

A Deadlock Difficult to Break

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The outcome of the constitutional referendum held on 4 December 2016 has given rise to feasibility assessments of any future reforms of the Constitution. It is generally agreed, both in the media and in academic contexts, that save for any unforeseen changes to current political institutions, any new proposals to amend the Constitution are totally unlikely, at least in the medium term. Beyond strictly legal considerations, it seems clear that any political force seeking to promote any amendment to the constitutional text faces very high risks, especially if the proposed amendment is extensive and profound.

This is not the appropriate forum in which to elaborate upon the concept of populism and its manifestations in terms of parties and movements, as this analysis has already been conducted both by Italian scholars and foreign political scientists. Nonetheless, it seems clear that leading a wide-ranging project of constitutional reform requires a lot of work and must be conducted by those political entities able to publicly demonstrate leadership capable of maintaining power authoritatively for at least the time needed to complete the amendment process. Under current circumstances, however, it is almost certain that such political entities, regardless of their leaders and of the average length of the leadership they exercise, would be quickly transformed into a political class to be opposed. In the opinion of a lay person, the outcome of the revision procedure would be inevitably doomed.

The constitutional comparatist can only point out how in the main European legal systems the constitutional revisions carried out since the 1980s have been approved by very vast majorities, far greater than the government majorities. One needs only recall the Basic Law amendments subsequent to the incorporation of the *Länder* of the former German Democratic Republic, made necessary by the changes to the structure of German federalism, and also the changes in the Spanish, Portuguese and French Constitutions to meet the requirements established by the inter-governmental or inter-institutional initiatives aimed at strengthening the European Union (EU). In addition, the Swiss revisions of 1999, or finally, the

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clusters of articles in the Dutch Constitution that were modernized and rewritten in 1988 and the following years. The impression gleaned from even a superficial comparative analysis is unambiguous: turning points in European history over the last fifty years, have always been marked by, or at least accompanied by, constitutional revisions approved by broad majorities (larger than the current governmental majorities of the moment) focused on rewriting wide-ranging rules. The revision of Title V of Part II of the Italian Constitution approved in 2001 was an important exception.

This is not meant to imply that all revisions approved by government majorities necessarily lack constitutional legitimacy or are politically inappropriate. Yet critical points in European constitutional history – if one can consider the making of the Amsterdam, Maastricht, Nice, Lisbon treaties as such – should have been evaluated fully, not ignored, with their fallout in the domestic dimension remaining unexamined. In Italy such events have been incorporated into the legal structure with the blessing of a broad consent of the political representatives almost without notice by the public opinion.

The reality is that, historically Italy has not followed the method of problematizing, highlighting, and proceduralizing the different constitutional steps, unlike other, more important EU countries. One could argue that, in the absence of progressive adjustments, or at least in the absence of the adjustments suggested and perhaps imposed by the development of EU law, in retrospect, pushing ahead with those reforms in some way forced and guided by majorities cannot be avoided as they are more conscious of delays and more eager for remedy, by extending reform to other fields, such as the form of government or the structure of the regional State. However, the Italian electorate has already shown little appreciation for this approach, not so much because it is ‘Jacobin’ in itself, but perhaps because of the inability of the reformist leadership to gather consensus within a sufficiently large segment of the electorate.

This seems to lead to the conclusion that the system of constitutional amendment has ended up in a vicious cycle, which is now extremely difficult to break. The adaptation of the Constitution to European law, supranational law and strictly international law (in its contemporary version), has not succeeded in the natural way, ie that of constitutional amendment, but has had to be assimilated into the system through the evolution of constitutional jurisprudence, while formal constitutional mechanisms remain unused. In the meantime, it has become apparent that parts of the constitutional text have become obsolete, primarily regarding the form of government, and to a lesser but not less important extent, especially in light of their relationship with non-domestic law, the catalogue of rights. At this point, a valuable constitutional tool increasingly strained by the complexities of globalization has to deal with increasingly large adjustment needs. And this is happening just as the crisis of

party system is reaching its peak. At the roots of it are external factors, linked to globalization on the one hand and to the pressure of the European institutions and bureaucracy on the other hand, as well as domestic factors, some of which are brought about by an institutional framework which is outdated or otherwise inadequate to respond to contemporary needs.

