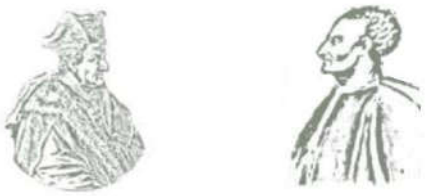
The Italian Law Journal



Special Issue


# *The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome*

edited by Paolo Passaglia

Edizioni Scientifiche Italiane

www.theitalianlawjournal.it

**THE ITALIAN LAW JOURNAL**

*An International Forum for the Critique of Italian Law*

Special Issue

# *The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome*

edited by Paolo Passaglia

**www.theitalianlawjournal.it**

ISSN 2421-2156 April 2017

# Table of Contents

The Italian Law Journal
Special Issue

## *The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome*

edited by Paolo Passaglia

## Part III
## *Views from Abroad*

The Italian Law Journal is sponsored by 'Harvard Italian Law Association' (HILA), by 'Società Italiana degli Studiosi del diritto civile' (SISDIC) and by 'Società Italiana per la ricerca nel diritto comparato' (SIRD).

# Introduction

Paolo Passaglia*

I. The Italian Constitution was adopted by the Constituent Assembly in 1947 and entered into force on 1 January 1948. Today, almost seventy years later, Italy has changed considerably: society, the economy, politics and international relations have all undergone dramatic evolutions, as well as the legal system itself.

Against this backdrop, the Constitution was amended several times, although always with regard to specific provisions. The only major reform was adopted in 2001, concerning the Regions (and, to a lesser extent, local authorities), the powers of which were strengthened in terms of both legislative and executive responsibilities. Other than this reform, it is difficult to find pivotal innovations in the constitutional text, to the point that in Italy, even the effects of the process of European integration and the changing landscape that this has entailed for Member States' legal orders, was not – at least until 2001 – explicitly recognized with constitutional amendments, unlike the case of almost all of the other Member States. The membership of the European Communities (today, of the European Union) was accompanied with and enabled by legal reforms coupled with changes in constitutional interpretation, without any reforms affecting the text of the Constitution.

The opposition between the rather static constitutional text and the dynamic system on which the Constitution relies has given rise to the question of whether the Constitution should be adapted to the new societal inputs. Compared to most other European legal systems, where significant constitutional changes (as well as reforms aiming to formally 'maintain' the relevance of the text) are rather frequently carried out, the Italian rejection of changes appears somewhat peculiar. This peculiarity, however, does not necessarily imply an obstinate attachment to the past: other ancient and static constitutions – among which the United States (US) experience more than any other, of course – may easily demonstrate that old texts can perfectly fit modern needs.

These conflicting views fuel the debate on whether the Italian Constitution should be considered a text that requires significant amendments, one that

* Full Professor of Comparative Law, University of Pisa. *Pro-tempore* Scientific Coordinator of the Comparative Law Area, Research Service, Constitutional Court of the Italian Republic.

should be subjected only to minor specific changes, or rather that should remain in its current form. This debate has been alive at least since the beginning of the 1980s, with several attempts to pass major reforms occupying the political agenda from time to time, drawing the attention of constitutional legal scholars and, occasionally, also of the public.

II. The constitutional referendum held on 4 December 2016 was the culminating point of one of the most heated seasons of this longstanding debate.

Several factors contributed to make this referendum a possible turning point in Italian constitutional and political history.

First, the reform that was passed by the Parliament and submitted to the people was remarkably ambitious, because it affected almost the entirety of the Second Part of the Constitution, concerning the 'Organization of the Republic'. If the reform had been adopted, the 1947 Constitution would have changed dramatically, even though the provisions regarding the recognition and the protection of rights and freedoms (located mostly in the First Part of the Constitution) would have remained unaltered.

Second, all moments when the people directly expresses its will are crucial moments for any democratic system: in this case, the sovereign was called upon to decide, for the third time in fifteen years,[1] on the contents of the Supreme Law of the Land. The choice was obviously of the greatest importance, and the decision-making process, resulting in the alternative between a simple 'yes' (approval of the reform) or a simple 'no' (its rejection), made it especially dramatic and solemn.

Third, because of the significance of the reform, the centre-left Government and, in particular, the President of the Council of Ministers, Matteo Renzi, connected the outcome of the referendum to their own destiny. The vote on the constitutional reform therefore became also a vote of 'popular confidence' on Renzi, something that may bring to mind similar events occurring in other systems,[2] but that was somewhat unprecedented in Italy, because a longstanding convention placed all constitutional reforms in the hands of the Parliament and only recently (probably since 2001, certainly since 2006) did the Government begin to play a significant role in the reform process.

III. The outcome of the referendum was clear: the constitutional reform adopted by the Parliament was rejected by an overwhelming popular majority

[1] The first time was in 2001, when a referendum was held on the reform mentioned above, in the text; the second was in 2006, when a new referendum rejected a wider reform of the Second Part drafted by the right-wing majority.

[2] For instance, in France, the constitutional practice that characterized various moments of General Charles de Gaulle's Presidency.

of just under sixty per cent of the valid votes cast.[3] This outcome had an undisputable meaning: the people did not want the Constitution to be changed in the manner proposed. This was the stark answer to the question posed to the people with the referendum.

Nevertheless, the referendum also had several other effects, only some of which are definite at this stage. One of these is certainly the impact on the Government: Renzi resigned a few minutes after the results were announced, and a new Government was quickly formed, based on the same political coalition of its predecessor but led by Paolo Gentiloni. The essential sameness of the coalition could be appreciated only from a theoretical point of view, because the referendum campaign and its outcome had deep repercussions within the political parties, the *Partito democratico* (Democratic Party) in particular. The Democratic Party is the cornerstone of the coalition supporting the former President of the Council of Ministers and his successor; however, it suffered from increasing opposition from among its own members, an opposition focused on the position to adopt towards the al reform and – even more importantly – towards Renzi's leadership. Consequently, after a very tense few weeks, in February 2017, a part of the Democratic Party's internal opposition opted for a breakaway.

More generally, the entire political landscape was considerably distorted by the outcome of the referendum, because the parties' alliances and prospects were linked by the referendum and thus a new equilibrium in the political sphere had to be found – one that took into consideration the will expressed by the people. The most striking factor of instability was, however, the Democratic Party's internal crisis, that gave rise to the possibility of holding political elections before the end of the Government's ordinary mandate in 2018. The problem with this idea was that the electoral law passed by the Parliament in 2015 had been conceived to elect the Chamber of Deputies (the lower parliamentary chamber) within the institutional system as it would have resulted pursuant to the proposed constitutional reform. Once the reform was rejected, the electoral law was difficult to apply. Moreover, its contents had been called into question, because their consistency with the Constitution was not quite indisputable: indeed, the Constitutional Court had been called upon to deliver a judgment on the issue, and thus a waiting attitude prevailed until the Constitutional Court rendered, at the end of January 2016, a declaration of unconstitutionality that reshaped the electoral system and at the same time suggested that Parliament adopt a new electoral law that would take into

[3] Almost nineteen million five hundred thousand voters rejected the reform (fifty-nine point eleven per cent), while nearly thirteen million five hundred thousand voters approved it (forty point eighty-eight per cent). The turnout (sixty-five point forty-seven per cent) was by far the highest compared to Italy's other constitutional referendums: in 2001, the voter turnout was extremely low (thirty-four point ten per cent); in 2006 it was higher, but barely exceeded half of the total number of eligible voters (fifty-two point forty-six per cent).

account the constitutional and political requirements to ensure stable governmental majorities.

All these aspects led to a seriously confused political landscape that overshadowed another key issue deriving from the outcome of the referendum: how to interpret the popular will with regard to constitutional reform. In particular, the rejection of the proposed constitutional reform did not provide any further direction as to whether *any other* constitutional reform should be adopted. In other words, the referendum campaign focused on the 'Renzi-Boschi reform',[4] and therefore tended to neglect other possible reforms that should or could be proposed as substitutes.

Now that the Renzi-Boschi reform had been conclusively rejected, this issue has become crucial, because it impels a choice between two alternative courses of action: preserving the current constitutional framework and opting, instead, to reform it. In the latter case, a further question arises regarding what should be modified and how the modifications could be drafted and eventually adopted. In other words, debate on constitutional reform will sooner or later start again. And maybe, after the deadlock resulting from the 2016 referendum, the issues that remained unsettled will at last be addressed and resolved. Over the years, the constitutional reform has increasingly grown to resemble Samuel Beckett's Godot, who is supposed to arrive but never actually does. The time has clearly come to establish whether it is worth waiting for Godot at all, but also to establish precisely what to expect of him.

IV. Of course, these questions cannot be answered yet; it is nevertheless a fact that what happened in Italy during the last few months will play a key role in the future of constitutional reform and, more generally, in shaping the institutional landscape for the near future. Precisely because of its importance, *The Italian Law Journal*'s Editors-in-Chief found that a focus on the 2016 constitutional referendum would be of interest, to provide an account and an analysis of the context and the outcome of the recent attempt to reform the Constitution.

V. This issue is divided into three parts.

In the first part (titled 'Constitutional Reform in Italy: Past and Present'), Jörg Luther's analysis of the previous attempts to reform the Constitution aims to contextualize this most recent referendum in the history of the Italian Republic. Graziella Romeo then explains the main features of the reform that was adopted by the Parliament, while the contribution of Giacomo Delledonne and Giuseppe Martinico outlines the different positions taken by constitutional

[4] Maria Elena Boschi was the Minister for Constitutional Reforms; she was considered the main author of the reform and was one of the key figures supporting the 'yes' vote in the referendum campaign, together with Renzi.

legal scholars with regard to the Constitution as it would have resulted following the intended reform. Finally, Elettra Stradella draws attention to the aftermath of the referendum and the impact of its outcome on the Italian political landscape.

In the second part ('Views on the Future of Constitutional Reform'), four Italian constitutional scholars express their views on the future of the Constitution. An issue addressed by all contributors is whether the Constitution needs to be changed; and all agree that the system does indeed require at least some updating. As noted by Paolo Carrozza, several paradoxes hinder the efforts to reform the system. Precisely due to the great difficulties encountered in these respects, in Beniamino Caravita's view, the rejected reform was an important chance that should have been seized. What the 2016 referendum leaves is a deadlock that, according to Giuseppe Franco Ferrari, will be very hard to break. Despite the problems that emerged and the general scepticism towards further reforms, this issue must nevertheless be faced; for this purpose, Ugo De Siervo proposes a set of provisions that should be modified and how these reforms should be carried out.

In the third part ('Views from Abroad'), four constitutional scholars, who are foreigners or Italians established abroad and who closely follow the evolutions of the Italian system, comment the process of constitutional reform and the outcome of the referendum from a comparative point of view. All of these contributions question the appropriateness of asking the people to decide, by means of a referendum, such a technical issue as constitutional reform. In this regard, Peter Leyland draws a comparison with the referendum held in June 2016 on the United Kingdom's membership of the European Union; in the same vein, Pasquale Pasquino sees, in constitutional referenda, both a formal deference to popular sovereignty and a demise of the principle of reasonableness. Jason Mazzone, instead, focuses on the impact of the rejection of the constitutional reform, and, comparing the Italian and the US experiences, expresses the fear that an enduring 'amendmentphobia' will be the ultimate result of the 2016 referendum. A similar concern is emphasized by Dian Schefold, who, although conceding that Italy needs reforms, questions whether there is a real need for *constitutional* reforms.

VI. This *Special Issue* is being published only four months after the constitutional referendum was held, a short publishing timeframe that has required considerable effort by the contributors. Therefore, I wish to express my sincere gratitude to them all, for having accepted to contribute an article, for having delivered their papers on time, and – above all – for having drafted papers that match the editor's requests perfectly. As the editor, this of course means that I must be considered responsible for any inadequacies that readers may find in this issue.

I also wish to extend my thanks to the publisher, the referees and the entire staff of *The Italian Law Journal*, whose hard work, carried out with great commitment, minimized the time required to publish the issue.

Last but not least, a final word of appreciation goes to *The Italian Law Journal*'s Editors-in-Chief, for granting me the task and the privilege to edit this issue and for their continuous support.

**THE ITALIAN LAW JOURNAL**

*An International Forum for the Critique of Italian Law*

Special Issue

# *The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome*

edited by Paolo Passaglia

# Part I

## *Constitutional Reform in Italy: Past and Present*

*Constitutional Reform in Italy: Past and Present*

# Learning Democracy from the History of Constitutional Reforms

Jörg Luther*

**Abstract**

This article shows how the history of constitutional reforms in Italy helps its people to learn constitutional democracy. This history is first of all a history of the amendment rules that suffered derogations and have not been changed. Two stories must be told: a story of the reforms that have been approved and a story of the unsuccessful reform proceedings. Both stories offer good and bad experiences. The increasing relevance of constitutional referendums shows that the people need better practices in a spirit of deliberative democracy. For the future of the Italian Constitution, a moderate optimism is still appropriate.

## I. *Quo Vadis* Italy?

The hopes and fears for the future of Italy in a European Union shocked by Brexit and increasing global disorder have been affected by the failure of the constitutional reform in 2016. What can the people learn from themselves? If they want to know to where they are moving, they could have a look at from where they are coming. Normally history never repeats itself – it offers weaker comparative arguments than strong narratives and not all people enjoy a good and a common memory. Nevertheless, the reasoning about constitutional history, a mixed species of legal, political and social history, could improve the peoples' legal and political cultures.

Constitutional reforms, amendments and/or revisions, are more or less extensive and intensive formal changes to the text of a written constitution that are guided by amendment rules and decided by political actors and lawmakers, including political parties and constitutional judges. Over the last decades they have gained more popular participation. Their history helps to focus specific needs of rule of law and democracy and is often used for promotion or prevention of claims for further constitutional reforms. The narratives of constitutional reform tell a lot about the ideas and the forces that move and justify them, about the cultures of idealism and realism, and about the conflicts

* Full Professor of Public Law, University of Eastern Piedmont, Alessandria. A preliminary study was drafted with Giovanni Cavaggion for ISRAL, Alessandria. Giovanni Boggero also made fine comments.

and consensus in a given constitutional order.[1]

On the one hand, idealists could believe that republican constitutions are not eternal and therefore '*semper reformandae*', that constitutional reforms can be a tool for saving ourselves in a Baron von Münchhausen's way, that constitutional revisionism avoids constitutional revolutions and is necessary for progress and development, that reform ideas should be dependent upon the path of constitutionalism, that constitutions cannot be left to informal changes through political practice or judicial interpretation, that reforms are needed in order to formalize or to correct informal constitutional change, that they need more time and consensus than other reforms, and so on. On the other hand, realists could hold that procedure matters for the content and for the success of the reform, that any constitutional machinery at work is difficult to change through 'technical engineering', that a 'veil of ignorance' is possible only when a new Constitution is under way, that the inability of political decision-makers in a given constitutional system cannot be ended through a political decision that changes the system itself, that we are not living in times of new constitutional compacts, that wishing to change all, one does not change anything, and wishing to change nothing risks changing everything, and so on.[2]

If one looks at the Italian constitutional history, the history of amendments is first of all a history of the implementation of the amendment rules (Part II). Furthermore, there are at least two stories that can be told: one of the reforms that have been approved (Part III) and one of the unsuccessful reform proceedings (Part IV). Special attention shall be drawn to the constitutional referendums (Part V).

## II. Constitutional Amendment Rules

The starting point of analysis is two articles of the Italian Constitution that have been officially translated into English as rules on 'amendments of the

[1] Italian narratives refer to the more traditional term of 'institutional reforms'. The most detailed reconstruction of this republican reform discourse is offered by C. Fusaro, 'Per una storia delle riforme istituzionali' *Rivista trimestrale di diritto pubblico*, 431-555 (2015). For external observers J. Luther, 'Conflict and Consent in the Constitutional Order of Italy: Lessons for (and from) Thailand?', in H. Glaser ed, *Norms, Interests and Values* (Baden-Baden: Nomos, 2015), 23-54; Id, 'Realism and Idealism in the Italian Constitutional Culture', in M. Adams and A. Meuwese eds, *Constitutionalism and Rule of Law – Bridging Idealism and Realism* (Cambridge: Cambridge University Press, 2017).

[2] See X. Contiades and A. Fotiadou, 'Models of Constitutional Change', in X. Contiades ed, *Engineering Constitutional Change* (London: Routledge, 2013), 417-468; R. Dixon, 'Constitutional Amendment Rules: A Comparative Perspective', in Id and T. Ginsburg eds, *Comparative Constitutional Law* (London: Elgar, 2011), 96-125. For the so-called paradoxes of constitutional reform in Italy G. Zagrebelsky, 'I paradossi della riforma costituzionale' (2004), in Id, *Intorno alla legge* (Torino: Einaudi, 2009), 240-266.

Constitution'.[3] The Italian word '*revisione*' is closer to 'revision', but means in the common language just a political 'review' of the law similar to a check-up of a car, not a fundamental change of type.[4]

This definition could have further normative implications. First of all the word explains the rule requiring a second vote after an interval of three months for further reasoning, review and hearings on the legitimacy and the impact of the reform. This rule can be combined with a more general principle of *in procedendo*, including for example a duty to make a good inquiry on the state of the Constitution and to hear the voices of legal and political science, the so called '*costituzionalisti*', as well as a duty of full disclosure of all relevant facts to the public. As Georg Hegel stated against Napoleon:

> 'A Constitution is not a mere artefact, but the work of centuries. It is the idea and the consciousness of what is reasonable, in so far as it is developed in a people'.[5]

The founding fathers created the Constitutional Court and the new amendment procedure as 'guarantees' of the constitutions on the premise that it would be better to pass from the flexible statute of the monarchy to a 'rigid' Constitution that could be developed, but not easily overthrown by a new dictatorship. The amendment mechanism was coherent with the genealogy of the Constitution that was approved by a multiparty majority of eighty point nine per cent (four hundred and fifty-eight of five hundred and sixty-six). The people designed a limited sovereignty over the Constitution when electing their representatives in the Constituent Assembly and voting simultaneously – with a small majority – against monarchy. The elected Constituent Assembly transformed the people's commitment to republicanism into an unamendable fundamental principle. The amendment mechanism based on a double vote with absolute majority in the bicameral Parliament, combined with a constitutional referendum that can be avoided only if there is a high

[3] Art 138: 'Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members'.

Art 139: 'The form of Republic shall not be a matter for constitutional amendment'.

[4] R. Albert, 'Amending Constitutional Amendment Rules' 13(3) *International Journal of Constitutional Law*, 667 (2015): 'Whereas an amendment alters the constitution harmoniously with its spirit and structure, a revision departs from its presuppositions and is inconsistent with its framework, thereby disrupting the continuity of the legal order'.

[5] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1821) (Frankfurt: Suhrkamp, 1976), § 247.

consensus, guaranteed by a threshold of two thirds, was suggested by the international lawyer Tommaso Perassi as an alternative to the Belgian model of necessary parliament dissolution between the first and the second vote.

The work of the Constituent Assembly was not entirely completed when the Constitution entered into force in 1948. The last chapters of the second part of the Constitution contained clauses that demanded separate 'constitutional laws' for the Statutes of Regions with special autonomy (Art 116) and for the 'conditions, the forms, the terms for proposing judgement on constitutional legitimacy, and the guarantees of the independence of the constitutional judges' (Art 137). The Constituent Assembly adopted the first 'constitutional laws' but could not deliver a complete 'constitutional legislation'. What Piero Calamandrei compared to the 'unfinished symphony' of Franz Schubert included also the amendment mechanism. Only in 1970 did the lawmakers decide to provide legislative rules for the constitutional referendum, which was used rarely in the beginning (five percent of all constitutions in 1950) but is a more frequent feature in constitutions today (ca forty percent in 2010).[6]

During the Cold War, the constitutional programme of further legislation and the changes in the Italian State and society were delayed and left to the next generation. The next generation started dreaming major constitutional reforms in a new European context, but the political parties could not stabilize themselves and come to agreements. After 1989, when the people obtained through referendum a move towards a more majoritarian electoral system (1993), the absolute majority threshold for parliamentary deliberation no longer constrained the search for a broad consensus on constitutional reform and proposals were made to get more rigidity or more flexibility for the amendment procedure. The new political parties founded after 1989 agreed on new *ad hoc* procedures in order to promote bipartisan constitutional reform with a mandatory referendum derogating from Art 138 of the Constitution. A revision of the myth that the constitutional compact was a result of '*Resistenza*' and of a second national '*Risorgimento*' and a so-called 'transition' to a 'second' or 'third' Republic with a great constitutional reform was prospected.[7]

If we look only at the history of the amendment clauses, one could conclude that Italy could need at the least a reform of Art 138 of the Constitution, but the discussion on this topic was, paradoxically, the best way for losing time and avoiding any real substantial revision.

## III. Passed Constitutional Amendments

[6] J. Blount, 'Participation in Constitutional Design', in T. Ginzburg and R. Dixon eds, *Comparative Constitutional Law* n 2 above, 38. For UK S. Tierney, *Constitutional Referendums* (Oxford: Oxford University Press, 2012), 301.

[7] P. Scoppola, *La costituzione contesa* (Torino: Einaudi, 1998).

The constitutional history of Italy is usually divided into different periods. In the first two legislatures of the 1950s, the Constitution was 'frozen' and only the rules of the Constitutional Court were integrated through a second single constitutional law (legge costituzionale 11 March 1953 no 1). The first real reform in 1958 extended until 1963 the already expired time limit for the territorial reform of the Regions listed in Art 131 of the Constitution. In 1963, the new small Region of Molise was created (legge costituzionale 27 December 1963 no 3), a decision that is today strongly criticised by supporters of a territorial reform that could pool together Regions. The special procedure providing for territorial reforms of Regions through constitutional legislation (Art 132, para 1, Constitution) has never been used and needs to be simplified. The first reforms justified the further delay of the promised regionalism and established a lamentable practice not to name all the constitutional laws that change the meaning of the constitutional articles and could be integrated in the text 'Law amending the Constitution'.

In 1961, another Constitutional Law (legge costituzionale 9 March 1961 no 1) derogated from the rules governing the composition of the Senate and assigned three senators to Trieste and other municipalities situated in the special Region Friuli-Venezia Giulia established in 1963 (legge costituzionale 31 January 1963 no 1). The final design of the regional geography was linked to a significant reform of bicameralism (legge costituzionale 9 February 1963 no 2). Amending Arts 56, 57 and 60 of the Constitution, the design of constituencies of both chambers was simplified and their duration rendered symmetrical. This was the end of the attempts of the Senate to find a better composition of itself, a search started in 1948, and it was the beginning of the so-called symmetrical bicameralism, ironically defined also as 'perfect'. The reform was preceded by simultaneous dissolutions of both chambers and followed by the reform of the standing orders of 1970 and the practice not to differentiate by objective criteria the choice by which a chamber should start new legislative proceedings.[8] The later proposals and efforts to move to a functional differentiation of both chambers were aiming at a 'counter-reform' that implied a negative evaluation of this reform of 1963.

Other significant reform experiences were made in 1967. For the purpose of an adaptation of the Criminal Code to the genocide convention (ratified in 1952), a Constitutional Law (legge costituzionale 21 June 1967 no 1) exempted genocide from the prohibitions to extradite for political crimes (Arts 10, para 4, and 26, para 2, Constitution). Another reform reduced the term of office of constitutional judges, and prohibited their re-eligibility and prolongment

[8] J. Luther, 'Il contributo di Leopoldo Elia al bicameralismo' *Rassegna parlamentare*, 1047-1075, 1055 (2009). On the nostalgia for corporative or 'institutional' representation P. Aimo, *Bicameralismo e regioni* (Milano: Comunità, 1977), 187-210. For the division of labour ideas of the seventies P. Barile and C. Macchitella, *I nodi della Costituzione* (Torino: Einaudi, 1979), 17.

(*prorogatio*). The Court lost in power and gained in legitimacy, but became vulnerable to obstructionism in the procedures of parliamentary election of new judges.[9]

These first experiences of repairs and adaptations of the constitutional machinery in the 1960s ended when the French model of presidentialism found its first supporters in Italy and President Antonio Segni proposed without any success to abolish the rule providing for the re-eligibility of the President of the Republic. Arturo Jemolo concluded that 'radical amendments aren't feasible' and that

> 'except for moments of crisis that we hope to avoid (…) for most of the most relevant inconveniences that happen today, ordinary laws could be sufficient'.[10]

This sort of '*conventio ad non revisionandum*' adopted in the 1970s during shorter legislatures was shared even by the leftist forces that were still fighting for the implementation of the constitutional programme of innovation of State and society.[11]

The history of amendments restarted only in 1988 when the reform debates in Parliament were followed by the appointment of the first 'Minister for Institutional Reforms', Antonio Maccanico; after the assassination of the reform counsellor Roberto Ruffilli by the left-wing paramilitary organization Red Brigades; and by a fundamental decision of the Constitutional Court claiming its power to exercise constitutional review on constitutional legislation.[12] The first reform tried to strengthen the rule of law and saved the Constitutional Court from being overloaded with proceedings for crimes of ministers (legge costituzionale 16 January 1989 no 1). A second reform in 1989 created a new form of referendum on the 'constitutional treaty' of the European Union that was held simultaneously with the elections to European Parliament and found a clear majority in support of a 'yes' to the following guideline questioned:

[9] G. D'Orazio, 'Commento alla proposta di legge costituzionale per la modificazione dell'art. 135 Cost.' *Giurisprudenza costituzionale*, 569-580 (1967).

[10] A.C. Jemolo, *La Costituzione: difetti, modifiche, integrazioni* (Roma: Accademia Nazionale dei Lincei, 1966), 10, 12: 'The Constitution has already been revised in some article of secondary relevance (and personally I have to deplore some innovation, for example the symmetrical duration of the legislature for the House of deputies and the Senate)'. At the end of the seventies, E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia* (Bologna: Il Mulino, 1978), 90 defined the Constitution a 'frame that is still valid and of productive potentiality'.

[11] P. Pombeni, *La questione costituzionale in Italia* (Bologna: Il Mulino, 2016), 323.

[12] Corte costituzionale 15 December 1988 no 1146, *Foro italiano*, I, 609 (1989). On Ruffilli cf M.S. Piretti, *Roberto Ruffilli: una vita per le riforme* (Bologna: Il Mulino, 2008). The Government De Mita prospected 'possible constitutional reforms'. The internal debate of the *Democrazia Cristiana* was now dominated by the proposal of a policy-making democracy by L. Elia, 'Per una democrazia di investitura e di indirizzo. Proposta per un riordino istituzionale possibile' (1988), in Id, *Costituzione, partiti, istituzioni* (Bologna: Il Mulino, 2009), 363-382.

> 'Do you hold that the European Communities should be transformed in an effective Union, conferring to the European Parliament the mandate to draft a European Constitution to be ratified directly at the competent organs of the member states of the Community?'

After the first electoral referendum in 1991, the constitutional reform decisively entered into the political agenda of the President of the Republic. A message from President Francesco Cossiga to the Parliament on 26 June 1991, which was not countersigned by Prime Minister Giulio Andreotti and criticized for not being in harmony with the Constitution itself, opened a debate on the amendment rules.[13] The President proposed as alternatives to the amendment procedure of Art 138 of the Constitution either the self-attribution of a constitution-making power to the Parliament, or the election of a new Constituent Assembly.

The next reform extended the presidential power to dissolve Parliament in order to allow elections when the terms of office of president and Parliament coincide (legge costituzionale 4 November 1991 no 1), just in time for the 'moral crisis' of political parties and Parliament that culminated in the so called *Tangentopoli* bribery scandal. Another reform act decided to transfer the power of amnesty and pardon to Parliament, requiring a two-thirds threshold that rendered them even more difficult to invoke than a constitutional amendment (legge costituzionale 6 March 1992 no 1). After another referendum that deeply changed the electoral system, a further constitutional reform changed the immunity rules for members of the Parliament, restricting the power of parliamentary authorisation to ordinary arrests and personal or home searches (legge costituzionale 29 October 1993 no 3). These reforms seem to have targeted a large popular consensus and tried to solve single problems, but they created many others and were not celebrated as a success.

