inoltre, quando ne venga pregiudicato il decoro o la reputazione;

— **il diritto al nome**, che è tutelato dall'art. 22 Cost., oltre che da alcune norme del codice civile.

Poiché il *nome* rappresenta il principale *mezzo di identificazione* della persona, gli artt. 6-10 c.c. provvedono a garantire *l'esclusività dell'uso del proprio nome* nonché dello *pseudonimo* (il c.d. *nome d'arte*) quando acquisti la stessa importanza del nome;

— **il diritto alla riservatezza**, ossia il diritto alla *intimità della vita privata*, che deve essere salvaguardata dall'altrui curiosità.

La tutela costituzionale di tale diritto si evince da quel complesso di norme che garantiscono le singole manifestazioni in cui si specifica il diritto in questione: l'*inviolabilità* del *domicilio*, la *libertà e segretezza di ogni forma di comunicazione*, la *pari dignità sociale* dei cittadini, etc. Peraltro, la tutela della riservatezza esce ulteriormente rafforzata dalla L. 31-12-1996, n. 675 che disciplina il *trattamento dei dati personali* prevedendo per chi debba trattare i dati altrui l'obbligo di notificazione al *garante per la protezione* appositamente istituito, nonché l'obbligo di richiedere il *consenso espresso* e *documentato per iscritto* all'interessato.

8. LA LIBERTÀ PERSONALE

A) Fondamento costituzionale

La libertà personale costituisce il *presupposto logico e giuridico* di tutte le *libertà* riconosciute all'individuo dalla Costituzione.

In dottrina si sostiene, ormai all'unanimità, che tale libertà non è solo da intendersi come libertà *fisica*, ma anche come libertà *morale*, cioè libertà non solo dalla coercizione fisica, ma anche da ogni forma di *coazione* della volontà, del pensiero, e della psiche dell'individuo.

Quindi, il **fondamento costituzionale** della *libertà personale* dell'individuo, sia in senso *fisico* che *morale*, deve ravvisarsi:

— nell'**art. 13** Cost. il quale stabilisce, nel primo comma, che «*la libertà personale è inviolabile*»;
— nell'**art. 23** Cost. secondo il quale «*nessuna prestazione personale o patrimoniale può essere imposta se non in base alla legge*».

B) Natura giuridica del diritto alla libertà personale

Il diritto alla libertà personale è un diritto inviolabile (art. 13 comma 1, e 2 Cost.), ed, in quanto diritto della personalità, presenta i seguenti caratteri:

— è *indisponibile* da parte del titolare;
— è *intrasferibile*: sono nulle le convenzioni con cui un soggetto trasferisca ad altri il diritto alla sua libertà personale;
— è *irrinunciabile*: sono annullabili gli atti che costituiscano rinuncia a tale diritto;
— è *imprescrittibile*: sono infatti imprescrittibili i diritti di cui il soggetto non può assolutamente disporre (art. 2934, 2° comma cod. civ.);
— è *tutelato erga omnes* e quindi ha carattere assoluto.

C) Garanzie della libertà personale

L'**art. 13 Cost.**, dopo aver dichiarato l'**inviolabilità** della libertà personale, afferma che: «non è ammessa alcuna forma di detenzione, di ispezione o perquisizione personale, né qualsiasi altra

restrizione della libertà personale, se non per atto motivato dell'autorità giudiziaria e nei soli casi e modi previsti dalla legge».
In tale disposizione si possono individuare *tre garanzie* fondamentali:

1) **la riserva di legge**, che consiste nell'*attribuzione in via esclusiva* al potere legislativo della competenza a disciplinare la materia relativa ai *casi* ed alle *modalità* in cui si può legittimamente limitare la libertà personale di un individuo. Il conferimento esclusivo al legislatore della competenza normativa è finalizzato a vietare qualsiasi intervento, in materia di misure restrittive della libertà, della potestà normativa secondaria (riservata al *potere esecutivo*), garantendo al cittadino che solo il *Parlamento*, che è l'organo rappresentativo del popolo, potrà, *con legge*, regolare la materia. Bisogna precisare che si tratta di una *riserva rinforzata*, in quanto una legge che regoli le restrizioni della libertà personale deve attenersi scrupolosamente ai principi stabiliti dall'art. 13 Cost.;
2) **la riserva all'autorità giudiziaria** della competenza alla emanazione dei provvedimenti restrittivi della libertà personale.
È la c.d. garanzia dell'*habeas corpus*, cioè dell'inviolabilità della libertà personale di cui all'art. 13 Cost.
Solo il giudice, infatti, in veste di autorità *super partes* è in grado di offrire garanzie *d'imparzialità*;
3) **l'obbligo della motivazione** che deve necessariamente accompagnare ogni *provvedimento giurisdizionale* che limita la libertà personale.

Tale obbligo costituisce una notevole garanzia in quanto impone al giudice di indicare espressamente i fatti, i motivi e, conseguentemente, l'*iter logico* che ha giustificato l'adozione del provvedimento restrittivo, rendendo sempre possibile il controllo della sua legittimità.
Si ricordi, inoltre, che l'art. 13 deve essere coordinato all'art. 111 Cost. il quale prevede che contro le sentenze ed i provvedimenti relativi alla libertà personale pronunciati dagli organi giurisdizionali ordinari o speciali, è sempre ammesso ricorso in Cassazione per *violazione di legge*.

9. LIMITI ALLA LIBERTÀ PERSONALE

L'art. 13 proclama la inviolabilità della libertà personale, ma ne ammette la limitazione per **atto motivato** della Autorità giudiziaria nei *soli* casi e modi *previsti* dalla legge. In casi eccezionali di necessità ed urgenza la Polizia Giudiziaria (P.G.), per finalità di pubblica sicurezza (esigenze cautelari), può adottare *provvedimenti provvisori* da assoggettare a convalida della A.G. entro il termine perentorio di 96 ore, scandito in un segmento di 48 ore assegnato alla P.G. per la informativa alla A.G., e in un altro di 48 ore per il provvedimento giudiziario di convalida. La stessa norma costituzionale fissa l'esigenza che la *legge* ordinaria stabilisca i termini massimi della carcerazione preventiva.

Il nuovo codice di procedura penale contempla, pertanto, *strumenti limitativi della libertà personale* di pertinenza della P.G. (*arresto in flagranza* e *fermo*) o del Pubblico Ministero (fermo di P.G.), organi inquirenti privi di potere giurisdizionale (il P.M. è un magistrato dell'ordine giudiziario con funzioni requirenti, ma non giudicanti), nonché strumenti di esclusiva pertinenza del giudice (Giudice per le indagini preliminari e giudice dibattimentale), che può adottarli solo su richiesta del P.M. (e quindi non di ufficio).

Assai vasta è la *gamma delle misure cautelari* di cui può disporre il giudice e non tutte sono privative o limitative della libertà perché accanto a *misure* di tal genere (*coercitive*), ve ne sono delle altre che intaccano solo talune facoltà o diritti, che non incidono sull'*habeas corpus* (tali sono le *misure interdittive*).

Va puntualizzato che i provvedimenti di natura cautelare promananti dalla P.G. e dal P.M. sono solo capaci di incidere sulla libertà (*arresto o fermo*), mentre al giudice è possibile emettere *misure cautelari* anche *reali*, di natura puramente patrimoniale (*sequestro conservativo* e *sequestro preventivo*), subordinati alla richiesta dell'organo dell'accusa (essendo il giudice sempre un arbitro, che giudica, ma non agisce).

A) Le misure cautelari

Il quarto libro del nuovo codice di procedura penale è interamente dedicato alle *misure cautelari*, che come indica il nome, sono provvedimenti adottati per esigenze di cautela processuale o sociale. Tali misure, per il principio della *riserva di legge* hanno *carattere tassativo* e *tipico* per la *finalità cautelare* che devono conseguire.

Nella prospettiva di un'adeguata tutela dei fondamentali diritti di libertà individuale e di difesa (spesso ingiustamente incisi da un uso distorto delle misure cautelari) ha visto finalmente la luce, dopo un travagliato *iter* processuale, la tanto discussa legge di riforma delle misure cautelari (L. 8 agosto 1995, n. 332 recante *Modifiche al codice di procedura penale in tema di semplificazione dei procedimenti, di misure e di diritto di difesa*).

L'obiettivo dichiarato è quello di orientare il sistema secondo direttive più efficacemente garantistiche, ridimensionando l'ambito di possibile utilizzazione della custodia cautelare.

B) Le misure cautelari personali

Sono quelle che attengono a *limitazioni* delle *libertà* o facoltà personali e possono spaziare da una dimensione massima (*custodia in carcere*) ad una più modesta (*misure interdittive*).

Tutte hanno però in comune alcune *caratteristiche fondamentali*, oltre quelle già ricordate sopra:

1) richiedono la sussistenza di **gravi indizi** di colpevolezza (art. 273 c.p.p.);
2) *si applicano solo ai* **delitti** e non anche alle contravvenzioni (artt. 280 e 287 c.p.p.);
3) devono sussistere **particolari esigenze cautelari** che possono così sintetizzarsi (art. 274 c.p.p.):
   a) *esigenze istruttorie*, attinenti alla completa e corretta salvaguardia del potenziale materiale probatorio (e per tanto soddisfatta tale esigenza, esse vengono meno: artt. 292 e 301 c.p.p.);
   b) *fuga o pericolo di fuga*, attinenti ad ipotesi comportanti una pena superiore a due anni di reclusione:
   c) *esigenze di tutela della collettività*, attinenti al pericolo che l'imputato commetta gravi delitti di violenza o contro l'ordine costituzionale o di criminalità organizzata ovvero della medesima specie di quello per cui si procede. Allo scopo di fronteggiare in modo più adeguato ed efficace i fenomeni di criminalità organizzata, in riferimento ad una serie di delitti ritenuti dal legislatore come tipica espressione di essa, la legge (art. 5 L. 12-7-91 n. 203) non solo presume la presenza di esigenze cautelari, ma le considera di tale intensità da imporre la più grave delle misure cautelari: la custodia cautelare in carcere. È però ammessa la prova contraria a tale presunzione;
4) la *misura* deve essere **proporzionata** *all'entità del fatto e alla sanzione irrogabile* (art. 275 comma 2 c.p.p.);
5) la *misura* deve essere **adeguata alle esigenze cautelari** da soddisfare in **concreto** (art. 275 comma 1 c.p.p.) e ciò anche in momenti successivi alla sua applicazione, ove mutino le condizioni che la determinarono (art. 299 c.p.p.). Si tenga presente però che per i delitti di criminalità organizzata va sempre prescelta la custodia cautelare in carcere (art. 5 D.L. 13-3-91 n. 75);
6) deve essere osservata una **gradualità** *nella scelta*, ritenendo la custodia cautelare come misura estrema, adottabile solo quando le altre si rivelino inefficaci (art. 275 comma 3 c.p.p.);
7) la **pena** prevista per il delitto deve essere **superiore ai tre anni** di reclusione (artt. 280 e 287 c.p.p.). Si ricordi però la *deroga* prevista nell'art. 391 comma 5 c.p.p..

C) Le misure coercitive ed interdittive

Le *misure* **coercitive** si distinguono in misure non custodiali: *divieto di espatrio* (art. 281 c.p.p.); *obbligo di presentazione* alla polizia giudiziaria (art. 282 c.p.p.); *divieto o obbligo di dimora* (art. 283 c.p.p.) e misure custodiali: *arresti domiciliari* (art. 284 c.p.p.); *custodia in carcere* (art. 285 c.p.p.); *custodia in luogo di cura* (art. 286 c.p.p.).

Le *misure* **interdittive** *sono*: la sospensione dall'esercizio della potestà dei genitori (art. 288 c.p.p.); la sospensione dall'esercizio di un pubblico ufficio o servizio (art. 289 c.p.p.); il divieto temporaneo di esercitare determinate attività professionali o imprenditoriali.

D) Applicazioni ed estinzione delle misure cautelari personali

L'*applicazione* della misura si ha con *provvedimento del giudice (ordinanza), su richiesta del P.M.*.

A causa della posizione di terzietà del giudice, quest'ultimo non può provvedere d'ufficio né superare le richieste dell'accusa (applicando, ad esempio, una misura più grave rispetto a quella richiesta).

Alla sua *esecuzione* deve seguire, in caso di applicazione della custodia cautelare, l'*interrogatorio dell'indagato entro un breve termine* (art. 294 c.p.p.: cinque giorni. Si tratta di una *condizione risolutiva di efficacia della misura disposta*, nel senso che in mancanza si dovrà disporre la scarcerazione.

Attesa la finalità cautelare ed il carattere contingente delle misure, queste *possono essere revocate o modificate quando vengono meno o mutino le esigenze che le hanno determinate* (art. 299 c.p.p.).

Va detto in proposito che, per effetto del *favor libertatis*, al giudice è consentito eccezionalmente di provvedere di ufficio, anche senza le richieste delle parti, alla revoca, sostituzione o modificazione della misura in atto.