It is therefore very difficult to make any diagnosis in the political context, even if only tactical, that could result in any kind of prescription involving future constitutional revisions. One cannot escape the impression that there are very few ways to short-circuit the current situation, and that only an eventful change of circumstances, caused by external events, could put an end to the deadlock. The ideal way to amend the Constitution seems to be the shared way, with a broad parliamentary participation, capable of conveying to the public an image of a large consensus in order to mitigate the risk of a populist reaction, though still not completely eliminable. However, at the moment and in the short term, this condition does not seem possible, let alone likely. The tactical manoeuvring of the party system, exacerbated by the uncertainties about the electoral formulas to be used, prevents the consolidation of sufficiently broad coalitions of parties, lest some subsequent penalization take place on election day. From a strictly academic viewpoint, one would be tempted to imagine a scenario in which a force of populist inspiration, after gaining the majority in both Houses, might confront the opportunity to promote a constitutional revision and then have to deal with a referendum: a reversed framework in comparison with the Boschi-Renzi reform ahead of the popular vote. However, laying aside this temptation, one cannot escape the thought that such a scenario is by far the closest to the breaking of the Constitution.

Therefore, a largely shared revision to the Constitution requires a stable and dynamic party system, while at present it is extremely unstable and withered. In addition, uncertainties regarding the electoral formulas hinder alliances and understandings. On the contrary, a revision approved by strictly governmental majorities or slightly larger ones seems doomed not only to failure, but to create conflicts that tear apart both the party system and the material constitution.

Furthermore, in terms of content, the scope and the extent of the amendments are widely questionable. However, recent referendum controversies aside, the perceived need for change is widespread, even among the most tenacious defenders of the status quo.

There seems to be no doubt regarding the adjustments to be made to Title V of Part II of the Constitution, concerning territorial autonomies. For example, the failure to repeal the reference to the Province in Art 114 has reopened the debate on the constitutional necessity of such local authority but also on the direct or indirect nature of the political representation by the Province, despite

and beyond judgments expressed on the issue in well-known decisions of the Constitutional Court. Unlike previous occasions, namely the enactment of the Bassanini laws and legge costituzionale 18 October 2001 no 3, this time the joining together of reforms on local authorities and the definition of their constitutional role has not been finalised. The gutting of representative offices and resources, without adequate supporting measures, has opened a wound that must be somehow dressed, even if starting from the top is not the best solution.

The issue of the division of powers between the State and Regions undoubtedly requires more than just a band-aid solution. In this regard, however, the 2001 experience shows that any revision should be well thought out and shared. Solutions too different from those already established, like the much criticized 'general and common provisions' in the Boschi-Renzi bill, should be avoided, as they would lead to an open season on constitutional litigation, like after 2001. So-called fiscal federalism, abandoned after 2011 on the basis that it burdened public finance with unsustainable dynamics, at least had the merit of recovering the standard costs of local functions under Art 119, and of eradicating, or at least the prospect of eradicating, the plague of the historical costs. The political forces should negotiate common guidelines, involving either the maintenance or the adjustment of the constitutional provision. This is not a zero-sum game that can be left to negotiations between the State-Regions Conference, ANCI (the National Association of Italian Municipalities) and the Government, or even to the unified Conference, but at the minimum, a reorganization of the common house, in order to get administrative and financial co-existence with the European institutions in decent working order and to provide citizens with a real and fair enjoyment of social and other rights.