In the meantime, another constitutional law had provided a new procedure for a constitutional reform in derogation from Art 138 (legge costituzionale 6 August 1993 no 1). The law established a (second) bicameral commission for constitutional reform charged with the task to draft an organic reform of the second part of the Constitution and of the electoral reforms rendered necessary by the referendum. The draft was to be approved first by Parliament and secondly by means of a mandatory referendum. When the electoral reform was approved on the basis of a proposal made by Sergio Mattarella, the President dissolved Parliament and the approved reform of the amendment procedure became obsolete. The same happened in 1997 with another constitutional law approved during the first Government of Romano Prodi (legge costituzionale 24 January 1997 no 1) when Silvio Berlusconi left the third bicameral commission and stopped the bargaining of reform in 1998. A

[13] P. Chessa and P. Savona, *La grande riforma mancata* (Soveria: Rubettino, 2014).

further attempt under the recent Government of Mr Enrico Letta did not produce any result.

These unsuccessful constitutional laws for *ad hoc* amendment procedures were followed by some small and medium-sized constitutional reforms that were preceded by administrative reforms. The enacted reforms aimed at promoting a new regionalism and to strengthen the protection of civil and political rights, trying to moderate new constitutional conflicts on federalism and on the powers of judiciary.

The first reform (legge costituzionale 22 November 1999 no 1) changed four articles of the chapter of the Constitution dedicated to territorial authorities, designed a new form of regional government, and provided for a new understanding of local autonomy. The reform legitimised the direct election of the President of the Region – introduced in 1995 through a law of the central State – simultaneously with the Regional Council on the basis of the principle *simul stabunt simul cadent*. It also allowed for autonomous regional electoral laws within the limits defined by State Law and provided for a new statute making procedures more similar to those of constitutional law-making. However, the new regional statutes did not succeed in inventing new regional forms of government and electoral reforms at regional level are still expected nowadays.

A second reform (legge costituzionale 23 November 1999 no 2) introduced into Art 111 of the Constitution new process rights clauses that specified the existing guarantees (Art 24), added a principle of 'due process' (*giusto processo*), and inserted some provisions inspired by the European Convention of Human Rights (Art 6) – especially the reasonable duration norm that has been frequently violated and censored by the Strasburg Court. This 'Europeanisation' of the constitutional texture was followed by a third reform (legge costituzionale 17 January 2000 no 1) – which was immediately corrected by a further law (legge costituzionale 23 January 2001 no 1) – that granted the right to vote to emigrated Italian citizens, (Art 48) establishing an overseas constituency for both chambers. These amendments too received bipartisan support and promised the solution for serious problems, but notwithstanding some modest progress their implementation is considered not conducive to a solution of the problems.

At the end of the legislature, when the bipartisan consensus was over, the majority government led by Giuliano Amato approved by a very thin majority of three votes a further constitutional reform that changed nine articles, repealed another five and provided for a complete revision of the Fifth Title of the second part of the Constitution that had already been partially agreed upon in the third bicameral commission. The centre-left coalition lost the elections but obtained a clear majority at the referendum (sixty-four point two per cent of the voters voted in favour with a low participation rate of thirty-

four point one per cent). The reform tried to bring regionalism closer to federalism and conceded to the Regions a general residual legislative competence and fewer restrictions on the shared competences (Art 117), the right to individually negotiate further forms of autonomy (Art 116), a principle of subsidiarity for administrative competences (Art 118), and more financial autonomy (Art 119). A representation of Regions in Parliament was envisioned, but not realised. Meanwhile the new Government delayed its implementation. The Constitutional Court mitigated the innovations through restrictive interpretations in favour of recentralisation, facing more and more conflicts between central and regional governments. Further corrections of this constitutional reform approved by Parliament failed in the referenda of 2004 and 2016.

The politicians learned from the 2001 constitutional referendum that bigger reforms are possible even with a non-bipartisan consensus, but the following Governments did not end the search for a bipartisan consensus, at least for small reforms that protected single rights and that were required by international human rights policies. The first reform in 2001 (legge costituzionale 23 October 2002 no 1) provided that the final provision no XIII, which prohibited ex-kings and their consorts and male descendants to access the Italian territory, 'ceased to be applicable'. The second reform rendered mandatory 'specific measures to promote equal opportunities between women and men' in the access to public offices and elective positions (Art 51). The third reform rendered irreversible the abolition of death penalty (Art 27).

Furthermore, the Government led by Mario Monti formed under undeclared conditions of financial emergency adopted a constitutional law (legge costituzionale 20 April 2012 no 1) entitled 'introduction of the principle of balanced budget in the Constitution'. It amended four articles and added a new provision, not formally included either in the main text or in the final provisions of the Constitution. The reform established a weak balanced budget rule,[14] strengthened the central powers, and invoked the rights of future generations and the responsibility of the public administration for ensuring the sustainability of the public debt. Being suspected to be a reform made under the dictate of financial markets, its implementation could be not strict and, in any case, was not sufficient for achieving the objective of sustainability.[15]

[14] Art 81, para 2: 'No recourse shall be made to borrowing except for the purpose of taking account of the effects of the economic cycle or, subject to authorisation by the two Houses approved by an absolute majority vote of their Members, in exceptional circumstances'. A 'concomitant adoption of amortisation plans' is prescribed only for the borrowing allowed to territorial entities.

[15] P. Bilancia, 'La nuova governance dell'Eurozona e i "riflessi" sugli ordinamenti nazionali' (5 December 2012) *federalismi.it*, 1-21 (2012); G. Boggero and P. Annicchino, 'Who Will Ever Kick Us Out?: Italy, the Balanced Budget Rule and the Implementation of the Fiscal Compact' *European Public Law*, 247-261 (2014).

This tale of realised constitutional reforms could be concluded by asserting that small reforms are always possible and can be more easily supported by bipartisan agreements. The medium-sized reforms of bicameralism in 1963, regionalism in 1999 and 2001, and balanced budgets in 2012 were more controversial and less successful, but the country learned to decide about constitutional referendums pushed by thin governing majorities. The Italian Constitution has been less frequently reformed than the French and German ones, but one should always bear in mind that this Constitution was made by much larger consensus for a much more divided country.

There are some myths influencing constitutional reforms in Italy that should be discredited in the light of reform experiences. First of all is the political myth that the catalogue of rights and duties of the first part of the Constitution and also the part on fundamental principles do not need reform and can be left to informal legislative or judicial changes. The reforms that have been enacted teach us that the developments of human rights can be reflected in the constitutional text: that the discrimination against women as having an 'essential role in the family' (Art 37) is still rooted in Italian society, that human dignity required extradition in cases of genocide and required prohibition of the death penalty, and that political rights need to be universalised and justice rights be protected even against judges. These reforms have been possible on a bipartisan basis. They have a high symbolic value for the capacities of integration and cooperation of the country.

Another myth was invented by a famous comedian and Oscar winner, Roberto Benigni. The title of a television show in 2012 depicted the Italian Constitution as the 'most beautiful in the world'. The beauty of the country is of course reflected in its constitutional code, a special kind of civil literature of a high aesthetic value.[16] The Italian Constitution is not short and obscure as Napoleon would have preferred, but a sufficiently long text[17] enlightened by a founding myth that is still at work – the common spirit of *Resistenza* – and by rich interpretative traditions. But constitutional reforms have not been facelifts and the revision practice has not been assisted by the guardians of the Italian language in the *Academia della Crusca*. The constitutional laws produced amendments left out of the corpus of the Constitution. Their multiplication created a disorder of texts instead of a well maintained book of constitutional sources of law. Even the duty to revise and coordinate the 'preceding constitutional laws' (sixteenth final provision) has not yet been carried out.

Another legend that must be rejected is that the electoral referendum and reforms framed a 'second' (or third) Republic.[18] There is no doubt that the

[16] Cf M. Ainis and V. Sgarbi, *La Costituzione e la Bellezza* (Milano: La nave di Teseo, 2016).

[17] Originally nine thousand and three hundred, today ten thousand and six hundred words.

[18] The enumeration changes if one includes the experience of the '*Repubblica Sociale Italiana*', a transitionary Government established in Salò under the control of the German Government with a presidential form of government very similar to the Nazi regime. A 'second' Republic was

passage from the proportional to a more majoritarian electoral system was favoured by dreams of a new republicanism with electors directly enabled to change government, with new parties and a political class purified from corruption. The electoral reform changed the form of democracy: that is at least partially substantial constitutional law or, more precisely, a part of the Constitution that has been deliberately left flexible. The shift from a more 'consociational' to a more 'majoritarian' democracy and its deep impact on constitutional culture created needs and expectations for a new constitutional compact that could integrate the newborn or renewed political parties, bring about a new form of government, strengthen local autonomies, and offer better 'guarantees' against a tyranny of the majority. But the 'second Republic' was just a projection of an open-ended 'transition' that could never be declared closed. The 2001 reform realised just a partial transformation initiated by administrative reforms, but it did not build a new constitutional identity and the further attempts at a quasi-total reform of the framework of powers failed.

## IV. Failed Constitutional Revisions

The history of the enacted small and medium-sized constitutional amendments has been tied up with another history of failed attempts of more or less elaborated 'organic' revisions. This second history of failures starts with the first project of a 'revision of the Fifth Title of the second part of the Constitution', the abolition of regionalism proposed in 1948 by the deputies of the post-fascist *Movimento Sociale Italiano* (MSI).[19] In the 1960s, the first ideals of presidentialism did not find a way from political parties and civil society to Parliament. In 1975, some deputies of the *Democrazia Cristiana* (DC) made the proposal to reduce the number of members of both chambers of Parliament.[20] The final steps for implementing regionalism, the first experiences of referendum, the common fight against terrorism, and the weakening of the so-called 'convention *ad excludendum*' that excluded communists from government consolidated the basic consensus, but a new common search for major constitutional reforms was launched. The direct election of the President of the Republic and a 'great reform' of the Constitution were proclaimed first by Giuliano Amato and Bettino Craxi, leaders of the *Partito Socialista Italiano* (PSI) in 1977 and 1979.

In the 1980s, the newly established law review '*Quaderni costituzionali*'

proposed by V.E. Sogno, *La seconda Repubblica* (Firenze: Sansoni, 1974). A 'new' Republic was envisaged by the *Unione democratica per una Nuova Repubblica* (1964) of Randolfo Pacciardi. A 'third' Republic was prospected by G. Miglio, *Una Costituzione per i prossimi trent'anni* (Roma: Laterza, 1990); C. Fusaro, n 1 above, 450.

[19] Atti della Camera (A.C.) I, 225 (Michelini et al).

[20] Atti della Camera (A.C.) VI, 4127 (Bianco et al).

(1981) promoted new scientific research for institutional reforms. The first editorial acknowledged an increasing demand for greater reforms, evolutionary dynamics in the practices of interpretation of the Constitution, and a need for more realism and attention to the history of institutions.[21] The so-called 'Group of Milan' directed by Gianfranco Miglio launched a research project 'Towards a new Constitution', suggesting a 'Better Republic for the Italians' that the people should dictate to a political class captured by 'partitocracy'.[22] Constitutional law and political science, supported by bridging philosophies, found a common focus on the institutional development of the 'future of democracy'.[23] The dialogue of 'technicians' encouraged politicians to promise bigger institutional reforms, but the outcome was more appetite than food. That was also the time of the first 'bicameral commission' presided over by the liberal constitution-maker Aldo Bozzi (1983). The final proposal of the commission (1985) was to change forty articles and add another four. There was a broad consensus for a new fundamental principle of protection of environment (Art 9), for new guarantees of the use of images, access to information (Art 21 ff), rights related to justice (Arts 24, 25, 27, 102), protection of disabled people (Art 32), protection of women in family and at work (Arts 29, 36, 37), access to an ombudsman (Art 98), new rules in order to strengthen democracy within political parties (Art 49), popular initiative for legislation and abrogative referendum (Arts 71, 75) and a differentiated bicameralism with both Chambers deciding only on laws on institutions of government, fundamental rights, and budget. The first Chamber would decide on all other legislation, the Senate on activities of control over government and both chambers assembled in one for the vote of confidence.

The divisions within the majority government and on the left, but also the scepticism on changes in the form of government prevailed. Nevertheless, very few remember that in 1990 the Senate approved a medium-sized reform of bicameralism that would have allowed the conclusion of a law-making procedure in one chamber if the other did not impose its veto (so-called 'principle of the cradle'), reserving to the Senate only initiatives on laws of interest for the Regions. The fundamental principle of internationality would have been amended with a specific clause requiring Italy to promote a political Union among the European Community (EC) Member States based on the principle of democracy and the safeguard of the rights of the human person.[24]

[21] 'Editoriale' *Quaderni costituzionali*, 3-6 (1981).

[22] G. Miglio, *Una Repubblica migliore per gli Italiani* (Milano: Giuffrè, 1983); Gruppo di Milano, *Verso una nuova Costituzione* (Milano: Giuffrè, 1983).

[23] N. Bobbio, *Il futuro della democrazia* (Torino: Einaudi, 1984). Cf the working group on institution studies in M. Fedele et al eds, *Mass media e sistema politico: atti del Convegno "La scienza politica in Italia: bilancio e prospettive"* (1984) (Milano: Franco Angeli, 1987). In 1984 was founded even a new Association of Italian Constitutionalists (AIC).

[24] Commissione parlamentare per le riforme costituzionali, 'Il progetto di revisione di

The same consensus could not be found in the next legislature, but was rather reversed in expectation of a 'constitutional revolution'.[25] A new bicameral commission presided over by Ciriaco De Mita and Nilde Iotti was created in 1992 and equipped with special powers through an *ad hoc* constitutional law in 1993 (legge costituzionale 6 August 1993 no 1). The task of the commission was to draft an organic reform of the entire second part of the Constitution, except for the section referring to the constitutional amendment rules. The commission divided itself into sub-committees and a) drafted guidelines for the electoral reform, b) envisioned a new 'form of State' based on a new system of legislative competences (in large part realised by the reform of 2001), c) agreed on a rationalised neo-parliamentarian form of government with the election of a Prime Minister and with a vote of constructive non-confidence by both chambers of Parliament assembled in one, restrictions on the number of Ministries and on the power to pass emergency law decrees, the right of minorities to obtain a commission of enquiry etc, but no significant changes to bicameralism, d) registered divisions on the reform of the so-called 'guarantees', especially the chapters of the Constitution referred to the judicial power and to the Constitutional Court.

In the next legislature, elected with the new majoritarian electoral system, the task of preparing a new constitutional reform was transferred to a committee of professors appointed by the Government (1994). The committee outlined alternative choices between a premiership based on direct popular election and a President elected by Parliament or a French-styled semi-presidential system, and between a Senate similar to the German *Bundesrat* or one elected by the regional, provincial, and local councils. For the purpose of preventing authoritarianism, the former member of the Constitutional Assembly Giuseppe Dossetti organized committees 'for a defence of the fundamental values of our Constitution'.[26]

alcune disposizioni della Costituzione approvato dalla Commissione Affari costituzionali della Camera nella X legislatura (A.C. 4887-A)', available at http://www.camera.it/parlam/bicam/rifcost/dossier/prec05.htm#(*) (last visited 20 March 2017).

[25] C. Fusaro, *La rivoluzione costituzionale* (Soveria Mannelli: Rubbettino, 1993); M. Segni, *La rivoluzione interrotta* (Milano: Rizzoli, 1994). For the origins of constitutional revisionism, *inter alia*, S. Messina, *La Grande Riforma* (Roma: Laterza, 1992); D. Fisichella, *Elezioni e democrazia* (Bologna: Il Mulino, 1994); E. Rotelli, *Riforme istituzionali e sistema politico* (Milano: Lavoro, 1983); Id, *Una democrazia per gli Italiani* (Milano: Anabasi, 1993).

[26] G. Dossetti, *I valori della Costituzione italiana* (Modena: Mucchi, 1995); G. Napolitano, *Dove va la Repubblica 1992-94. Una transizione incompiuta* (Milano: Rizzoli, 1994); G. Sartori, *Ingegneria costituzionale comparata* (Bologna: Il Mulino, 1995); S. Cassese, *Maggioranza e minoranza* (Milano: Garzanti, 1995); C. Chimenti, *Addio alla prima Repubblica* (Torino: Giappichelli, 1995). The annual meeting of AIC discussed 'The form of State and the revion of the constitution', cf M. Dogliani, 'Potere costituente e revisione costituzionale' and L. Carlassarre, 'Forma di Stato e diritti fondamentali' *Quaderni costituzionali*, 7-66 (1995); U. De Siervo, 'Ipotesi di revisione costituzionale: il cosiddetto regionalismo "forte" ' *Le Regioni*, 27-70 (1995); M. Mazziotti

When Umberto Bossi proposed secession of the northern part of Italy and proclaimed the transitory 'Constitution of a Federal Republic of Padania' (1996), the idea of passing a constitutional reform became more a dividing than a uniting political issue. The first Government of Romano Prodi no longer included a minister for institutional reforms, but launched administrative reforms under the ministry of Franco Bassanini. Nevertheless, a third bicameral commission for 'constitutional reforms' presided over by Massimo D'Alema and Silvio Berlusconi received a further mandate to enact a reform of the form of State, the form of government, the bicameralism, and the system of guarantees, derogating from Art 138 of the Constitution (legge costituzionale 24 January 1997 no 1). The final draft changed the structure and most articles of the second part of the Constitution, now entitled 'Federal Order of the Republic', and was presented as a 'new Constitution' for the purpose of an 'institutional modernization'. Most amendments regarding the form of State (first title) have been implemented by the reform of 2001, except for the constitutionalization of the conferences of all levels of government that realize the principle of loyal cooperation among territorial entities. A new weak semi-presidential form of government, supported by a thin majority of the commission, left a strong power over most national policies to the Prime Minister. Differentiated legislative procedures were provided, with an absolute or relative veto power of the Senate, for certain categories of laws integrated by regional, provincial, and local council members. Furthermore, the Senate would elect the bodies of independent authorities and the Bank of Italy was granted autonomy and independence. A specific title was reserved to the participation of Italy in the European Union (EU). The draft redefined the competences of the Superior Council of the Judiciary, prospected a Court of Justice for magistrates and assigned to the Constitutional Court new competences, including direct access for citizens, and five more judges. The different parts of the reform were sustained by different majorities, but strongly criticised by constitutional lawyers. Constitutional reform could not be separated from other issues of the political process and the weakest consensus on the last part of the reform regarding the judiciary could not be maintained.[27]

The reform of 2001 tried to save the most consolidated part of the

di Celso, 'Principi supremi dell'ordinamento costituzionale e forma di Stato' *Diritto e società*, 303 (1996).

[27] A. Pace, U. Rescigno et al, 'La riforma costituzionale nel progetto della Commissione Bicamerale' *Diritto pubblico* (1997); N. Bobbio, *Verso la seconda repubblica* (Torino: La Stampa, 1997); A. Baldassarre, *Una Costituzione da rifare* (Torino: Giappichelli, 1998); G. Pitruzzella, *Forme di governo e trasformazioni della politica* (Roma: Laterza, 1998); A. Pizzorusso, *La Costituzione ferita* (Roma: Laterza, 1999); A. Spadaro ed, *Le 'trasformazioni' costituzionali nell'età della transizione* (Torino: Giappichelli, 2000); Associazione Italiana dei Costituzionalisti ed, *La riforma costituzionale* (Padova: Cedam, 1999).

consensus, but it was perceived as a sort of '*coup de constitution*' of a government majority that aimed at a fresh plebiscitarian legitimacy through the first constitutional referendum ever made. The Government did not survive, but partisan reforms became attractive. The new Government initiated another reform approved by Parliament in 2005 that would have changed forty-six articles and added another three. It was a counter-reform that devolved new competences to Regions and created a federal Senate with legislative powers on laws of regional interest, but reintroduced clauses of national interest and supremacy and excluded the Senate from the mechanism of votes of confidence in favour of a Government headed by a strong premiership. The President was obliged to appoint the candidate of the elected majority and the premier could be changed only through a vote of constructive non-confidence. The judiciary and the Constitutional Court would have been changed.[28] The government majority also changed the electoral system, but lost the elections. And in 2006 the people finally rejected the reform with a clear majority (sixty-one point twenty-nine per cent) in a referendum with a higher turnout (fifty-two point forty-six per cent) than in 2001.

Nevertheless, the commission for constitutional affairs of the next Chamber of deputies made an attempt to find a new minimum consensus. The twenty-four articles-draft of Luciano Violante (2007) designed a new 'Senate of the autonomies', a reform already promised by a provision of the constitutional law of 2001. The failures of the governments of Mr Prodi and Mr Berlusconi stopped this project as well as governmental initiatives that designed a new constitutional statute of the judiciary and a more liberal constitution of economy (Arts 41, 97, 118).[29] In 2012, the Senate approved by a simple majority twenty-one articles designing a more complex reform of bicameralism with a new federal Senate, the reduction of the number of members of Parliament, the direct election of the head of State who would preside over the government, stronger powers for the prime minister, a duty to participate in the works of Parliament, a reform of the Superior Council of the Judiciary (CSM) presided over by the president of the Court of Cassation, and the access of parliamentary minorities to the Constitutional Court.[30] In the same year, the new Government of Mario Monti obtained the reform

[28] F. Bassanini, *Costituzione: una riforma sbagliata. Il parere di sessantatre costituzionalisti* (Firenze: Passigli, 2004); S. Ceccanti and S. Vassallo eds, *Come chiudere la transizione* (Bologna: Il Mulino, 2004); L. Elia, *La Costituzione aggredita* (Bologna: Mulino, 2005); G. Sartori, *Mala Costituzione e altri malanni* (Roma: Laterza 2006); 'Seminario sul disegno di legge costituzionale contenente modifiche alla parte II della costituzione, maggio 2005 – Resoconto', available at http://archivio.rivistaaic.it/materiali/convegni/20050516_roma/resoconto.html (last visited 20 March 2017).

[29] A.C. XVI, 4144.

[30] 'Riforma Costituzionale: Parlamento e Governo nel testo proposto dalla Commissione affari costituzionali del Senato (A.S. n. 24 e abbinati-A)', available at http://www.senato.it/service/PDF/PDFServer/BGT/00737451.pdf (last visited 20 March 2017).

enshrining the balanced budget rule into Art 81, but did not get approved a mini-reform of the competences of Regions (Arts 116, 117, 127).[31]

In the meantime, the financial crisis pushed for a reconsideration of constitutional reform as a tool or a precondition for structural reform, to be appreciated by European and global market analysts. When the seventeenth legislature started with the failure of the majority to pass a new electoral law, the constitutional reform policy entered onto the agenda of the President Giorgio Napolitano. He first set up in 2013 a working group for institutional reforms that recommended some amendments and a reform of bicameralism[32] and he accepted re-election only under the informal condition of a new constitutional reform. The Government of Mr Letta presented a new bill of constitutional law for an *ad hoc* procedure in derogation from Art 138 and created a commission composed of constitutional lawyers that delivered a survey of the most relevant reform ideas.[33] The Government of Mr Renzi opted for a procedure based on Art 138 and did not consult with the commission on the amended forty-one articles. The Constitutional Court declared the electoral law unconstitutional (2014) and the Parliament adopted a new electoral law only for the Chamber of Deputies, the so-called *Italicum* (2015), again declared partially unconstitutional (2017). Sixty-five point forty-seven per cent of voters participated in the referendum and fifty-nine point twelve per cent of them rejected the reform (2016).[34]

The new Government of Mr Paolo Gentiloni abolished the minister for constitutional reforms. What can the people learn from this long history of failures? It might be easier to learn from success than from failure, but one can observe that politicians and citizens do not suffer from a reform fatigue. There could be a consensus over the need for more and larger constitutional reforms, not only among politicians, but there is not a consensus on their details and probably not even on their urgency.

Did thirty years of 'eternal' reform debates without a total revision cause

[31] Disegno di legge costituzionale 15 October 2012 no 3520 'Disposizioni di revisione della Costituzione e altre disposizioni costituzionali in materia di autonomia regionale', available at http://www.senato.it/service/PDF/PDFServer/BGT/00680798.pdf (last visited 20 March 2017).

[32] The final report of the group composed of the former President of the Chamber of Deputies, Luciano Violante, the former President of the Constitutional Court, Valerio Onida, and the former Ministers for Institutional Reforms, Gaetano Quagliarello, and the Minister for Defence, Mario Mauro was not officially published: http://www.giurcost.org/cronache/relazioneriforme.pdf (last visited 20 March 2017).

[33] Cf M. Siclari, *L'istituzione del comitato parlamentare per le riforme costituzionali* (Roma: Aracne, 2013); F. Rigano, *La Costituzione in officina* (Pavia: University Press, 2013). For a retrospective view on the last ten years M. Volpi ed, *Istituzioni e sistema politico in Italia* (Bologna: Il Mulino, 2015); on the last twenty years S. Sicardi, M. Cavino and L. Imarisio eds, *Vent'anni di Costituzione (1993-2013)* (Bologna: Il Mulino, 2015).

[34] Cf E. Rossi, *Una Costituzione migliore?* (Pisa: University Press, 2016); A. Apostoli, M. Gorlani and S. Troilo, *La Costituzione in movimento* (Torino: Giappichelli, 2016); G. Zagrebelsky and F. Pallante, *Loro diranno, noi diciamo* (Roma: Laterza, 2016).

some damages? One could argue that it served to delay structural reforms. It might be even a threat to the convention of recognition of the Constitution itself, but the text of the 'formal Constitution' seems still to find more patriotism than the system of political parties and forces which are dominating the so-called 'material Constitution'.

Further observations could help the sovereign to learn more about democracy and the perspectives of future constitutional reforms. First of all, since the referendum has been used, citizens have not trusted revisions that are perceived as potential new constitutions. Small is smart and great is suspect, especially under conditions of an uncertain 'transition'. The greater the distrust in the political class, the less a great reform is the right means for regenerating citizens' confidence in the political class that is considered a 'caste'. The constitutional referendum can regenerate citizens' confidence in themselves, but not necessarily in their representatives. The new or renewed political parties seem to need a new constitutional compact or some sort of constitutional populism more than the citizens.

Secondly, the eight major drafts partially approved in Parliament (1985, 1990, 1993, 1997, 2005, 2007, 2012, 2016) do at least partially converge on a political *acquis* of common reform wishes and alternative solutions. Most elements of the last draft recycled ideas of earlier ones, but did not sufficiently declare their origins. A minimal consensus in Parliament seems to be possible, but the differences grow when elections are coming. And over the last decades, the political, legal and socioeconomic context evolved to an extent that the *acquis* risks being no longer up do date. On the one hand, the multipartitism changed first towards bipolarism and later towards tripolarism. On the other hand, the re-personalisation of power and politics pushed a demand for new 'guarantees' and practices of constitutionalism. The informal presidentialization of the form of government makes progress, but the memory of the fascist Republic of Salò is still a strong argument against presidentialism.

Thirdly, the failures show again how much procedure matters, not only in the sense that the best ideas can be outweighed by bad procedures, but also that a good memory of past failures could help to save time and provide for better problem-solving. This was the bad experience of the constitutional laws that created *ad hoc* procedures for constitutional reform. The greater a reform's size is, the more accuracy is needed for consensus-building, especially if the Government takes the initiative. The proceedings did not optimize the organisation of academic expertise and popular participation. No public investigation was made of the costs of the constitutional reform. Most proposals neglected time limits and the need for transition rules. A special attention should thus be drawn to the increasing relevance of the procedure of constitutional referendums.

