

## *Views on the Future of Constitutional Reform*

### **For an Effective Improvement of Our Institutions**

Ugo De Siervo\*

I. The recent referendum has indicated an overwhelming majority of votes against the extensive constitutional amendments which were approved by Parliament last April, notwithstanding the fervent efforts of several influential political parties and social entities urgently to modernize our constitutional and political system (at the same time raising much and well-founded criticism).

Now, obviously, the question arises as to how to meet the demands – insofar as they are effective and may be agreed upon – arising from this failed attempt at constitutional reform.

Surely it is inconceivable that all the proposals that were laid down in the constitutional revision bill can be agreed upon, explicitly or implicitly (not disclosing all the real elements of a reform being not a small flaw). I would highlight three serious shortcomings of the rejected draft, namely that: it was an injudicious reform, proposing a questionably different form of representation and massive reduction in the Senate's powers; it would have resulted in drastic downsizing of the ordinary Regions' powers, whereas paradoxically, those of the special Regions were to have been preserved; the mediocre technical quality of many of the proposed changes, while being implemented, would have raised a great deal of doubt and conflict.

Moreover, purely in political terms, how might one underestimate the perilous concentration of powers that would have followed the approval of the constitutional reform? Indeed, while the Senate would have not been involved in the vote of confidence, this would have made our institutional system much more simple, for the benefit of those with a majority in the Chamber. Yet this, indirectly, would have upheld the controversial election law 6 May 2015 no 52. As is well known, this law secures a wide majority bonus to the winning party, despite it winning the elections with only a slim margin and confers crucial powers on party leaders to select candidates in the elections.

II. While these and other minor flaws make it impossible to dwell upon

\* Former Full Professor of Constitutional Law, University of Florence; Former President of the Constitutional Court of Italy. I wish to thank Luca Ettore Perriello (PhD Candidate, University of Sannio) for the translation of this article from Italian into English and an anonymous referee for his/her useful comments and suggestions.

the referendum, it is the case that a couple of issues addressed by the attempted reform point to questionable constitutional provisions or institutions that have turned out to be unsatisfactory or dangerous in their implementation. For example, I would identify flawed constitutional provisions on regional powers, institutions such as the *Consiglio Nazionale dell'Economia e del Lavoro* (CNEL) and sources of law in the form of decree laws (let alone the sheer number of Members of Parliament).

The question is, how to take action on these issues, now that the negative outcome of the 2016 referendum (which follows the partly similar 2006 referendum) appears to show that the majority of the electorate is suspicious of proposed constitutional reform?

It is obviously inappropriate to submit to popular vote extensive constitutional revisions, which in any case are debatable and debated, for they did not have in Parliament the special qualified majority set out in Art 138, para 3, Constitution.

It is unsurprising that, for a number of reasons, changes to large parts of the Constitution raise many doubts and much skepticism. The electorate is asked to vote on even more complicated issues (with the implied threat posed by their contents, which might even encroach on fundamental constitutional principles) and the political system tends to multiply the reforms, away from public debate, which makes it increasingly difficult for the public to form mindful and consistent opinions. At the same time, with regard to the controversial diversity of the referendum question, a constitutional reform voted by the Parliament as a whole cannot but be assessed by the electorate in the same way.

Clearly, extensive changes to the Constitution are considered to be dangerous, as the high turnout of voters for the referendum showed, which contrasts with the growing trend of low turnout at successive elections. One cannot agree with the exaggerated celebration of the Constitution (including the inappropriate statement that ours is 'the finest in the world'). However, public opinion is mainly positive about the Constitution, despite it being constantly attacked and denigrated, for it is, at least, considered to be an essential element of unity in our country.

A second point of criticism is that, in recent legislatures, the political systems temporarily holding the majority propose 'large' or 'average' constitutional revisions in attempts to hold allegedly extensive constitutional dysfunction accountable for the mediocre operation of the institutions, for the inability to change certain ordinary laws and for the shortcomings of the political system. The recent referendum is significant in this respect, in that support for the referendum was, completely inappropriately, grounded in the need to reform certain ordinary laws and in the alleged need to enhance administrative efficiency or even national productivity. Some, even irresponsibly,

suggested that the ability of our country to modernize itself depended on the outcome of the referendum.

However, these needs can now be met through a range of ordinary legislative and administrative powers, as we shall see later.