In terms of rights to freedom, there is a commonly shared fear that amending Part I of the constitutional text might give way to worse failures than those that would arise from its maintenance. However, the fact remains that very different Constitutions, such as those of Switzerland, Finland, the Netherlands, and Norway have been revised on the basis of structured improvement to the standards of protection in the sphere of liberties, by adding third and fourth generation rights and an adequate consideration of the Strasbourg case law, compared with more traditional subjective positions. The Italian Constitutional Court had to do it alone, often facing judicial activism that corresponded to the silence of Parliament on delicate issues such as the end of life, the system of personal ties different from those of the traditional family, and bioethics. In these areas, one could imagine deep political divides, so garnering wide consensus in Parliament could be problematic.

On the delicate matter of general principles, adapting Arts 10 and 11 would have been very useful in the 1980s, when enormous intellectual

energies were consumed by the theory of counter-limits, on the relationship with supranational jurisdictions, on the standards of protection; and in the 1990s, when the debate about peace-keeping and peace-restoring, the impact of jus cogens, monetary and financial sovereignty, globalization and soft law, began. Italian scholars and judges have almost become accustomed to doing without updated constitutional principles on this delicate matter, as if the structural problems of a system of legal sources and the equilibrium of original dualism were already overcome, resolved through interpretation. The quality of international law studies in our country is such that cultural support and proper drafting should not be lacking from any serious revision attempt.

On the side of the form of government, the field is open, since opinions are wide apart, as evidenced by the recent pre-referendum debate. To take a stand for one of the many viable solutions here is neither possible nor appropriate. It is clear that a solution involving strengthening the Executive and the easing of equal bicameralism, after the recent experiences, can only be approved by a slim majority, due to the harsh contrast between the positions that have emerged with respect to this field. Also, the electoral systems cannot be relegated to the background as if they are irrelevant variables, whether or not they are constitutionalized.

Other minor changes, starting with the abolition of the CNEL (the National Council for Economics and Labor), may not cause particular difficulties. However, other non-minor ones, like the possible formalization, if necessary, of the separation of judicial careers, despite having wider agreement than is generally believed, would likely be able to garner broad consensus only in a genuine situation of constitutional reform.

Another and different issue is that of the 'vehicle' for possible future constitutional revisions: one law or multiple bills? Recent experience seems to point to the latter solution: assuming the popular rejection of the reform has depended on the difficulty in voters' minds in separating the different contents of the package submitted for their consideration, rather than more general political factors. Somewhat extreme theories about the need to articulate referendum questions despite a single revision law are not shared, as more than one question is admissible only if there are several revision laws. But even in that case, there is always the risk that an excessive articulation might give rise to different levels of popular approval, with consequent contradictory and mutually incompatible outcomes. For example, the modification of Title V, inclusive of regional representation at the central level, could be approved, while a new structure for the Senate could be rejected, or vice versa. On the other hand, at least in Europe, referendum en bloc on constitutional texts approved by a Constituent Assembly or processed by small committees, like in France, historically occur only in very special circumstances, radically constituent in nature, rather than merely reviewing.

Finally, one need not be an old-fashioned constitutionalist or a conciliatory one to believe that any revision, large as it might be, should only go through the established and accepted form of Art 138. It is not advisable, for many reasons, to repeat past attempts to follow alternative derogating paths. The most important of those reasons is that, if the new text needs to be legitimized in the same way as the old one, space should not be afforded to radical criticism. Many politicians and some public law scholars have recently labelled the amendment procedure a *coup d'état*, due to the fact that the revision was approved by a Parliament elected on the basis of an electoral formula declared unconstitutional in part. Since the level of political tension now seems to be growing rather than diminishing, the political and constitutional system cannot afford deadweight of any kind.

The occasion of the recent referendum and the uselessly performed aggravated procedure must therefore legitimately stimulate timely reflections, hopefully less passionate than those that took shape over the last few months during the unfolding of the procedure provided for in Art 138. However, we should still not delude ourselves. As Lucien Febvre taught, men study history, but almost always this does not result in real experience.