## V. Better Constitutional Referendums

The 2016 referendum was more participated in than earlier constitutional referendums, but still less than elections. This is a positive development if the constitutional referendum becomes an instrument of civic participation to a deliberative democracy and matters for both the contents and the results of constitutional reform.[35]

Nevertheless, the people experienced various forms of abuse and manipulation by the political elites. An early Italian experience was the plebiscites of 1929 and 1934 when the voters just answered 'yes' or 'no' to Benito Mussolini's demand for consensus, instead of choosing their representatives. Any confusion of referendum and election should be accurately avoided, but the referendums of 2001 and 2006 were not held in sufficient temporal distance from general elections (five and three months, respectively). In the long time between the parliamentary deliberation (15 April) and the referendum (4 December) of 2016, regional elections took place and confusion occurred because the President of the Council of Ministers Matteo Renzi announced he would resign if the reform was rejected. The decision on the constitutional reform could then be perceived as a decision on a sort of non-confidence vote or recall of a government non prospected at the last elections.

Furthermore, the Parliament was elected on the basis of electoral laws that were later declared unconstitutional by the Constitutional Court. The judgment 14 January 2014 no 1 explained that elections should not necessarily be invalidated, but the opposition argued that the residual powers of the Parliament were limited to the approval of a new electoral system, not to a revision of the Constitution that is the only source of legitimacy of a parliamentary government elected with an unconstitutional electoral law. As an intermediate position, one could argue that in the case of popular consensus for the reform the people would have changed the basis of the parliamentary form of government and this decision would have implied a de-legitimation of the Parliament. However, the constitutional reform was preceded by an electoral reform of the first chamber pending in the Constitutional Court. It would have changed the parameters of constitutionality and the decision on the constitutional referendum was partially influenced by the opinions on the electoral reform.

One can conclude that if confusions of referendum and elections as well as constitutional and electoral reform issues are not avoided, the sovereignty of the electors is at risk of being a mere fiction. This suggests asking whether the constitutional referendum was organized effectively in a way consistent

[35] S. Voigt, 'The Consequences of Popular Participation in Constitutional Choice – Towards a Comparative Analysis?', in A. van Aaken, C. List and C. Luthge eds, *Deliberation and Decision: Economics, Constitutional Theory, and Deliberative Democracy* (Aldershot: Ashgate, 2003), 199-229.

with meaningful democratic deliberation.

A first objection regarding the intelligibility and the format of the referendum question, notably the incorrect title of the law and the non-identification of the amended articles of the Constitution, was rejected as inadmissible by an administrative court.[36]

A second objection regarding the impossibility to vote article by article or chapter by chapter was rejected by the ordinary and administrative courts.[37] This issue was already discussed for the referendum of 2006. The relevant law allows only a single vote and leaves the decision on the question to a special office of the Court of Cassation. The 'Guidelines for constitutional referendums at national level' of the Venice Commission of 2001 state that

> 'except in the case of total revision of the Constitution, there must be an intrinsic connection between the various parts of the text, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link; the revision of several chapters of the Constitution at the same time is equivalent to a total revision'.

The reform of 2016 invested several chapters and was therefore similar to a total revision, but this should raise a further question as to whether Art 138 of the Constitution can be used also for 'total revisions' or whether the Constitution doesn't reserve the adoption of a new one implicitly to a new constituent assembly.[38]

A third objection could be based on the right to be informed on the content of the constitutional reform. The soft law of the Venice Commission of 2001 states that

> 'electors must be informed of the consequences of the referendum; (…). The authorities must provide objective information. This implies that the text submitted to referendum and an explanatory report should be made available to electors sufficiently in advance, as follows:
>
> - they must be published in an official gazette at least one month before the vote; they must be sent directly to citizens and be received at least two weeks before the ballot;
> - the explanatory report must give a balanced presentation not only of the executive and legislative authorities' viewpoint but also the opposing

[36] Tribunale Amministrativo Regionale-Lazio 20 October 2016 no 10445, *Guida al diritto*, 94 (2016).

[37] B. Randazzo and V. Onida, 'Note minime sulla illegittimità del quesito referendario' *Rivista AIC*, 4 (2016).

[38] P. Carnevale, 'Il referendum costituzionale del prossimo (sic!) dicembre fra snodi procedurali, questioni (parzialmente) inedite e deviazioni della prassi' 2 *Costituzionalismo.it*, 35-70 (2016).

one'.[39]

The minister held that the title of the law and the publication in the *Gazzetta Ufficiale* would be sufficient. But neither the internet access to the discussions in Parliament, nor the propaganda of the committees for the Yes and for the No in public media, nor the work done by most constitutional law professors granted sufficient information.[40]

Several parliamentary interrogations focussed on questions of excessive campaigning for Italians abroad and insufficient information on the cost-savings effects of the reform. The said guidelines state that

> 'the national, regional and local authorities must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes during the referendum campaign proper (ie in the month preceding the vote) must be prohibited. A strict upper limit must be set on the use of public funds for campaigning purposes in the preceding period'.

Similar limitations have not been established in Italy and the expenses incurred by the authorities cannot really be controlled.

## VI. The Future of the Constitution

To conclude, the long history of constitutional reforms, no matter if approved or rejected, shows that the Italian Constitution is neither the most beautiful of the world, nor a wreck. Italians do not like to veil the divisions and weaknesses of Governments, but external observers should not underestimate the resilience of the people and their constitution. Italy might need further 'slim-fit' amendments without referendum, but could also have a medium to large reform with a new constitutional referendum in the next legislature. A reform 'at any cost' or just for the sake of 'revisionism' cannot help – only a reform that makes real 'savings' to the benefit of constitutionalism.[41] Informal changes through new conventions, jurisprudence, and amendments to ordinary legislation and standing orders are possible as well as better practices of constitutional referendum.

The sovereignty of a people depends upon its capacity to learn constitutional

[39] 'Guidelines for constitutional referendums at national level' (adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001)), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)010-e (last visited 20 March 2017).

[40] The Authority for Guarantees in Communications (AGCOM) reported an asymmetry in the first time: 'Il Referendum Costituzionale nei Tg e negli Extra-Tg' (2016), available at https://www.agcom.it/documents/10179/5139876/Dati+monitoraggio+15-072016+1470066868257/cf6de3c1-8768-42b9-b442-1d432eb0edd6?version=1.0 (last visited 20 March 2017).

[41] G. Azzariti, *Contro il revisionismo costituzionale* (Roma: Laterza, 2016).

democracy even in conditions of global uncertainty. One could be sceptical and believe that the people decided not to save the Constitution, but just to kick out 'the caste' of today instead of 'the caste of yesterday'. But one could even hold that the people learned to distrust thin majorities and greater reforms that frequently suffered from approximation, instrumentalism, emotionalism and inconclusiveness.[42] The accuracy in the making and interpretation of the texture, the coherence of a plurality of values, the civilisation of passions, and the ability of reasonable conclusions are virtues of the people and the best guarantees for a good Constitution. A moderate optimism is still in order.

[42] U. Allegretti, *Storia costituzionale italiana* (Bologna: Il Mulino, 2014), 223.

*Constitutional Reform in Italy: Past and Present*

# The Italian Constitutional Reform of 2016: An 'Exercise' of Change at the Crossroad between Constitutional Maintenance and Innovation

Graziella Romeo*

**Abstract**

The essay analyses the Italian Constitutional Reform of 2016, starting from provisions concerning the frame of government and specifically the overcoming of the Italian model of 'perfect bicameralism'. The essay then explores the reform of the relationships between the State and the Regions, which were successfully reorganised in 2001 but still occupy the most significant part of the Constitutional Court litigation load. The last part of the analysis is devoted to the provisions amending the Italian system of constitutional adjudication and specifically to the introduction of a form of *contrôle préventif* on electoral laws. Finally, the Author provides some conclusions about the 2016 reform as an example of '*manutenzione costituzionale*'.

## I. The Italian Reform of 2016: Origins, Cultural Background and Fundamental Choices beyond the 'Constitutional Maintenance' Logic

If one is tempted to understand the ideological inspiration or the theoretical premises behind the Italian Constitutional Reform of 2016,[1] he may well be disappointed by the persistent combination of two arguments in both pamphlets and essays dedicated to the topic. The first one is the (obvious) acknowledgment of the validity of the table of values and principles of the 1948 Constitution, which needs neither revision nor actualization.[2] The second one is the call for efficiency and efficacy of both the Parliament's and the Executive's action. Proponents of the reform advanced the two arguments as they mutually contribute to provide for a justification to the amendment

* Assistant Professor of Constitutional Law, Bocconi University, Milano.

[1] 'Disposizioni per il superamento del bicameralismo paritario, la riduzione del numero dei parlamentari, il contenimento dei costi di funzionamento delle istituzioni, la soppressione del CNEL e la revisione del titolo V della parte II della Costituzione' *Gazzetta Ufficiale* 15 April 2016 no 88. The text is also available at http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0027272.pdf (last visited 20 March 2017).

[2] See the foreword to the volume *Perché sì* written by the former Minister of Reforms Maria Elena Boschi: M.E. Boschi, 'Prefazione', in C. Fusaro, C. Pinelli et al, *Perchè sì* (Roma-Bari: Laterza, 2016), V-VIII.

procedure. On the one hand the fundamental values remain untouched, on the other the interventions are designed to speed up legislative procedures and advance the efficiency of the whole system of government.[3] To put it differently, the first part of the Constitution stands, while the second is amended to correct original sins, first and foremost the 'perfect bicameralism'.[4]

The former argument declares the continuity between the ideological inspirations of the framers and that of the proponents of the new reform. The latter conceals the theoretical premises behind a clear-cut logic, which was apparently responsive to a widespread discontent emerging from both the Italian electorate and international partners.

From a political viewpoint the arguments strived to downsize the dramatization of the debate over a major change in Italian constitutional history, with the proponents keeping good memory of the previous unsuccessful attempts to amend the Constitution.[5] In other words, the lack of a broadly-conceived and values-inspired revision has been presented as the key for the potential success of the reform, on the assumption that the *maintenance* ('*manutenzione*')[6] of the constitutional text would not have raised as many controversies as a comprehensive revision.

The argument has been advanced to answer criticism of those who maintained the heterogeneity of the constitutional bill or even its subversive

[3] Political science literature on the issue is broad. See *ex multis* S. Bolgherini, 'Crisis-driven Reforms and Local Discretion: An Assessment of Italy and Spain' *Italian Political Science Review*, 71-91 (2016), arguing that the reform has been prompted by the global financial crisis, which forces Governments to pursue efficiency and fast-track normative procedures. See also M. Morelli and M. Osnabrügge, 'Some Neglected Reasons to Eliminate Perfect Bicameralism: The Italian Constitutional Reform and Legislative Efficiency' *Vox*, 26 November 2016, available at http://voxeu.org/article/italian-constitutional-reform-and-legislative-efficiency (last visited 20 March 2017). The Authors insist more directly on the need to overcome bicameralism in order to achieve efficiency and facilitate policy changes via ordinary legislation. Massimo Morelli and Moritz Osnabrügge specifically focus on other neglected effects of bicameralism, including fostering the resort to decree laws (*decreti legge*) and legislative decrees (*decreti legislativi*).

[4] Alternatively named 'full and/or symmetric bicameralism': see G. Tsebelis, '*Compromesso astorico*: The Role of the Senate after the Italian Constitutional Reform' *Italian Political Science Review*, 87, 88 (2017) and G. Tsebelis and J. Money, *Bicameralism* (New York: Cambridge University Press, 1997). The Italian Government used the locution 'perfectly equal bicameralism' in the English translation of the reform explanatory note.

[5] See J. Luther, 'Learning Democracy', in this issue.

[6] See for example C. Fusaro, 'Le ragioni di una riforma', in Id and G. Crainz eds, *Aggiornare la Costituzione. Storia e ragioni di una riforma* (Roma: Donzelli, 2016), 129. Constitutional maintenance ('*manutenzione costituzionale*') is highly controversial term in Italian constitutional law. It has been used by Alessandro Pizzorusso (*La costituzione ferita* (Roma-Bari: Laterza, 1999), 47) with the purpose of identifying modifications, updating and corrections of the existing constitutional text with a view to incorporate factual or normative changes developed after its entry into force. Later on Italian scholars developed a partially different understanding of the concept, which is often used to label constitutional changes not necessarily entailing a formal revision or consisting in minor (*revisione minima*) or strictly focused changes (*revisione mirata*): see F. Palermo, 'La "manutenzione costituzionale": alla ricerca di una funzione', in F. Palermo ed, *La «manutenzione» costituzionale* (Padova: CEDAM, 2007), 4.

nature.[7]

Irrespective of the validity of those theses, some scholars argued that the argumentative strategy contributed to the failure of the December referendum[8] because the efficiency logic[9] does not fit constitutional debates, in the sense that it is an argument incapable of sensitising citizens to major constitutional changes.

On the contrary, constitutional reforms need to gain momentum through values-oriented discussions prevailing over purely political (and all the more so legal) fundamental choices.[10]

Irrespective of any arguable consequences-oriented judgment, one has to consider if it is true that the reform does not purport any other ideological inspiration a part from the efficiency and efficacy arguments (within which the '*governabilità*' or governability played a major role).

The efficiency and the effectiveness of the frame of government may well have been the crucial concerns of the reform, nevertheless there are fundamental choices reflecting a certain theoretical framework. That framework has consequences in terms of the institutional arrangements assumed to be essential to straightening up the functioning of the parliamentary system.

In other words, while the *reasons* behind the constitutional project have been sufficiently investigated, the *motives* have been somehow neglected in scholarly and public debates.

To understand the aforementioned fundamental choices one should start from the Final Report of the Committee of Wise Men.[11] It is clear from the document, dated September 2013, that the experts were basically divided along two lines. More precisely, a group of experts identifies the dysfunctions of the Italian system with the endemic structural weakness of the Executive; while another group maintains that the parliamentary government is improperly balanced, with functions unnecessarily duplicated between the two Chambers or confused between the Legislative and the Executive power. In other words,

[7] See A. Pace, 'Una riforma eversiva della Costituzione vigente' 4 *Rivista AIC*, 1-4 (2016).

[8] See for example B. Caravita, 'Considerazioni sulle recenti vicende sociali e istituzionali del Paese e il futuro della democrazia italiana' *Lo Stato*, 291, 293 (2016). The Author argues that the proponents inadequately explained the cultural background of the constitutional reform, undermining the power of the two core arguments: the overcoming of perfect bicameralism and the reframing of legislative authority between the State and the Regions.

[9] Especially in recent years there are many studies on the impact of institutional arrangements over States' economic performances: see W.J. Henisz and E.D. Mansfield, 'Votes and Vetoes: the Political Determinants of Commercial Openness' 50 *International Studies Quarterly*, 189-211 (2006). See also S.L. Kastner and C. Rector, 'International Regimes, Domestic Veto-players, and Capital Controls Policy Stability' 47 *International Studies Quarterly*, 1-22 (2003).

[10] See P. Pombeni, 'Ripensare la Costituente settant'anni dopo' *Rivista Il Mulino*, 398, 400 (2016). See also A. Cerri, 'Riflessioni sull'esito del *referendum* costituzionale' 1 *Rivista AIC*, 1-5, 2 (2017), and M. Bertolissi, 'Riforma costituzionale e contesti' 2 *Rivista AIC*, 1-8, 2 (2016).

[11] The Committee has been appointed by the Former President of the Republic, Giorgio Napolitano, pursuant to Decreto del Presidente del Consiglio dei Ministri 11 June 2013.

the malfunctions are to be located within the relationship between the Parliament and the Government.[12]

The two arguments bear some consequences when it comes to the proposed amendments to the Constitution. Those arguing for strengthening the Executive were open to the possibility of adopting the semi-presidential system; while those insisting on the relationship between powers defended the parliamentary system, only supporting those changes that would *rationalize* the functioning of the current frame of government.

The constitutional bill mirrored the latter argument. The reformers made the fundamental choice to identify the problem of the existing frame of government with Parliament's functions and attributions. In other words, the logic of the reform was to concentrate the efforts in reframing the legislative power to the benefit of the whole system.

The new Senate, the rationalization of the vote of confidence, the limitations on law decrees all were expressions of the same premise: the need to solve the problems by returning the legislative power to the Parliament (and specifically to the Chamber of Deputies) and reducing the intersection of normative functions with the Government.

Even the amendment of the provisions concerning the relationships between the State and the Regions mirrors the same 'constitutional logic':[13] to avoid clashes of legislative competences and to reduce conflicts and litigation.

The goal was to achieve a more efficient functioning of the existing frame of government, focusing on the legislative function and more broadly on the role of Parliament.

## II. The Constitutional Procedure and Parliamentary Debate: An Overview

The reform would have amended forty-five articles and abolished two articles (Arts 58 and 99) of the one hundred and thirty-four in force (and of the one hundred and thirty-nine of the original text).

The constitutional amendment procedure started on 8 April 2014 with the Senate Act no 1429, on government initiative. Few days later, on the 15th, the President of the Senate appointed the two majority rapporteurs. The Senate amended twenty-four of the forty-four articles of the Government proposed constitutional bill, and introduced changes to three more articles, not included in the original text. Specifically, the Senate submitted modifications to Art 63 (enabling the Senate to regulate Senators' incompatibility between offices

[12] Commissione per le riforme costituzionali, 'Per una democrazia migliore. Relazione finale, 17 September 2013', available at bpr.camera.it/bpr/allegati/show/CDBPR17-127 (last visited 20 March 2017).

[13] C. Fusaro, n 6 above, 50-51.

hold at the regional or local levels); Art 73 (charging the Constitutional Court with the preventive control of constitutionality on electoral laws) and Art 74 (conferring to the President of the Republic the power to send selected provisions of a given law back to the Chambers for new deliberation).[14]

Readings and debates took four month and the final text was passed to the Chamber of Deputies on 8 August 2014. The Chamber approved fifteen of the twenty-four Senate amendments and introduced three brand new (minor) changes to Art 78 (on the majority required to deliberate on the state of war); Art 97 (on the principle of transparency in public administration) and to Art 122 (enabling the State to impose the principle of gender equality in regional electoral law). Moreover, the Chamber extended the provision on preventive constitutional adjudication to electoral laws approved during the current legislative term. Finally, it amended the provision concerning the election of constitutional judges to restore the bicameral appointment. After seven months, on 3 April 2015, the Chamber approved the text with no further change.

Pursuant to Art 138 of the Italian Constitution, requiring a double deliberation of the two Chambers at intervals of not less than tree months, the bill passed to the Senate. The Upper House amended four of the fifteen articles of the Chamber's first reading. The most relevant changes at this stage were three. First of all, the Senate insisted on separating the voting procedure on Constitutional Court's nominees (see below, para VI). Secondly, it raised the quorum for the election of the President of the Republic (three fifths of voters for each Chamber). Thirdly, the Senate introduced a subsection to Art 57, requiring the election of Senators to be consistent with the choices expressed by the electors. The amendments ended at this point. The Chamber approved the text with no changes on 11 January 2016; the Senate ten days later. The Chamber's final approval took place on 4 April 2016, after two years from the beginning of the parliamentary debate.[15]

## III. Overcoming the 'Perfect Bicameralism' and Reframing the Legislative Authority: The Parliament in the Constitutional Reform Bill

The central core of the constitutional reform is the overcoming of symmetric bicameralism. There is virtually unanimous agreement on the need to put an end to the duplication of functions between the two Chambers.[16] The

[14] The Chamber of Deputies later rejected the amendment to Art 74.

[15] It is worth mentioning that the reform, in the final session, has been approved by one hundred and eighty Senators, representing fifty-six per cent of the members, and by three hundred and sixty-one Deputies, representing the fifty-seven per cent of the members. See C. Fusaro, n 6 above, 57. The record of the parliamentary proceedings is available at http://www.camera.it/temiap/2016/10/13/OCD177-2444.pdf (last visited 20 March 2017).

[16] See C. Lavagna, 'Prime considerazione per uno studio sulla migliore struttura del Parlamento'

Italian system indeed is a unique example of perfect bicameralism.[17] The choice could be easily traced back to the founding fathers' intention to confer the Parliament a central role in the frame of government, after the marginalization it had suffered during the fascist regime. Nonetheless, it is historically more accurate to underline that the framers predominantly focused the discussion on the alternative between monocameralism and bicameralism, discarding the former for the fear of an *assembly dictatorship*.[18]

Especially in recent years, political science literature insisted on the connection between this peculiar institutional arrangement and both the legislative gridlock and the governmental instability that have long beleaguered Italy.[19] The reform addressed the issue by redesigning the nature of the Senate and by excluding it from the vote of confidence.

Even if there were no proposal to change the name, the new Senate would have been a Chamber of representation of Regions and local Governments.

According to the constitutional bill, the Senate would have consisted of a maximum number of one hundred members: ninety-five senators elected on a proportional basis and up to five senators appointed by the President of the Republic for a non-renewable seven-year mandate.

Seventy-four of the ninety-five would have been elected by the Regional Councils among their own members, while twenty-one by each Region among

*Studi di diritto costituzionale in memoria di Luigi Rossi* (Milano: Giuffré, 1952), 278; L. Carlassare, 'Un bicameralismo discutibile', in L. Violante ed, *Storia d'Italia*, *Annali* 17 (Torino: Einaudi, 2001), 325; P. Ciarlo and G. Pitruzzella, 'Monocameralismo: unificare le due camere in un unico Parlamento della Repubblica' 1 *Osservatorio AIC*, 1-4 (2013); R. Bin, '*Referendum* costituzionale: cercasi ragioni serie per il no' 3 *Rivista AIC*, 1-6, 3 (2016). It is worth to be mentioned that the simultaneous functioning of the two Chambers has been contradicted by the constitutional praxis of rendering the Senate and the lower House more and more autonomous as far as their orders of business were concerned. Especially in recent years, for example, the extraordinary summoning of one Chamber no longer automatically triggered the summoning of the other, at least in some circumstances, as it is required by Art 62: see V. Di Ciolo and L. Ciaurro, *Il diritto parlamentare nella teoria e nella pratica* (Milano: Giuffrè, 2013), 355-356 and R. Di Cesare, 'Convocazione straordinaria e convocazione di diritto delle Camere' *Forum di Quaderni costituzionali*, 9 October 2016, available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/old_pdf/372.pdf (last visited 20 March 2017).

[17] See M. Calamo Specchia, 'Un'analisi comparata del nuovo senato della repubblica disciplinato dalla legge costituzionale: verso quale bicameralismo?' 3 *Rivista AIC*, 1-27 (2016). The Author discusses the Italian constitutional reform in a comparative law perspective, arguing that new Senate would have been a hybridization of the Austrian and the German models.

[18] At the same time the founding fathers were aware of the risks of perfect bicameralism. To address this issue, the *Assemblea costituente* distinguished the two Chambers by differentiating composition, term and system of election. Nevertheless, the constitutional provision has been eluded firstly in 1953 and then again in 1958 with the anticipated dissolution of the Senate in order to level off its term with that of the lower House. Finally, with legge costituzionale 9 February 1963 no 2 the terms of the two Houses were levelled off. L. Paladin, *Diritto costituzionale* (Padova: CEDAM, 1997), 289 discusses the premature dissolution and especially the missed differentiation of the electoral systems. See also C. Fusaro, 'Per una storia delle riforme istituzionali' *Rivista trimestrale di diritto pubblico*, 431, 436 (2015).

[19] See G. Tsebelis, n 4 above, 87.

its mayors. Both elections were requested to be consistent with the choices expressed by the electors at the regional and local levels.[20] The locution 'consistent with the choices' has been interpreted in the sense of allowing the regional electors to indicate their preferences concerning the members of the Regional Councils they would like to be elected to the Senate.[21]

As the senators would have been expression of their territorial communities, the length of the senators' mandate would have been the same of that of the Regional Councils that elected them and they would not have received additional emolument for their national office. The logic has been that of the co-existence (*compresenza*)[22] of the two levels of representation with a view to foster the dialogue with regional and local authorities.

In the constitutional design, the Senate would have been excluded from the vote of confidence, thus leaving the Chamber of Deputies the only one to directly control Government's political accountability (see below para IV).

The exclusion of the Senate from the legislative-executive confidence circuit meets the need to guarantee governmental stability, reducing at the same time the impact of the Senate as veto player.[23] In the intention of the framers, there was also an additional (though intimately connected) result: to ensure that the Senate would have authentically functioned as the filter of Regional and local needs and exigencies, rather than a political chamber with some kind of veto power over policy changes.

The Senate and the Chamber of Deputies would have continued to exercise equal legislative functions according to a bicameral procedure in a limited number of areas and specifically: laws reforming the Constitution and other constitutional laws; implementation of the Constitution in subjects related to the protection of linguistic minorities, referenda regulation, functions and electoral legislation concerning municipalities and 'metropolitan cities'; the Senate's electoral system; and, finally, legislation attributing to the Regions further autonomy than is already envisioned in the Constitution.[24]

Consistently with its role, the constitutional reform bill involves the Senate in all the decisions related to Regions and local Governments, including the protection of linguistic minorities.

The procedure for non-bicameral laws has been designed to reduce uncertainty in both timing and outcomes. More precisely, the reform introduced deadlines for specific stages, including for the conversion of law-decrees into

[20] The provision, which was introduced during the third of the Senate's deliberations, was one of the most controversial as it seemed to call into question the election by the Regional Councils. See I. Ciolli, 'Il Senato della riforma tra forma e sostanza' 4 *Rivista AIC*, 1-20, 14 (2016).

[21] See F. Sorrentino, 'Sulla rappresentatività del Senato nel progetto di riforma costituzionale' 2 *Rivista AIC*, 1-5, 3 (2016).

[22] See C. Fusaro, n 6 above, 60.

[23] See G. Tsebelis, n 4 above, 90.

[24] See Art 70 as amended by 10 of the constitutional reform bill, n 1 above.

law.

The Senate would have been granted the possibility to 'recall' the bills for examination, but the lower Chamber would have kept the last word. Some scholars have argued that this would have been a case of asymmetrical bicameral laws (*leggi bicamerali asimmetriche*).[25] Going into details, the examination of bills would have been initiated by the Chamber, which immediately would have transmitted the draft to the Senate after its approval. After deciding whether to examine it, the Senate could have proposed modifications to the text. The Chamber in turn would have been free to decide whether to accept them or not.

According to the constitutional reform proposal, the Senate examination of bills in the field of public budget would have been mandatory. Similarly, the Senate would have examined the bills covered by the so called 'supremacy clause', that is bills intervening in areas not attributed to national exclusive competence. Nevertheless, in both circumstances, a reduced duration of the procedure was prescribed.

Had the Senate approved amendments referred to bills covered by the aforementioned 'supremacy clause' by absolute majority, the Chamber could have overridden them only by absolute majority.

In all legislative procedures, the Government could have asked for a 'vote by a certain date' to ensure a 'fast track' (seventy days or eigthy-five, at most) to the bills deemed to be essential to the implementation of its program. Some categories of laws, and specifically electoral laws and ratification of international treaties, would have been excluded.

The reform bill affected also the law-decrees. It would have *constitutionalised* the limits, currently established under legge 23 August 1988 no 400 as well as under the Constitutional Court's case law, for issuing law decrees. Finally, the Renzi-Boschi reform provided for an extended deadline (of thirty days) for the conversion of law-decrees into a law when the President of the Republic asks the Chambers for a new vote on the conversion.

The reform would have required a joint session of the two chambers of the Parliament in a number of cases, including the election of the President of the Republic. The new composition of the Senate would have affected the requested quorum: two-thirds of the members of Parliament from the first to the third count, three-fifths in the following three counts, and absolute majority from the seventh count onwards. Given the size of the Senate, the Chamber of Deputies would have played the major role in the election, the Deputies being approximately the eighty-six per cent of the electorate.

The joint session would not have been preserved for the election of constitutional judges. The Senate proposal prevailed over a reluctant Chamber.

[25] See S. Staiano, 'Le leggi monocamerali (o più esattamente bicamerali asimmetriche)' 1 *Rivista AIC*, 1-9 (2016).