La *custodia cautelare* ha una durata massima, che l'art. 303 c.p.p. articola con riferimento alla pena prevista dalla legge per il delitto e in relazione al momento in cui matura il termine.

Avverso l'ordinanza che applica le misure è possibile, oltre al *ricorso per cassazione* (art. 311 c.p.p.), anche il duplice rimedio del *riesame* e dell'*appello*, che non sono però cumulativi.

E) Le misure cautelari reali

Si tratta di provvedimenti che *incidono sul patrimonio*, ed hanno finalità cautelari riferibili o alla garanzia per il pagamento delle pene pecuniarie, spese di giustizia ed eventuali risarcimenti danni (*sequestro conservativo*, artt. 316-320 c.p.p.), ovvero alla esigenza di impedire la commissione di nuovi reati o ulteriori conseguenze di quelli già commessi (*sequestro preventivo*, artt. 321-323 c.p.p.).

Anche tali misure *vanno richieste al giudice da parte del p.m.*, ed anche per esse è previsto un sistema di impugnazioni (riesame e ricorso per cassazione).

10. FERMO DI POLIZIA GIUDIZIARIA O DEL PUBBLICO MINISTERO DEGLI INDIZIATI DI REATO

Nel nuovo codice di procedura penale l'istituto del *fermo* ha assunto particolare rilevanza nell'ambito delle misure privative della libertà perché, come detto, non sono previste misure cautelari obbligatorie (c.d. *cattura obbligatoria*) e il potere di arresto obbligatorio è notevolmente ristretto in ragione della gravità della pena.

Inoltre il fermo non differisce più dall'arresto sotto il profilo della durata, essa infatti per entrambi è limitata nel massimo a 96 ore, a norma dell'art. 13 Cost., e sotto quello della comune convertibilità, ad opera del giudice, all'udienza di convalida, in misura coercitiva.

Il fermo consiste, come l'arresto, in privazione di libertà ed è soggetto alle stesse diposizioni valide per l'arresto (artt. 385-391 c.p.p.).

Diversi, però, ne sono i **presupposti**, le **finalità** e la **titolarità** del potere.

In ordine ai *presupposti*, il fermo richiede anzitutto la sussistenza di *gravi indizi di reità*. Deve ricorrere inoltre il pericolo di fuga, desunto da elementi specifici. Non è invece richiesta la flagranza. Infine deve consentirlo il titolo del delitto (o per l'entità della pena, ovvero per espressa previsione).

Le *finalità* tendono ad evitare che l'*indagato* possa darsi alla fuga, soprattutto quando, mancando il requisito della flagranza, non può procedersi all'arresto.

La *titolarità del potere di fermo*, spetta in via principale al P.M. e solo in via sussidiaria alla Polizia Giudiziaria (prima dell'assunzione della direzione delle indagini da parte del Pubblico Ministero, ovvero in caso di sopravvenute emergenze, come previsto dall'art. 384 comma 3 c.p.p.).

11. ULTERIORI GARANZIE PER LA TUTELA DELLA PERSONA UMANA

Oltre ai principi fondamentali già esaminati, in tema di tutela della persona nella sua integrità fisica e morale, la Costituzione ha previsto altre disposizioni cui si è uniformato anche il legislatore ordinario; in particolare si evidenzia che:

a) sulle persone sottoposte a restrizione di libertà è *vietata* ogni *violenza fisica e morale* (art. 13 Cost.);

b) le *pene* «non devono consistere in *trattamenti contrari al senso di umanità*» e devono tendere «alla *rieducazione del condannato*» (art. 27 Cost.);
c) è *vietata la pena di morte*. Fino al 1994 essa era prevista solo per alcuni reati militari commessi in tempo di guerra, ma con la L. 589/94 sono state abrogate anche queste ipotesi residuali;
d) è vietato sottoporre a *misure di sicurezza* i cittadini se non nei casi previsti dalla legge;
e) è garantito a tutti i cittadini il *diritto alla difesa* in giudizio e alla riparazione degli errori giudiziari; ai non abbienti è anche garantito il c.d. «*gratuito patrocinio*»;
f) *nessuna prestazione personale o patrimoniale può essere imposta se non in base ad una legge* (art. 23 Cost.). Nel rispetto di tale garanzia si attua l'art. 53 Cost. che prevede l'obbligo per tutti (cittadini e stranieri solo per i redditi prodotti in Italia) di *concorrere* alle spese pubbliche secondo la propria *capacità contributiva*;
g) l'*estradizione* del cittadino può essere consentita, soltanto ove sia *espressamente prevista* dalle *convenzioni internazionali* e non può in nessun caso essere ammessa per reati politici (art. 26 Cost.);

12. LA LIBERTÀ DI DOMICILIO

L'art. 14 comma 1° Cost. sancisce l'inviolabilità del domicilio. Nel sistema delle libertà fondamentali, la libertà di domicilio rappresenta l'espressione più tipica della libertà personale, in quanto si concreta nella *proiezione spaziale* della persona. Tutelando il domicilio, quindi, l'ordinamento garantisce la persona stessa, o più esattamente il rapporto persona-ambiente (BARILE e CHELI).

Il concetto di *domicilio* va inteso in un'*accezione molto ampia*, tale da ricomprendere non solo l'abitazione ma anche il luogo dove il soggetto svolge la propria attività lavorativa, la sua dimora occasionale od anche una camera d'albergo; in pratica ogni luogo comunque adibito allo svolgimento delle attività della vita e dal quale il titolare ha intenzione di escludere la presenza dei terzi.

Essendo sancita l'inviolabilità del domicilio dall'art. 14 Cost. non possono essere eseguite perquisizioni, ispezioni, sequestri se non nei modi stabiliti dalla legge secondo le garanzie prescritte. Tale **inviolabilità** è però **esclusa** in caso di «**accertamenti** per motivi di **sanità** ed **incolumità** pubblica **o a fini economici e fiscali**». Si tratta di una deroga alla inviolabilità del domicilio prevista per favorire interessi costituzionalmente protetti, considerati preminenti (sentenza Corte Costituzionale n. 273/1974).

Le prove che la polizia si procuri illegalmente o non conformemente all'art. 14 Cost. non possono essere utilizzate nel processo.

13. LA LIBERTÀ E LA SEGRETEZZA DELLA CORRISPONDENZA

A) Generalità

L'art. 15 Cost. tutela la libertà e la segretezza dell'espressione e della comunicazione del pensiero sancendo l'*inviolabilità* della *libertà* e della *segretezza* della *corrispondenza* e di ogni altra forma di *comunicazione*.

Anche a garanzia di questa libertà la Costituzione ha previsto la *riserva di giurisdizione* in quanto la sua limitazione può avvenire solo con un atto motivato dell'autorità giudiziaria e con le garanzie stabilite dalla legge.

B) Le intercettazioni telefoniche

Le intercettazioni consistono in *acquisizioni di conoscenza e di telecomunicazioni* (attraverso telefono o altre forme di trasmissione) e di *colloqui tra presenti, all'insaputa di almeno uno degli interessati.*

Si tratta di un *atto a sorpresa* che, incidendo sulla libertà delle comunicazioni, garantita dall'art. 15 della Costituzione, deve essere *adottato dall'Autorità Giudiziaria con provvedimento motivato*. La legge prevede che sia consentita solo per *talune categorie di reati*, identificati per l'entità della pena o per il bene giuridico protetto. Inoltre devono sussistere *gravi indizi di reato*.

È previsto l'*intervento del giudice con funzione di controllo e garanzia*, per assicurare la legalità dell'intercettazione, per cui il Pubblico Ministero può disporla solo nei casi di urgenza, quando vi è fondato motivo di ritenere che dal ritardo possa derivare grave pregiudizio all'indagine (dovrà chiedere, però, la convalida al Giudice per le indagini preliminari entro le 24 ore, e quest'ultimo dovrà provvedere nelle successive 48 ore: art. 267 c.p.p.). In via normale, invece, andrà rivolta richiesta al G.I.P., che provvederà con decreto motivato.

La legge consente l'*utilizzazione delle intercettazioni in altro procedimento*, purché risultino indispensabili per l'accertamento di delitti per i quali l'arresto in flagranza sia obbligatorio (art. 270 c.p.p.).

Sono espressamente dichiarate inutilizzabili le intercettazioni eseguite fuori dei casi consentiti dalla legge ovvero relative a conversazioni di persone tenute al segreto professionale (art. 271 c.p.p.). Va notato che l'art. 295 comma 3 c.p.p. prevede la possibilità di intercettazioni quando queste possono agevolare la ricerca del latitante.

Si ricordi che, con la legge 12-7-1991 n. 152 recante misure urgenti per la lotta alla criminalità organizzata, il decreto del P.M. che dispone le intercettazioni telefoniche potrà ordinarle per un periodo fino a 40 gg. e saranno altresì ammesse proroghe per periodi successivi di 20 gg.

14. LA LIBERTÀ DI CIRCOLAZIONE E SOGGIORNO

A) Generalità

Il diritto relativo alla libertà di circolazione e soggiorno è sancito dall'art. 16 Cost. che afferma: «ogni cittadino può circolare e soggiornare liberamente in qualsiasi parte del territorio nazionale, salvo le limitazioni che la legge stabilisce in via generale per motivi di sicurezza o sanità». Subito dopo, la norma precisa che «nessuna restrizione può essere determinata da *ragioni politiche*».

Dal contenuto di tale disposizione si evince la vigenza del principio della *riserva di legge* in materia di limitazioni alla libertà di circolazione e soggiorno.

Tuttavia si tratta di *riserva di legge relativa*, in quanto delle limitazioni al diritto di libera circolazione e soggiorno possono essere poste anche da un'*autorità amministrativa solo*, però, per motivi di *sanità e sicurezza* (si pensi ad esempio ai provvedimenti che limitano parzialmente la circolazione degli autoveicoli nei centri abitati per motivi di sicurezza del traffico cittadino).

Il diritto garantito dall'art. 16 Cost. si estrinseca in tre facoltà:

— libera circolazione sul territorio dello Stato;
— libertà di fissare ovunque la propria residenza;
— facoltà di uscire temporaneamente o definitivamente dallo Stato e di rientrarvi.

B) Applicazioni

In applicazione di tale articolo vengono in rilievo:

1) il **foglio di via obbligatorio**: tale istituto prevede in taluni casi, il rimpatrio al comune di origine di persone sospette o in qualche modo pericolose per l'*ordine e la sicurezza pubblica*.
Si noti che la *Corte Costituzionale*, pur affermando la compatibilità del provvedimento in questione con l'art. 16 Cost., nella sent. 2/1956 ha ritenuto *illegittimo* il *rimpatrio forzato* di persone sospette in mancanza di un atto dell'autorità giudiziaria, per la violazione del principio della *riserva di giurisdizione*;
2) la **libertà di espatrio**: l'art. 16 Cost. conferisce al cittadino la libertà di uscire dal territorio della Repubblica e di rientrarvi, salvi gli obblighi di legge. In tali categorie, secondo la dottrina prevalente, rientrerebbero solo gli obblighi di *diritto pubblico* stabiliti dalla legge e non anche quello di munirsi del *passaporto* che ha natura di *autorizzazione amministrativa* subordinata solo al controllo dell'adempimento degli obblighi previsti in quanto il suo rilascio *non* è legato ad alcuna *valutazione discrezionale* da parte dell'autorità competente.

15. LA LIBERTÀ DI RIUNIONE

A) Generalità

La libertà di riunione, garantita ai soli cittadini dall'art. 17 della Cost., consiste nella *facoltà* di *darsi convegno*, temporaneamente e volontariamente, in un luogo determinato ed in seguito a

preventivo accordo, *indipendentemente* dalle ragioni per cui ci si riunisce (politiche, ricreative, religiose, etc.).

Tale libertà, anche se si pone come «libertà del singolo», non è suscettibile di *esercizio individuale*, ma solo *congiunto* ad altri soggetti e spesso costituisce lo strumento attraverso cui i gruppi e le *formazioni sociali* perseguono i propri fini.

Le riunioni possono assumere forme diverse, ossia:

— **assembramenti**: sono riunioni occasionali causate da una circostanza improvvisa ed imprevista;
— **dimostrazioni**: sono riunioni che danno luogo a manifestazioni per scopi civili o politici.

Inoltre, a *seconda del luogo in cui si svolgono*, le riunioni si distinguono in:

1) **private**, ossia quelle che si svolgono in luoghi privati;
2) **aperte al pubblico**, ossia quelle che si svolgono in luoghi privati, ma nei quali l'accesso può essere consentito in conformità a particolari prescrizioni (es.: l'acquisto del biglietto per l'ingresso in un cinema);
3) **pubbliche**, cioè quelle che si svolgono in luoghi pubblici ai quali tutti possono liberamente accedere.