Those in favor of broad constitutional reforms have also submitted that the referendum might bring about the numerous attempts at institutional reforms that have been made for decades in our political and parliamentary history. Now, while it is arguable that constitutional reforms can be based upon previous failures, *legge costituzionale* 22 November 1999 no 1 and *legge costituzionale* 18 October 2001 no 3 implemented many past proposals on regional autonomies but were later accused of other serious shortcomings which would call for other constitutional reforms. Moreover, many of the proposals submitted by various Parliamentary or Cabinet Committees were merged into the large constitutional reform of 2005 but rejected in the 2006 referendum. Other proposals culminated in the 2016 referendum, which has been recently rejected as well.

We must acknowledge that these efforts to reform very significant parts of the Constitution of the Republic have failed. Yet we cannot give up on more or less specific constitutional reforms, upon which the vast majority of the Members of Parliament appeared to have agreed, thereby preventing the possibility of referendum petitions or, if anything, facing a referendum debate on only a few themes.

III. The republican procedure in the application of the process of constitutional revision under Art 138 Constitution seems to require a two-thirds majority for specific revisions and constitutional laws. On the contrary, all three constitutional revisions to large parts of the Constitution (in 2001, 2005 and 2016) did not achieve the two-thirds majority and thus required a popular referendum to be held (with a favorable outcome in 2001 only).

Currently, once the post-referendum recriminations have been set aside, it should not be difficult to implement specific constitutional reforms which will be likely to succeed, as previously envisaged.

It is suggested that the process of constitutional revision should be improved (maybe immediately through reformation of the parliamentary rules of procedure) and include specific authorities or qualified bodies in the consultative process in order to enhance the quality of the proposed revision. Indeed, some constitutional laws in force (eg not only *legge costituzionale* 18 October 2001 no 3 but also *legge costituzionale* 23 January 2001 no 1 and *legge costituzionale* 20 April 2012 no 1) and the two constitutional revision bills of 2005 and 2016, which were rejected in a referendum, show that even the drafting of some parts of the most recent constitutional revisions has been of poor quality.

While the correct path is to seek a large majority in Parliament for constitutional amendments, there may be a risk of implementing essentially political agreements, which often can be inconsistent and at odds with other parts of the Constitution. In circumstances such as this, an influential consultative body might help fuel the debate in Parliament and address public opinion as well, before the reform is adopted, thereby encouraging the political system to pass laws of better quality.

On the contrary, other reforms of Art 138 Constitution appear to be inappropriate or hardly implementable.

First, in an age of constitutional revisions which should be specific, it is unreasonable to repeat the controversial attempts, which have already been made through legge costituzionale 6 August 1993 no 1 and legge costituzionale 24 January 1997 no 1, to adopt special procedures for examination jointly between the Chamber and the Senate, which were intended to ensure that large and complicated reforms were designed simultaneously.

The proposal, which some have recently proposed, to establish a real Constituent Assembly is, to an even greater extent, unacceptable. It is based on the assumption that the Republican Constitution is beyond redemption and facing an irreparable crisis, yet the 2006 and 2016 referenda have shown that the electorate continues to trust the current constitutional text. Further doubts persist as to the constitutional legality of recourse being made to Art 138 Constitution to advance a similar proposal.

IV. Above all, quite apart from that which specific constitutional reforms can affect or change, it is necessary urgently to reform certain areas of law which are in part responsible for the fact that some important components of our institutions work poorly and that central, regional and local political systems often face difficulties in functioning properly. This remains in the context of widespread corruption, countless bureaucratic hurdles, inefficiency and delays in the administration of justice and archaic legislation on administrative controls and responsibilities.

This is all the more necessary since certain primary sources (parliamentary laws and parliamentary rules of procedure), which directly implement the constitutional framework in different areas, appear to be extremely deficient.

Decree laws and the procedures to convert them into law have degenerated for decades and legislative decrees have expanded remarkably, while its constitutional limits have been drastically reduced. However, this does not reflect the flawed wording of Arts 76 and 77 Constitution but the parliamentary authority which does not confer a significant role upon the Government in Parliament when draft laws are examined and then adopted. Yet, while the Government plays a peripheral role in the parliamentary rules of procedure and their application, it does retain a key role, though in an

alarmingly confusing way (with the implicit consent of Parliament) when it jeopardizes the fundamentals of decree laws and legislative decrees beyond any rules and limitations.

There might be envisaged a thorough reform of the Parliamentary procedural rules to change the conduct of the Chambers in their mutual relations and in their relations with Government, specifically within the area of legislative procedure. Moreover, this would call for a revamped and more analytical framework for government administration, notably in the crucial area of its structures and the procedures to exercise its considerable regulatory powers.

At the same time, regarding relations between the State and ordinary and special Regions, the current framework seems largely to ignore the Constitution and special statutes, while it reflects relational models resulting from the stratification of power relations over time, pursuant to autonomy policies which often fall short of the Constitution and the statutes. Thus far, ordinary Regions have not yet adopted comprehensive legislation on how independently to finance their activities. Besides, at least since 2001, Parliament has not adopted framework laws and laws to transfer to Regions state authorities as well as funds for the new areas of competence.