With a (presumable) view to promoting the democratic legitimacy of the body,[26] the vote on Constitutional Court's sits would have been split into two distinct elections, with the Senate choosing two judges, and the lower House three.

## IV. The Functions of the Senate in the Frame of Government

New functions would have been bestowed upon the Senate. Among these functions, both the representation of territorial institutions and the coordination between the State and the regional and local Governments would have been consequential to the Senate's role in the constitutional frame.

The constitutional bill introduces other functions. More precisely, the reform would have entrusted the Senate with: a) the evaluation of public policies and of the activities of the public administrations; b) impact assessment of European Union (EU) policies on the territories; c) participation on decisions regarding formation and implementation of EU law and policies. Moreover, the Senate would have participated in three additional functions: d) coordination between State, other entities of the Republic and the European Union; e) control over the implementation of State laws; f) advice on governmental designations of high-level officials.

At least some of the aforementioned functions (and specifically those cited under a); b) and e)) can be summarized in a broad concept of 'oversight functions'. Although parliamentary law, as a scholarly field, tends to couple parliamentary control with political sanctions on the Executive (and precisely with political accountability, ie the Executive's duty to resign from office),[27] it must be recalled that in contemporary parliamentary systems the Parliaments experience a number of alternative ways to exercise an influence over the Governments.[28] In other words, even if the Chamber of Deputies would have kept the monopoly on the vote of confidence, the Senate could still have had a strong impact on the legislative-executive circuit of political accountability.

[26] As it is provided in most of the federal and quasi-federal systems. The most cited example is the German Constitutional Court. See J. Luther, 'La composizione dei tribunali costituzionali e le autonomie territoriali: esperienze straniere', in A. Anzon, G. Azzariti and M. Luciani eds, *La composizione della Corte costituzionale. Situazione italiana ed esperienze straniere* (Torino: Giappichelli, 2004), 68. See also Id, 'I giudici costituzionali sono giudici naturali?' *Giurisprudenza costituzionale*, 2478, 2484 (1991). The Author argues that the mechanism of selection of the judges of the *Bundesverfassungsgericht* is designed to guarantee democratic legitimacy and representativeness to the Court.

[27] See A. Manzella, *Il Parlamento* (Bologna: Il Mulino, 2003), 441.

[28] See M. Luciani, 'Funzione di controllo e riforma del Senato' 1 *Rivista AIC*, 1-5 (2016), who specifies that the strictly political control (*controllo politico parlamentare in senso stretto*) is reserved to the Chamber of Deputies. The Author resorts to the difference between institutional political accountability (*responsabilità istituzionale*) and diffused accountability (*responsabilità diffusa*), elaborated by Giuseppe Ugo Rescigno, to explain the broad meaning of parliamentary function of control over the Government's conduct. See G.U. Rescigno, *La responsabilità politica* (Milano: Giuffrè, 1967).

One interesting aspect of the Senate's oversight functions is their latitude. The constitutional bill included activities that have both a local and a national dimension, such as the evaluation of public policies and of the activities of the public administration, as well as the control over the implementation of State laws; not to mention the involvement of the upper House in the EU bottom-up policy-making. One may be tempted to conclude that, although it would have had a region-based representation (and legitimization), the Senate would have been intensely involved in national policies. An alternative reading could be that the Upper House would have still performed its functions considering its position in the frame of government,[29] ie evaluating and assessing national policies only with the aim of guaranteeing the best impact on the Regions or to minimize externalities at local level.

The constitutional structure designed by the reform is potentially open to multiple strategies by institutional actors. More broadly, some scholars underlined that the frame of government resulting from the reform does not exclude in principle the ability of the Senate to paralyse the lower House at least in some specific circumstances. Apart from the obvious reference to bicameral laws, the scholarly debate concentrated on constitutional revision.

The procedure for constitutional reforms and constitutional laws has not been amended by the reform. Many commentators, working both in the field of constitutional law and of political science, insisted on the risk of gridlock in keeping perfect bicameralism in this context relying on the analysis of veto players in unicameral and bicameral arrangements.[30]

A completely different argument has been put forward by scholars who link the bicameral nature of the constitutional revision procedure to the quasi-federal asset of the Italian State (which is better qualified by the Italian locution *Stato autonomistico*). From their viewpoint, the reform bill is perfectly consistent with solutions coming from other legal systems with comparable institutional arrangements.[31]

## V. The Relationship between the State and the Regions

[29] This seems to be the reading of the constitutional reform suggested by M. Luciani, n 28 above, 4.

[30] Among constitutional law scholars see: M. Luciani, n 28 above, 4. Among political scientists see G. Tsebelis, n 4 above, 93-94. Others argued that the so called '*combinato disposto*', ie the combination between the constitutional reform and the electoral law (now declared partially unconstitutional) would have created a situation in which the majority party would have monopolized the Chamber of Deputies, thus substantially preventing future corrections to the imbalance of powers caused by the Renzi-Boschi reform: see V. Tondi della Mura, 'Se il rimedio è peggio del male. I rischi di una riforma costituzionale non emendabile' 3 *Rivista AIC*, 1-10, 9 (2016).

[31] See U. Allegretti, 'Un giudizio positivo e notevoli riserve. Appunti critici sulla riforma costituzionale' 2 *Rivista AIC*, 1-5, 4 (2016).

As far as the relationship between the State and the Regions is concerned, the constitutional reform intended to rationalize and reorganize the legislative competences.

The concurrent competence ('*competenza concorrente*') would have been abolished, with the goal to reduce possible conflicts between the entities that form the Republic (and thus to decrease constitutional litigation). The shared competences would not have been entirely and expressly allocated to the State or to the Regions; therefore, the list of subject-matters would have been only partially transferred under national or regional competence.[32] For the subject-matters no longer included in the new catalogues the interpretation by the Constitutional Court would have been crucial.

Indeed, the other trajectory of the constitutional reform was to bring back to the State some key competences that had been neglected by the framers of the 2001 reform of Italian regionalism,[33] such as labour policies, anti-trust regulation and strategic infrastructures. Some of the State's competences would have been attributed with a special formula: the State would have adopted only general and common provisions (*disposizioni generali e comuni*), thus leaving to the Regions the power to integrate legislation according to specific needs and policy preferences.

The residual competence would have been left to the Regions in areas not falling under the State's exclusive legislative domain. Nevertheless, the constitutional bill introduced a 'supremacy clause', providing for national legislation, subject to a proposal by the Government, even on subject-matters of regional competence when necessary to protect the country's legal or economic unity or to guarantee the national interest.

The 'supremacy clause' has been widely discussed by Italian scholars. The core issue would have been to understand if the prerequisites for legislative intervention (country's legal or political unity and national interest) would have been considered justiciable or not by the Constitutional Court.[34]

In any case, the centripetal thrust would have been compensated[35] firstly

[32] According to some scholars, a solution of this kind can potentially determine an increased centralization: see S. Mangiameli, 'Il riparto delle competenze normative nella riforma costituzionale', in Id, *La riforma del regionalismo italiano* (Torino: Giappichelli, 2002), 116.

[33] See M. Belletti, *Percorsi di ricentralizzazione del regionalismo italiano nella giurisprudenza costituzionale. Tra tutela di valori fondamentali, esigenze strategiche e di coordinamento della finanza pubblica* (Roma: Aracne, 2012), 252.

[34] Some scholars argued that given the precedents, the Constitutional Court would probably interpret the clause exclude the justiciability of the prerequisites, thus risking to transform the supremacy clause into a 'vampire clause': see A. D'Atena, 'La specialità regionale tra deroga e omologazione' 1 *Rivista AIC*, 1-14, 9 (2016). According to other authors the supremacy clause would have introduced (*rectius* constitutionalised) a tool to make more dynamic the distribution of competences, thus addressing the concrete and diverse needs of complex societies: see A. Morrone, 'Lo Stato regionale e l'attuazione dopo la riforma costituzionale' 2 *Rivista AIC*, 1-12, 5-6 (2016).

[35] See A. D'Atena, n 34 above, 8.

by the creation of a Senate as a Chamber of Regions and secondly by the simplification of the legislative procedure required to deliberate on extended autonomy for both ordinary Regions and for those granted with special status. In other words, under the existing constitutional framework, it is possible to establish, by means of ordinary law, a kind of differentiated regionalism. Pursuant to Art 116, ordinary Regions can be granted special conditions of autonomy by requesting the Parliament to pass a law, which needs to be approved by absolute majority. As a consequence, Italian regionalism can be articulated as follows: Regions with ordinary attributions, 'special Regions' (*Regioni a statuto speciale*), and Regions with heightened autonomy.

The constitutional reform would have repealed the requirement of absolute majority, only requiring the Parliament to assess the Region's economic and financial conditions (and specifically the budget balance) in order to grant higher conditions of autonomy. Moreover, the new Art 116 would have been applied also to the *Regioni a statuto speciale*.[36]

For sure, an impulse in the direction of centralization has come from the global economic crisis, which has determined a centripetal trend in institutional arrangements all over Europe.[37] Indeed global competition between economic systems has pushed States towards centralism with a view to concentrate economic strategic choices at the national level, sometimes frustrating principles of federalism and, more broadly, local diversities and peculiarities.[38]

In the Italian scenario, though, this synthesis is somehow partial and oversimplifying. The centralized turn in Italian regionalism dates to the early days of the post 2001 constitutional reform. The quasi-federal arrangement of the aforementioned revision has been progressively eroded by concurring factors, including the organization of administrative competences, the reshaping of the distribution of legislative competences and the need for centralizing decisions in some sectors, such as environmental protection and regulation.

Some scholars argued that the centripetal trend has been a reaction to the flaws of the 2001 revision. The wide attribution of legislative competences was not properly balanced with institutional mechanism of coordination, with the result of allocating some shares of decision-making procedures to institutional places other than legislative assemblies (the so-called system of conferences or *sistema delle Conferenze*).[39] The final outcome was a certain rigidity of the dialogue between State and other territorial entities and ultimately their

[36] On the consequences of the constitutional reform on the status of the 'special Regions': see V. Onida, 'Regioni a statuto speciale e riforma costituzionale. Note minime su una singolare (futura) norma transitoria' 3 *Rivista AIC*, 1 (2016).

[37] S. Bolgherini, n 3 above, 71.

[38] On this global trend and with specific reference to the US case see: H.K. Gerken, 'Foreword: Federalism All the Way Down' 124 *Harvard Law Review*, 4, 44 (2010-2011).

[39] See A. D'Atena, 'Dimensioni e problemi della sussidiarietà', in G.C. De Martin ed, *Sussidiarietà e democrazia. Esperienze a confronto* (Padova: CEDAM, 2008), 43.

marginalization. On the contrary, the reform would have pursued the creation of a different kind of regionalism, with the allocation of powers being distributed according to a dynamic approach.[40]

Finally, the Renzi-Boschi reform would have amended the already existing power to replace (*potere sostitutivo*) regional and local institutions in the exercise of their functions. The new discipline would have been consistent with the new functions of the Senate. The Upper House would have had the function of advising the Government on the exercise of the aforementioned power when regional and/or local inaction would have violated international (including EU) obligations or compromised public safety, legal and economic unity or the guarantee of essential conditions for the exercise of rights. In line with the historical contingencies, the reform also provided for the possibility to remove from their functions the office-holders of governmental regional and local bodies in case they directly determined a situation of budgetary imbalance.

The constitutional reform of 2016 conceived the implementation of Italian regionalism as an objective to be achieved first and foremost via institutional mechanisms.

At the same time, though, the reform continued the tradition of Italian regionalism by focusing on regulating the perimeter of national and regional subject-matters and by adopting the solutions elaborated by the Constitutional Court in the last fifteen years.[41]

## VI. The Constitutional Guarantees. The Constitutional Court and the Adjudication on Electoral Laws

The constitutional reform would also have had an impact on the system of constitutional guarantees by reshaping existing institutions of direct democracy (popular legislative initiative and referendum) and introducing new instruments, such as propositional referenda (*referendum propositivi e di indirizzo*). Those new provisions were introduced during the Senate first examination of the text and not included in the government project of reform. Neither occupied the scholarly debate very much.[42] The disposition on popular legislative initiative partially mirrors provisions of the existing Senate's rules of procedure by prescribing precise timing for the examination of bills of popular initiative. The reform would have regulated the *referendum abrogativo* (the referendum to repeal laws in force) by lowering the validity quorum from the majority of

[40] See A. Morrone, n 34 above, 6.

[41] Ibid 5.

[42] See E. Castorina, 'Gli istituti di democrazia diretta nella legge di riforma costituzionale Renzi-Boschi: cosa cambia sul versante della democrazia partecipativa' 4 *Rivista AIC*, 1-14, 4 (2016) and E. De Marco, 'Il referendum propositivo nell'attuale progetto di riforma costituzionale. Aspetti problematici e spunti di riflessione', in A. Ruggeri ed, *Scritti in onore di Gaetano Silvestri* (Torino: Giappichelli, 2016), 776.

the electorate to the majority of the voters in the last elections, had the proposal been filed by at least eight hundred thousand voters.

The most interesting innovation would have been the *referendum propositivi e di indirizzo*, which would have been regulated by an *ad hoc* constitutional law. Those two instruments were included in Art 71 para 4, concerning the right to popular legislative initiative. This choice has been interpreted as the intention to draw a line between this kind of direct democracy and the one that is conveyed via the *referendum abrogativo*.[43] The latter is a kind of negative legislative intervention, which cannot surrogate the ordinary means to pass laws. The former is a form of active participation into the exercise of the legislative function.

Among the most interesting amendment of the constitutional reform of 2016, there is the preventive control of constitutionality on electoral laws. As is well known, the Italian system of constitutional adjudication is repressive, in the sense that constitutional adjudication intervenes after a law entered into force. In virtually all cases, with one exception,[44] the control is also concrete, being grounded on the application of an existing law. Therefore, the Renzi-Boschi reform would have introduced a brand new way to access the Constitutional Court. The proposed Arts 73 para 2 and 134 para 2 would have allowed one-fourth of the deputies and one-third of the senators to lodge a claim to challenge their electoral laws before the Constitutional Court within ten days from their approval. The Constitutional Court should have decided within ten days; during that period the law could not have been promulgated.

The introduction of *contrôle préventif* on electoral laws has a clear factual background, which is substantially unrelated to the core content as well as the driving force of the Renzi-Boschi reform. The Constitutional Court's ruling no 1 of 2014 paved the way to the debate over the *constitutionalization* of preventive adjudication of electoral laws.

There are at least two reasons why the decision was a pivotal one for the constitutional reform project. Firstly, the Court affirmed its jurisdiction even if the Italian system of constitutional adjudication could have theoretically prevented the proceeding to be brought before the *Consulta*.

Indeed, the case originated from an ordinary proceeding, whose central claim was the violation of the right to vote. The ordinary judge declared a stay and referred the case to the Constitutional Court, arguing for the unconstitutionality of the electoral law. According to some scholars, the incidental proceeding was *de facto* translated into a brand-new possibility to directly access the Court for the adjudication of constitutional rights.[45]

[43] See E. Castorina, n 42 above, 11.

[44] See Art 123, Italian Constitution concerning the preventive control of Regional Statutes (*statuti regionali*).

[45] See A. Anzon Demmig, 'Accesso al giudizio di costituzionalità e intervento "creativo" della Corte costituzionale' *Giurisprudenza costituzionale*, 34, 36 (2014). See also R. Romboli, 'La

The *Consulta*'s decision to declare the admissibility of the question of constitutionality contradicted the consolidated interpretation according to which electoral laws are a matter for parliamentary scrutiny.[46] In the judgment no 1 of 2014 the Court argued that Parliament's control (the so called *verifica dei poteri*) does not prevent ordinary judges to adjudicate on fundamental rights and especially on political rights.

The Constitutional Court's stand made sufficiently clear that electoral laws cannot longer be a 'no man's land' (*zona franca*)[47] of constitutional adjudication.

The second reason why the decision of 2014 was crucial to the constitutional reform is that the political mediation of interests failed and found a (controversial) surrogate in constitutional litigation.[48] The judicial proxy of the political confrontation had a number of consequences, including the opening of a debate over the legitimacy of the Parliament in office, notwithstanding the Court's statement concerning the legal legitimacy of the Parliament.[49] Eventually, the scholarly discussion affected the debate over the reform, with some opponents arguing the legislative assembly was not entitled to pass a constitutional law because of its illegitimacy[50] or, alternatively, because of its weak political legitimization.

In this scenario, the Senate decided to charge the Constitutional Court with the task of preventive adjudication of electoral laws with a view to couple the political assessment of conflicting interests with an immediate juridical scrutiny. At the same time the proponents intended to prevent the hybridization of the model of constitutional adjudication, which circumscribes the cases of direct access to the Constitutional Court.[51]

costituzionalità della legge elettorale 270/05: la Cassazione introduce, in via giurisprudenziale, un ricorso quasi diretto alla Corte costituzionale?' *Foro italiano*, I, 1836 (2013).

[46] See Art 66, Italian Constitution and Art 87, para 1, Decreto del Presidente della Repubblica 30 March 1957 no 361. See M. Siclari, 'Il procedimento in via incidentale', in R. Balduzzi and P. Costanzo eds, *Le zone d'ombra della giustizia costituzionale* (Torino: Giappichelli, 2007), 26 and A. Ciancio, 'Il controllo preventivo di legittimità sulle leggi elettorali ed il prevedibile impatto sul sistema italiano di giustizia costituzionale' *federalismi.it – Focus Riforma costituzionale*, 1-23, 19 (2016), available at http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=32552 (last visited 20 March 2017).

[47] See A. Pizzorusso, ' "Zone d'ombra" e "zone franche" della giustizia costituzionale italiana', in A. D'Atena ed, *Studi in onore di Pierfrancesco Grossi* (Milano: Giuffrè, 2010), 1021.

[48] See E. Grosso, 'Riformare la legge elettorale per via giudiziaria? Un'indebita richiesta di "supplenza" alla Corte costituzionale, di fronte all'ennesima disfatta della politica' 4 *Rivista AIC*, 1-12, 4 (2013).

[49] As was foreseen by Antonio Ruggeri since the press release of the Constitutional Court, before the handing down of the judgment: see A. Ruggeri, 'La riscrittura, in un paio di punti di cruciale rilievo, della disciplina elettorale da parte dei giudici costituzionali e il suo probabile 'seguito' (a margine del comunicato emesso dalla Consulta a riguardo della dichiarazione d'incostituzionalità della legge n. 270 del 2005)' *Consulta Online*, 1-6, 5 (9 December 2013), available at http://www.giurcost.org/studi/ruggeri31.pdf (last visited 20 March 2017).

[50] See A. Pace, n 7 above, 4.

[51] See B. Caravita, 'La riforma costituzionale alla luce della sent. 1/2014' *federalismi.it*, 1-7 (2014), available at http://www.federalismi.it/nv14/articolo-documento.cfm?artid=24022 (last

Proponents of the reform argued that the preventive nature scrutiny would have reduced political conflicts, while opponents maintained that those conflicts would have been simply transferred to the Court, politicising constitutional adjudication without benefiting the political climate.

For sure the preventive adjudication cannot preclude neither the jurisdiction of ordinary judges nor their activism. The theoretical possibility of a new incidental proceeding concerning the electoral laws would have been still in place.

In any case, despite the peculiar circumstances surrounding its introduction in the constitutional reform bill, the preventive adjudication of electoral laws would have emphasized the Constitutional Court's role as guarantor of the legality of the whole system, rather than as guarantor of constitutional rights.[52]

## VII. The Simplification of the Constitutional Structure: The Abolition of the *Consiglio Nazionale dell'Economia e del Lavoro* (CNEL)

It is worth mentioning that the constitutional reform bill would have abolished the *Consiglio Nazionale dell'Economia e del Lavoro* (CNEL – National Council for Economy and Labour), which is probably one of the most unknown and academically unexplored constitutional auxiliary body.

The Council is formed of sixty-five members: ten experts on economic, social and legal affairs, forty-eight representatives of public and private sectors producers of good and services and six representatives of association of social promotions and charities. There is also a president who is appointed by the President of the Republic.[53] The CNEL was designed to perform consultative functions to the benefit of the Parliament and the Government and to exercise legislative initiative on economic and social matters.

There was almost no debate on the abolition, in both academic literature[54] and political confrontation.[55]

There is a reason for that: the Council has never functioned properly. The establishment of the CNEL is generally explained with the need to add a room

visited 20 March 2017).

[52] A. Ciancio, n 46 above, 8.

[53] See legge 22 December 2011 no 214.

[54] Even those who strongly opposed the reform do agree on the need to abolish the Council: see U. De Siervo, 'Appunti a proposito della brutta riforma costituzionale approvata dal Parlamento' 2 *Rivista AIC*, 1-6 (2016). A different perspective comes from Adriana Apostoli, who maintains the need for an intermediate body which is able to function as neutral institution of dialogue between conflicting interests, citing the institutional experience of other European countries and the existence of similar bodies at the European Union level: see A. Apostoli, 'La soppressione del CNEL', in Id, M. Gorlani and S. Troilo eds, *La Costituzione in movimento: la riforma costituzionale tra speranze e timori* (Torino: Giappichelli, 2016), 227.

[55] See the parliamentary records of the debate on the reform, available at http://www.camera.it/temiap/2016/10/13/OCD177-2444.pdf (last visited 20 March 2017).

for filtering needs coming from the world of professionals, workers, and employers with a view to foster labour and economic reforms. More broadly, the CNEL mirrors the logic of integrating political representation with the representation of workers and professionals on the assumption that the combination of the two forms of representation is necessary to face the needs of complex societies.[56]

In practice, the Council has never performed this role due to many factors, including the implementation measures, which have *de facto* limited the exercise of constitutional attributions, circumscribing the power of legislative initiative.[57] Moreover, the Council has been progressively marginalized by the operation of parallel channels of dialogue between the social groups (the so called '*rappresentanze degli interessi*') and the legislative-executive circuit.[58]

According to many scholars, rather than a Council propelling reforms and policy changes, it works like a highly expensive research and analysis unit, with modest practical impact especially when reforms are compelled by historical contingencies.

Thus, the abolition fits perfectly the logic of the constitutional reform bill, since the suppression clearly pursues efficiency and reduction of costs connected to politics and the functioning of public administration.

## VIII. Some Conclusions

This analysis was meant to be a 'fresco' of the constitutional reform and does not claim to provide for an explanation of the failure of the referendum held in December 2016.

Moreover, there is no (presumed) inherent flaw of the constitutional bill that is able to explain *per se* the result of the referendum more than the complex political climate, the historical circumstances and the so-called implicit question of the referendum that is the approval/disapproval of Renzi's political choices.

The Italian constitutional reform affected many provisions of the Constitution, even beyond the initial content of the Government's proposal. Some scholars argued that the heterogeneity of the amendments intervention

[56] See M. Volpi, 'Crisi della rappresentanza politica e partecipazione popolare', in N. Zanon and F. Biondi eds, *Percorsi e vicende attuali della rappresentanza e della responsabilità politica* (Milano: Giuffrè, 2001), 129.

[57] Legge 5 January 1957 no 33 and legge 30 December 1986 no 936.

[58] See F. Pizzolato and V. Satta, 'I Consigli regionali dell'economia e del lavoro: fondamenti costituzionali e percorsi di attuazione', in C. Buzzacchi, F. Pizzolato and V. Satta eds, *Regioni e strumenti di* governance *dell'economia. Le trasformazioni degli organi ausiliari* (Milano: Giuffrè, 2007), 17.

was one of the weakness of the reform.[59] On the same basis, others derived the inadmissibility of the referendum question, relying on an analogic interpretation of the Constitutional Court's case law concerning the admissibility of referenda called for to repeal statutory laws.[60]

For sure the political climate urged changes that were not foreseen by the government proponents, including the new attribution of the Constitutional Court. From this viewpoint, the rhetoric of the '*manutenzione costituzionale*', which was supposed to minimize the escalation of political confrontation revealed itself as a double-edge sword. On the one hand the *fil rouge* of the constitutional reform (the reframing of the Senate and the consequential rethinking of the relationship between the State and the Regions) was partially watered down by the concurrence of other elements of constitutional design (such as the strengthening of some forms of direct democracy or the preventive control on electoral laws). On the other hand, the constitutional logic of maintenance probably downsized the theoretical premises of the reform.

In any case, the formula '*manutenzione costituzionale*' does not adequately sketch the Italian attempt to amend the Constitution. It may well have been a '*manutenzione*' from a formalist viewpoint, as fundamental principles remained formally untouched. Nonetheless and irrespective of any assessment of the contents of the reform, the constitutional bill intended to solve many problems connected to the functioning of the frame of government as well as to the efficiency of the system as a whole.

This peculiar feature of a reform project does not make less relevant the need for a constitutional change to be effectively rooted in the civil society,[61] rather than in the theoretical goodness of the legal solutions.

[59] See M. Cosulich, 'Degli effetti collaterali del voto referendario' 1 *Rivista AIC*, 1-14, 2 (2017).

[60] See B. Randazzo and V. Onida, 'Note minime sull'illegittimità del quesito referendario' 4 *Rivista AIC*, 1-7, 3 (2016).

[61] See A.A. Cervati, 'Diritto costituzionale, mutamento sociale e mancate riforme testuali' 1 *Rivista AIC*, 1-7, 2 (2017). The Author underlines that '*le costituzioni, quanto le stesse riforme costituzionali, sono un portato della storia e hanno radici nelle esigenze di mutamento sociale, spesso avvertite più dai comuni cittadini che dalla cultura specialistica o dal volontarismo dei politici di professione*' ('constitutions, as well as constitutional reforms, are the result of historical processes and have their roots in the demands for social change, which are often perceived first and foremost by citizens, rather than by specialists or politicians').

*Constitutional Reform in Italy: Past and Present*

# Yes or No? Mapping the Italian Academic Debate on the Constitutional Reform

Giacomo Delledonne and Giuseppe Martinico*

**Abstract**

The recent campaign for the constitutional referendum was perceived as highly divisive even in the academic world. The aim of this paper is to 'map' the academic debate concerning the Renzi-Boschi constitutional reform rejected by Italian people in the referendum held on 4 December 2016. This survey does not look at the contents of the reform, rather it focuses on the arguments employed by Italian academics either to support or question the reform. Special attention is paid to the initiatives and attitudes of the Italian Association of Constitutional Lawyers (AIC).

## I. Introduction and Methodology

Despite the clear result of the recent constitutional referendum held on 4 December 2016, the campaign was highly divisive and dominated by a sense of uncertainty. This is also the feeling one has when looking at how scholars, especially constitutional law scholars, were split over the contents of the constitutional reform. Indeed, the campaign for the constitutional referendum was perceived as highly divisive even in the academic world, and this explains the decision of the *Associazione italiana dei costituzionalisti* (Italian Association of Constitutional Lawyers) (AIC) not to take an official position about the contents of the reform. After the referendum took place, as we shall see, this choice was harshly contested by a group of constitutionalists who had voted no.

Against this background, the aim of this paper is to 'map' the academic debate concerning the Renzi-Boschi constitutional reform rejected by Italians. A few words on what this paper is not about: we are not going to explain the contents of the constitutional reform, since they shall be treated in other

* Giacomo Delledonne is Postdoctoral Fellow in Constitutional Law, Sant'Anna School of Advances Studies, Pisa and Convenor of the Research Group on 'Subnational Constitutions in Federal and Quasi-Federal Constitutional States' within the International Association of Constitutional Law. Giuseppe Martinico is Associate Professor of Comparative Public Law, Sant'Anna School of Advances Studies, Pisa; Research Fellow, Centre for Studies on Federalism, Turin and Honorary Professor at the European Law Research Centre, Henan University, Kaifeng, China.