B) Limiti alla libertà di riunione

Il diritto di riunione pur essendo tutelato dall'art. 17 Cost. è sottoposto a determinati **limiti**:

1) un primo limite riferibile a tutte le riunioni consiste nel fatto che esse devono svolgersi in **forma pacifica** e **senza armi**. La polizia può intervenire per sciogliere qualsiasi riunione che non sia pacifica o i cui partecipanti siano armati;
2) per le *riunioni pubbliche*, anche se non è richiesta alcuna autorizzazione, deve essere dato *preavviso* alle autorità di polizia affinché possano, preventivamente o contemporaneamente, intervenire per tutelare la pubblica incolumità, eventualmente anche vietando la riunione stessa, anche se tale divieto deve essere giustificato da comprovati motivi di sicurezza;
3) per le *riunioni private o in luoghi aperti al pubblico* non occorre nemmeno il preavviso.

La Corte Costituzionale ha ritenuto che il preavviso non è condizione di legittimità della riunione, ma un *onere* giuridicamente sanzionabile a carico dei soli promotori: pertanto non è sufficiente la *mancanza di preavviso* per procedere allo *scioglimento* della riunione in assenza di comprovati motivi di sicurezza e incolumità pubblica.

16. LA LIBERTÀ DI ASSOCIAZIONE

A) Generalità

La libertà di associazione è sancita dall'art. 18 comma 1° Cost., che dichiara: «i cittadini hanno diritto di associarsi liberamente, senza autorizzazione, per fini che non sono vietati dalla legge penale».

La libertà di associazione è, come la libertà di riunione, una **libertà strumentale**. La Costituzione, infatti, garantisce la libertà di associazione poiché, considera quest'ultima come una *libertà indispensabile* per favorire lo *sviluppo* della persona umana e la sua *partecipazione* alla vita economica, politica e sociale del Paese (art. 2 Cost.).

Inoltre dopo aver garantito in linea generale la libertà di associazione nell'art. 16, riconosce tale libertà particolarmente nei campi: *politico* (art. 49 Cost.); *sindacale* (art. 39 Cost.); *religioso* (art. 19 Cost.).

L'art. 18 della Costituzione, in ossequio al fondamentale principio del *pluralismo*, garantisce altresì la libertà delle associazioni, nel senso che tutela la *libertà* di dar vita ad una *pluralità di associazioni*, anche se perseguono lo stesso fine.

B) Limiti alla libertà di associazione

A norma dell'art. 18, sono **vietate**:

— le associazioni che la legge penale **vieta** espressamente (es. le associazioni a delinquere: art. 116 c.p.);
— le associazioni **segrete**;
— le associazioni a carattere **militare** che perseguono, anche se indirettamente, scopi politici.

La *proibizione delle associazioni segrete* deriva dal fatto che esse, in un regime democratico che garantisce la libertà di associazione, non possono che perseguire *finalità illecite* (es. Loggia P2).

La *proibizione delle associazioni militari* scaturisce dalla considerazione che in un regime democratico, i fini politici vanno perseguiti attraverso il *pacifico e civile scambio di idee*, senza ricorrere alle armi, alla violenza e a gerarchie di tipo militare.

17. LA LIBERTÀ DI FEDE RELIGIOSA

La libertà di fede religiosa garantita dall'art. 19 Cost. consiste nel diritto di tutti i cittadini di «professare liberamente la propria fede religiosa in qualsiasi forma, individuale o associata, di farne propaganda e di esercitarne in privato o in pubblico il culto, purché non si tratti di riti contrari al buon costume».

Per comprendere l'effettiva portata della libertà di fede religiosa occorre procedere ad una lettura sistematica degli artt. 3 e 19 Cost. dalla quale si evince che la *libertà* e la *perfetta eguaglianza* tra i *fedeli* è tutelata nell'ambito dell'estrinsecazione della fede, sia attraverso la manifestazione del pensiero, sia attraverso atti di culto individuale e collettivi.

Unico **limite** in materia è costituito dal fatto che gli atti di culto non devono essere *contrari* al **buon costume**, cioè **non** devono concretarsi in manifestazioni contrarie alla morale sessuale corrente (RESCIGNO).

18. LA LIBERTÀ DI PENSIERO E DI COMUNICAZIONE

La libertà di manifestazione del pensiero, che costituisce uno dei pilastri di ogni ordinamento democratico, è prevista nell'art. 21 della Costituzione che garantisce ad ogni soggetto («*tutti*») la facoltà di esteriorizzare il proprio pensiero con la *parola*, lo *scritto* ed ogni *altro mezzo di diffusione*.

I limiti a tale libertà possono così sintetizzarsi:

— la **riservatezza** e l'**onorabilità della persona**: in base agli artt. 2 e 3 Cost., il diritto di ciascuno a manifestare il proprio pensiero non deve essere esercitato in modo tale da ledere la dignità, l'onore, la *privacy* altrui. Il *rispetto della persona* è, infatti, tutelato da quelle norme penali che puniscono i reati di *diffamazione*, *ingiuria* e *oltraggio*;
— il **buon costume**: secondo la dottrina prevalente devono considerarsi vietate, a norma dell'art. 21 ult. comma, quelle manifestazioni di pensiero che, secondo il sentimento della collettività, offendono il *comune senso del pudore* e la *pubblica decenza*;
— il **segreto giudiziario**: per *garantire il buon andamento dell'amministrazione della giustizia e per proteggere la reputazione degli imputati*, è vietata la pubblicazione di atti destinati a rimanere segreti;
— il **segreto di Stato**: in base all'art. 12 della L. 12-10-77 n. 801 sono coperti dal segreto di Stato, atti, documenti, notizie, attività la cui divulgazione potrebbe recar danno alla sicurezza dello Stato democratico. Il segreto di Stato può essere imposto a tutela di interessi militari, diplomatici o di sicurezza;
— la **tutela della personalità del lavoratore**: la legge 20-5-70 n. 300 (*Statuto dei lavoratori*) pone una serie di norme dirette a consentire che i singoli prestatori di lavoro possano *liberamente manifestare il proprio pensiero* (art. 1), e a tal fine prevede la possibilità di svolgere nell'ambito aziendale *assemblee*, *referendum*, *etc.* (art. 31);
— l'**apologia di reato**: che non costituisce manifestazione di pensiero, ma rappresenta solo un *comportamento idoneo* a provocare delitti e pertanto non è ammissibile nel nostro ordinamento.

19. LA LIBERTÀ DI INFORMAZIONE

La libertà di manifestazione del pensiero viene concretamente esercitata attraverso una pluralità di mezzi tra i quali rientrano: *la stampa*, la *telediffusione e la radiodiffusione*, *la pubblica affissione*, gli spettacoli pubblici, etc.

La manifestazione del pensiero attraverso tali strumenti divulgativi rappresenta quel particolare aspetto del diritto sancito dall'art. 21 Cost., che viene denominato come «*libertà d'informazione*». Essa si articola in una pluralità di diritti: di *informare*, di *informarsi* e di *essere informati*.

Il principio della libertà di informazione deve, inoltre, considerarsi giuridicamente vigente in Italia anche per effetto dell'art. 19 della «*Dichiarazione universale dei diritti dell'uomo*» nel quale si riconosce ad ogni individuo il diritto di ricercare informazioni e notizie servendosi di qualsiasi mezzo, anche oltrepassando le frontiere nazionali (LOIODICE).

20. LA LIBERTÀ DI STAMPA

A) Premessa

Uno dei più importanti ed incisivi mezzi di manifestazione del pensiero è la **stampa**.

L'art. 21 Cost. sancisce in materia i seguenti principi:

— esclusione di ogni forma di **autorizzazione preventiva**. Infatti chi intende pubblicare un libro o uno stampato *non* deve chiedere alcun *consenso preventivo* per poterlo diffondere (art. 21, comma 2°);
— esclusione di ogni forma di **censura** successiva alla redazione dello stampato, ma antecedente alla sua pubblicazione (art. 21, 2° comma);
— disciplina legislativa delle ipotesi di **sequestro dello stampato**: questa misura *repressiva* posta in essere per impedirne la diffusione, dunque, deve seguire particolari procedure a garanzia della libertà di stampa (art. 21, commi 3° e 4°);
— possibilità di stabilire con legge dei **controlli** sui mezzi di **finanziamento** della stampa periodica (art. 21 comma 5°). La legge 5-8-1981 n. 416 (Disciplina delle imprese editrici e provvidenze per l'editoria) seguita dalle leggi n. 137/1983 e 1/1985 prevede una dettagliata disciplina per individuare i titolari delle imprese editoriali (che per motivi di trasparenza devono essere solo *persone fisiche*) ed impedire la concentrazione delle testate con la conseguenza di pericolose situazioni monopolistiche nel settore;
— la previsione della facoltà del legislatore di adottare **controlli** *preventivi e mezzi repressivi contro la stampa* che offenda il **buon costume** (art. 21, ultimo comma).

Attualmente, abolita l'*autorizzazione* per la pubblicazione di stampati è stato adottato un sistema di *registrazione* dei periodici presso la Cancelleria del Tribunale nella cui circoscrizione deve avvenire la pubblicazione.

B) Il sequestro degli stampati

Il *sequestro* delle pubblicazioni, giusto il dettato dell'art. 21 Cost. 3° comma, è possibile «*solo per atto motivato dell'autorità giudiziaria, nel caso di delitti per i quali la legge sulla stampa espressamente lo autorizzi, o nel caso di violazione delle norme che la legge prescrive per l'individuazione dei responsabili*».

Al di fuori di questi due casi la Corte Costituzionale ha ritenuto *inapplicabile* ogni tipo e forma di sequestro di stampati.

Quando però vi sia una *assoluta urgenza* e non sia possibile il tempestivo intervento dell'autorità giudiziaria, il sequestro della stampa periodica può essere eseguito da *ufficiali di polizia giudiziaria*, che *entro le 24 ore* devono fare denuncia all'autorità giudiziaria. Se questa non lo convalida nelle 24 ore successive, il sequestro s'intende *revocato e privo di ogni effetto* (art. 21, 4° comma, Cost.).

C) La responsabilità per i reati commessi col mezzo della stampa

La legge sulla stampa n. 47 dell'8 febbraio 1948 prevede il divieto della *stampa anonima* in quanto essa si pone in contrasto con i principi e le libertà costituzionali, essendo finalizzata ad occultare la responsabilità relativa ad eventuali illeciti penali in essa contenuti. Per questo motivo tutte le pubblicazioni devono riportare le generalità ed il domicilio dello stampatore e dell'editore.

Il codice penale si occupa dei *reati di stampa* negli artt. 57-58 bis come risultano dalle modifiche apportate dalla legge 4-3-1958 n. 127.

Con la riforma della legge n. 127/1958 il nuovo testo dell'art. 57 è stato così riformulato: «*il direttore o il vicedirettore responsabile, il quale omette di esercitare sul contenuto del periodico da lui diretto il controllo necessario ad impedire che col mezzo della pubblicazione siano commessi reati, è punito, a titolo di colpa, se un reato è commesso, con la pena stabilita per tale reato, diminuita in misura non eccedente un terzo*».

L'art. 57 bis estende questa disposizione alla *stampa non periodica*.

D) Il diritto di cronaca

Il *diritto di cronaca* costituisce una specificazione della libertà di manifestazione del pensiero (contra CHIOLA e BARILE). Infatti, il cronista non si limita solo al riferire e diffondere le notizie, ma anche ad *interpretarle* ed a *commentarle*. L'attività del giornalista, cioè, non è mai «*neutrale*»; i fatti che vengono riferiti sono sempre in qualche modo influenzati dalle *opinioni* del cronista (CRISAFULLI e PIZZORUSSO) e, pertanto, la *cronaca* rappresenta, comunque, il risultato della *elaborazione del pensiero dello stesso*.

Il diritto di cronaca presenta però alcuni *limiti interni* ed *esterni* che non possono essere travalicati:

— i **limiti interni** sono individuabili nella *rilevanza pubblico-sociale* e nella *verità obiettiva* dei fatti riferiti ed, inoltre, nella *forma* utilizzata per la narrazione che non deve concretarsi in un linguaggio di per sé offensivo;
— i **limiti esterni**, invece, sono finalizzati alla tutela di altri interessi rilevanti, come l'interesse ad una efficace amministrazione della giustizia (segreto di determinati atti o fasi processuali) o l'interesse alla difesa nazionale (segreto di Stato).

21. LA LIBERTÀ D'ANTENNA

Un importante mezzo di manifestazione del pensiero, nonché strumento di diffusione di idee e notizie, è la *radiotelevisione*.

Il D.L. 6-12-84 n. 807 convertito, con modifiche nella L. 4-2-1985 n. 10, recentemente integrata dalla L. 223/90, ribadisce che il sistema radiotelevisivo italiano si informa ai principi di *libertà di manifestazione del pensiero* e di *pluralismo* dettati dalla Costituzione e pertanto riconosce un *sistema misto* di emittenza, pubblico e privato, sancendo quello che è stato definito «il *diritto di libertà d'antenna*», diritto che tutela anche l'iniziativa economica privata (art. 41 della Cost.).

A) Il monopolio R.A.I.