Accordingly, it has been entirely up to the Constitutional Court to determine the areas of state and regional competence, which has overloaded the Court with inappropriate responsibilities. The Court has exercised its powers extensively (and sometimes unjustly), in its attempt to overcome several shortcomings in the 2001 constitutional reforms but it has acted in a legal vacuum created by the national legislator, which failed to define the distribution of legislative powers.

Now, after the referendum outcome, it is, first and foremost, necessary that Government and Parliament should resume their fundamental responsibilities for their support to regionalism by implementing legislation which is essential to give effect to the Constitution and the special statutes and for coordination between ordinary and special Regions at national level. This might start with a comprehensive reform of the bodies connecting the State to the Regions. It seems also inevitable that Parliamentary rules of procedure will supplement the Bicameral Chamber for Regional Affairs with representatives of the Regions, which was provided for by Art 11 of legge costituzionale 18 October 2001 no 3.

After the referendum, a third area requires prompt legislative action to close the current and dangerous loophole in significant constitutional provision. It would address the constitution of political parties and large social groups, the number, status and responsibilities of the people's representatives and the cost of politics. Additionally, there is a need to reform current administrative and financial controls.

It must be acknowledged that too many issues arise regarding the effectiveness and legality of various political classes to delay further a decision on such matters. The legal vacuum has become unsustainable.

In other words, what appears to be clearly lacking is high quality, significant and continuous policy to implement the Constitution for purposes of the effective functioning of the institutions. This might result in the development of the current constitutional framework and at the same time, elimination or reduction of damage arising from flawed or inconsistent provisions or institutions. Their reform within the Constitution is possible but only in specific areas and by providing alternative and sufficiently persuasive solutions; there is a compelling need to correct all the major discrepancies created by the *legge costituzionale* 18 October 2001 no 3, when it enacted the current Art 117 Constitution.

V. The heated and lengthy discussion on the efforts to reform large parts of the current Constitution, dismissed in the recent referendum by an overwhelming majority, might help raise awareness of what steps need to be taken fully and effectively to implement the current Constitution, even in areas which have thus far been left out.

As we have seen, various reforms will, of necessity, have to tackle the Government of the Republic. Its structure has been heavily pressured in our recent institutional history to organize it in a modern and effective way, not only by strong opposition but by the poor enforcement that regionalism has experienced.

On the one hand, there exists the Government's role and powers, especially the normative and top management ones, which have latterly and just partially been governed by *legge* 23 August 1988 no 400. For instance, we have made reference to how scant the rules on the key aspect of the Government's acts having the effect of law are, despite, in the last few years, its legislation making up the majority of the primary sources of law.

Therefore, when the real and important question arises as to the limitations of parliamentary procedures for the adoption of laws in Parliament, the similar question arises regarding the Government's acts having the effect of law, all the more so given that these confer autonomous powers on the Regions and local authorities; it is suggested that it might be worth supplementing the Bicameral Chamber for Regional Affairs with representatives of the Regions.

Meanwhile, there exists no proper policy to implement the Constitution in regional and local matters; the Government still appears to be wholly liable for the entirety of public administration, despite all the reforms introduced into the Constitution. What has not hitherto been regulated by way of laws, decrees or implementing provisions, in fact has been left to the Government or to its

discretion but the Government seems to be unable to carry out its task of solely guiding and monitoring in the areas of competence of Regions and local authorities. On the contrary, the last few years have amplified the tendency systematically and gradually to centralize administrative powers, which instead should be exercised at local or regional level.

The current and deep distortion between the Government's role and the Constitution has been confirmed in recent years by the tendency of some Governments to anticipate in ordinary legislation the constitutional amendments that they were considering making. While, in the late 1990s, certain crucial legislative decrees conferred powers upon the Regions and thus anticipated what was forthcoming in new constitutional provisions, the recent judgment no 251 of 2016 of the Constitutional Court indicates that new legislative decrees were purporting to anticipate diminution in the Regions' powers in relation to their employees. This appeared in what should have been the new Art 117 which, fortunately, was dismissed.

Consideration might also be given to the damage caused latterly by successive Governments seeking confusingly to anticipate the abolition of the Provinces through ordinary legislation (and before that, administrative activities) before this was achieved through constitutional reform.

This is erroneous by reason that the Government, which is the legitimate representative of the temporary political majority alone, should instead be particularly prudent while planning constitutional reforms and above all, while demanding exemptions relating to institutions, as are laid down in the Constitution.