This paper is the product of a joint effort. However, Giacomo Delledonne authored sections IV and V while Giuseppe Martinico wrote sections II and III. Section I is coauthored.

contributions included in this special issue, and also because contributions in English on the subject have not been absent from legal journals and legal and political blogs.[1] Rather, we shall focus on the arguments employed by Italian academics either to support or question the reform. Among academics, the main, although not exclusive, contribution to the debate came, of course, from constitutional lawyers.[2]

The paper is structured as follows: before entering the debate, we shall clarify the main (but not exclusive) sources we have considered for this article.[3] In part II, we shall focus on the official position of the Board of the AIC. In part III, we shall review the main contents of the Manifestos of the 'yes' and 'no' camps. In part IV, we shall analyze the main scholarly initiatives in the immediate aftermath of the referendum. Finally, before concluding, we shall try to explain why academic constitutional lawyers were so intensely involved in the debate about the referendum and the subsequent referendum campaign.

As regards our sources of reference, we shall not primarily consider those books written by constitutional lawyers in order to present the contents of the Renzi-Boschi reform to the general public.[4] Since the debate has been huge, we have decided to select some publications that are generally considered as representative of the arguments employed by constitutional law scholars, starting with two *Manifestos*[5] signed by many legal scholars, two short books

[1] For instance: L. Violini and A. Baraggia, 'The Italian Constitutional Challenge: An Overview of the Upcoming Referendum' *I·CONnect. Blog of the International Journal of Constitutional Law and Constitution Making.org* (2 December 2016), available at http://www.iconnectblog.com/2016/12/the-italian-constitutional-challenge-an-overview-of-the-upcoming-referendum/ (last visited 20 March 2017); C. Joerges, 'After the Italian Referendum' *Verfassungsblog. On Matters Constitutional*, available at http://verfassungsblog.de/after-the-italian-referendum/ (last visited 20 March 2017); M. Simoncini, 'Analysis – Italy's Referendum: A Specter Haunting Europe?' *US Muslims* (3 December 2016), available at http://www.usmuslims.com/analysis-italys-referendum-a-specter-haunting-europe-13331h.htm (last visited 20 March 2017); M. Bassini and O. Pollicino, 'Nothing Left to Do but Vote – The (almost) Untold Story of the Italian Constitutional Reform and the Aftermath of the Referendum' *Verfassungsblog. On Matters Constitutional*, available at http://verfassungsblog.de/nothing-left-to-do-but-vote-the-almost-untold-story-of-the-italian-constitutional-reform-and-the-aftermath-of-the-referendum/ (last visited 20 March 2017); M. Goldoni, 'Italian Constitutional Referendum: Voting for Structural Reform or Constitutional Transformation?' *Verfassungsblog. On Matters Constitutional* (11 August 2016), available at http://verfassungsblog.de/italian-constitutional-referendum-voting-goldoni/ (last visited 20 March 2017).

[2] As a matter of fact, the *Manifesto* in favor of the reform was also signed by eminent economists, political scientists, and political theorists.

[3] However, sometimes we shall look at other sources, like books written by eminent constitutional law scholars.

[4] See discussion by E. Catelani, 'Tanti libri sulle riforme costituzionali: molta buona informazione, ma anche molte 'inesattezze' ' *federalismi.it* (3 November 2016), available at http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=32828&content=Tanti+libri+sulle+riforme+costituzionali:+molta+buona+informazione,+ma+anche+molte+%27inesattezze%27&content_author=%3Cb%3EElisabetta+Catelani%3C/b%3E (last visited 20 March 2017).

[5] 'Basta un Sì. Il Manifesto', available at http://www.bastaunsi.it/manifesto/ (last visited 20

published by Giuffrè respectively devoted to the arguments in favor (by Beniamino Caravita)[6] and those against (by Alessandro Pace),[7] a special issue of *Questione Giustizia. Rivista trimestrale* hosting, among other things, an exchange between Luciano Violante[8] (supporting the adoption of the reform) and Valerio Onida[9] (advocating the rejection of the reform) and an issue of *Quaderni Costituzionali*,[10] hosting a sort of collective interview with ten common questions directed to almost thirty constitutional law scholars. While we are aware that these publications do not exhaust the richness of the debate, at the same time, we do think they can offer a very good overview of the arguments employed by scholars.

When looking at the arguments marshaled either in favor of or against the constitutional reform, we first tried to map the debate considering the nature of the arguments employed by constitutional law scholars (whether technical, cultural or political), but then we realized that this was possible only in very few circumstances, while in most cases it was very hard to separate the argumentative strands.[11] Sometimes, as a further confirmation of the non-feasibility of this approach, eminent figures of the AIC have had important political roles[12] and this has inevitably led them to conflate technical and political arguments during the campaign. Further, constitutional lawyers have massively engaged not only in debates with fellow academics but also in discussions with politicians and opinion leaders in the broadest sense.[13] Having in mind these methodological assumptions, however, it is possible to

March 2017); '56 costituzionalisti bocciano la riforma della costituzione Boschi-Renzi', available at https://coordinamentodemocraziacostituzionale.net/2016/04/29/56-costituzionalisti-bocciano-la-riforma-della-costituzione-boschi-renzi/ (last visited 20 March 2017).

[6] B. Caravita, *Referendum 2016 sulla Riforma costituzionale. Le ragioni del SÌ* (Milano: Giuffrè, 2016).

[7] A. Pace, *Referendum 2016 sulla Riforma costituzionale. Le ragioni del NO* (Milano: Giuffrè, 2016).

[8] L. Violante, 'La riforma costituzionale e il referendum. Le ragioni del SÌ' 2 *Questione Giustizia. Rivista trimestrale*, 23-31 (2016).

[9] V. Onida, 'La riforma costituzionale e il referendum. Le ragioni del NO' 2 *Questione Giustizia. Rivista trimestrale*,16-21 (2016).

[10] 'Dieci domande sulla riforma costituzionale' *Quaderni Costituzionali*, 219-353 (2016).

[11] See, for instance, R. Bin, 'Referendum costituzionale: cercasi ragioni serie per il NO' 3 *Rivista AIC*, 1-6 (2016), where the author, on one hand, admits some of the weaknesses of the reform but, on the other hand, also underlines the political importance of the reform 'I myself have written critical commentaries on the text approved by Parliament, which in some respects I apologize for the coquetry of quoting the title of one of my comments – "the worst possible" solutions; and yet I will vote YES' (translation by the authors).

[12] For instance, S. Ceccanti and R. Zaccaria. See also the very interesting considerations made by F. Palermo (currently a member of the Italian Senate), 'Riforma costituzionale: intervento in aula di Francesco Palermo' (17 July 2004), available at https://www.youtube.com/watch?ùv=KmX E5dQR6uI (last visited 20 March 2017).

[13] See eg C. Fusaro, 'Campagna referendum 2016 di Carlo Fusaro. Rendiconto delle attività, degli spostamenti e dei costi', available at http://www.carlofusaro.it/materiali/Rendiconto_Campagna_Ref_2016.pdf (last visited 20 March 2017).

pinpoint a specifically constitutional debate about the Renzi-Boschi constitutional amendment and the referendum vote.

## II. The Official Position of the *Associazione Italiana dei Costituzionalisti* (AIC)

As already mentioned at the beginning of the article, due to the variety of views spread among its members, the Italian Association of Constitutional Lawyers[14] decided not to take an official position either for or against the constitutional reform. Quite reasonably, in our view, the Board of the Association decided to organize some initiatives, including a workshop held on 12 December 2016, one week after the referendum, instead of adopting a uniform position. However, this decision was harshly attacked, even after the result of the constitutional referendum, by some constitutional lawyers who voted no; in a letter which was echoed in the media, they accused the current Board of not having pointed out the ambiguities of the reform, and opting instead for a 'futile neutralism'.[15] Later on, a former President of the AIC, Federico Sorrentino, wrote an open letter, to which the current President of the AIC publicly responded (see part IV).[16]

The Board's neutral position can be traced back to the previous Board as well, since the previous Presidency, whose term lasted from 2012 to 2015, organized similar workshops, like the two held on 28 June 2013 and 28 April 2014. In the text of a newsletter dated 4 June 2013, this position was justified as follows:

> 'In a period in which many complain about the silence of the culture on issues of public debate, Italian constitutionalists feel a civic duty to contribute to ongoing processes in the manner that is best suited to their nature: that of independent reflection and scientific record on issues that

[14] The Italian Association of Constitutional Lawyers (AIC) was established in 1985: its chief institutional aim is to foster research and teaching in the field of constitutional law by promoting and coordinating conferences, seminars and collective research projects. The AIC is affiliated to the International Association of Constitutional Law (IACL). Its main organs are the General Assembly and the Board; the latter is elected for a three-year term. The President of the Association is elected within the Board.

[15] Part of the contents of the letter was disclosed by *Il Foglio*: M. Rizzini, 'Costituzione ed epurazione. Ha vinto il No, ma c'è chi vuole stravincere. Una lettera svela un clima robespierriano in seno all'Associazione italiana costituzionalisti', available at http://www.ilfoglio.it/politica/2016/12/10/news/referendum-costituzione-associazione-italiana-costituzionalisti-110283/ (last visited 20 March 2017).

[16] F. Sorrentino, 'Lettera aperta al Presidente AIC'; M. Luciani, 'Risposta del Presidente AIC', both available at http://www.associazionedeicostituzionalisti.it/lettera-aperta-al-presidente-aic.html (last visited 20 March 2017).

are directly pertinent to their areas of expertise'.[17]

In a subsequent newsletter dated 27 March 2014, the Board held that

> 'In the midst of political debate on reforms destined to impact our constitutional and institutional system, The Italian Association of Constitutional Lawyers cannot be absent. The AIC is the best source of constitutionalist culture of the Country. Making its own voice heard, in the ways appropriate for a scientific association, offering a qualified and independent contribution, corresponds to its *raison d'être*, in a season like this'.[18]

It is worth noting, however, that the AIC launched an open debate on the contents of the reform with a call for papers which resulted in the publication of over fifty contributions that appeared both in the *Rivista AIC* and in the *Osservatorio AIC*, the two official journals of the Association.[19] These publications offer further evidence of the different positions within the AIC and the variety of arguments exchanged in this debate. In this sense the Association indeed gave voice to the plurality of views. As mentioned, after the referendum there was another workshop held on 12 December 2016, which aimed to reunite the AIC and to favor a frank debate right after the referendum.

At the end of the day, in our view, the position is not so different from that assumed by the AIC in 2004 with regard to the reform which went on to be rejected by voters in 2006, although, on that occasion, the Association opened the debate by producing a document stressing the weaknesses of the proposed reform.[20]

## III. The *Manifestos*

As noted above, a good summary of the arguments employed by constitutional law scholars is represented by the two official *Manifestos* signed by many scholars and former members of the Constitutional Court. With these documents as a starting point, one can summarize the arguments in favor of the reform as follows:

[17] 'Seminario: "I Costituzionalisti e le riforme" - Roma 28 giugno 2013' *Newsletter AIC* (dated 4 June 2013; translation by the authors).

[18] 'Comunicazione del 27 marzo 2014' *Newsletter AIC* (translation by the authors).

[19] 'Dibattito aperto sulla riforma costituzionale in *itinere*' available at http://www.associazionedeicostituzionalisti.it/dibattito-aperto-sulla-riforma-costituzionale-in-itinere-b5c.html (last visited 20 March 2017). Contributions available at http://www.rivistaaic.it/dibattito-aperto-sulla-riforma-costituzionale-in-itinere.html and http://www.osservatorioaic.it/dibattito-aperto-sulla-riforma-costituzionale-in-itinere-7e3.html (last visited 20 March 2017).

[20] S. Bartole, 'Invito al dibattito sulle riforme istituzionali', available at http://archivio.rivistaaic.it/dibattiti/revisione/bartole_invito.html (last visited 20 March 2017).

1. Overcoming so-called perfect bicameralism, with confidence entrusted solely to the Chamber of Deputies, and with a deeply restructured Senate. This – according to the supporters of the reform – would have put the regional and local authorities at the center of the political system.

2. Simplification of the legislative procedures, with the prevalence of the Chamber of Deputies (the political Chamber) which would have the last say, but with the possibility for the Senate to recall bills in order to constrain the political majority.

3. Reform of Title V of part II of the Constitution according to (this is *expressis verbis* written in the Manifesto) the guidelines given by the Italian Constitutional Court in its post-2001 case law. The reform would have also provided for the abrogation of the shared competencies and a rationalization of competencies and the bases for a collaborative regional model.

4. Reform of the normative power of the Government with the codification of many of the limits to the law decrees that had been devised by the case law of the Constitutional Court and, at the same time, the provision of a preferential procedure for the legislative bills of governmental initiative.

5. Reinforcement of the system of guarantees. This is the most heterogeneous point of the Manifesto, in which different measures included in the reform, such as the reinforcement of direct democracy (abrogative referendum, popular legislative initiatives), an *ad hoc* preemptive form of constitutional review for electoral laws and the establishment of a higher quorum to elect the President of the Republic, are grouped together.

6. An evident institutional simplification with the cancellation of the National Council for Economics and Labour (CNEL) and of the Provinces.

7. A cost reduction due to the decrease in the number of members of Parliament and other measures.

The reasons supporting the rejection of the constitutional reform were based on a (sometimes even completely opposite) reading of the proposed reforms. It is more difficult to classify the reasons provided by the academic opponents of the reform, as they range from concerns about method and legitimacy to substantive arguments. Among substantive arguments, in turn, a distinction might be traced between those that recognize the desirability of specific aspects of the reform but point to the flaws and inconsistencies of the text passed by Parliament, and those that openly question some of the innovations *per se*. In light of these premises, arguments against the reform can be summarized as follows:

1. The method: the reform would have been the direct offspring of a clear political majority, which at a certain point, seemed to condition the stability of the Government in charge on the approval of the reform. Although any constitutional reform is also, to a certain extent, a product of politics, this does not mean that constitutional reforms should be understood as the outcome of

political contingency. In this sense critics point to the example of the constitutional reform dated 2001, in which case the reform was supported by a majority and still created more conflicts than solutions.

2. Overcoming so-called perfect bicameralism, a goal frequently described as shareable, was established at a very high price, ie the depreciation of the new Senate, whose composition and functions were not considered appropriate to its new constitutional mandate.

3. A distinct argument against the new Senate claimed that the reform was in sharp contrast with the supreme principles of the Italian constitutional order, which cannot be altered even by constitutional amendment. More specifically, an indirectly elected Senate would have violated the fundamental principle of popular sovereignty (Art 1 para 2 Constitution); the confused provisions concerning composition and functions of the Senate would also have violated the principle of equality, conceived as rationality and reasonableness of the new norms.

4. The evoked simplification of the legislative procedure would have not represented an actual simplification, since the number of legislative procedures would have not decreased but increased (bicameral laws, laws adopted by the Chamber of Deputies only but with the possibility of amendment by the Senate, other distinct legislative procedures with the possibility for the Chamber of Deputies to reject possible amendments by a simple majority or an absolute majority), and this would have triggered new conflicts.

5. The Reform of Title V would have represented an evident step back in terms of decentralization of power, with an excessive centralization of power. Moreover, the abrogation of the shared competencies would not have necessarily decreased the litigation between the State and the Regions. Moreover, the Regions would have been deprived of real autonomy.

6. The real reduction of costs cannot be based on the sole elimination of the CNEL or Provinces or on the reduction of the number of the Members of Parliament, since it would also be dependent on the creation of better equilibria among political and administrative bodies. In this sense, many of the measures listed in the reform were labelled as merely rhetoric.

7. Critics of the reform also acknowledged the importance of some of the proposals (for instance the containment of the emergency normative powers of the Government), but since the question of the constitutional referendum could not be divided in many autonomous questions the overall assessment was negative. This point is connected to another ground for criticism: instead of adopting a single, big reform involving the revision of many articles of the Constitution and inevitably resulting in a very heterogenous referendum question the Government could have instead proposed different packages of reforms.[21]

[21] This is due to the origin of Art 138 of the Constitution, which was clearly devised thinking of punctual reforms instead of systemic reforms. This also explains why the requirement of the

The manifestos do not exhaust all the points raised by constitutional lawyers. For instance another point frequently recalled by the critics of the reform was the combination of the electoral law for the Chamber of Deputies (the so-called *Italicum*) and the institutional arrangement produced by the reform. The new electoral law, which was partially struck down by the Constitutional Court in January 2017,[22] did only apply to the Chamber and came into force *before* the referendum was held. This was a very frequent critique, which had induced the Government and the parliamentary majority to change, partially at least, their position in the last weeks of the campaign. A second point is closely linked to this one. In terms of legitimacy, critics of the reform argued that judgment no 1 of 2014 of the Constitutional Court, which had found many basic provisions of the electoral law then in force to be unconstitutional, had clearly undermined the political, if not the legal legitimacy of the sitting Parliament, and, consequently, of the reform itself.

## IV. The Aftermath of the Referendum

On 8 October 2016, a couple of months before the referendum took place, the Board of the AIC announced a seminar regarding the future of the Constitution and Italian institutions, to be held on 12 December at the University 'La Sapienza' in Rome. According to the announcement, 'regardless of the result, the referendum will affect the destiny of our Constitution'. For that reason, 'collective reflection is necessary in the immediate aftermath of the vote'.[23] Meanwhile, as already mentioned, two public interventions of constitutional lawyers who had supported the no campaign during the campaign openly questioned the AIC's position in the run-up to the referendum.

In his introduction to the seminar, the President of the AIC stressed that the aftermath of the referendum, even in the event of a victory of the 'yes' vote, would inaugurate a 'very delicate constitutional phase'. On the one hand, popular approval of the reform would have demanded a number of implementing measures, while the text of the constitutional amendment was silent on some fundamental issues; on the other hand, the actual result of the

homogeneity of the question, a pillar of the constitutional case law (for instance Corte costituzionale 2 February 1978 no 16, *Foro italiano*, 265-266 (1978)) about abrogative referenda has not been extended to constitutional referenda *ex* Art 138 Constitution. V. Onida and B. Randazzo tried to challenge the heterogeneity of the question by asking the *Tribunale di Milano* to raise a constitutional question to the Italian Constitutional Court. The *Tribunale di Milano*, however, rejected their argument and did not trigger the control of constitutionality. See Tribunale di Milano 6 November 2016, available at http://www.lexitalia.it/a/2016/84031 (last visited 20 March 2017).

[22] Corte costituzionale 25 January 2017 no 35, available at www.cortecostituzionale.it.

[23] 'Comunicazione dell'8 ottobre 2016' *Newsletter AIC*.

referendum had made it necessary to address a great number of questions which had been left unresolved pending the referendum. Moreover, a seminar held some days after the referendum would make it possible to trace a clearer distinction between 'scientific dialectic' and the conditioning influence of 'day-to-day politics'.[24] Thus, the seminar addressed the virtues and possible flaws regulated by Art 138 of the Constitution, the impact of the rejection of the Renzi-Boschi reform on the Italian legal order, and the role of constitutional lawyers as it had emerged from the referendum campaign.[25]

Finally, it deserves mention that the President of the AIC made reference not only to the past attitudes of the Italian Association under similar circumstances, but also to the behavior of comparable learned societies elsewhere in Europe, first and foremost the *Vereinigung der deutschen Staatsrechtslehrer* (VDStRL) in Germany. In this respect, it is interesting to develop a brief digression on how German scholars have retrospectively assessed the role of the VDStRL during the history of the Federal Republic. Since the 1960s, increasing diversity among German public lawyers strengthened the idea that 'unity in public law scholarship' is a task that demands continuous discussion in the framework of 'confrontational scientific discourse'. Thus, the *Vereinigung* is ' "a fabric of pluralistic structures and attitudes", from which it can draw its own scientific force'.[26]

## V. Concluding Remarks: Why Were Scholars so Intensely Involved in the Campaign? An Explanatory Attempt

Before concluding, another point deserves clarification: why were constitutional lawyers so intensely involved in the discussion about the reform and the referendum campaign? Why were these issues so sharply contested?

One possible answer lies in the extreme weakness of political parties and their apparent inability to formulate significant policy orientations: that is why experts, most notably constitutional lawyers, have come to the forefront in the discussion.

But we think that two other possible reasons, both well-rooted in Italian constitutional history, coincide in explaining this development.

The first reason has to do with the early steps of the reform process at the

[24] See M. Luciani, 'Introduzione' 1 *Rivista AIC*, 1-2 (2017).

[25] At the date of 15 February 2017, the proceedings of the seminar include an introduction and concluding remarks by M. Luciani, and contributions by A. Anzon, A. Cerri, A.A. Cervati, M. Cosulich, E. Lamarque, and A. Lucarelli. They are published in *Rivista AIC* and available at http://www.rivistaaic.it/seminario-la-costituzione-dopo-il-referendum-12-dicembre-2016.html (last visited 20 March 2017).

[26] H. Schulze-Fielitz, 'Staatsrechtlehre als Mikrokosmos. Eine einleitende Vorbemerkung', in Id, *Staatsrechtslehre als Mikrokosmos. Bausteine zu einer Soziologie und Theorie der Wissenschaft des Öffentlichen Rechts* (Tübingen: Mohr Siebeck, 2013), 3, 24 (translation by the authors).

beginning of the current parliamentary term, in Spring and Summer 2013. In the inaugural address of his second term, President Giorgio Napolitano deplored the

> 'unforgivable (…) failure to make any headway on the reforms – limited and targeted as they were – pertaining to the second part of the Constitution, reforms that took such effort to agree on and yet which never managed to break the taboo of "equal bicameralism" '.[27]

On 11 June 2013, a Prime Minister's decree established a Commission (*Commissione per le riforme costituzionali*) entrusted with

> 'laying down propositions for amending the Second Part of the Constitution, (…) with regard to the form of state, the form of government, bicameralism and the norms related thereto, and relevant ordinary laws, with specific regard to the electoral laws'.

The Commission, chaired by the Minister responsible for Constitutional Reform,[28] was made up of thirty-five 'wise men' (and women), mainly (but not exclusively) chosen among academic constitutional lawyers. At the same time, a seven-member Drafting Committee (*Comitato per la redazione delle proposte di riforma*) was also established. This move of the Enrico Letta Government was not entirely unprecedented: in fact, after the victory of center-right parties at the general election of 1994, Silvio Berlusconi's first Government established a Study Committee for Institutional, Electoral and Constitutional Reform. However, its size was comparatively reduced and constitutional reform was not one of the main and most urgent points on the political agenda in that parliamentary term. In 2013, by contrast, the appointment of the Commission for Constitutional Reform and the final output of its activities were carefully monitored by the media.

However, the activities of the Commission were hardly immune from day-to-day political contingencies. In Summer 2013, two of its members, Lorenza Carlassare and Nadia Urbinati, resigned in order to show their radical disagreement with the Government, supported by a precarious coalition of center-left and center-right parties. In this respect, it is useful to consider the manner in which Italian constitutional culture has been marked by the memory of the Constituent Assembly of 1946-1948. According to standard studies in Italian constitutional history, and in spite of the dramatic national and international developments during those months, the Constituent Assembly and the Government of the day succeeded in preserving the distinction between,

[27] English translation of the speech available at http://presidenti.quirinale.it/elementi/Continua.aspx?tipo=Discorso&key=2700 (last visited 20 March 2017).

[28] Himself a historian, specialized in Gaullist France.

respectively, constitutional politics and day-to-day politics.[29]

On 17 September 2013, the Commission for Constitutional Reform published a final report of its activities, *Per una democrazia migliore*.[30] Whether or not the proposal of a majority of the members of the Commission was more radical than the text of the Renzi-Boschi reform lies outside the purposes of this paper.[31] What should be mentioned is that the final report reflects the nature of the Commission as a non-political forum for discussion. On each topic – bicameralism, legislative procedure, regional and local Government, form of government, voting system, and direct democracy – the objections raised by individual members are duly reported. In a way, this final report 'photographed' 'the state of the art of bipartisan institutional reformism'.[32] Meanwhile, it also revealed the existence of significant points of disagreement among its members on a number of fundamental issues. Moreover, other scholars clearly disagreed not only on the proposals of the Commission, but also on how its role had been conceived from the outset.[33]

There is also a second, long-standing reason for the intense involvement of constitutional scholars in this debate: many of those who took sides regarding the reform saw it as possibly the last stage in the 'second phase' of the constitutional history of the Italian Republic, dominated by discussions about the reform of the Constitution (just like the previous phase had been dominated by the implementation of constitutional provisions). In this respect, and regardless of the result of the referendum vote, the Renzi-Boschi constitutional reform seemed to acquire special significance, even beyond its specific contents and contingent goals.

To sum up, in this paper we have presented the main features of the academic debate on the Renzi-Boschi constitutional reform which preceded and followed the referendum. In our view, the analysis has shown that discussions among constitutional lawyers were part of, and clearly connected to, the wider debate about the reform. This might explain the apparent success, even in non-specialized debates, of quite technical arguments like the possible effects of the combination of constitutional reform and electoral reform.

However, it is also possible to identify arguments which are specific to the academic discussion. These concern both the method and contents of the ultimately unsuccessful reform; in all their diversity, they generally reveal an

[29] See eg E. Cheli, *Il problema storico della Costituente* (Napoli: Editoriale Scientifica, 2008).

[30] Available at http://bpr.camera.it/bpr/allegati/show/CDBPR17-127 (last visited 20 March 2017).

[31] See eg S. Curreri, 'Riforma costituzionale e forma di governo' *Istituzioni del federalismo*, 15, 17-18 (2016).

[32] C. Fusaro, 'Per una storia delle riforme istituzionali (1948-2015)' *Rivista trimestrale di diritto pubblico*, 431, 505 (2015).

[33] See eg G. Azzariti, 'Interrogativi minimi sulla relazione della Commissione governativa per le riforme costituzionali', available at http://www.costituzionalismo.it/notizie/612/ (9 October 2013) (last visited 20 March 2017).

effort to contextualize the proposed amendments and to interpret them in the framework of the Constitution as a whole. The Renzi-Boschi reform only affected provisions of the Second Part of the Constitution, concerning the 'Constitutional Order of the Republic' (*Ordinamento della Repubblica*): however, both supporters and opponents of the reform stressed its links with (and possible impact on) the first part the constitutional charter ('Citizens' Rights and Duties', *Diritti e doveri dei cittadini*).

*Constitutional Reform in Italy: Past and Present*

# Italy after the Constitutional Referendum: Legal and Political Scenarios, from the Public Debate to the 'Electoral Question'

Elettra Stradella*

**Abstract**

The aim of this paper is to illustrate and critically discuss events, debates, legal and political facts developing after the rejection of the constitutional reform by the constitutional referendum occurred in the past December.

In the section I the paper takes into consideration the crisis of government, underlining its characters and peculiarities; in the section II it studies the consequences of the crisis, with a special attention to the kind of government created due to the crisis.

The sections III, IV and V focus on the main post-referendum issue, which is the choice of the electoral system. The paper analyzes the problems deriving from the rejection of the constitutional reform for the (potential) application of the legge 6 May 2015 no 52. Then, it studies the complaints filed to the Constitutional Court, investigates the ways open to the Court, and, at the end, makes a focus on the recent decision of the Constitutional Court (judgment no 35 of 2017).

The last section proposes some concluding remarks, taking into consideration three main features that seem to be affected by the 'post-referendum' events: the system of government; the relationship between representative and direct democracy; and the role of the Constitutional Court, permanently swinging between politics and jurisdiction.

## I. The Crisis of the Government (or of the Prime Minister?): Premises and Peculiarities

This essay describes and critically discusses the events, debates and legal and political facts unfolding in the aftermath of the constitutional referendum held on 4 December 2016.

In this referendum, the Italian people rejected the constitutional reform proposed by the Matteo Renzi Government, whose main target was the amendment of the bicameral Parliament and the functioning of the legislative procedure, and some changes in the territorial organization and regional powers.