Si ricordi che le trasmissioni radiotelevisive fino al 1975 erano gestite in *regime di monopolio dalla Rai-TV* (*Radio Audizioni Italia*). Tuttavia più volte era stata sollevata la questione di *legittimità costituzionale* di tale monopolio, anche se la Corte Costituzionale aveva sempre respinto tale questione *legittimando il regime di monopolio R.A.I.* sulle seguenti considerazioni:

— per il carattere di *preminente interesse generale* che l'attività radiotelevisiva riveste e che avrebbe giustificato il monopolio ex art. 43 Cost.;
— in considerazione del numero circoscritto di bande di frequenza e, quindi, della necessaria limitazione delle trasmittenti. In tal caso l'abolizione del monopolio pubblico avrebbe determinato la nascita di *un oligopolio privato*, privo delle garanzie generali teoricamente assicurate dal monopolio statale, che avrebbe finito per comprimere, fino a farlo scomparire, il diritto di tutti alla libera minifestazione del pensiero attraverso il mezzo radiotelevisivo.

Nell'aprile 1975 fu varata una legge di *riforma* che riaffermava il monopolio statale sulle trasmissioni radiotelevisive attraverso la RAI-TV, ma segnava al tempo stesso, un radicale rinnovamento in senso democratico della RAI, sottraendola alla gestione clientelare dei partiti della maggioranza governativa.

B) La rottura del monopolio

Tuttavia, nel 1976, con la sentenza n. 202 del 9 luglio, la Corte Costituzionale dichiarava l'incostituzionalità del monopolio radiotelevisivo via *etere, su scala locale*, riconoscendo la disponibilità delle frequenze per consentire la libertà di iniziativa privata, senza pericolo di creare situazioni di monopoli ed oligopoli, e anche per il modesto costo degli impianti di trasmissione.

A seguito di tale sentenza, successivamente confermata da ulteriori interventi della Corte (sentenza n. 148/1981; n. 237/1984; n. 231/1985), chiunque, previa regolare autorizzazione, veniva posto in condizione di installare una stazione radiofonica o televisiva via etere, nell'*ambito locale*, senza subire nessuna forma di coordinamento e controllo.

C) La legge Mammì

Dopo un lungo periodo di totale anarchia nel settore radiotelevisivo, nel 1990 fu emanata la L. 6-8-1990, n. 223, meglio nota come legge Mammì, nella quale venivano fissate, non senza molteplici compromessi, concrete norme in tema di radiotelediffusione.

In questa legge sono stati riaffermati, senza equivoci, anche in tale materia, i principi del **pluralismo** e **della libera manifestazione del pensiero** confermando l'esistenza, anche nel nostro Paese di un **sistema misto** di emittenza pubblica e privata, ed è stato altresì riaffermato il preminente interesse generale dello Stato in materia di trasmissioni radiotelevisive.

La travagliata storia dell'emittenza pubblica e privata in Italia non si è, tuttavia, interrotta con l'emanazione della L. 223/90: dopo pochi mesi, infatti, già se ne segnalavano le lacune, indubbiamente frutto del compromesso tra le diverse forze politiche, sostenitrici dei vari potentati economici interessati alla disciplina dell'emittenza.

Già in sede di ripartizione e assegnazione delle frequenze radiotelevisive vi è stato un lungo dibattito sui criteri e le modalità da seguirsi.

Successivamente è stata emanata la L. 25-6-1993, n. 206 contenente disposizioni di riforma della RAI-TV.

La legge aveva come scopi principali quello di sottrarre l'ente radiotelevisivo all'influenza dei partiti politici — perpetratasi attraverso la famigerata pratica della «lottizzazione» — e quello di sanare il grave dissesto finanziario della RAI.

D) La disciplina transitoria, la sent. 420/94 della Corte Costituzionale e i referendum del '95

Subito dopo l'approvazione della legge di cui sopra il governo ha presentato un decreto legge (D.L. n. 323/93 conv. in L. 422/93) che rappresenta, in realtà, la quarta stesura di un testo originario risalente al febbraio 1993 (decreti nn. 44, 127 e 208).

Con questo provvedimento si è inteso procedere all'emanazione di una normativa transitoria, in attesa della prevista revisione globale dell'assetto del settore, autorizzando le emittenti titolari di concessioni ad operare con gli impianti già esistenti per un periodo transitorio fino ad agosto 1996: entro quella data era necessario procedere ad una più generale riorganizzazione dell'intero assetto radiotelevisivo.

Sulla materia è, poi, nuovamente intervenuta la Corte Costituzionale che, con sent. 420/94, ha dichiarato l'illegittimità costituzionale dell'art. 15, co. 4, della L. 223/90 nella parte in cui prevede che il 25% (o tre reti) delle emittenti private a diffusione nazionale possano essere detenute dallo stesso soggetto in quanto non garantisce «la libertà ed il pluralismo informativo e culturale», principio al quale si era richiamata la stessa Corte allorché aveva rotto il monopolio dell'emittenza pubblica.

Tramontata anche l'ipotesi di una sola rete televisiva nazionale per operatore, a causa dell'esito negativo del referendum svoltosi l'11 giugno 1995, la legge 23-12-1996, n. 650, convertendo il D.L. 545/96, ha prorogato il termine del 27 agosto 1996 fino al 31 maggio 1997 o addirittura fino al 31 luglio 1997 se entro tale data la legge di riforma del sistema radiotelevisivo abbia ricevuto l'approvazione di una delle Camere. Tutti gli eventi richiamati rendono ancora più evidente la non rinviabilità della riforma. Si ricordi, infine, che con L. 31-7-1997, n. 249 è stata istituita l'*Autorità garante per le telecomunicazioni.*

22. LA CONDIZIONE GIURIDICA DELLO STRANIERO

A) Generalità

Nel nostro ordinamento giuridico lo straniero si trova in una posizione per molti aspetti non dissimile a quella del cittadino.

In particolare la Costituzione all'art. 10 prevede *diritto di asilo* a favore dello straniero al quale sia impedito nel suo Paese l'effettivo esercizio delle libertà democratiche, garantite dalla Costituzione stessa.

Tra l'altro l'art. 16 delle disposizioni sulla legge in generale prevede la c.d. «*Clausola della reciprocità*», per cui lo straniero è ammesso a godere dei diritti civili attribuiti al cittadino a condizione di reciprocità e salve le disposizioni contenute in leggi speciali (1).

In materia di stranieri importanti innovazioni sono state apportate nel nostro ordinamento dal D.L. 30/12/89 n. 416 (conv. in L. 28/2/90 n. 39), disciplinante «l'ingresso ed il soggiorno» nello Stato dei cittadini «extracomunitari».

Tale normativa ha abrogato numerosi articoli del T.U. delle Leggi di P.S. e del Regolamento (art. 13), incidendo, pertanto, anche sulla disciplina dettata in generale per gli stranieri.

Attualmente, quindi, in tema di stranieri bisogna fare una distinzione tra i *cittadini «comunitari»*, per i quali si applica la sola normativa del TULPS e Reg. (nonché norme generali contenute eventualmente in leggi speciali); ed i *cittadini «extracomunitari»* (a cui sono equiparati gli «**apolidi**») per i quali vige la disciplina prevista dalla L. 39/90.

(1) L'art. 1 del D.L. 30/12/89 n. 416 (convert. in L. 39/90) ha disciplinato la materia relativa all'ingresso nello Stato dei «*Rifugiati*» facendo cadere precedenti limitazioni geografiche e riserve.

B) Normativa in ordine ai cittadini comunitari

In base all'art. 13 della L. 39/90 tutti i limiti alla libera circolazione degli stranieri («comunitari», per gli «extracomunitari», infatti, come vedremo vige la disciplina limitativa della L. 39/90) sono venuti meno.

C) Normativa in materia di ingresso e soggiorno dei cittadini extracomunitari

Secondo quanto disposto dall'art. 2 della recente L. 28-2-1990, n. 39, di conversione del D.L. 30-12-1989, n. 416, i cittadini extracomunitari possono entrare in Italia per vari motivi: quali il turismo; lo studio; il lavoro subordinato o autonomo; la cura; i familiari; il culto.

È consentito entrare nel territorio dello Stato agli stranieri che al controllo di frontiera siano provvisti di *passaporto* valido o *documento equipollente* (legalmente riconosciuto), nonché di *visto* ove previsto, e che siano, altresì in regola con le vigenti disposizioni, anche amministrative, in materia sanitaria e assicurativa.

Il visto di ingresso, rilasciato dalle autorità diplomatiche o consolari competenti in relazione ai motivi di viaggio, deve contenere: il motivo; la durata; il numero di ingressi consentiti.

Gli uffici di polizia di frontiera devono respingere dalla frontiera stessa gli stranieri sprovvisti dei documenti e dei requisiti poco sopra descritti a meno che non dimostrino la disponibilità in Italia di beni o di un'occupazione regolarmente retribuita.

Gli stranieri provvisti di permesso di soggiorno hanno diritto all'iscrizione anagrafica presso il comune di residenza.

I Sindaci annotano sia l'iscrizione che la variazione anagrafica sul permesso di soggiorno e ne danno comunicazione, entro 10 gg., alla questura.

La carta d'identità è rilasciata agli stranieri che hanno ottenuto l'iscrizione anagrafica su apposito modello approvato con decreto del Ministro dell'Interno.

D) Comunicazione agli interessati e norme in materia di tutela giurisdizionale

L'autorità competente ad emanare i provvedimenti concernenti l'ingresso, il soggiorno e l'espulsione degli stranieri, deve comunicare o notificare all'interessato l'atto che lo riguarda unitamente all'indicazione delle modalità di impugnazione e ad una traduzione in lingua da lui conosciuta ovvero ove non sia possibile in francese, inglese o spagnolo.

E) Espulsione dal territorio dello Stato

L'art. 7 della L. 28-2-90, n. 39, di conversione del D.L. 30-12-89, n. 416, stabilisce che fermo restando quanto previsto dal codice penale, dalle norme in materia di stupefacenti e le disposizioni in materia di ordine pubblico, gli stranieri che abbiano riportato condanna con sentenza passata in giudicato per uno dei delitti previsti dall'art. 380, co. I e II, c.p.p. (arresto obbligatorio in flagranza) sono espulsi dal territorio dello Stato.

Sono altresì espulsi gli stranieri che violino le disposizioni in materia di ingresso e soggiorno; che si siano resi responsabili direttamente, o per interposta persona, in Italia o all'estero, di una violazione grave di norme valutarie o fiscali o delle norme in materia di intermediazione di manodopera, sfruttamento della prostituzione o del reato di violenza sessuale; che appartengano ad una delle categorie elencate dall'art. 1 della L. 1423/56 in materia di misure di prevenzione; che si trovino in una delle condizioni di cui all'art. 1 della L. 575/65 e successive modificazioni, recante disposizioni contro la mafia; su richiesta dello stesso straniero (o del suo avvocato) nel caso in cui vi sia stata condanna, con sentenza passata in giudicato, ad una pena inferiore a tre anni o sia stata disposta misura di custodia cautelare per delitti diversi da quelli previsti dall'art. 275, 3° comma del c.p.p.

L'espulsione viene disposta:

— dal prefetto con decreto motivato e, qualora lo straniero risulti sottoposto a procedimento penale, previo nulla-osta dell'autorità giudiziaria;
— dal Ministro dell'Interno, con decreto motivato, per motivi di ordine pubblico o di sicurezza dello Stato, previo nulla-osta dell'A.G., ove lo straniero risulti sottoposto a procedimento penale;
— dal giudice che procede, o da quello dell'esecuzione, per gli stranieri che ne abbiano fatto richiesta nelle ipotesi sopra ricordate.

Lo straniero espulso viene rinviato allo Stato di appartenenza ovvero, quando ciò non sia possibile, allo Stato di provenienza. Il questore esegue l'espulsione mediante *intimazione* allo straniero ad abbandonare entro 15 gg. il paese.

In ogni caso non è consentita l'espulsione dello straniero verso uno Stato ove possa essere oggetto di persecuzione per motivi di razza, sesso, lingua, cittadinanza, opinioni politiche, religione, condizioni personali o sociali.

CAPITOLO QUARTO

PRINCIPI COSTITUZIONALI RELATIVI A DIRITTI E RAPPORTI DI NATURA ETICO-SOCIALE

1. LA FAMIGLIA

A) Principi costituzionali

La Carta Costituzionale garantisce ampiamente le *formazioni sociali* nel cui ambito la personalità dell'uomo può trovare piena esplicazione.

Tali formazioni sociali costituiscono un importante *raccordo* tra lo Stato ed il singolo cittadino e rappresentano una presenza imprescindibile per un ordinamento autenticamente democratico.