The article focuses on the topic that has drawn the most political and legal attention from the media and jurists alike: the reconsideration of the rules governing the electoral system that have been formulated over the last few

* Assistant Professor of Public Comparative Law, University of Pisa.

years, rules which allegedly sought to alter the composition of the Parliament and, above all, to establish a different relationship between the Government on one hand, and, respectively, the Chamber of Deputies and the Senate on the other. Such a reconsideration is very much necessary, as the abovementioned reforms have demonstrably failed in their goals.

The political (and constitutional) debate concerned also the crisis of the Italian Government and the change in its leadership – factors that will influence the duration and the goals of the current Government, as well as its possible resistance to immediately holding new elections.

A premise that must be considered when discussing the government crisis sparked by the outcome of the referendum is that, with regards to the constitutional reform, the political parties and the Government acted in an illogical, irrational and non-linear manner. Indeed, a linear path towards the overall reform of the constitutional and political system (with specific regards to the functioning of the Parliament, the relationships between the Government and the Parliament, the role of the President of the Republic, and the form of government as a whole), would have first and foremost led to a definitive adoption of the constitutional reform, and (only) secondarily to an intervention on the electoral legislation.[1]

The subsidiary nature of electoral legislation is well known, as is the relationship between the form of government, the framework regulating political parties' activity and electoral systems.[2] From these aspects, two main considerations obtain. On one hand, it is recommended to make a homogeneous amendment to the form of government (including the position of the Head of the State, whose election procedure was partly modified by the constitutional reform, without any change to the office's constitutional status or powers), rather than introducing separate provisions concerning the Parliament, the Regions, advisory bodies, etc. On the other hand, as noted above, the logical precedence of a constitutional amendment to the electoral system should have been taken into consideration.

Unfortunately, the proponents of the reform were not sensitive to these circumstances, and this insensitivity contributed to the government crisis that followed the outcome of the referendum.

To shed some light on this crisis, it should be emphasized that the creation of the new cabinet, led by Paolo Gentiloni, was caused by two main factors: (i) the failure of the parliamentary opposition to take political responsibility for the creation of a new cabinet, coherently with the solicitations made by the resigning Renzi; and (ii) the material impossibility to vote for a new Parliament

[1] V. Lippolis, 'L'Italicum di fronte alla Corte e i tempi del referendum sulla riforma costituzionale' *federalismi.it*, 1-4, 2-3 (2016), available at http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=32462 (last visited 20 March 2017).

[2] In Italian legal literature, see especially L. Elia, 'Governo (forme di)' *Enciclopedia del diritto* (Milan: Giuffrè, 1970), XIX, 638.

with the existing electoral system. The latter point was confirmed by the President of the Republic himself.[3]

These political circumstances, and, especially, the dynamics determined by the political parties in their approach to electoral legislation and institutional rules more generally, deeply influenced the Head of State's choice of the new Government. Indeed, the situation substantially deprived the President of the Republic of the constitutional possibility to dissolve the legislative assembly and call new elections.

Indeed, although the Constitution formally confers upon the President of the Republic the power to dissolve Parliament before its ordinary deadline in case of a (political or parliamentary) crisis, the *de facto* absence of a logical and functioning electoral law prevented the President from doing so. Some jurists have emphasized that there are no legal remedies against this institutional 'disabling', and thus alleged that a legitimate option would be for the President to file an appeal with the Constitutional Court to challenge the Parliament's wrongful conduct. However, even if the Constitutional Court were to decide this hypothetical appeal in favour of the President, the only effect would be to bring the issue back to the attention of the Parliament.[4]

The political crisis lasted very little, because it was necessary to account to the European Union (EU). Indeed, the EU increasingly appears to be the real partner in a 'confidence relationship' with the Government, and Government appears to be effectively accountable to the European institutions even more so than to the Parliament. A meeting of the European Council had been scheduled for 15 December 2016, and for the occasion, Italy needed a fully-empowered Prime Minister, to reassure the European institutions and international investors of the country's political solidity and cohesion. For these purposes, President Gentiloni was found to be the best solution.

However, the incongruence between the *de facto* consequences of the crisis and the constitutional provisions governing both the crises and the creation of government emerged in sharp relief, especially with regards to the substantive reasons that led to the crisis.

Differently from the vast majority of political crises, in the present case, there had not been any evolution in the Government's policies, nor any changes to the composition of the political group supporting it: therefore, at the constitutional level, the legal conditions justifying a government crisis at the constitutional level did not exist.[5]

[3] President Sergio Mattarella stated that it was impossible to vote using the existing electoral system during his speech of 31 December 2016.

[4] A. Ruggeri, 'Le dimissioni di Renzi, ovverosia la crisi di governo del solo Presidente del Consiglio, le sue peculiari valenze, le possibili implicazioni di ordine istituzionale' *forumcostituzionale.it*, 1-3 (2016), available at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2007/01/ruggeri.pdf (last visited 20 March 2017).

[5] Ibid; Id, *La crisi di governo tra ridefinizione delle regole e rifondazione della politica*

Indeed, the crisis was not a 'government crisis' but rather a 'crisis of the Prime Minister': a crisis affecting Renzi, who, having transformed the constitutional referendum into a 'plebiscite' on his own political legitimacy and career, was obliged to translate the 'no' vote into something akin to a negative 'vote of confidence'.[6] This also explains why his ministers remained basically unaffected by the outcome of the referendum.

## II. The Consequences of the Crisis: What Type of Government?

The main consequence of the crisis was the establishment of a new government. However, it is worth exploring whether the Government led by Paolo Gentiloni is a truly new one, and what type of government it may be.

The best way to answer these questions is perhaps to define the current Italian Government in a 'negative' manner, specifying what it *is not*, rather than what it *is*.

In this author's view, this Government is neither a 'technical executive', nor a '(strictly) political executive', nor an 'executive of discontinuity'. It is not a technical executive because technical skills – so fundamental in previous experiences, such as the Government led by Mario Monti – do not seem to have influenced the President of the Republic in his appointment of Gentiloni. Indeed, Gentiloni has had a long political career, and characterizes himself as a long-standing politician rather than as a technocrat (Gentiloni was part of the City Council of Rome in the 1990s, a Member of Parliament since 2001, the Minister of Communications from 2006 to 2008, and Minister of Foreign Affairs in Matteo Renzi's Government).

Gentiloni's Government is also not a political government, or an ordinary government within a representative and democratic system. Indeed, the features of a political executive differ from those of the current Government. First, a political executive enjoys the support of a political majority, generally pursuant to elections in which political alliances confront one another on various issues, themes and political perspectives. A political executive is also characterized by the enjoyment of support from a political majority built not only on the need to maintain power and endorse the Government, but also on a common project and shared ideas for the social and economic development

(Milano: Giufffrè, 1990) and Id, 'Le crisi di governo tra "regole" costituzionali e "regolarità" della politica' *Politica del diritto*, 79 (2000); R. Cherchi, 'Le crisi di governo fra Costituzione ed effettività' *costituzionalismo.it*, 1 (2011), available at http://www.costituzionalismo.it/articoli/390/ (last visited 20 March 2017); N. Maccabiani, 'Gli sforzi congiunti del Presidente del Consiglio dei ministri e del Presidente della Repubblica per evitare la crisi di governo' 1 *Osservatorio AIC*, 1-15 (2013).

[6] The instrument used by the Italian Parliament, even if it is not disciplined by the written Constitution, by which the Government asks to the Chambers to vote on a fundamental legislative proposal knowing that a negative vote on that would be equivalent to a positive vote on a motion of no confidence.

of society at large. Finally, a political government normally benefits (albeit indirectly) from the people's mandate – this was not the case, neither for the previous Government, led by Renzi, nor for the current one.

Finally, Gentiloni's Government is not one of discontinuity. This is chiefly due to the fact that its relationship with the previous Government is one of substantial continuity, both in terms of its political composition (and 'nonpolitical' nature) and of the men and women actually covering governmental roles.[7]

Indeed, President Gentiloni has given his own definition of 'his' Government: one of a 'government of responsibility'. However, this appears to be rather inaccurate for several reasons. First, because every government is accountable to the public system and to society at large. Second, governments are necessarily connected to the Parliament by a relationship of (political) responsibility. Finally, because today, governments are vested with an additional form of responsibility with respect to traditional internal political responsibility: responsible towards the European institutions, the (international) market and financial actors.

Finally, some jurists have defined Gentiloni's Government as one of 'necessity' or as an 'inevitable government',[8] referring to the fact that it was actually the only viable solution after the government crisis triggered by Renzi.

At any rate, the current Government legitimately claims to enjoy full powers and has assured its total commitment to the resolution of the country's various political, social and economic problems, as any ordinary government would following the usual electoral and political process.

However, the sword of Damocles in the hands of the Constitutional Court (consisting in its decision on the electoral law) has been hanging over the Government from the very first moment of its entry into power. Indeed, it was very well known that an 'immediately applicable electoral system' would have encouraged many political parties to call for immediate elections.

## III. The Main Issue after the Referendum: Which Electoral System to Apply? The Political Debate and Problems Arising from the Rejection of the Constitutional Reform for the (Potential) Application of the *Italicum*

Everybody knows that the electoral law known as the *Italicum*, would

[7] The only changes made were not particularly significant, and regarded: the relocation of the former Minister of Constitutional Reform, Maria Elena Boschi, to the position of Secretary of State at the Presidency of the Council of Ministers, due to the fact that the topic of constitutional reforms was removed from the new Government's programme; the transfer of Minister Angelino Alfano from the Ministry of Home Affairs to that of Foreign Affairs; and, finally, the replacement of Stefania Giannini with Valeria Fedeli at the Minister of Education, University and Research.

[8] A. Ruggeri, n 4 above.

certainly have had a different application if the constitutional reform proposed in the referendum had been confirmed. Indeed, the *Italicum* concerned only the Chamber of the Deputies, because it was linked to the new (potential) constitutional provision that abolished the confidence relationship between the Government and the Senate.

In addition, the points considered by the Constitutional Court – which are analysed further below – change completely, depending on whether they do or do not accompany an institutional system such as that which the constitutional reform sought to design.

The 'no' vote reinstated the 'game' over the electoral law, which the Parliament should have quickly reformed to prevent the next political elections from taking place using two different electoral systems, one for the Chamber of Deputies and the other for the Senate. Indeed, as already underlined, the *Italicum* (which entered into force in July 2016) only regulates the elections to the Chamber of Deputies. When Parliament passed the law, it was assumed that the constitutional reform would be adopted and, therefore, that the Senate would no longer be elected by universal suffrage.

Any political elections that might have been held before the Constitutional Court handed down its judgment (which will be discussed in Section V below) would have applied the *Italicum* for the Chamber of Deputies and the so-called *Consultellum* for the Senate: the latter being the strongly proportional system arising pursuant to judgment no 1 of 2014 of the Constitutional Court, which repealed some provisions of the so-called *Porcellum*,[9] or legge 21 December 2005 no 270, on the previous electoral system (which was formally proportional but fundamentally majoritarian).

The *Italicum* establishes a proportional electoral system with some majoritarian correctives: a two-round system, electoral thresholds and a majority bonus. The law creates one hundred multi-member electoral constituencies, and party lists that are closed with regards to the top candidates. Voters may express no more than two preferences; if two preferences are cast, one woman and one man should be chosen: if both preferences were for candidates of the same sex, the second choice is to be considered void.

The list or party obtaining more than forty per cent in the first round (or that wins the second round) also gains the majority bonus of three hundred and forty upon six hundred and thirty seats. The remaining two hundred and ninety seats are assigned to the other parties. Regardless of whether anyone succeeds in obtaining forty per cent of the votes cast, the second round would be open to the two parties or lists that had obtained the most votes at the first round. The minimum threshold was fixed at three per cent.

[9] This author does not approve of the frequent use, especially in recent years, of a mangled Latin to define the various electoral statutes, and will seek to restrict it as much as possible. However, these terms will occasionally be used for the sake of brevity.

As mentioned above, in judgment no 1 of 2014 (which will be examined in further detail in Section V of this paper), the Constitutional Court actually transformed the previous electoral system pending the adoption of a new statute, which was supposed to be the *Italicum*. Indeed, by handing down a declaration of unconstitutionality, the Court transformed the electoral system into a strictly proportional one, with a threshold of eight per cent for individual parties and of twenty per cent for coalitions.

Therefore, as things stood prior to the Constitutional Court's decision on the latest electoral law, the Italian Parliament would have been elected on the basis of two distinct electoral systems: one applying to the Chamber of Deputies (the *Italicum*) and the other to the Senate (*Consultellum*). However, such an ambiguous – and perhaps dangerous – framework did not change after the Court's judgment, because the latter addressed only the electoral system for the Chamber of Deputies. In other words, the system's serious heterogeneity remains, thus sending a strong warning to the legislator to provide for a coherent framework as soon as possible.

Furthermore, the *Italicum* had already drawn criticism before the referendum's outcome was known, mainly for the following reasons: first, it created a very large majority bonus, which imperiled the fairness of the relationship between the legislative and the executive power; second, because of issues relating to the adequate representativeness of parliamentary minorities of the top candidates,[10] which, being in closed positions on the party lists, would not have been chosen by the voters but by the political parties. Parliament could have regulated these issues in a very different manner, (see the Constitutional Court's statements in judgment no 1 of 2014 on legge 21 December 2005 no 270).[11]

For these reasons, many proposals to modify the statute were advanced. These were proposed chiefly by the Democratic Party, which had elaborated the statute in the first place. Prior to the referendum, this political group, which was closest to the former Prime Minister Renzi, had also proposed to reduce the majority bonus, to allay the wishes expressed on this point by a minority within the party. Other proposals concerned a return to the so-called *Mattarellum* system (the majoritarian and one-round system in force from 1994 to 2005), and an amendment of legge 6 May 2015 no 52 to provide for a majority bonus of ninety seats for the winning list and the elimination of the second round.

Another public proposal, that the press had colloquially termed *Mattarellum*

[10] The expression 'top candidates' indicates the first candidates in their lists within the constituency in which they compete. This position entails a greater possibility of election due to the absence of preferential voting, as will be discussed in the following paragraphs.

[11] I. Nicotra, 'Proposte per una nuova legge elettorale alla luce delle motivazioni contenute nella sentenza della Corte costituzionale n. 1 del 2014' *giurcost.it*, 1-19 (2014), available at http://www.giurcost.org/studi/Nicotra2.pdf (last visited 20 March 2017).

*2.0*, provided for the election of four hundred and seventy-five deputies upon six hundred and thirty within single-member and single round constituencies. The remaining one hundred and forty-three seats (with the exception of the seats elected by the constituency of Italians residing abroad) would be assigned as follows: a majority bonus of ninety seats would be assigned to the winning list, with a limit of three hundred and fifty deputies; thirty seats to the second list or coalition; and twenty-three seats distributed among the lists that have obtained more than two per cent of votes cast and have less than twenty candidates elected.

The faction of the Democratic Party led by Matteo Orfini, which gathers the party's younger executives, proposed a proportional system based on the Greek electoral system: a single round and a majority bonus for the winning party, of fifteen per cent of seats (equal to fifty MPs upon three hundred and fifty).

The smallest centre-right parties proposed to maintain legge 6 May 2015 no 52 (the majority bonus, double-round system, preferences, blocked top candidacies)[12] but with a substantial amendment, assigning the majority bonus to a coalition of parties. This would arguably foster the creation of coalitions of lists, rather than the autonomy of single (major) parties.

The Movimento *Cinque Stelle* – or Five-Star Movement, the radical movement that for some years now has challenged the established political scenario with new forms of communication and populist messages transcending traditional 'left' and 'right' conceptions of politics and society – proposed a pure proportional system, without thresholds and with intermediate constituencies and preferences. This, however, seemed to be more of a provocation than a real and substantial position, because the *Italicum* would have strongly favoured this party.

Other legislative proposals were advanced by individual MPs, and were thus clearly unlikely to be approved. For example, some deputies proposed cancelling the two-round system to establish a majority bonus pursuant to which the party in question would automatically obtain forty per cent of the votes; the president of the 'Mixed Group' of the Chamber of Deputies proposed to assign the majority bonus only to coalitions, and that the second round would be valid only if voter turnout reached the threshold of fifty per cent.

After the referendum, however, all of the criticisms levelled against the electoral system's problematic pale in comparison to the issue of the heterogeneity between the electoral system applied to the Chamber of Deputies and that governing elections to the Senate.

Indeed, it is evident that, without modifications to the current electoral law, it would be almost impossible to establish a parliamentary majority that is capable of voting a new government into power.

[12] On these points, see G. Azzariti, 'La riforma elettorale' 2 *Rivista AIC*, 1-13, 2 (2014).

Even a projection made by '*Scenari politici*',[13] which elaborated electoral polls on a regional basis, concluded that the use of the *Italicum* for the Chamber of Deputies and of the *Consultellum* for the Senate would inevitably lead to the Parliament being seriously incapable of voting into power not just a *political* government, but perhaps even any other type of government (technical, compromise, etc).

The numbers shown in *Table 1* below reveal that even a 'coalition', an 'agreement' between the Democratic Party and Forza Italia (the political movement led by Silvio Berlusconi, now separated from the other wing party, deriving from the same experience, led by the Minister Angelino Alfano) would obtain one hundred and fifty-four senators in the Senate – far from the majority required to support a government.[14]

| REGIONI | SEGGI | PD | ALTRI CSX | FORZA IT | LEGA N. | FRAT D'IT | ALTRI CDX | 5 STELLE | SVP | FARE-AP |
|---|---|---|---|---|---|---|---|---|---|---|
| Piemonte | 22 | 7 | 1 | 3 | 4 | 0 | 0 | 7 | 0 | 0 |
| Valle D'Aosta | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lombardia | 47 | 17 | 0 | 6 | 13 | 0 | 0 | 11 | 0 | 0 |
| Trentino Alto Adige | 7 | 2 | 0 | 1 | 1 | 0 | 0 | 1 | 2 | 0 |
| Veneto | 24 | 7 | 0 | 2 | 6 | 1 | 0 | 6 | 0 | 2 |
| Friuli Venezia Giulia | 7 | 2 | 0 | 1 | 2 | 0 | 0 | 2 | 0 | 0 |
| Liguria | 8 | 2 | 0 | 1 | 1 | 1 | 0 | 3 | 0 | 0 |
| Emilia Romagna | 21 | 10 | 0 | 2 | 3 | 0 | 0 | 6 | 0 | 0 |
| Toscana | 18 | 9 | 0 | 1 | 3 | 0 | 0 | 5 | 0 | 0 |
| Umbria | 7 | 3 | 0 | 1 | 1 | 0 | 0 | 2 | 0 | 0 |
| Marche | 8 | 3 | 0 | 1 | 1 | 0 | 0 | 3 | 0 | 0 |
| Lazio | 27 | 9 | 0 | 4 | 2 | 2 | 0 | 10 | 0 | 0 |
| Abruzzo | 7 | 2 | 1 | 1 | 0 | 0 | 0 | 3 | 0 | 0 |
| Molise | 2 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| Campania | 30 | 10 | 2 | 6 | 0 | 1 | 0 | 11 | 0 | 0 |
| Puglia | 21 | 8 | 0 | 4 | 0 | 1 | 2 | 6 | 0 | 0 |
| Basilicata | 7 | 3 | 0 | 1 | 0 | 0 | 0 | 3 | 0 | 0 |
| Calabria | 10 | 3 | 0 | 2 | 0 | 1 | 0 | 3 | 0 | 1 |
| Sicilia | 26 | 7 | 1 | 4 | 0 | 1 | 2 | 9 | 0 | 2 |
| Sardegna | 9 | 3 | 0 | 1 | 0 | 1 | 1 | 3 | 0 | 0 |
| Estero | 4 | 2 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 |
| | | | | | | | | | | |
| Totale partiti | 313 | 111 | 5 | 43 | 37 | 9 | 5 | 96 | 2 | 5 |
| Totale coalizioni | 313 | 116 | | 94 | | | | 96 | ScenariPolitici | |

*Table 1. Projections made by scenaripolitici.com on the possible results for the Senate, based on polls and on the application of the electoral system resulting pursuant to judgment no 1 of 2014 of the Constitutional Court.*

[13] A website that compiles and collects political surveys. See http://www.scenaripolitici.com.

[14] See also '*Consultellum*: se si va al voto senza modificare l'*Italicum*, il Senato sarà paralizzato. Anche con un nuovo "Nazareno" ' *Huffington Post*, 16 November 2016 available at http://www.huffingtonpost.it/2016/11/16/consultellum-legge-elettorale_n_13008656.html (last visited 20 March 2017).

## IV. The Cases Brought to the Constitutional Court: An Analysis of the Issues and the Ways Open to the Court

This section does not focus on the debate surrounding the date scheduled by the Constitutional Court to hear the case. Indeed, several discussions have centred upon the Court's adoption of a 'political' attitude in its choice to decide (or refrain from deciding) the case after the referendum was held. From a political point of view, this would have amounted to a sort of 'confession' that institutional, political, social and economic factors do influence the Court's decisions. Indeed, on some views, the constitutional judges awaited the popular verdict on the constitutional reform to decide the fate of the electoral system accordingly. Should the reform have passed, this system would have concerned the only Chamber linked to the Executive branch by a relationship of confidence.

The Court explained the reasons for the (late) scheduling in various public statements.

The Court justified scheduling the hearing on 24 January on the ground that an earlier date would have deprived the parties of the opportunity to rely on the deadlines established in law to bring proceedings. In early 2017, Paolo Grossi, the President of the Constitutional Court, signed the decree to schedule the public hearing for the reference orders remitted by the Tribunals of Trieste and Genoa. These courts had submitted to the Court some questions on legge 6 May 2015 no 52 that were similar to those in other orders that had already been scheduled for the same hearing.

In particular, both Tribunals referred questions concerning the second round and the right of option granted to the top candidates elected in more than one constituency. The Tribunal of Genoa also referred questions concerning the assignation of the majority bonus at the first round and on the proportional reallocation of the votes in Trentino Alto-Adige.

Therefore, the Court stated that its scheduling respects the due dates within which the parties were to submit their pleadings, because these orders reached the Court's Registry on 5 and 12 December 2016 respectively, and were published *per saltum* in the no 50 of the *Gazzetta Ufficiale* (Official Journal of the Italian Republic), on 14 December 2016.

To analyse the issues raised and to consider the various hypothetical solutions, three main points relating to the orders will be discussed:

a) the relationship between the existing electoral mechanisms and the constitutional reform;
b) the admissibility of the claims; and
c) their merits.

With regards to (a), it is first necessary to emphasize that the referendum's outcome critically affects the Constitutional Court's evaluation, in particular its judgment on the proportionality between the ways used to

achieve the constitutional aim of government stability (the majority bonus) and the compression of the parliamentary assembly's representative function (judgment no 1 of 2014, para 3.1). It is important to recall that this proportionality is the parameter on which the cancellation of a part of legge 21 December 2005 no 270 was based.

Indeed, the majority bonus assumes different values in a system in which only one assembly is linked to the Executive power in a relationship of confidence (ie what would have happened if the referendum had approved the reform) and in systems in which two chambers are politically linked to the Executive power, and in which the second chamber is elected via a proportional method.

The Court's review should concern not only the balance between stability and representativeness in a given electoral system, but should also consider the consequences of the system on the overall institutional context.[15]

If the law adopted in 2015 should coexist, in a context of equal bicameralism, with a pure proportional electoral system such as that ensuing from judgment no 1 of 2014, several problems would emerge. In particular, a majority bonus assigned after the second round (ie a bonus granted to those lists that failed to achieve forty per cent of the votes in the first round) would not make sense if the Senate were to be elected by means of a proportional system. Indeed, the bonus would fail in its purpose of ensuring governmental stability and solidity. The majority bonus could perhaps be reasonable if assigned to a list achieving forty per cent of votes for the Chamber of Deputies if it could be assumed that, given such a high consensus, it would also be capable of obtaining the majority of seats at the Senate with the *Consultellum*. However, it is difficult to justify the bonus in the second round, because the winning list is unlikely to gain the majority at the Senate too.

All these reflections suggest that the constitutional review of the provision on the second round should be stricter within the current context of equal bicameralism, because the likelihood of attaining the intended result – in terms of governmental stability – would diminish due to its application to a single chamber.

As for point (b), it is submitted that this is the more technical – and crucial – point. The Constitutional Court's role, its 'behaviour' and its position within the constitutional system must also observe the rules governing its activity and the constitutional process as a phenomenon of a (constitutional) jurisdiction. In any case, the choice to decide or to not decide is closely connected with the timing and the ways in which the proceedings are launched.

The Tribunal of Messina made its reference to the Court when the *Italicum* was yet to enter into force. This case clearly lacked the requirement of relevance of the Court's decision for the solution of the referred proceedings.

[15] See V. Lippolis, n 1 above.

Art 23 of legge 11 March 1953 no 87 establishes that when a judgement cannot be defined independently from the resolution of the question concerning the constitutionality of a given provision, the judicial authority issues an order referring the case to the Constitutional Court. In the case of legge 6 May 2015 no 52, the referral order of the Tribunal of Messina had been proposed with regards to a law that had yet to become effective, and that could not therefore violate the constitutional rights mentioned by the civil court. Indeed, the entry into force of the *Italicum* was postponed to 1 July 2016, and the Tribunal of Messina delivered its order on 16 February 2016, thus before the law could be applied: this should lead to the Court holding that the relevance of the questions of constitutionality submitted by the Tribunal of Messina is unfounded and, therefore, issuing a declaration of inadmissibility.

The Constitutional Court has always stated that, to be relevant, a provision must at least be applicable to a specific case (judgments no 115, 125, 149, 180 and 255 of 2001; 240 of 2012; and 184 of 2013). If political elections had been held before 1 July 2016, the electoral system applied would have been that deriving from legge 21 December 2005 no 270 as amended by judgment no 1 of 2014. This demonstrates the *fictio litis* nature of the question referred to the Constitutional Court.[16]

Conversely, the orders referred by the Tribunals of Turin and of Perugia are subsequent to the date on which the law entered into force. However, they too present substantial problems of admissibility.

First, admissibility depends on the specific moment in which the requirement of relevance (for the referred proceedings) of the constitutional decision is to be evaluated. Indeed, if this moment coincides with the date on which the (referring) court reserved judgment after the hearing, in the case of both tribunals, such date precedes the day of entry into force of the *Italicum*.

A further reason undermines the admissibility of the questions. The even that gave rise to the proceedings is very different from that which led to the Constitutional Court's judgment in 2014. In that case, the case concerned elections that had already occurred.

In 2016, no political elections had taken place; and, consequently, no violations of the right to vote, which is protected and guaranteed by Art 48 of the Italian Constitution.

To declare the question admissible would imply a deep transformation of the overall constitutional arrangements, considering that the Italian legal system envisages neither a form of *amparo constitucional* nor the prior review of legislation for constitutionality.

Moreover, judgment no 1 of 2014 is not the only precedent that the

[16] S. Pizzorno, 'L'*Italicum* alla prova della Corte costituzionale, tra questioni di ammissibilità e di merito' *forumcostituzionale.it*, 1-8, 4 January 2017, available at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/05/pizzorno.pdf (last visited 20 March 2017).

Constitutional Court can take into consideration: rather different indications seem to derive from judgment no 193 of 2015. In this ruling, which regarded the constitutionality of the electoral law of the Lombardy Region, and more specifically the assignment of the majority bonus to the coalition that has obtained the greatest number of votes, the Constitutional Court's review was based on concrete electoral results, by means of which it verified that the potential risks deriving from the allocation of the bonus to minority lists or coalitions did not arise because the lists linked to the President of the Lombardy had obtained a significant majority.

The third point (c), concerns the merit.

Both the Tribunal of Turin and the Tribunal of Perugia submitted the same questions, concerning (i) the holding of a second round of voting between the two lists that have obtained the most votes in the first round, and the consequent assignment of the majority bonus to the winning list, without a minimum threshold; and (ii) the provision enabling multiple candidacies on part of individual candidates, with the possibility for the top candidates elected in more than one constituency to choose the constituency in which to result as having been elected, without any limit or obligation.

The Tribunal of Messina alone presented a question on the substantial differences between the two electoral systems for the election of the Chamber of Deputies and of the Senate. In addition, the Tribunal of Messina presented various other questions, concerning the majority bonus, the three per cent threshold, the breach of the principle of territorial representation and direct vote, and the difference between the thresholds applying to the Chamber of Deputies and to the Senate. The Tribunal of Messina considered the majority bonus to be rational, but also worthy of discussion in light of the fact that such bonus depends on a percentage of valid votes, rather than on the number of voters, and because of the threshold of three per cent, which clearly limits the system's representativeness.

All of the issues raised by the various tribunals focused on the main issue of the majority bonus. This topic was extensively discussed by scholars, who reached very different conclusions on the matter.

The first position supports the notion that there are no doubts on the constitutionality of the minimum threshold established by the electoral legislation in 2015 for assigning the bonus. On this view, the threshold is a rational and logical compromise between the Constitution's requirements (set out in judgment no 1 of 2014) to fix not only a minimum, but also an appropriate, threshold: one that could not be excessively low, to prevent a small party from possibly gaining the bonus, nor excessively high, to avoid frustrating the bonus' usefulness.

Therefore, the threshold of forty per cent could be rational, even compared

to the entity of the bonus, which consists in fifty-four per cent of the seats.[17]

Instead, another position supports the view according to which, although the threshold is logical in itself, problems derive from assigning the majority bonus to the winning list at the second round, without any consideration of the votes it actually obtained in the first round.[18]

## V. The Constitutional Court's Judgment on the Electoral Law

On 24 January 2017, the Constitutional Court held the public hearing in the case on legge 6 May 2015 no 52 (as mentioned above, also known as the *Italicum*), referred by five different tribunals. The day after the hearing, the Court published on its website a brief public statement with three main points.

The first point regarded the role of the Constitutional Court, as it established that the claims of inadmissibility argued by the Attorney General were rejected. The Court also declared the inadmissibility of the request, submitted by the parties' respective counsel, to autonomously raise and consider the question of the constitutionality of the procedure followed to pass the law.

The second point concerned the substance of the provisions: the Court rejected the question of constitutionality regarding the 'majority bonus' raised by the Tribunal of Genoa, but accepted those raised by the Tribunals of Turin, Perugia, Trieste and Genoa on the second round, declaring the unconstitutionality of the provisions establishing the electoral mechanism. Moreover, the Court upheld the question, raised by the same courts, on the provision that allows the top candidates on the electoral list to choose the constituency of their election. In the public statement, the Court also ruled (correctly, in this author's view) that this declaration of unconstitutionality maintains the criterion of the random draw, already provided for by law (by Art 85 of the decreto del Presidente della Repubblica 30 March 1957 no 361).

The third and fundamental point constitutes the decision's real result. In the public statement, the Court declared that, after the judgment, the (resulting) electoral law could be immediately applied. This ultimately means that the Constitutional Court (temporarily?) substituted itself for the legislator, thus assuming the role of actual lawmakers in electoral matters.

From this, a wise and forward-thinking Court seems to emerge with regards to the guilty inactivity of Parliament, where opposing political tendencies and (above all) the fear of losing the chance to be elected to the Chambers are

[17] G. D'Amico, 'Premio di maggioranza, soglia minima e ballottaggio', in A. Ruggeri and A. Rauti eds, *Forum sull'Italicum. Nove studiosi a confronto* (Torino: Giappichelli, 2015), 8.

[18] G. Sorrenti, 'Premio di maggioranza, soglia minima e ballottaggio', in A. Ruggeri and A. Rauti eds, n 17 above, 9-10.

paralysing the capacity to formulate new (constitutionally compatible and efficient) electoral legislation.

The Constitutional Court's is not surprising; the Court appears to consider judgment no 1 of 2014 as an actual precedent, and to have elaborated a theory of constitutional review of electoral matters, by bypassing the 'grey area' (or 'free zone') of the electoral law.[19] The decision is clear:

> '(...) as regards national political elections, the right to vote could not be judicially protected due to the provisions contained in Art 66 of the Constitution and in Art 87 of the decreto del Presidente della Repubblica

[19] Much has been written on the historical judgment of the Constitutional Court that declared the unconstitutionality of the statute 21 December 2005 no 270, evidently bypassing the procedural rules on constitutional adjudication and formulating a new power of the Court. Among these, see A. Anzon Demmig, 'Accesso al giudizio di costituzionalità e intervento "creativo" della Corte costituzionale' 1 *Rivista AIC*, 1-4 (2014); F. Bilancia, ' "Ri-porcellum" e giudicato costituzionale' *Costituzionalismo.it*, 1-9 (2013), available at http://www.costituzionalismo.it/articoli/465/ (last visited 20 March 2017); R. Bin, ' "Zone franche" e legittimazione della Corte' *Forum di Quaderni costituzionali*, 1-5 (2014), available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2014/0018_nota_1_2014_bin.pdf (last visited 20 March 2017); B. Caravita, 'La riforma elettorale alla luce della sent. 1/2014' *federalismi.it*, 1-7 (2014), available at http://www.federalismi.it/nv14/articolo-documento.cfm?artid=24022 (last visited 20 March 2017); F. Dal Canto, 'Corte costituzionale e giudizio preventivo sulle leggi elettorali. Seminario del Gruppo di Pisa Corte costituzionale e riforma della Costituzione Firenze, 23 ottobre 2015', available at http://www.gruppodipisa.it/wp-content/uploads/2015/11/Dal-Canto-Giudizio-preventivo-30-ottobre.pdf (last visited 20 March 2017); A. D'Aloia, 'La sentenza n. 1 del 2014 e l'*Italicum*', available at http://gspi.unipr.it/sites/st26/files/allegatiparagrafo/22-12-2015/daloia_la_sentenza_n._1_del_2014_e_litalicum.pdf (last visited 20 March 2017); S. Gambino, 'Democrazia costituzionale e *Italicum*' 3 *Osservatorio AIC*, 1-9 (2015); A. Martinuzzi, 'La fine di un antico feticcio: la sindacabilità della legge elettorale italiana' *Forum di Quaderni costituzionali*, 1-23 (2014), available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2014/0019_nota_1_2014_martinuzzi.pdf (last visited 20 March 2017); A. Morrone, 'La sentenza della Corte costituzionale sulla legge elettorale: *exit porcellum*' *Quaderni costituzionali*, 119 (2014); R. Pastena, 'Operazione di chirurgia elettorale. Note a margine della sentenza n. 1 del 2014' 1 *Osservatorio AIC*, 1-9 (2014); A. Pertici, 'La sentenza della Corte costituzionale sulla legge elettorale: l'incostituzionalità ingannevole' *Quaderni costituzionali*, 122 (2014); L. Pesole, 'L'incostituzionalità della legge elettorale nella prospettiva della Corte costituzionale, tra circostanze contingenti e tecniche giurisprudenziali già sperimentate' *costituzionalismo.it*, 1-29 (2014), available at http://www.costituzionalismo.it/articoli/484/ (last visited 20 March 2017); A. Riviezzo, 'Nel giudizio in via incidentale in materia elettorale la Corte forgia un tipo di dispositivo inedito: l'annullamento irretroattivo come l'abrogazione. È arrivato l' "abroga-mento"?' *Forum di Quaderni costituzionali*, 1-9 (2014), available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2014/0009_nota_1_2014_riviezzo.pdf (last visited 20 March 2017); G. Serges, 'Spunti di giustizia costituzionale a margine della declaratoria di illegittimità della legge elettorale' 1 *Rivista AIC*, 1-14 (2014); L. Trucco, 'Il sistema elettorale "*Italicum*" alla prova della sentenza della Corte costituzionale n. 1 del 2014 (note a prima lettura)' *giurcost.it*, 1-16 (2014), available at http://www.giurcost.org/studi/trucco10.pdf (last visited 20 March 2017); Id, 'Il sistema elettorale "*Italicum-bis*" alla prova della sentenza della Corte costituzionale n. 1 del 2014 (Atto secondo)' *giurcost.it*, 1-22 (2015), available at http://www.giurcost.org/studi/trucco12.pdf (last visited 20 March 2017); G. Zagrebelsky, 'La sentenza n. 1 del 2014 e i suoi commentatori' *Giurisprudenza costituzionale*, 2959 (2014).

> 30 March 1957 no 361, as interpreted by the ordinary courts and Parliament when it controls the result of the elections, coherently with the non-implementation of the delegation contained in Art 44 of legge 18 June 2009 no 69 in which it authorized the Government to establish the exclusive jurisdiction of the administrative tribunals over disputes concerning elections (...) even for the parliamentary elections. (...) Because the need to avoid, for the political electoral system, (the emergence of) a "free zone" (immune from) constitutional review persists, the Court must restate that which it decided in judgment no 1 of 2014, with the same limits.' (para 3.1., *Considerato in diritto*).

To reprise the points emphasized by the Court in its statement, I analyse the first: that on admissibility.

Three problems emerge with regards to this topic: (i) the electoral law was not yet in force when the interlocutory question of constitutionality was raised in the referred proceedings; (ii) the electoral law has never been used before the proceedings; and (iii) it was difficult to distinguish the subject of the referred proceedings (the ordinary proceedings), from that of the constitutional review.

As for the first point, the Court stated (para 3.3., *Considerato in diritto*) that the objective uncertainty surrounding the effects of the right to vote is directly linked to the changes in the legal system caused by the entering into force of the electoral legislation. Therefore, the postponement of the entry into force of the legislative provisions is irrelevant, because Parliament merely established that the new electoral rules would enter into force on 1 July 2016, but did not provide for a suspension clause. The entering into force of the statute does not depend on a hypothetical future event, because the lawmaker defined a due date for its application. Therefore, the Court stated that the parties have an interest in the legal action, an interest based on the legal provisions that have entered into force even if they are not yet significant.

As for the second point (no application of the law), the Court quoted the Italian Court of Cassation, recalling that the specific type of action used in the case does not require a previous and concrete violation of the right to have occurred. Indeed, such action could also be used to prevent future injuries. The Court refers to judgment no 1 of 2014, the direct precedent. In this judgment, it stated that the holding of admissibility derived from the need to protect the right to vote from being (even potentially) jeopardized by unconstitutional electoral legislation.

Finally, as for the third point, the Court held unfounded the objection that the questions would not be preliminary due to the fact that the subject matters of the ordinary judgments and of the constitutional review were indistinct. Recalling judgment no 110 of 2015 and (again) judgment no 1 of 2014, the Court asserted that, while in ordinary proceedings, the main issue is the

request to verify the effectiveness of the right to vote, the constitutional proceedings concern the declaration that the right to vote has jeopardized by the current electoral legislation. Therefore, according to the Court, the subject matter of the proceedings ordinary courts – namely the verification of the effectivity of the right to vote – has autonomous value.

As for the merit of the legislative provisions, the Court took into consideration two points to declare the unconstitutionality of some of the provisions evaluated: those concerning the majority bonus (para 9.2., *Considerato in diritto*), and those on the choice of the top candidates (para 12.2., *Considerato in diritto*).

With regards to the majority bonus, the Court stated that it is beyond doubt that the legislator is entitled to establish a majority bonus within a proportional system as long as such mechanism does not lead to an extreme overrepresentation of the list that obtained the simple majority (see also judgment no 1 of 2014). In this case, the legislator had established a minimum threshold for the allocation of the majority bonus, also providing for a second round to be held if none of the lists achieved three hundred and forty seats at the first round. The Court, however, believed that the actual procedures to assign the majority bonus at the second round contrast with the constitutional principle of popular sovereignty and with the constitutional right to vote.

Indeed, the second round, as regulated by legge 6 May 2015 no 52, is not a new and different voting exercise, but rather constitutes a 'continuation' of sorts of the first round. According to the Court, this much is revealed by the provisions governing the second round: only the two lists that had obtained the most votes in the first round may gain access to the second, and the lists could not make any alliances and coalitions between the first and the second round, in order to become stronger at the second round. Moreover, even after the second round, the percentages according to which the parliamentary seats are distributed remain the same as those established for the first round, except for the winning list and for the list that had taken part (and lost) in the second round.

According to the Court, this type of majority bonus failed to protect the constitutional need to prevent an excessive compression of the representativeness and equality of the vote. Indeed, a list could gain access to the second round even by obtaining a small consensus in the first round, and with such consent obtain the majority bonus in the second round: thus, the seats obtained by the list would be more than double those that the list would have obtained in the first round. These considerations led the Court to state that the challenged provisions on the second round reproduce the distorting effect that rendered the previous legislation (legge 21 December 2005 no 270) unconstitutional. In this case too, indeed, the legitimate and constitutionally oriented aim to endow the executive bodies with stability leads to a

disproportionate restriction of other constitutionally protected interests (ie the representativeness and equality of the vote). Therefore, the review for proportionality and rationality led the Court to hold that the majority bonus was unconstitutional.

Another interesting point concerns the judgment's 'outcome'.[20] The Court stated that it does not have the power to modify the concrete procedures with which the majority bonus is assigned, neither by means of additional interventions nor by introducing corrective mechanisms such as those suggested by the ordinary courts. Only the legislator could make such decisions (for example, whether to assign the majority bonus to a single list or to a coalition of lists). According to the Court, however, the legal framework that remains in force after the declaration of unconstitutionality was immediately applicable. In the Court's own words, 'it is adequate to guarantee the replacement, in any moment, of the Constitution's elected body, as required by constant constitutional case-law'.

With regards to the choice of the top candidates, the Court stated that the absence of any objective criteria in the provisions analyzed – an absence that is coherent with the will expressed by the voters, as it aims to orient the decisions made by top candidates elected in more than one constituency – manifestly contrasts with the personal identification of candidates by voters that legge 6 May 2015 no 52 permits by means of the preferences.

The option provided by the law allows the top candidate returned in more than one constituency to choose the constituency to which to be officially returned and thus, indirectly, to choose the candidate that will be returned in another constituency. This mechanism would intrude upon the very effect of the preferences expressed by the voters and violates the constitutional principles of equality and personal nature of the right to vote.

Moreover, it would be difficult to identify another constitutional value capable of balancing such a breach. Indeed, the capacity to freely choose the constituency to which one could be elected, which was justified to initiate a specific relationship of political accountability with the voters, may, if ever, have been reasonable if the candidates in question were to obtain the majority of votes. However, this was certainly not the case with 'closed' top candidates (compared to candidates that have obtained preferences by the voters).

After the Court's intervention, the decision of a (yet again) delegitimized Parliament are now awaited, in the hope that this time, rules conforming to the Constitution will be elaborated: it would be the first time since 1993![21]

[20] On the outcome of the judgment, A. Morrone, 'Dopo la decisione sull'*Italicum*: il maggioritario è salvo, e la proporzionale non un obbligo costituzionale' *Forum di Quaderni costituzionali* (2017), available at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2017/01/morrone_nota_35_2017.pdf (last visited 20 March 2017).

[21] A. Pertici, 'L'incostituzionalità dell'*Italicum*' (6 February 2017), available at http://www.paradoxaforum.com/lincostituzionalita-dellitalicum/ (last visited 20 March 2017).

Thus far,[22] an analysis of the parliamentary works, and in particular of the works of the Constitutional Affairs Commission, shows that only three bills were assigned to the Commission after the constitutional referendum. In addition, some other bills that were previously assigned to it contain proposals that are more or less similar to those discussed in Section III above.

A bill drafted by various deputies of the Popular Party proposes a system with a first round, in which all the parties compete with one another on the basis of a proportional method, with a threshold of three per cent and the possibility to cast a preferential vote. The system also provides for a majority bonus (up to fifteen per cent) to be assigned to the list that obtains more than forty per cent of the votes in the first round.

If no list achieves forty per cent, the bill establishes that a second open round be held, either with all the lists gaining at least thirty per cent of the vote in the first round, or with the coalitions achieving thirty per cent together. If no list has reached thirty per cent of the votes and no coalitions were created for the purpose, a second round is not called and the seats are distributed according to a pure proportional method. The second round leads to the attribution of a majority bonus, consisting of up to three hundred and twenty-one seats (or fifty-one per cent of the seats in the Chamber of Deputies).

Deputy Giuseppe Lauricella presented the second proposal submitted to the Constitutional Affairs Commission. This proposal aimed to extend the electoral discipline to the Senate, essentially eliminating the second round.

Another proposal (by Pierpaolo Vargiu and Salvatore Mattarese) sought to annul legge 21 December 2005 no 270 and legge 6 May 2015 no 52 and reactivate the previous framework, the aforementioned *Mattarellum*, which applied in the elections held in 1994, 1996 and 2001.

A reactivation in any form of the *Mattarellum* appears to be the most likely prospect today, although there is no single path to achieve this objective. Indeed, at the time of writing, the political context and the rift within the Democratic Party greatly complicates the issue, making it even more difficult to achieve agreement on a reform of the electoral law.

## VI. Concluding Remarks. What the Post-referendum Developments Say about: (a) The System of Government; (b) Democracy and Referenda (Representative Democracy and Direct Democracy); and (c) the Role of the Constitutional Court, from Politics to Adjudication

The discussion developed in this article has sought to provide many details on various aspects of the Italian political and institutional system, its

[22] The review was updated in February 2017.

evolutions, its peculiarities and its perspectives.

Three main areas appear to be affected by the events occurring after the referendum: (a) the system of government; (b) the relationship between representative and direct democracy, and the balance to be struck between these to achieve substantive democracy and fair popular participation; and (c) the role of the Constitutional Court and the true nature of its powers, which perpetually swings between politics and adjudication.

As for (a), for many years now, in Italy there has been much debate on the evolution of the system (or form) of government. This debate began as early as the beginning of the 1990s, when the adoption of a mixed electoral system and the dissolutions of the existing political parties, due to the well-known court cases and the phenomenon of *Tangentopoli* led to a (partially) different (and directly popular) means to legitimate the Government, and its progressive institutional strengthening. Such strengthening regarded both the relationship with the President of the Republic and that with the Parliament, especially in the field of legislative power.

This evolution is ongoing, and would not have stopped even if the constitutional reform had been approved. Indeed, the reform would not have affected the system of government, leaving the constitutional framework on this subject unchanged.

However, once again, the recent government crisis highlights the important role played by the President of the Republic, who, despite his personal attitude – which is not particularly proactive – has truly made a mark on these developments. The gap between the form of government designed by the Constitution and the 'actual' system of government is not especially wide, in terms of the beginning and end of a government's lifespan: these two moments reveal the constitutionally strong role that the Head of State may play and the complete divide between the elections and the selection of the government.

The evolution of the form of government also takes place on another level: that of lawmaking. In this context, it is evident that not only has the role of the Government has significantly increased, but also that the overall system is changing: its hierarchical nature, its derivation from the principle of sovereignty, its incorporation into the Parliament, and its political dimension. In recent years, all of these features have been transformed, and the evolution is still very much ongoing.

The post-referendary events also confirm the Prime Minister's current role. The events show that the Council of Ministers is not a genuinely collegial body, neither in its decisions nor in its responsibilities. The entire history of the constitutional referendum underscores the Prime Minister's enhanced role of political supremacy and exposure.

On the other hand, it is uncertain whether this experience can lead to

general arguments on this specific point. The supremacy of the Prime Minister may very well be linked to the present historical context, to Renzi's highly political character, and to his place within the Democratic Party and the political framework.

Another important fact on the system of government deriving from the events unfurling after the referendum concerns the relationship between the electoral system and the form of government. Judgment no 35 of 2017 clearly rejects the idea that the Italian Constitution establishes a proportional electoral system.[23] The constitutional provisions on the subject do not require an absolute form of representativeness, which perfectly reproduces the distribution of votes and political consensus. Conversely, pursuant to the Constitutional Court's judgment, the Constitution allows for the creation of electoral systems that foster the stability and solidity of Governments, also by means of mechanisms aiming to substantially alter the vote through majority bonuses and thresholds. The impact on the system of government is evident: it is the lawmaker (and therefore mainly Parliament; sometimes the Government ...) that is called upon to discretionally establish the extent to which it will foster the representative principle or stability and the majoritarian principle; this choice will determine the nature of each Government, ie coalition Governments, single-party Governments or others.

As for (b), the relationship between democracy and referendum appears to have been strengthened by the constitutional referendum. The populist use of the referendum turned against its proponents, who had believed that they would benefit from it.

Renzi's request for political confidence by confirming his constitutional reform was rejected by the Italian people, which voted on the basis of political reasons more than on the effective contents of the constitutional amendment. Thus, the people denied confidence to the leader of the Executive (rather than to the branch as a whole), thus causing a political (and not legal) obligation to resign.

From this point of view, the resignation does not illustrate the evolution of the system of government towards a direct relationship between the elections and the creation of a Government itself. To a much lesser extent, therefore, does it encompass the existence of a *simul stabunt simul cadent*, that is by now unconceivable (the current Government is the fourth to have taken power in the present legislature ...); rather, it exemplifies the particular value of the referendum and the Prime Minister's political defeat.

What emerges from the outcome of the referendum, in terms of the value of the referendum itself, is the democratic revival of this instrument. However, this instrument should be an (exceptionally used) institution for direct democracy, and remains within a representative system in which the 'call to

[23] A. Morrone, n 20 above.

the people' is never the political weapon to grant effectiveness, legitimation, and reliability to decisions taken without any participation on part of the political and parliamentary minorities.

As for the final point, (c), or what the post-referendum events say about the role of the Constitutional Court, it is impossible to exhaustively investigate the dual nature and legitimation of the Court, and of the constitutional jurisdiction more generally, in this article.[24] Nevertheless, new prospects have already appeared after judgment no 1 of 2014. In recent years, the topic of elections has revealed a (partly) new face of the Court: a Court that openly contravenes certain firmly entrenched procedural rules – largely self-defined in its own case law – on the admissibility of the cases. A Court that analyses the merits and resolves questions which it 'technically' could not address, entering, with its judgments, into one of the most important 'grey areas' of constitutional review, making this choice in the name of the transparency of the representative system and the right of voters to choose and to matter.

Therefore, the Constitutional Court plays the role of a strong political institution that seeks to assure the constitutional protection of the system overall, rather than that of a jurisdictional body.

[24] The legal literature on these topics is abundant. In Italy, the main work is that by C. Mezzanotte, *Corte costituzionale e legittimazione politica* (Roma: Tipografia Veneziana, 1984). More recently, an interesting investigation has drawn attention to the question of the legitimacy of constitutional courts and the complexity of their role in a comparative overview, L. Pegoraro, *Giustizia costituzionale comparata. Dai modelli ai sistemi* (Torino: Giappichelli, 2015).

**THE ITALIAN LAW JOURNAL**

*An International Forum for the Critique of Italian Law*

Special Issue

# *The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome*

edited by Paolo Passaglia

# Part II

## *Views on the Future of Constitutional Reform*

Four Italian constitutional scholars express their views on the future of the Constitution. An issue addressed by all contributors is whether the Constitution needs to be changed; and all agree that the system does indeed require at least some updating. As noted by Paolo Carrozza, several paradoxes hinder the efforts to reform the system. Precisely due to the great difficulties encountered in these respects, in Beniamino Caravita's view, the rejected reform was an important chance that should have been seized. What the 2016 referendum leaves is a deadlock that, according to Giuseppe Franco Ferrari, will be very hard to break. Despite the problems that emerged and the general scepticism towards further reforms, this issue must nevertheless be faced; for this purpose, Ugo De Siervo proposes a set of provisions that should be modified and how these reforms should be carried out.

# The Constitutional Reform, between a Lost Opportunity and a Negative Outlook

Beniamino Caravita di Toritto*

I. The Italian legal system is in urgent need of reform. This is a statement that is generally accepted among constitutional scholars as well as in the national and international political debate. A possible reform was rejected by a general referendum held in December 2016, with a majority of sixty percent of voters rejecting a comprehensive reform approved by the Parliament, after a law-making process that had started in 2014. Currently, Italy is still experiencing the turbulent consequences of the recent popular vote; as the example of the United Kingdom (UK) also shows, in our modern liberal democracies it is very difficult to achieve a coordination between direct democracy and representative democracy.

The weakness of the Italian constitutional framework was and is well known. Italy is a parliamentary regime characterized by two Chambers that are both elected by popular vote and that both take part in the law-making process. The Government is equally responsible to both Chambers, which on the whole share the same duties and functions, and which play the same role in the system. The position of the Government is traditionally weak and there are no means ensuring stability. The party system is characterized by a permanent fragility, resulting, among other factors, from the key role that was played, for a long time, by the Communist Party, until its fall.

Following the 2001 constitutional reform, the competencies of the Italian Regions – territorial entities created by the 1947 Constitution – have increased in a manner that was not viable for the operation of the institutions, as well as from an economic point of view.

The reasons for these weaknesses of the Constitutional system can be found in the attitudes of the main political parties in the Constituent Assembly operating in 1946-1947. After the Second World War, Europe was divided between the Western Allies and the Communist Soviet Union and the destiny of Italy was not yet determined. Against this backdrop, the Catholic party and the leftist parties (communists and socialists) had no reciprocal faith in one another's real democratic character, and both tried to build up a constitutional

* Full Professor of Public Law, University of Rome 'La Sapienza'.

system in which the party or the parties that had won the political elections would never be able to annihilate the loser or the losers. This weak constitutional system worked after the Second World War, and its operation lasted until the fall of the Soviet Union and of the Communist regimes. During that period, the Christian Democratic Party was the pivot of any possible political alliance and was therefore able to guide the political evolution of the Italian system.

Since 1989, many attempts have been made to reform the Constitution. It would be difficult and it would take a very long time to describe in detail the various proposals, models, and procedures which have been tried. Among the proposed reforms, we should mention at least the other comprehensive reform that was approved in 2006 by a centre-right majority, but then rejected by a popular referendum.

II. The 2016 constitutional reform was proposed by the Government led by Matteo Renzi, after the ambiguous results of the 2013 general elections. The Democratic Party had the absolute majority of seats in the Chamber of Deputies, thanks to an electoral system granting three hundred forty seats to the leading party, but had no majority in the upper house (the Senate of the Republic). After months of attempts to build a majority based on the Democratic Party and on the Five Star Movement (a recently-founded populist party), and after attempts to elect a new President of the Republic, a Government was formed based on an alliance between the Democratic Party and the party of the former President of the Council of Ministers, Silvio Berlusconi. The President of the Republic currently in office, Giorgio Napolitano, was re-elected, notwithstanding the fact that constitutional practice stood against the re-election of the President of the Republic for a second mandate.

Both the re-election of President Napolitano and the appointment of the new Government were based on the parliamentary majority's commitment to engage in constitutional reforms. The weakness of the constitutional system could therefore be faced and solved, at last; meanwhile, a new electoral law was supposed to be adopted, in order to ensure a clear majority in Parliament and, as a result, a stronger and more solid Government.

III. In this context, there were two constitutional dilemmas: 1) could the constitutional reform be proposed by the Government? And 2) should a wide reform be discussed and approved within a single act or should it be divided in several acts, each of them concerning different subjects?

Regarding the first dilemma, in the Italian Constitution there is no formal prohibition on the Government proposing a constitutional bill, and the argument based on the work of the Constituent Assembly of 1946-47 does not seem to be conclusive. As a matter of fact, the main parties in the Assembly

did take part both in the Government and in the activities of the Assembly; therefore, the separation between the decision-making in the Assembly and the operation of the Government was the result of similar majorities in the two bodies. Even after the agreement between the centrist parties and the Marxist parties had ended, with the Socialists and Communists leaving the governing majority, the Government's impact on the work of the Constituent Assembly was rather limited. As a matter of fact, to avoid a backlash against the Assembly, the President of the Council of Ministers reduced his interventions in the debates on the drafting of the Constitution as much as possible. In the recent attempt to reform the Constitution, a political agreement on the constitutional reform was reached among the parties that constituted the parliamentary majority. Given this agreement, it did not make any sense, from a political point of view, to leave the Government out of the political debate concerning the reform.