La principale e basilare formazione sociale intermedia è senza dubbio la *famiglia*, della quale trattano gli artt. 29-31 Cost. dal cui esame si possono evincere i seguenti **principi generali** in materia di rapporti familiari:

a) il riconoscimento della **famiglia** come **società naturale** fondata sul matrimonio, e quello dei *diritti della famiglia come tale*, a prescindere dai diritti (e doveri) dei membri di essa (art. 28 comma 1);
b) la **libertà** di **scelta** del proprio **coniuge**;
c) l'**eguaglianza morale e giuridica** dei **coniugi** (vedi infra);
d) la *tutela* e la *garanzia* dell'**unità familiare**;
e) il *diritto-dovere* dei genitori di **mantenere**, **istruire** ed **educare** i **figli** (art. 30 comma 1);
f) l'*assicurazione* della *formazione*, *istruzione* e *mantenimento* dei **figli** in **assenza** dei **genitori**, perché ignoti, o incapaci, o morti (artt. 30 comma 2; 31 comma 2).
All'art. 31 Cost. sono indicati i *compiti* attivi della Repubblica nei confronti della famiglia; lo Stato agevola con misure economiche ed altre provvidenze la formazione della famiglia e l'adempimento dei compiti relativi, con particolare riguardo alle famiglie numerose. Inoltre protegge la maternità, l'infanzia e la gioventù, favorendo gli istituti necessari a tale scopo (come, ad esempio, i *consultori familiari* istituiti con legge 29-7-75 n. 405);
g) il diritto alla **procreazione cosciente e responsabile** ed il *valore sociale della maternità e la tutela della vita umana fin dal suo inizio*.
La legge 22 maggio 1978 n. 194 (interruzione volontaria della gravidanza) consente alla donna, nei primi 90 giorni della gestazione, piena ed assoluta libertà di decisione sull'interruzione della gravidanza. Anche la minorenne può interrompere la gravidanza, prescindendo, con autorizzazione del giudice tutelare, dall'assenso delle persone che esercitano la potestà parentale. È introdotto, altresì, il diritto alla «*obiezione di coscienza*» per il personale sanitario: due referendum nel 1981 hanno confermato il mantenimento della legge.

B) Attuazione di tali principi nel nuovo diritto di famiglia

Con la legge 19 maggio 1975 n. 151 il legislatore, tenendo conto del principio della *uguaglianza giuridica dei coniugi*, ha ampiamente modificato la disciplina dei rapporti familiari, dando piena attuazione anche ad altri istituti previsti dalle norme costituzionali.

È stata riconosciuta la completa **uguaglianza giuridica e morale dei coniugi**, pur con i limiti stabiliti dalla legge a garanzia dell'unità familiare, con riferimento: sia ai rapporti morali e patrimoniali fra i coniugi stessi, sia ai rapporti tra genitori e figli.

È *stata abolita la potestà maritale*: spetta oggi infatti ad entrambi i coniugi, in egual misura, la determinazione dell'indirizzo della vita familiare e la fissazione della residenza della famiglia secondo le esigenze di entrambi e quelle preminenti della famiglia stessa (art. 144 cod. civ.).

Qualora sorga disaccordo, la legge prevede la possibilità di intervento del *giudice*, il quale, ove sia richiesto espressamente e congiuntamente dai coniugi, può adottare la soluzione che ritiene più adeguata alle esigenze della famiglia.

Incombe ad entrambi i coniugi, in egual misura, il rispetto dell'obbligo (morale e giuridico) di *reciproca fedeltà* (art. 143 cod. civ.).

Entrambi i coniugi devono collaborare alla vita della famiglia, ed entrambi sono tenuti, ciascuno in relazione alle proprie *sostanze* e alla propria *capacità di lavoro* professionale o casalingo, a contribuire ai bisogni della famiglia (art. 143 codice civile).

È venuto meno l'istituto della dote e si è istituita la *comunione legale volontaria* dei beni fra i coniugi i quali godono in comune dei beni acquistati durante il matrimonio e possono anche porre in comunione i beni di cui essi disponevano già prima del matrimonio, o acquistati personalmente da oguno di essi durante il matrimonio. Infine è scomparsa ogni forma di *predominio* giuridico del *marito sulla moglie*. Questa conserva il proprio cognome e vi aggiunge quello del marito; conserva la cittadinanza italiana, salvo espressa rinuncia, anche se per effetto del matrimonio assume una cittadinanza straniera.

Per quanto riguarda il **rapporto genitori-figli** la riforma del diritto di famiglia ha apportato notevoli e significative innovazioni in base alle quali:

— incombe ad entrambi i coniugi, in egual misura, l'obbligo di mantenere, istruire ed educare la prole tenendo conto delle capacità, dell'inclinazione naturale e delle aspirazioni dei figli (art. 147 cod. civ. modif. dalla L. n. 151/1975);
— è stata sostituita alla patria potestà, la potestà parentale sui figli che spetta in egual misura al padre e alla madre. In caso di contrasto su questioni di particolare importanza relative all'educazione della prole, ciascuno dei genitori può ricorrere al giudice, che stabilisce i provvedimenti che ritiene utili nell'interesse del figlio a garanzia dell'unità familiare;
— la riforma del 1975 è conforme alle direttive costituzionali per quanto riguarda ogni aspetto della tutela giuridica e sociale dei figli nati fuori dal matrimonio. È scomparsa la denominazione di «*figlio illegittimo*» che prima costituiva quasi un marchio di carattere morale gravante ingiustamente sulla persona e si è adottata la denominazione di «figli naturali», per indicare i figli nati al di fuori di un rapporto matrimoniale giuridico.
L'art. 113 della legge 1975, n. 151, afferma che «*la paternità e maternità naturale possono essere giudizialmente dichiarate nel caso in cui il riconoscimento è ammesso*» e che «*la prova della paternità e della maternità può essere data con ogni mezzo*». *Anche i figli naturali godono così dei diritti successori* che in precedenza erano riconosciuti solo ai figli legittimi.

C) La famiglia di fatto

Negli ultimi decenni è emerso nella realtà sociale un modello di convivenza alternativa alla famiglia legale: la c.d. *famiglia di fatto*, definita in giurisprudenza come convivenza tra due persone non legate da vincoli matrimoniali ma caratterizzata dai connotati sostanziali tipici del rapporto matrimoniale: coabitazione abituale, assistenza reciproca, collaborazione, contributo ai bisogni comuni.

Secondo quanto disposto dall'art. 317bis del codice civile, «se il riconoscimento del figlio è fatto da entrambi i genitori, l'esercizio della potestà (sul figlio) spetta congiuntamente, a entrambi, qualora siano conviventi».

Da ciò si evince il riconoscimento, nel nostro ordinamento, della *famiglia di fatto* (garantita costituzionalmente almeno relativamente alla filiazione).

A rafforzare tale tesi è intervenuta la sentenza della Corte Costituzionale n. 404/1988 che ha riconosciuto rilevanza giuridica alla convivenza *more uxorio* ai fini della successione nel contratto di locazione.

2. LA SCUOLA

A) Principi costituzionali

Per l'art. 9 Cost., la Repubblica *promuove lo sviluppo della cultura e la ricerca scientifica e tecnica; tutela il paesaggio e il patrimonio storico ed artistico della nazione.*

Tale articolo trova la sua applicazione, per quel che riguarda lo sviluppo della cultura, negli artt. 33-34 Cost., che disciplinano la materia dell'**istruzione scolastica** secondo i seguenti principi:

a) il principio della *libertà* di *insegnamento* (art. 33 comma 1);

b) il principio della *presenza* di *scuole statali* per tutti i tipi, ordini e gradi dell'istruzione (art. 33 comma 2);
c) il principio del *libero accesso all'istruzione* scolastica, senza alcuna discriminazione (art. 34 comma 1);
d) il principio della *obbligatorietà* e *gratuità* della istruzione dell'obbligo (art. 34 comma 2);
e) il riconoscimento del *diritto* allo *studio* anche a coloro che sono *privi di mezzi*, purché capaci e meritevoli (art. 34 comma 3) mediante borse di studio, assegni familiari ed altre provvidenze da attribuirsi per concorso;
f) il principio dell'ammissione *per esami* ai vari gradi dell'istruzione scolastica e dell'abilitazione professionale per *esami* (art. 33 comma 5);
g) il principio della *libera istituzione di scuole* da parte di *enti o privati* (art. 33 comma 3);
h) il principio della *possibilità* di *parificazione* delle scuole statali a quelle private, quanto agli effetti legali e al riconoscimento professionale del titolo di studio (art. 33 comma 4).

B) La libertà d'insegnamento

L'art. 33 comma 1 sancisce che l'*arte* e la *scienza* sono *libere* e *libero* ne è l'*insegnamento*.

Secondo la comune accezione, riconosciuta dalla dottrina prevalente, per libertà di insegnamento si intende qualunque manifestazione del proprio pensiero riguardante l'arte e la scienza e si sostanzia nelle ulteriori:

— *libertà* di *manifestare* il *proprio pensiero* con ogni mezzo possibile di diffusione;
— *libertà* di *professare qualunque tesi* o *teoria* si ritenga degna di accettazione;
— *libertà* di *svolgere* il proprio insegnamento secondo il *metodo* che appaia *opportuno* adottare.

Quindi è riconosciuta al docente la libertà di esercitare le sue funzioni didattiche (ed eventualmente di ricerca scientifica) senza vincoli di ordine politico, religioso o, comunque, ideologico. È un diritto personale dell'insegnante, che trova solo un limite «interno» nel fatto che l'attività didattica deve esercitarsi in ogni caso nel rispetto della libertà di opinione del discente e sviluppandone il senso critico.

C) La libertà dell'istruzione e il diritto allo studio

Lo Stato garantisce non solo la libertà di insegnamento inteso come attività culturale didattica, ma anche la libera gestione dell'istruzione.

Conseguentemente si può affermare che:

— lo Stato *non ha il monopolio* della istituzione di scuole e corsi di istruzione, sia di cultura generale che tecnico-professionale;
— chiunque, *ente* o *privato*, può istituire scuole, di qualsiasi tipo, per impartire qualunque tipo di istruzione.

Ciò discende evidentemente dalla libertà di manifestazione del pensiero e di iniziativa per la diffusione dello stesso con molteplicità di contenuti ideologici.

Invece *non è libera*, ma *legata* a precise *valutazioni tecniche*, la possibilità di *parificare* le scuole istituite da enti o privati, alle scuole gestite dallo Stato (art. 33 comma 4 Cost.).

3. LA SALUTE E L'AMBIENTE

A) Generalità e applicazioni del diritto alla salute

L'art. 32 della Costituzione sancisce e tutela ampiamente il *diritto alla salute* come «*fondamentale diritto dell'individuo*» ed «*interesse della collettività*».

Tale diritto presenta una molteplicità di valenze, infatti:

— nel suo contenuto tradizionale, si identifica nel *diritto al rispetto dell'integrità fisica* che può essere fatto valere *erga omnes*;
— nella concezione solidaristica della Costituzione si pone anche come *diritto all'assistenza sanitaria*, che però può esser fatto valere nei confronti dello Stato. Sotto questo profilo significativa è stata la *riforma sanitaria* apportata con la legge del 23-12-78 n. 833 che, istituendo il *Servizio Sanitario Nazionale*, ha esteso l'obbligo dello Stato di assicurare le prestazioni sanitarie e farmaceutiche non solo agli indigenti ma anche a tutta la popolazione (gratuitamente o semigratuitamente attraverso i *tickets*);
— nella prospettiva di una più efficace tutela della persona, la giurisprudenza ha affermato (Cass. Sez. Un. 6 ottobre 1979 n. 5172) che il diritto alla salute comprende anche il diritto alla *salubrità dell'ambiente*.

B) Salvaguardia e risarcibilità

Come già evidenziato, l'art. 32 Cost. tutela la salute come diritto fondamentale dell'individuo, diritto salvaguardato nel modo più *pieno* e *completo*. Sotto questo profilo viene in rilievo il problema della risarcibilità del c.d. **danno biologico**, inteso come danno alla salute in sé per sé.

Il riconoscimento costituzionale contenuto nell'art. 32 Cost. del diritto alla salute ha indotto la dottrina e la giurisprudenza più moderna a considerare la violazione di tale bene come fonte di responsabilità ex art. 2043 cod. civ., *indipendentemente* dalle conseguenze che tale violazione abbia causato sull'*attitudine a produrre reddito*.

C) Tutela dell'ambiente

Strettamente collegata al *diritto alla salute sancito* dall'art. 32 Cost. è, come si è detto, la tematica relativa alla **tutela dell'ambiente**; tra le norme costituzionali su cui si può fondare la legislazione ambientale rilevano particolarmente gli artt. 9 e 32, 1° comma Cost.

L'art. 9 è composto da due commi, di cui il primo è rivolto specificamente alla tutela della «*cultura*» e della «*ricerca scientifica e tecnica*», mentre il secondo è finalizzato alla salvaguardia del «*paesaggio e del patrimonio storico-artistico*». Questi quattro aspetti non devono essere considerati isolatamente bensì come un *quid unitario* che identifica complessivamente la c.d. *tutela ambientale* (PIZZORUSSO).

Infatti se è evidente che l'aspetto principale di tale tutela è costituito dal *paesaggio*, non può negarsi tuttavia, un suo collegamento con la tutela della *cultura* e della *ricerca scientifica*, che è indispensabile per impedire l'assoggettamento e la formazione della natura a meri interessi economici e speculativi.

L'art. 32, 1° comma, tutela il diritto del cittadino alla salute sia come diritto *individuale*, sia come interesse della *collettività*. Tale diritto non può essere considerato separatamente rispetto alla tutela dell'ambiente nel quale l'individuo esplica la sua personalità, dovendosi invece ritenere che il diritto alla salute ricomprende in sé anche il diritto alla *salubrità dell'ambiente*.

Per quanto riguarda in particolare il problema della tutela giuridica dell'ambiente, essa si concretizza principalmente nell'attuazione di una razionale disciplina urbanistica e nella difesa del territorio, dell'aria e dell'acqua contro gli inquinamenti ecologici.

Sotto quest'ultimo profilo notevole importanza ha avuto la legge 8 luglio 1986 n. 349 la quale, oltre ad aver istituito il *Ministero dell'Ambiente* (che ha assorbito le competenze prima ripartite fra altri ministeri e comitati), ha dettato la disciplina relativa al c.d. **«danno ambientale»**, legittimando alcune associazioni ambientalistiche ad intervenire nei giudizi promossi dallo Stato e ad impugnare davanti ai giudici amministrativi, gli atti amministrativi lesivi, appunto, diritto ad un ambiente salubre.

4. I DOVERI PUBBLICI

Gli artt. 52-54 Cost. prevedono una serie di **doveri pubblici inderogabili** che risultano strettamente connessi alla concreta attuazione del *principio di solidarietà* sancito nella seconda parte dell'art. 2 Cost.

I principali doveri pubblici consistono:

— **nel dovere del cittadino di difendere la patria** e di prestare il **servizio militare obbligatorio**.

Il legislatore ha tuttavia riconosciuto il principio di *obiezione di coscienza* come espressione della libera esplicazione della propria personalità provvedendo con legge 15-12-72 (modificata con L. 24-12-74 n. 695) a consentire agli obiettori di coscienza la prestazione di un *servizio sostitutivo civile*;

— nel dovere di **contribuire alla spese pubbliche** sancito dall'art. 53 C. per «*tutti*» (cittadini e stranieri) in proporzione delle rispettive capacità retributive.

Per quanto riguarda gli stranieri, l'obbligo di contribuire alle spese pubbliche è riferito solo a coloro che vivono o hanno un reddito prodotto in Italia;

— nel dovere di *tutti i cittadini* di essere **fedeli alla Repubblica** e di osservarne la Costituzione e le leggi.

CAPITOLO QUINTO
I RAPPORTI ECONOMICI E SOCIALI

1. IL LAVORO COME CARATTERISTICA FONDAMENTALE DELLO STATO

La Costituzione considera il lavoro come il più importante fenomeno della vita sociale, affermando all'art. 1, che *«l'Italia è una Repubblica democratica fondata sul lavoro»*.

Il concetto di lavoro riportato nell'art. 1, è identico a quello dell'art. 4, comma 2°, Cost.: cioè, è lavoro qualsiasi *attività socialmente* utile, intendendo per tale ogni attività o funzione che concorra al progresso materiale o spirituale della società.

Per l'art. 1 Cost., sono *lavoratori* tutti coloro che svolgono una attività socialmente utile (MAZZIOTTI), sia in forma autonoma che subordinata.

Il 1° comma dell'art. 4 Cost. afferma: *«La repubblica riconosce a tutti i cittadini il diritto al lavoro e promuove le condizioni che rendono effettivo questo diritto»*.

Il diritto al lavoro, menzionato nel comma 1° Cost., *non* dà luogo ad un diritto *soggettivo perfetto*, e per ciò stesso azionabile in giudizio dai cittadini che ne sono momentaneamente privi, bensì indica un *principio fondamentale* di indirizzo per il legislatore ordinario al fine di promuovere l'effettività di tale diritto.

Il **diritto al lavoro** si configura:

— come diritto di **libertà**: ogni cittadino pur essendo tenuto a svolgere un'attività lavorativa, deve essere libero di *scegliere* quale attività lavorativa svolgere;
— come diritto **civico**: il diritto al lavoro sancito dall'art. 4, attribuisce al cittadino la pretesa ad un *«facere»* da parte della repubblica per promuovere le condizioni che rendono effettivo il diritto al lavoro (CUOCOLO).

Il diritto al lavoro ex art. 4 Cost. essendo un diritto *non perfetto* in quanto non azionabile in giudizio, e concretandosi sostanzialmente in un principio direttivo per il legislatore ordinario, non garantisce al singolo il diritto di ottenere in concreto un'occupazione e neppure, in via assoluta il diritto alla conservazione del posto di lavoro.

Il 2° comma dell'art. 4 Cost. afferma: *«Ogni cittadino ha il dovere di svolgere, secondo le proprie possibilità e la propria scelta, una attività o una funzione che concorra al progresso materiale o spirituale della società»*.

Non si tratta di un *dovere giuridico*, bensì esclusivamente *morale* in quanto l'obiettivo della piena occupazione, nonostante siano passati quarant'anni dall'entrata in vigore della Costituzione, non è stato affatto conseguito.

L'art. 4 non intende costringere il cittadino a lavorare, ma esprime solo l'ovvia esigenza che, per avere diritto a vivere a spese della collettività, occorre essere in *condizioni tali da non potere sostentarsi, né con i propri beni, né con il proprio lavoro*: questa norma, cioè esclude ogni forma di parassitismo economico e sociale.

Ciò del resto è confermato dall'art. 38, 1° comma, Cost., secondo il quale «ogni cittadino inabile al lavoro e sprovvisto dei mezzi necessari per vivere ha diritto al mantenimento e all'assistenza sociale».

2. PRINCIPI COSTITUZIONALI IN MATERIA DI LAVORO

Oltre agli artt. 1 e 4 Cost., che trattano del lavoro come fenomeno sociale caratterizzante la struttura dello Stato, vigono numerose altre norme costituzionali che si occupano della suddetta materia.

Tra esse possiamo distinguere quelle norme che concernono espressamente il rapporto di *lavoro*, ponendo i principi fondamentali della disciplina di tale rapporto, e quelle che invece attengono più propriamente alla attività di *contrattazione* e *sindacale*.

Tra i **principi** riguardanti in maniera specifica il **rapporto di lavoro** vanno ricordati:

— il principio della *tutela* del *lavoro* che la Repubblica assume come suo compito fondamentale (art. 35, comma 1°);

— il principio della *retribuzione proporzionata* e *sufficiente* (art. 36 comma 1°);
— il *diritto irrinunciabile* del lavoratore al *riposo* settimanale ed alle *ferie* annuali retribuite (art. 36, comma 3°);
— l'*eguaglianza di diritti* fra *lavoratori* e *lavoratrici* (art. 37, comma 1°);
— il principio del *contemperamento* fra la funzione della *maternità*, propria della donna, ed il *diritto al lavoro* spettante ad essa a parità dell'uomo (art. 37, comma 1°, seconda parte);
— il principio della *parità di retribuzione* per il lavoro dei minori, rispetto al lavoro ordinario, e l'esigenza di una tutela legislativa appropriata del lavoro minorile (art. 37, comma 3°);
— la *riserva di legge* per determinare la durata della *giornata lavorativa*, e l'età minima per poter svolgere *il lavoro* salariato (art. 36, comma 2° e 37, comma 2° Cost.);
— il diritto al *mantenimento* e all'*assistenza sociale*, riconosciuto a tutti coloro che sono *inabili al lavoro* (art. 38, comma 1°);
— il diritto ad *ogni forma di previdenza sociale* da parte dei lavoratori (art. 38, comma 2°);
— il diritto all'*educazione e avviamento professionale* anche per coloro che sono inabili o minorati (art. 38, comma 3°).

Tra i **principi** costituzionali riguardanti in maniera specifica la **contrattazione collettiva** vanno ricordati:

— il principio della *libertà* dell'organizzazione sindacale, (art. 39, comma 1°);
— il principio della *capacità* dei sindacati registrati, di *stipulare contratti collettivi* di lavoro, vincolanti per tutti i lavoratori appartenenti alle categorie che essi rappresentano, anche se non iscritti (art. 39, comma 3°);
— il riconoscimento del *diritto di sciopero*, anche se non illimitato ma circoscritto nell'ambito delle leggi che lo regolano (art. 40 Cost.).

3. Segue: LA PARITÀ TRA UOMO E DONNA IN MATERIA DI LAVORO

La *parità in materia di lavoro* (cioè la mancanza di discriminazione) è stata prevista dal costituente solo in relazione al *sesso* e per questo la Costituzione all'art. 37 afferma che *«la donna lavoratrice ha gli stessi diritti, e a parità di lavoro, le stesse retribuzioni che spettano al lavoratore»*.

In base a tale norma, già dal momento della entrata in vigore della Costituzione sarebbero dovute cadere molte norme che vigevano nel precedente regime e sancivano una diversità di trattamento tra uomo e donna.

Malgrado ciò l'effettivo conseguimento della parità dei sessi nel campo del lavoro si è affermata solo dopo parecchi anni dall'entrata in vigore della Costituzione, grazie anche al progressivo accoglimento da parte della giurisprudenza del principio di eguaglianza *fra sessi nel lavoro*.

Per troncare così ogni disparità di trattamento tra uomini e donne, il legislatore intervenne con la legge n. 903 del 9 dicembre 1977 relativa alla *«parità di trattamento tra uomini e donne in materia di lavoro»*.

Secondo l'art. 1 della legge, *«è vietata qualsiasi discriminazione fondata sul sesso per quanto riguarda l'accesso al lavoro, indipendentemente dalle modalità di assunzione e qualunque sia il settore o il ramo di attività, a tutti i livelli della gerarchia professionale»*.

In base al 3° comma di questo articolo, il divieto si estende a tutte le *iniziative in materia di avviamento, formazione e aggiornamento professionale* per impedire che, in frode al disposto del 1° comma, si attuasse una discriminazione, indirizzando verso settori diversi del lavoro uomini e donne, già dal momento d'inizio della formazione professionale.

Accanto a questi generali divieti, la legge ha introdotto **numerose altre regole**, dirette ad *attuare l'effettiva* parità tra uomo e donna, che affermano la:

— **parità di retribuzione**: già espressamente prevista dall'art. 37 Cost., anche se la formula è sintetica;
— **parità di progressione nella carriera**: benché l'art. 37 Cost. non faceva esplicito accenno alla carriera, il diritto della donna ad ottenere gli stessi criteri di avanzamento propri dell'uomo deve senz'altro farsi rientrare fra i diritti inerenti al rapporto di lavoro, e quindi è anch'esso tutelato dalla Costituzione (art. 3);
— **parità di diritti** anche in ordine all'*assunzione* degli **oneri familiari**: ad esempio, oggi può essere il lavoratore-padre a chiedere il permesso di assentarsi dal lavoro per assistere il figlio, in luogo della lavoratrice-madre, purché questa vi abbia rinunciato.

Si ricordi che con L. 22 giugno 1990, n. 164, sono state dettate le norme sulla composizione ed i compiti della *Commissione nazionale per la parità* e le pari opportunità tra uomo e donna previste dal comma 2° dell'art. 21 della L. 400/88, che ha il compito di promuovere l'uguaglianza tra i sessi rimuovendo ogni discriminazione diretta ed indiretta nei confronti delle donne ed ogni ostacolo di fatto limitativo della parità in conformità dell'art. 3 della Costituzione.

Con l'entrata in vigore della L. 125/91, infine, è stata definitivamente sancita tale parità.

Inoltre con la stipula dei trattati di Roma e l'ingresso del nostro paese nel mercato comune è stato recepito dal nostro ordinamento il principio di *libera circolazione dei lavoratori* dei paesi della CEE.

Corollario di tale principio è la *non-discriminazione* tra i lavoratori dei paesi aderenti ai trattati, principio successivamente esteso anche ai lavoratori extracomunitari.

4. Segue: LA TUTELA COSTITUZIONALE E LEGISLATIVA DEL LAVORO

L'art. 35 e **l'art. 37** della Costituzione, con lo stabilire il principio della **tutela del lavoro** in tutte le sue forme ed applicazioni, e con l'*estendere al lavoro femminile* tutti i principi dettati dalla legge in materia di lavoro, hanno voluto non solo ribadire il principio già affermato nell'art. 1, ma soprattutto attuare, anche in materia di lavoro, quella *parità di diritto fra uomo e donna*, che, come detto, ha subito fino ad epoca recente, proprio in questa materia, le più gravi violazioni.

Anche **l'art. 38** della Costituzione, *affermando i principi di* **previdenza e assistenza sociale** come diritto del lavoratore, ha inteso garantire nell'ambito del lavoro subordinato, il rispetto della persona umana, ponendo al sicuro il prestatore stesso da quei rischi che possono incidere sulla capacità lavorativa e sui bisogni del suo nucleo familiare.

In materia di tutela del lavoratore riveste fondamentale importanza la legge 20 maggio 1970 n. 300, c.d. **«Statuto dei lavoratori»**, che ha introdotto una serie di norme dirette a garantire il *rispetto*, da parte del datore di lavoro, del contratto di lavoro e della personalità del lavoratore.

5. L'AUTOTUTELA DA PARTE DEI LAVORATORI

L'ordinamento costituzionale riconosce ai lavoratori la possibilità di autotutelare la propria posizione economica e giuridica, nei confronti dei datori di lavoro, attraverso azioni di *lotta collettiva*.

Strumentali per tutte queste rivendicazioni sono due importantissimi principi giuridici previsti dalla Costituzione:

a) la *libertà dell'associazione sindacale* (art. 39 Cost.);
b) il *diritto di sciopero* (art. 40 Cost.).

A) Le associazioni sindacali

Il **Sindacato** è una associazione, libera e spontanea, di lavoratori, o anche di datori di lavoro, costituita al fine di tutelare gli interessi professionali dei propri appartenenti.

Il 1° comma dell'**art. 39** della Costituzione sancisce il principio della *libertà* di *organizzazione* sindacale, i commi successivi la *posizione giuridica* dei sindacati di fronte all'*ordinamento positivo* statuale.

Tale articolo dispone inoltre che ai sindacati non può essere imposto altro *obbligo* oltre a quello della *registrazione* presso uffici centrali o periferici e che, a seguito di tale registrazione, ad essi è attribuita *personalità giuridica* e capacità di stipulare, attraverso rappresentanze unitarie, contratti collettivi, con efficacia *erga omnes*. Unica condizione per la registrazione è che i sindacati adottino un **ordinamento interno a base democratica**.

La libertà sindacale sancita dall'art. 39 Cost. comprende:

— la **libertà** di **costituire** anche **più sindacati** per una **medesima categoria** (e ciò a differenza del sistema corporativo che, come visto, prevedeva un solo sindacato per ogni categoria), salvo alcuni divieti stabiliti per categorie particolari (magistrati, forze armate);
— la **libertà** per i singoli di **scegliere** fra i vari sindacati esistenti, oppure di non aderire ad alcuno di essi;
— la **libertà dall'ingerenza statale** per quanto attiene all'organizzazione ed all'attività dei sindacati;
— la **libertà di esercitare** i **diritti sindacali** e di fare propaganda sindacale anche all'interno dei luoghi di lavoro (purché non si arrechi danno al datore di lavoro).

Secondo l'art. 39, comma 2° Cost., infine, *«ai sindacati non può essere imposto altro obbligo se non la loro registrazione presso uffici locali o centrali, secondo le norme di legge»*.

È da notare tuttavia che l'art. 39 Cost. ha **natura programmatica** che impegna il legislatore ordinario ad emanare norme conformi ai principi da esso delineati.

Tra le molteplici funzioni svolte dai sindacati sicuramente una delle più importanti è quella relativa alla *contrattazione collettiva*.

I contratti collettivi di lavoro sono quei contratti destinati a regolare il rapporto di lavoro per una *generalità di soggetti*, stipulati da associazioni di categorie di lavoratori e i datori di lavoro, o con la corrispondente associazione di datori di lavoro (confindustria, etc.).

La Costituzione prevede che i contratti collettivi *«con efficacia obbligatoria per tutti gli appartenenti alle categorie alle quali il contratto si riferisce»* (c.d. *efficacia erga omnes*), debbano essere stipulati dai *sindacati registrati*, «rappresentati unitariamente in proporzione dei loro iscritti» (art. 39 comma 4°).

b) Il diritto di sciopero

Il principale strumento di lotta sindacale volta all'ottenimento delle rivendicazioni dei lavoratori è costituito dallo **sciopero**.

Lo sciopero si concreta nell'*astensione concertata dal lavoro per la tutela di un interesse professionale collettivo* e rappresenta una forma di autotutela, riconosciuta e garantita dalla Costituzione.

Tale riconoscimento del diritto di sciopero non implica, però, che il suo esercizio sia *illimitato*. Infatti la stessa Costituzione stabilisce che *«lo sciopero si esercita nell'ambito delle leggi che lo regolano»* (art. 40 Cost.).

La Costituzione, dunque, ha previsto una *regolamentazione legislativa* del diritto di sciopero, allo scopo di evitare che un suo esercizio *indiscriminato* e *incontrollato* danneggi l'intera collettività.

A tal riguardo la **L. 12-6-90 n. 146** ha disciplinato dettagliatamente **lo sciopero nei servizi pubblici essenziali.**

Tale legge, in particolare, si prefigge lo scopo di «contemperare l'esercizio del diritto di sciopero nei *servizi pubblici essenziali* con il godimento dei *diritti della persona*, costituzionalmente tutelati, *alla vita, alla salute, alla libertà ed alla sicurezza*, alla libertà di circolazione, all'assistenza e previdenza sociale, all'istruzione ed alla libertà di comunicazione» (art. 1, commi 1° e 2°).

Sono da considerarsi *servizi pubblici essenziali*, indipendentemente dalla natura giuridica del rapporto di lavoro, anche se svolti in regime di concessione o mediante convenzione, quelli volti a *garantire* il godimento dei diritti pubblici soggettivi sopra richiamati.

6. LA LIBERTÀ DI INIZIATIVA ECONOMICA PRIVATA

L'art. **41** della Costituzione consacra la *libertà dell'iniziativa economica privata*. La Costituzione non ritiene però, che tale libertà sia *illimitata e incontrollata* e prevede una serie di *limiti* e di *interventi pubblici* nell'economia.

Secondo tale norma, infatti:

1) **l'iniziativa economica privata è libera**: ciò comporta che lo Stato non può sottrarla completamente ai privati, né può imporre ai singoli il tipo di attività da svolgere;
2) l'iniziativa economica privata **non può svolgersi in contrasto** con l'utilità sociale o in modo da recar danno alla sicurezza, alla libertà o alla dignità umana;
3) spetta al legislatore (*riserva assoluta* di legge) stabilire **i modi dell'intervento pubblico** (es. la programmazione economica) e i **controlli** affinché l'attività economica pubblica e privata sia indirizzata e coordinata al perseguimento di finalità sociali.

In particolare il terzo comma dell'art. 41 Cost. prevede l'instaurazione di un **sistema economico misto**, cioè presuppone la *coesistenza*, accanto alle imprese private, anche di aziende esercitate da *soggetti pubblici*. Tuttavia, a differenza di quanto previsto per l'imprenditoria privata (art. 41, comma 1), *non* offre all'attività economica pubblica una *specifica garanzia costituzionale*.

Si ricordi che il 27 settembre 1990 è stato approvato — in via definitiva dalla Commissione industria del senato — il disegno di legge contenente «norme per la tutela del mercato» le cui norme sono contenute nella L. 10 ottobre 1990, n. 287.

Per la prima volta, dunque, in Italia viene varata una **normativa anti-trust** di cui il nostro ordinamento era carente. Con tale legge si è data piena attuazione al principio costituzionale della libertà di iniziativa economica poco sopra citato.

La legge si applica alle *intese*, agli *abusi di posizione dominante* ed alle *concentrazioni di imprese* che non ricadono nell'ambito di applicazione degli artt. 65 e/o 66 del Trattato CECA, e degli artt. 85 e/o 86 del Trattato CEE in materia di disciplina della concorrenza.

Essenzialmente la nuova normativa vieta le intese tra imprese che abbiano l'*obiettivo* o l'effetto di impedire, restringere, falsare in maniera consistente, il gioco della concorrenza all'interno del mercato italiano.

La nuova normativa disciplina, peraltro, le operazioni di concentrazione di imprese tali da incidere in modo negativo sulla libera concorrenza nel mercato interno (fusione di due o più imprese; costituzione di un'impresa comune ad opera di due o più imprese; acquisizione diretta o indiretta di una o più imprese da parte di un soggetto che è in posizione di controllo di almeno un'impresa).

Il compito di far rispettare tale normativa è affidato al *Garante dell'Economia* che, tra l'altro, ha la facoltà di concedere eventuali autorizzazioni, per un tempo limitato, allo scopo di raggiungere intese e accordi.

7 LA PROPRIETÀ PRIVATA E L'ESPROPRIAZIONE

L'art. 42 Cost. sancisce che «la proprietà è pubblica o privata. I beni economici appartengono allo Stato, ad enti o a privati. La proprietà privata è riconosciuta e garantita dalla legge che ne determina i modi d'acquisto, di godimento ed i limiti allo scopo di assicurarne la funzione sociale e di renderla accessibile a tutti. La proprietà privata può essere, nei casi previsti dalla legge e salvo indennizzo, espropriata per motivi d'interesse generale».

In questa norma sono raggruppati i principi costituzionali essenziali in materia di proprietà che sono:

a) **riconoscimento della proprietà privata** sia riguardo i beni di consumo che i beni strumentali (*mezzi di produzione*);
b) **garanzia legislativa** della proprietà privata, entro determinati limiti; per assicurarne la **funzione sociale**, per renderla **accessibile a tutti**, per **sfruttarne** *razionalmente le risorse* (della proprietà terriera ed immobiliare) (art. 64 Cost.);
c) possibilità di **espropriare**, *nei soli casi previsti dalla legge* e *salvo indennizzo*, i **beni** che rivestono *interesse generale*.

Secondo il dettato costituzionale (art. 42 C.) la proprietà privata nel nostro sistema può essere **espropriata per pubblica utilità**: in questo caso è dovuto al proprietario da parte dell'espropriante un **indennizzo** adeguato.

In virtù di tale istituto lo Stato ha, quindi, il potere di sacrificare, nel pubblico interesse e dietro indennizzo, diritti reali altrui.

INDICE GENERALE

PARTE PRIMA
TEORIA GENERALE E STORIA DELLE ISTITUZIONI

CAPITOLO PRIMO: **CONCETTI GENERALI**

1. Generalità sul diritto ..... Pag. 3
2. L'ordinamento giuridico ..... » 4
3. La pluralità degli ordinamenti giuridici: gli ordinamenti politici ..... » 4
4. Lo Stato (rinvio) ..... » 5
5. La Costituzione ..... » 5

CAPITOLO SECONDO: **LO STATO**

1. Generalità ..... » 7
2. Caratteristiche ..... » 7
3. Gli elementi o presupposti (rinvio) ..... » 8
4. Il popolo ..... » 8
5. Il territorio ..... » 11
6. Il governo (rinvio) ..... » 12
7. Formazione e continuità dello Stato ..... » 12
8. Forme di governo ..... » 12
9. Forme tipiche di Stato unitario: unitario, federale, regionale ..... » 14
10. Rapporti tra Stato e Nazione ..... » 15
11. Forme odierne di Stato ..... » 15
12. Lo Stato e le organizzazioni internazionali ..... » 17
13. Segue: Rapporti fra Stato italiano e diritto internazionale ..... » 19
14. Rapporti fra Stato e Chiesa cattolica ..... » 20
15. Attuali rapporti tra la Repubblica italiana e la chiesa cattolica ..... » 21

CAPITOLO TERZO: **IL DIRITTO E LE NORME GIURIDICHE**

1. Diritto oggettivo e soggettivo ..... » 23
2. I soggetti del diritto ..... » 23
3. Gli status e le situazioni giuridiche soggettive statiche ..... » 24
4. Le situazioni soggettive dinamiche (Barile) ..... » 25
5. Rapporti giuridici ..... » 26
6. Le norme giuridiche: caratteri ..... » 26
7. Segue: Categorie di norme giuridiche ..... » 27
8. Diritto pubblico e privato ..... » 27
9. I rami del diritto pubblico ..... » 28
10. L'ordine pubblico ..... » 30
11. Le fonti del diritto (fonti scritte) ..... » 30
12. La riserva di legge ..... » 31
13. Le fonti non scritte ..... » 32
14. L'interpretazione delle norme giuridiche ..... » 33
15. Efficacia delle norme nel tempo ..... » 35
16. Efficacia delle norme nello spazio ..... » 36
17. Brevi cenni di diritto internazionale privato 36

CAPITOLO QUARTO: **CENNI STORICI SUL COSTITUZIONALISMO IN ITALIA**

1. Il trionfo del costituzionalismo ..... Pag. 38
2. Lo Statuto Albertino: caratteri ..... » 38
3. Segue: Esegesi del contenuto dello Statuto ..... » 38
4. Evoluzione del sistema ..... » 39
5. Il colpo di stato monarchico-fascista ..... » 40
6. Gli organi dello Stato nel periodo fascista ..... » 40
7. Dalla caduta del fascismo al referendum ..... » 40
8. L'Assemblea costituente ..... » 41
9. Caratteri della Costituzione repubblicana ..... » 41
10. Caratteri della Repubblica ..... » 42
11. L'attuazione della Costituzione ..... » 42
12. L'attuazione delle libertà costituzionali ..... » 43
13. Il dibattito sulle riforme istituzionali ..... » 44
14. Conclusioni ..... » 45

PARTE SECONDA
LO STATO APPARATO

CAPITOLO PRIMO: **I SOGGETTI DI DIRITTO PUBBLICO**

1. Il problema della personalità giuridica dello Stato ..... » 46
2. Rapporto organico e rapporto di servizio ..... » 47
3. Classificazione degli organi ..... » 49

CAPITOLO SECONDO: **ORGANI DEL DIRITTO COSTITUZIONALE E DI AMMINISTRAZIONE ATTIVA**

Sezione Prima - *Nozioni introduttive*

1. Generalità ..... » 51
2. Organi costituzionali di amministrazione attiva ..... » 51

Sezione Seconda - *Il corpo elettorale: generalità*

1. Il diritto di voto ..... » 52
2. Elettorato attivo ed elettorato passivo ..... » 53
3. Leggi elettorali ..... » 54
4. I sistemi elettorali ..... » 54
5. Segue: Singoli sistemi elettorali ..... » 55
6. I procedimenti elettorali ..... » 56

Sezione Terza - *Il Parlamento*

1. Definizione, fonti e sistematica ..... » 58
2. Cenni storici ..... » 59
3. Il bicameralismo ed i problemi ad esso connessi ..... » 59
4. Le Camere in seduta comune ..... » 61
5. Elezione della Camera dei Deputati (L. 277/1993) ..... » 61
6. Elezione del Senato della Repubblica (L. 276/1993) ..... » 64

Sezione Quarta - *Organizzazione delle Camere*

1. I regolamenti parlamentari (c.d. «interna corporis») ..... » 66
2. Ufficio di presidenza ..... » 66
3. Funzionamento delle Camere ..... » 67
4. Deliberazioni, votazioni e pubblicità delle sedute ..... » 68
5. Organizzazione interna delle Camere ..... » 70
6. Il problema degli interna corporis ..... » 72

Sezione Quinta - *Le prerogative*

1. Le prerogative delle Camere ..... » 72
2. Prerogative dei membri parlamentari ..... » 73

Sezione Sesta - *Il Presidente della Repubblica*

1. Significato e definizione della figura ..... Pag. 75
2. Elezione del Presidente della Repubblica ..... » 76
3. Posizione giuridica - prerogative - patrimonio ..... » 77
4. Supplenza e cessazione dall'Ufficio ..... » 78

Sezione Settima - *Il Governo*

1. Cenni storici - Definizione - Composizione ..... » 80
2. Vicende del Governo: formazione e fiducia delle Camere ..... » 80
3. Segue: crisi - rimpasto - dimissione ..... » 82
4. Organi del Governo: Il Presidente del Consiglio ..... » 84
5. I ministri ..... » 85
6. Segue: Il Consiglio dei Ministri ..... » 86
7. Segue: Organi non necessari del Governo ..... » 87
8. La responsabilità e le relative sanzioni ..... » 89

Sezione Ottava - *La Pubblica Amministrazione*

1. I principi costituzionali in materia ..... » 90
2. L'amministrazione indiretta ..... » 92
3. Il rapporto di pubblico impiego ..... » 93
4. I principi costituzionali in materia di pubblico impiego ..... » 93
5. La riforma del pubblico impiego (D.Lgs. 3 febbraio 1993, n. 29) ..... » 94
6. Il nuovo sistema delle fonti del pubblico impiego ..... » 96
7. La contrattazione collettiva ..... » 97
8. Struttura del pubblico impiego ..... » 98
9. La dirigenza pubblica ..... » 99
10. Accesso al pubblico impiego ..... » 100
11. Controlli di spesa ..... » 102
12. La mobilità nel pubblico impiego ..... » 102
13. Modificazioni del rapporto di pubblico impiego ..... » 104
14. Estinzione del rapporto di pubblico impiego ..... » 105
15. Competenze amministrative del Consiglio dei Ministri e sottosegretari ..... » 106
16. I singoli ministeri ..... » 107
17. Amministrazione statale periferica ..... » 108

Sezione Nona - *La Corte Costituzionale*

1. L'esigenza di un organo di «giustizia costituzionale» ..... » 109
2. Definizione, composizione e funzionamento ..... » 110
3. Prerogative e rapporti con altri organi ..... » 111

CAPITOLO TERZO: **GLI ORGANI CON RILIEVO COSTITUZIONALE**

Sezione Prima - *Il Consiglio Superiore della Magistratura*

1. Definizione ..... » 113
2. Composizione ..... » 113
3. Attribuzioni ..... » 114

Sezione Seconda - *Il Consiglio Nazionale dell'Economia e del Lavoro* ..... » 115

Sezione Terza - *Il Consiglio Supremo di Difesa* ..... » 115

Sezione Quarta - *Il Consiglio di Stato e la Corte dei Conti*

1. Il Consiglio di Stato ..... » 116
2. La Corte dei Conti ..... » 116

Sezione Quinta - *Organi consultivi e di controllo a competenza generale*

1. L'Avvocatura di Stato ..... Pag. 119
2. Le ragionerie dello Stato ..... » 119

CAPITOLO QUARTO: **LE FUNZIONI PUBBLICHE**

Sezione Prima - *Generalità*

1. Lo Stato e le sue funzioni: la divisione dei poteri ..... » 120
2. Il superamento del principio della tripartizione: il concetto di «potere» ..... » 121
3. Tipologia delle funzioni ..... » 121

Sezione Seconda - *Le singole funzioni: la funzione costituente e quella di revisione costituzionale*

1. Funzione costituente ..... » 122
2. Funzione di revisione costituzionale ..... » 122

Sezione Terza - *La funzione di indirizzo politico*

1. Generalità: fini, limiti, influenze ..... » 123
2. Parlamento e Governo ..... » 124
3. Segue: Leggi di autorizzazione e di approvazione ..... » 125
4. Segue: I poteri di inchiesta parlamentare ..... » 126
5. Segue: Altre attività congiunte di indirizzo politico ..... » 127
6. Il Presidente della Repubblica ..... » 127
7. I singoli poteri del Presidente della Repubblica ..... » 129
8. La Corte Costituzionale: Generalità ..... » 133
9. Il sindacato di legittimità costituzionale ..... » 133
10. Il procedimento per il sindacato di costituzionalità della legge ..... » 135
11. Risoluzione dei conflitti di attribuzione ..... » 137
12. Giudizio nei confronti del Presidente della Repubblica ..... » 138
13. Il giudizio sull'ammissibilità del referendum abrogativo ..... » 139

Sezione Quarta - *La funzione di indirizzo politico-economico-finanziario*

1. Generalità ..... » 139
2. Organi: I comitati interministeriali ..... » 139
3. Segue: Altri organi ..... » 140
4. Lo svolgimento delle funzioni di indirizzo dell'economia ..... » 141

Sezione Quinta - *La funzione legislativa*

1. La funzione legislativa delle Camere ..... » 143
2. La concessione dell'amnistia e dell'indulto ..... » 148
3. L'attività legislativa eccezionale del Governo ..... » 148

Sezione Sesta - *La funzione amministrativa*

1. Norme amministrative ..... » 151
2. Organi dell'attività amministrativa ..... » 153
3. I beni pubblici ..... » 153
4. Le prestazioni in natura ..... » 156
5. L'espropriazione per pubblica utilità ..... » 156
6. La confisca ..... » 157
7. Le prestazioni di attività ..... » 157
8. Prestazioni di denaro ..... » 158

Sezione Settima - *La funzione giurisdizione*

1. Generalità ..... » 159
2. Principi costituzionali relativi alla giurisdizione ..... » 159
3. I rami della giurisdizione ..... » 161

4. Giudici ordinari e giudici amministrativi ..... Pag. 161
5. Posizione della magistratura ..... » 161

CAPITOLO QUINTO: **RIMEDI AMMINISTRATIVI E GIURISDIZIONALI CONTRO L'ATTIVITÀ ANTIGIURIDICA DELLA P.A.**

1. Concetto di giustizia nell'amministrazione ..... » 162
2. I rimedi amministrativi ..... » 163
3. I rimedi giurisdizionali contro gli atti della P.A. ..... » 164
4. Segue: La competenza dell'autorità giudiziaria ordinaria ..... » 164
5. Segue: La competenza della giurisdizione amministrativa ..... » 164
6. I Tribunali Amministrativi Regionali (T.A.R.) ..... » 165
7. Il Consiglio di Stato ..... » 165
8. Le impugnazioni ..... » 166
9. Il regolamento dei conflitti di giurisdizione ..... » 166
10. Le giurisdizioni speciali ..... » 166

CAPITOLO SESTO: **GLI ATTI PUBBLICI**

1. Generalità e concetto di atto pubblico ..... » 168
2. Atto pubblico: presupposti ..... » 168
3. Formazione della volontà ..... » 168
4. Emanazione dell'atto ..... » 169
5. Struttura formale dell'atto amministrativo ..... » 169
6. I controlli ..... » 170
7. Comunicazione ed esecutorietà dell'atto ..... » 170
8. Classificazione oggettiva degli atti pubblici ..... » 170
9. Classificazione soggettiva degli atti pubblici ..... » 171
10. L'invalidità degli atti pubblici: generalità ..... » 172
11. Segue: Nullità ed esistenza ..... » 173
12. Segue: Annullabilità ..... » 173
13. I rimedi contro i vizi degli atti pubblici ..... » 174
14. L'autotutela amministrativa ..... » 175

PARTE TERZA
LO STATO COMUNITÀ

INTRODUZIONE: **LE AUTONOMIE**

1. Significato ed importanza del concetto di autonomia ..... » 176
2. Tipi ..... » 176
3. Titolarità ..... » 176

CAPITOLO PRIMO: **LE AUTONOMIE POLITICHE**

1. Premessa ..... » 177
2. Gli istituti di democrazia diretta: il referendum ..... » 177
3. Segue: Il diritto di iniziativa legislativa popolare ..... » 181
4. Segue: Il diritto di petizione popolare ..... » 181
5. I partiti politici ..... » 182

CAPITOLO SECONDO: **LE AUTONOMIE TERRITORIALI**

Sezione Prima - *Le Regioni*

1 Lo Stato regionale e la repubblica italiana ..... » 186
2. Il regionalismo ..... » 186
3. Attuale ordinamento italiano ..... » 187
4. Natura, caratteri e autonomia delle Regioni ..... » 187
5. Organi della Regione ..... » 189
6. L'autonomia finanziaria ..... » 191
7. Funzioni delle Regioni: partecipazione all'attività statale; la conferenza permanente ..... » 192

8. Autonomia normativa e regolamentare delle Regioni ..... Pag. 193
9. I controlli statali su atti e organi delle Regioni ..... » 197

Sezione Seconda - *Le altre autonomie locali*

1. Il Comune ..... » 200
2. Segue: La provincia ..... » 202
3. Segue: I controlli sugli atti dei Comuni e delle Province ..... » 203
4. Segue: Modificazioni territoriali, fusione e istituzioni di nuovi Comuni ..... » 204
5. Segue: I Municipi ..... » 204
6. Segue: Circoscrizioni comunali ..... » 205
7. Segue: Circondari e circoscrizioni provinciali ..... » 205
8. Le comunità montane ..... » 205
9. Aree metropolitane ..... » 205
10. Forme associative e di cooperazione ..... » 206
11. Il federalismo amministrativo introdotto dalla legge Bassanini ..... » 207
12. La legge 127/97 (c.d. Bassanini bis) ..... » 209

CAPITOLO TERZO: **LE AUTONOMIE DEI PRIVATI**

1. Introduzione ..... » 210
2. Il principio di uguaglianza ..... » 210
3. Applicazioni concrete del principio d'uguaglianza ..... » 211
4. I diritti inviolabili dell'uomo ..... » 211
5. La presunzione di espansione delle libertà costituzionali ..... » 212
6. Significato di «doveri inderogabili» ..... » 213
7. I diritti della personalità ..... » 213
8. La libertà personale ..... » 214
9. Limiti alla libertà personale ..... » 215
10. Fermo di polizia giudiziaria o del pubblico ministero degli indiziati di reato ..... » 217
11. Ulteriori garanzie per la tutela della persona umana ..... » 217
12. La libertà di domicilio ..... » 218
13. La libertà e la segretezza della corrispondenza ..... » 218
14. La libertà di circolazione e soggiorno ..... » 219
15. La libertà di riunione ..... » 219
16. La libertà di associazione ..... » 220
17. La libertà di fede religiosa ..... » 221
18. La libertà di pensiero e di comunicazione ..... » 221
19. La libertà di informazione ..... » 222
20. La libertà di stampa ..... » 222
21. La libertà d'antenna ..... » 223
22. La condizione giuridica dello straniero ..... » 224

CAPITOLO QUARTO: **PRINCIPI COSTITUZIONALI RELATIVI A DIRITTI E RAPPORTI DI NATURA ETICO-SOCIALE**

1. La famiglia ..... » 226
2. La scuola ..... » 227
3. La salute e l'ambiente ..... » 228
4. I doveri pubblici ..... » 229

CAPITOLO QUINTO: **I RAPPORTI ECONOMICI E SOCIALI**

1. Il lavoro come caratteristica fondamentale dello Stato ..... » 230
2. Principi costituzionali in materia di lavoro ..... » 230
3. Segue: La parità tra uomo e donna in materia di lavoro ..... » 231
4. Segue: La tutela costituzionale e legislativa del lavoro ..... » 232
5. L'autotutela da parte dei lavoratori ..... » 232
6. La libertà di iniziativa economica privata ..... » 233
7. La proprietà privata e l'espropriazione ..... » 233