In relation to the second dilemma, the main argument against a single act was that in the Italian Constitution no difference exists between partial and total revision, for there is only one process to follow in order to reform the Constitution. Theoretically speaking, it was argued that the process regulated in Art 138 was designed only for partial reforms, and not for reforms aiming to amend a wide range of constitutional provisions. Nevertheless, under the letter of the Constitution there is nothing that supports this point of view. With the benefit of hindsight, one could admit that if several bills had been proposed and then approved by the Parliament, probably the various referenda on each constitutional law would have led to a more positive outcome. The voters could have agreed on some but not all of the proposed reforms, and at least some of them would have been adopted. However, it is fair to say that several bills would have encountered enormous difficulties during the law-making process at the Parliamentary stage, so that a final adoption would have been harder to achieve, if not completely prevented.

IV. The constitutional reform adopted by the Parliament and eventually rejected in the referendum was based on the following elements:

- two Chambers with members elected on different grounds and with different functions; only the Chamber of Deputies would have been directly elected by the people in general elections, whereas the members of the Senate would have been chosen as representatives of regional and local authorities;
- the Government would have been responsible only to the Chamber of Deputies;
- the law-making process would have been changed according to the different functions that the two Chambers would have exercised;
- a special procedure would have been provided in order to regulate the approval of Government's bills;

- the legislative powers of the Regions would have been modified, so as to introduce a clearer distinction between State and Regions' responsibilities;

- the Provinces (local authorities intermediate between Regions and Municipalities) and the National Council of Labour and Economy would have been abolished;

- some partial measures aiming at reducing the costs borne by taxpayers for politics and institutions would have been adopted.

The constitutional bill was approved by the majority of the members in both Chambers of the Parliament but did not reach the threshold of two thirds of the members. In such cases, Art 138 of the Constitution allows a parliamentary minority, five hundred thousand voters, or five Regional legislatures to request that a popular referendum be held on the bill adopted by the Parliament.

To complete the scene, the electoral law, which is regulated by an ordinary act (and not by the Constitution), was approved, under which a majority of seats was allotted to the party that reached, in the first round of the elections, forty percent of the valid votes or the majority of votes in the second round, in which a run-off would take place between the first two parties in the first round.

V. The constitutional reform was severely criticized. According to some constitutional legal scholars, the text was very imprecise, failed to embrace a holistic approach, and suffered many technical imperfections. The criticisms made against the text were probably excessive, because any legislative text – and even more so, any constitutional text – is necessarily the result of difficult compromises that must be reached by decision-makers. Seeing things from a political point of view, the Government led by Mr Renzi was not able to secure the support of Mr Berlusconi's party and the left side of the Democratic Party. This shortcoming, together with a difficult economic situation, led an important part of Italian society to vote against the Government. The result was a quite unexpected rejection of the constitutional reform approved by the Parliament.

VI. The rejection had significant political consequences. The President of the Council of Ministers, Mr Renzi, resigned; the Democratic Party faced a crisis; a new Government was appointed and passed a vote of confidence in both Chambers of Parliament; a quite messy debate began concerning the new electoral law, in particular when the Constitutional Court declared the unconstitutionality of the electoral law in force; it was (and it is) impossible to foresee when new general elections will be held, for it is not clear whether they will be organized in 2017 or in 2018. The risk of a victory of populist forces must be taken seriously. And the party system seems weaker and weaker and also unable to reform itself in any way.

The outcome of the referendum has also had a negative impact on the future of constitutional reform in Italy. After two referenda rejected reforms adopted by the Parliament (in 2006 and in 2016), both seeking to establish a difference between the two Chambers regarding the selection of their members and their powers, it will be very difficult to take action on Italian bicameralism again, and after the rejection of two reforms focusing on giving a more rational framework to the powers of Regions, any reform pursuing the same goal will have little chance of being adopted. Any provisions aimed at strengthening the Government will face severe critiques concerning supposed attempts to establish an authoritarian regime.

In light of all these difficulties, the question to ask is whether Italy is going to become, again, the Great Sick Man of Europe. Or, maybe, the question should be even more pessimistic: Will Italy's sickness play an active part in the sunset of Europe?

# The Paradoxes of Constitutional Reform

Paolo Carrozza*

## I. Why is Constitutional Reform so Difficult to Reach?

In this article, I will discuss a number of the paradoxes that have arisen in the context of Italy's most recent attempt at constitutional reform. A famous paradox about constitutional reform, well-known in Italy through its use by Norberto Bobbio,[1] notes that '*The more a constitutional reform is necessary, the more it is difficult to gain it*'. This paradox has general value, and applies not only to Italian constitutional reform, but also to that of many other countries. Within Italy, it also applies to the reform of the electoral system.

Many general factors, apart from typically Italian political fragmentation, make constitutional reform even more difficult to reach. The first factor is the present weakness of national and state constitutionalism. National constitutions were enacted in order to limit and to regulate national power. Economic and financial globalization, however, as well as the international and supranational dimensions of power have prevailed with the exception of a few leading countries (such as China, the United States (US), and Germany) over national power. National constitutions cannot regulate such power because a portion of this power (of sovereignty, if you would use the ancient legal term) remains 'outside' of the state constitution (and out of the borders of each national state).

This fact does not necessarily represent a crisis of constitutionalism as a whole, which has an increasing supranational and international development, especially in the interrelation (not even dialogue…)[2] of domestic and international or supranational judges and courts. This important development regards only one of the two faces of constitutionalism according to Art 16 of French Declaration of 26 August 1789, the Human Rights face. The crisis affects only the other face of the constitutionalism, the face that French

* Full Professor of Constitutional and Comparative Law, Sant'Anna School of Advance Studies, Pisa.

[1] See N. Bobbio, 'Il paradosso della riforma' *La Stampa*, 4 December 1987; see also G. Zagrebelsky, 'I paradossi della riforma istituzionale' *Politica del diritto*, 165 (1986).

[2] See G. Martinico and O. Pollicino, *The Interactions between Europe's Legal Systems* (London: Edgar, 2012), passim.

revolutionaries called 'separations of powers', ie the organization of the form of government and of the form of the state. From another point of view, we have many indications that the crisis of state constitutionalism is not temporary. We live an era of transformation and uncertainty, especially in Europe, and we do not know if a stricter union or a new strengthening of national states context awaits us.

The question then becomes whether an increasing number of political, economic and social problems due to interrelations and interdependence among states cannot currently be solved at the national state level, could they be solved by further reform of state constitutions? The parochial and populist political visions of nationalist movements and parties, spread throughout Europe, would say 'yes'. However, I agree with Ingolf Pernice (when referring to the future of Europe) on his assessment that, when the political processes of each member State are not suitable to solve problems which are overflowing national boundaries, the only possible answer is to propose alternative, new forms of democracy and power at the European level.[3]

In short: if national constitutions are not able to give a democratic and competent answer to the people's demands for work, welfare and security, that is not the fault of constitutionalism. Instead, we must begin to put in the political agenda the creation of a political power, at the European level which is capable of responding to these demands. The problem is not the weakness of constitutionalism;[4] it is rather the weakness of the state dimension of present constitutionalism.

On the other hand the true constitutional reform of the last twenty years has already occurred without a formal reform of our Constitution. It consists of the consequences of the process of integration within the European Union and, above all, the undeniable progress of this process, which may be seen and described, in spite of its uncertain nature (we are dealing with constitutional law or international law?), as a 'federalizing process', as noted by Carl Friedrich.[5]

In this context, the progress of the process of European integration is of decisive, as well as disruptive, constitutional importance. Consequently, the discussion of the reform of the second part of the Italian Constitution, which

[3] See I. Pernice, 'Domestic Courts, Constitutional Constraints and European Democracy: What Solution for the Crisis?', in M. Adams, F. Fabbrini and P. Larouche eds, *The Constitutionalization of Budgetary Constraints* (London: Hart, 2014), 297.

[4] See G. Azzariti, *Il costituzionalismo moderno può sopravvivere?* (Roma-Bari: Laterza, 2013).

[5] See C.J. Friedrich, *Governo costituzionale e democrazia* (Vicenza: Neri Pozza, 1950), 274. The notion of *federalizing process* was conceived by the author in the 1930s: see C.J. Friedrich, *Constitutional Government and Politics: Nature and Development* (New York: Harper & Brothers, 1937). For the application of the notion of *federalizing process* to European unification, see C.J. Friedrich, 'Federal Constitutional Theory and Emergent Proposal', in A.W. Macmahon ed, *Federalism. Mature and Emergent* (New York: Russell & Russell, 1962), 510.

has been underway since 1984, is much less important today.

So, acting and thinking in an exclusively national dimension of power, divorced from the global and supranational context, may *per se* be a useful cultural exercise, but it does not solve the problems of governability and representation typical of modern democracies. In other words, it is certainly useful and possible to discuss how to maintain and perhaps even update our Constitution, but it is illusory to think that this would solve our many political and institutional problems, since they can only be solved at a supranational level (not only for Italy), by tackling and dissolving the many ambiguities and doubts preventing a further qualitative leap to give impulse to the process of European integration.

It is therefore necessary to be aware of the purely State dimension of the sovereignty crisis: if at least fifty per cent of the important decisions for public policies arise from choices at European Union (EU) or higher level (World Bank, International Monetary Fund (IMF), World Trade Organization (WTO), the international financial market etc), and these choices are also the most important from the citizens' point of view, how to adjust the remaining decisions is important but not decisive.

It follows that there is no other path to constitutional reform that better incorporates the multilevel government perspective. It is, however, necessary to realise that sovereignty and power are not the same as when our Constitution was conceived and written: one cannot expect solutions to questions that cannot be decided at the State level by limited constitutional reform of the current document.

The second issue, which is responsible for the weakness of state constitutions, especially the Italian Constitution, is due to the large amount of sovereign debt. At the end of 2016, this amounted to over two thousand two hundred seventeen billion Euros in Italy, double the size of the sovereign debt of France. It costs to Italians about seventy billion every year (sixty six and a half billion in 2016) in interest payments in the international financial market, and the interest rate, in spite of the policy of the so-called Quantitative Easing from the European Central Bank, is very high compared to German bonds (the so-called 'spread').

This debt (or better: its amount) means the freezing of any keynesian or neo-keynesian policy aimed at supporting development, research, facilities, the modernization of institutions and other such tasks, in short, all public policies that require public investment. In periods of economic stagnation, such as the present, debt is also mainly responsible for cuts in public welfare expenditures and it consequently represents a serious attack to social rights. These are the rights which, more than other rights, would instead need an increase in public expenditure in times of economic crisis.

The amount of sovereign debt tells us that the responsible of our present

difficulties is not the Euro, Europe, Germany's policy, or the Treaties on Euro's stability mechanism, or the so-called Fiscal Compact and the consequent introduction, with the constitutional reform in 2012, of the so-called golden rule in Arts 81 and 119 of the Constitution. The blame belongs on the silent and inexpressible alliance between Italian political elites and electors in order not to face a long term policy of privations and sacrifice necessary to seriously reduce the debt in favour of the future generations.

## II. Is any Part of our Constitution Obsolete?

We have more than a suspicion that the constitutional reform, and the Constitution itself, cannot solve the main economic, social and political problems of Italian society. This suspicion does not prevent us from asking another question about the constitutional reform: is there some constitutional part or rule not up to date, which is obsolete and not able to face the challenges of the present times?

The answer to this question is very difficult, because, in my opinion, the main obsolescence of our Constitution lies in its First Part, and particularly in that devoted to 'Economic Rights and Duties' of the citizens, and depends on the increasing process of economic integration due to the EU[6] and in many respects is not consistent with the model of economy and political economy enforced by EU Treaties, especially from the Single Market Act onwards.[7] On the other hand, many 'new human rights', such as the rights of the so-called fourth and fifth generations,[8] do not have constitutional recognition and this lack of constitutional (and often legislative) recognition makes very difficult for judges – not only for the Constitutional Court – to adjudicate claims for one of the new rights, especially when the claimed right involves ethic and religious controversies. I'm referring to lesbian, gay, transgender, bisexual, queer (LGTBQ) rights, internet rights, bioethics rights, and in general to the new rights produced by technology and biotechnology. It is true that the classification and the listing of these new human rights are an impossible and perhaps inappropriate task;[9] but the lack of constitutional recognition deprives judges of certain parameters for their decisions. These decisions thus appear even more case-by-case based, and founded on the occasional balancing of liberties and interests of some people, and cannot be easily repeated and

[6] This is particularly true of the so-called 'economic constitution', ie the rules on 'Economic rights and duties', from Art 35 to Art 47.

[7] See S. Cassese, *La nuova costituzione economica*, in S. Cassese ed, *La nuova costituzione economica* (Roma-Bari: Laterza, 3rd ed, 2015), 319-330.

[8] See S. Rodotà, *Diritti e libertà nella storia d'Italia. Conquiste e conflitti 1861 – 2011* (Roma: Donzelli, 2011) and Id, *Repertorio di fine secolo* (Roma-Bari: Laterza, 2nd ed, 1999).

[9] Unfavourable to this listing, even in the International Charters of Human Rights, is S. Rodotà, 'Tra diritto e società' *Rivista critica di diritto privato*, 176 (2000).

reproduced, even in similar cases.

In both the above mentioned cases, discussions about the opportunity of the constitutional reform are purely hypothetical because the reform of any aspect of the First Part of the Italian Constitution was never on the ground of political debate, in any constitutional reform's attempts since the 1980s. They probably will never be dealt with in the future.

The change of European economy and political economy towards a 'social' model, more consistent with the First Part of the Italian Constitution, is certainly possible (and perhaps desirable), but it depends on a decision assumed by all member states of the Union. On the other hand, if the reform of the First Part of the Constitution is in general a political taboo, the incorporation of new human rights is particularly affected by the paradox of constitutional reform, requiring a general consensus in the content of the new constitutional principles ruling these rights which is impossible to reach in such themes, since they are subject to ethic or religious or ideological (or the three together) disputes and discussions.

Accordingly, we must pay attention to the Second Part of the Italian Constitution (Organization of the Republic), which since 1984 was the subject of an intense debate about its reform until the referendum held on 4 December 2016. Actually, most of the various projects, especially those which aimed to reform the form of government (that of 1999 and that of 2006), above all responded to temporary and occasional pretentions of some political party and/or political leader. But two topics, always included in the various proposals of the reform, correspond to and fulfil the real need to updating some parts of our Constitution that do not correspond to the evolution of the relations between institutions and society. These are the dilemma of the composition and role of the second chamber, the *Senato*, and the framework of State-Regions relations, especially relating to the range of the legislative and administrative tasks of Regions. In short: the measure of regionalism/federalism.

In spite of the negative results of the constitutional referendum over the proposed reforms, these two constitutional topics require particular attention. For the political parties to deny the urgency and the necessity of a constitutional reform aimed at the modernization and rationalization[10] of the political representation and the assurance of more flexibility to State-Regions

[10] The word 'rationalisation', often used to express the ultimate *ratio* of certain proposed constitutional reforms and to describe the evolution of parliamentarianism, dates back to a twentieth century French scholar, Boris Mirkine-Guetzevitch. In his works illustrating constitutional solutions that emerged in the constitutions after World War I, he coined it to represent the introduction of constitutional rules to ensure political stability (eg those regulating the vote of confidence in the Government, see Art 94 of the Constitution, or the German-style no confidence of Art 67 of the German Constitution) and a new framework of federal relations: see B. Mirkine-Guetzevitch, *Les nouvelles tendances du droit constitutionnel* (Paris: LGDJ, 2nd ed, 1936).

relations would be a serious mistake. We are dealing with some measures that could make the Italian legal order more efficient for the citizens and more reliable in the eyes of its European partners, and especially for foreign investors. On the other hand, the degree of consciousness about the content of the constitutional reform subject to the confirmative referendum on 4 December was indeed very low: only a small number of electors knew the terms of the modification of the Constitution and the effects expected with the new text. Indeed, the referendum was, for the greater part of the voters, a real political 'plebiscite', for/against the President Matteo Renzi. With the Renzi's Government resignation as the direct effect of the prevailing of the 'no' to the reform, the Government was dismissed. However, the two above mentioned political and constitutional problems remain unsolved.

## III. The *Senato* and Its Transformation: Are We Going to Modify Its Composition, Its Functions or Both?

The transformation of the *Senato* into a 'federal' chamber and the modification of its legislative and political role, through the abandonment of the 'perfect or paritarian bicameralism' introduced by the Founding Fathers in 1947, is a general problem, well known in all countries who did not choose monocameralism – only a few in Europe.[11] We are currently facing the different sides of the question: the transformation of the *Senato* into a 'federal' chamber (such as the US Senate or the German and Austrian *Bundesrat*) concerns the composition and the election (if an election is needed) of the chamber. The end of the 'paritarian bicameralism', which concerns the functions (legislative, political etc) that the Constitution entrusts to each chamber, is a different issue. In the last proposal, that of Renzi's Government, the two issues were joined together. This link is not necessary and each measure may work separately; thus, it is better to deal with them separately, and then face their possible inconsistency and overlapping.

Many years ago, I was in favour of the reform of the senate which aimed at its transformation into a 'federal' chamber, apart from the method of election or nomination of its members.[12] My main reasons for believing this were two: first, the opportunity to strengthen the political role of the Regions and their influence over the national political process and policy making process. In order to reach this goal, maintaining the 'paritarian bicameralism' (or the most part of it) was essential.

[11] For a full review of second chambers, not only with federal composition, see J. Luther, P. Passaglia and R. Tarchi eds, *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism* (Milano: Giuffrè, 2006).

[12] See P. Carrozza, *La* Cour d'Arbitrage *belga come corte costituzionale* (Padova: Cedam, 1985), passim.

Second, the *Senato* created by Constituent Assembly in 1947, as a compromise among different views on people's representation, was a patchwork:

a) the *Senato* has the same functions of the *Camera* (paritarian bicameralism). It is interesting to observe that the constitutional reforms proposed since 1984 were aimed at both modifying the composition of the *Senato* and transforming it into a regional chamber, as well as modifying its functions in the sense of the selection of the law subject to bicameral vote, or removing from the *Senato* the vote of confidence to the Government, or both reforms joined together, mixed in various ways;

b) originally the *Senato* was elected for six years (one more than the *Camera*). This rule was never applied and since 1953 the *Senato* was dissolved together with the *Camera*. In 1963 the Constitution was modified so that the Senate's mandate also lasted for five years (Legge costituzionale 27 December 1963 n0 3, Art 3);

c) in the election of the *Senato* the voters must be twenty-five years old and only those who are forty years old are eligible as senators (the electorate is very different with respect to that of the *Camera*). This electorate and the number of elected members (three hundred and fifteen, half of the *Camera*) make it very difficult for political parties to obtain at the *Senato* the same proportion of seats reached in the election of the *Camera* (in the last four legislatures, the Government had not a sure majority in the *Senato*). The Constitutional Court, reviewing legge 6 May 2015 no 52 (new electoral law for the *Camera*), at para 15.2 of the judgement no 35 of 2017 noted that '(…) if the Constitution does not impose to the legislator the duty to vote the same electoral law for the two chambers of Parliament, nevertheless it requires, in order not to damage the correct functioning of parliamentary form of government, that the two electoral laws, even differing one from the other, to not obstruct the formation of homogeneous majorities in the two chambers as the effect of the elections'; but if the representation in the two chambers needs to be homogeneous (ie the same), the utility of the second chamber is even less evident;

d) according to Art 57 of the Constitution the *Senato* '(…) is elected on a regional basis', but the same Constituent Assembly, when in 1948 voted the first electoral laws, denied this prescription in the composition of the chamber. The reason for this failure of electoral laws to fully implement the principle of regional representation in the Senate's composition, is simple and can be found in history: the Regions were only implemented in 1970 and were initially politically weak. In short, how can there be political representation of the Regions or an electoral mechanism that implements the parenthesis of Art 57 referring to the Regions if there are no Regions? Of course, the Regions were then instituted (1970-1971), but the political-institutional framework was completely different from the one known to members of the Constituent

Assembly. After the end of the 1980s, the electoral question was posed in terms quite different from those postulated by the members: the end of the unwritten constitutional convention on proportional representation and the repeated attempts to introduce a majority-type electoral system for the sake of stability and political transparency. For such electoral systems, regional representation became secondary.

This patchwork is very complex and there is no way to reduce it to a synthesis coherent with all these premises. Accordingly, for many years, Italian scholars have told us that the *Senato* was a useless double of the *Camera*.[13] Due to the variety of the reforms of the Senate which have been proposed, and to the consequent uncertainty about its utility and role, the most pressing question is which reform could make the second chamber useful to improve the efficiency of our institutions?

The main arguments in favour and against to the transformation of the *Senato* into a regional or federal chamber came from political scientists, not from constitutionalists.

The American idea of the Senate as a federal chamber lies in the theory of the so-called political safeguards of federalism, due in its original conception to Henry Wechsler.[14] Under this theory, the more effectively the states are represented by the Senate and can take part in federal decision-making, the less useful it is for them to resort to the resolution of conflicts before the Supreme Court, which is provided for in the United States constitution. After Wechsler, another American political scientist, Jesse Choper, attempted to demonstrate this hypothesis, by illustrating various relatively unsophisticated ways in which the Constitution of the United States enables states to participate in federal decision-making, such as in the election of the president, and thus influence of the federal executive, or influence legislative power and judicial power through the Senate.[15]

Since the post-World War II period, there has been a drastic reduction in cases before the Supreme Court between the federal and state government on issues of federalism. This experience does not seem to work in Europe,

[13] For the debate until the end of seventies see G. Floridia, 'Il dibattito sulle istituzioni (1948-1975)' *Diritto e società*, 261-330 (1978); for the critique to our bicameralism see E. Cheli, 'Bicameralismo' *Digesto delle discipline pubblicistiche* (Torino: UTET, 1987), 323; A. Barbera, 'Oltre il bicameralismo' *Democrazia e diritto*, 47 (1981); L. Elia, 'Il dibattito sul bicameralismo' *Nuova Antologia*, I, 71 (1990); L. Paladin, 'Tipologia e fondamenti giustificativi del bicameralismo. Il caso italiano' *Quaderni costituzionali*, 234 (1984); L. Carlassare, 'Un bicameralismo discutibile', in L. Violante ed, *Il Parlamento* (*Storia d'Italia*, *Annali* 17, (Torino: Einaudi, 2001)), 349; S. Bonfiglio, *Il Senato in Italia. Riforma del bicameralismo e modelli di rappresentanza* (Roma-Bari: Laterza, 2007).

[14] See H. Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government', in A.W. Macmahon ed, *Federalism: Mature and Emergent* n 5 above, 97.

[15] See J.H. Choper, *Judicial Review and the National Political Process* (Chicago: Chicago University Press, 1980).

however, presumably because it is not easy to reproduce. Even if the introduction of the federal chamber did not cause a reduction of legal conflicts before the respective Constitutional Courts, and any effective decrease in constitutional litigation on the subject of federal relations was not achieved, the experience of the federal composition of the chambers in countries such as Germany and Belgium is generally considered a useful instrument for the better efficiency and effectiveness of the political process.

On the other hand, many political scientists think that, in today's Europe, the representation of Regions implemented with the second chamber of regional composition is going to reproduce the disposition of interparty relationships characterising the other chamber of purely political representation. These sceptics argue that, in Europe, political systems do not want strong regional autonomy. In his well-known essay on political parties in Europe,[16] Klaus Von Beyme called political parties 'agents of centralisation' in order to underline that the political systems of the main European countries have no interest in weakening political (and institutional) centralism, which guarantees their survival. Strong regional autonomy, and its strictly regional representation, would weaken centralism and undermine the workings of the political system, apart from the case of countries in which the voters are divided, on a territorial basis, by religious and linguistic cleavages. A federal chamber may work at his best only in such conditions, not by reproducing the classical right/left political cleavage.[17]

Indeed, many political scientists sustain that in classical federalism (US, Canada, Australia etc) parliamentary groups and majorities are determined on the basis of political party rather than region, even in the federal chamber.[18] This often occurs in the highly rationalised German *Bundesrat*, whose members are not elected.

Between supporters of the theory of the so-called political safeguards of federalism and political scientists sceptical of the real differentiation between political and regional representation, it is difficult, if not impossible, to understand who is right.

However, we may on some starting points for the elaboration of the content of the reform of our *Senato*:

a) classical forms of federalism in the countries in which federal or

[16] See K. Von Beyme, *I partiti nelle democrazie occidentali* (Bologna: Zanichelli, 1987).

[17] See A. Lijphart, *Le democrazie contemporanee* (Bologna: Il Mulino, 2001), 51-68. This author pointed out that the linguistic unification was decisive in the evolution of great contemporary democracies; the fact that the linguistic unification was reached before the extension of electorate and the arising of mass-parties determined a great *ratio* of homogeneity; for Arend Lijphart homogeneity consists of being at least eighty per cent of the population not divided by religious or linguistic cleavages.

[18] For a complete survey see B. Baldi, *Stato e territorio. Federalismo e decentramento nelle democrazie contemporanee* (Roma-Bari: Laterza, 2003).

regional chambers of representation arose and developed do not have a parliamentary form of government (American, Canadian, Australian, Swiss, etc). Parliamentary forms of government not only suffer from the classical problem of how to represent the population and the Regions/States politically, but also from the decisive preliminary problem of concluding whether the chamber of representation of the Regions/States takes part in the political process of confidence between the Government and the majority in Parliament and hence in the main political circuit.

b) The second chamber, especially in a system of paritarian bicameralism, is regarded as a chamber that slows down decisional processes. It is true that the problem lies mainly in the paritarian character of bicameralism, but the problem remains. Whatever its composition, a second chamber with federal structure must first of all not slow down decisional processes, which is a factor of institutional inefficiency, due to the natural role of a second paritarian Chamber, which is to ensure and enlarge consensus through the slowdown of the decision.

c) The Italian debate on the transformation of the Senate into a chamber of regional representation began with the original proposal of a 'Chamber of Regions' which evolved into a 'chamber of Regions and local Governments'. In this respect, I limit myself to observing that no economically developed country (indeed, no country at all) has a strong State, strong Regions and strong local Governments. In the quasi-federal view that the Title V, and previously the so-called Bassanini reforms (1997-1999), seemed to take, it is logical to think of increasing integration between Regions and their respective systems of local government.

d) Last but not least, the principle of free mandate, included in almost all European Constitutions in tribute to the old principles of liberalism according to which members represent the nation and not their voters, suggests that members of a Chamber of Regions would represent their political party rather than their Region or voters.

e) Without going into the merits of the current value of the principle of free mandate (certainly not that attributed by Emmanuel Joseph Sieyès or Edmund Burke two centuries ago, thanks to the role of political parties), it is necessary to bear in mind that probably the main reason why the German *Bundesrat* works well is that it is not elective, but rather based on the principle of the so-called 'block vote', refusing the principle of free mandate.

On the other hand, if we exclude the federal or regional composition of the second chamber, my opinion is that a reform of the functions of the *Senato*, maintaining its 'political' composition, is neither useful nor opportune, and the risk of complicating the work of the institutions (instead of simplifying them) is very high. Every way of modifying the paritarian bicameralism would mean dividing functions in a non paritarian way between the two chambers.

The citizens, in a multilevel world, with at least four levels of government (EU, State, Region or members State, and municipalities), need institutional simplification, not complication. Accordingly, the instrument for the division of the functions of the two chambers, whatever is the way of the separation of functions (bicameral and monocameral laws, entrusting the whole function of control in the senate etc) risks becoming a source of political and legal conflicts which the voters do not necessarily understand.

We can also not say that the distinction of functions is necessary in order to improve the efficiency of the Parliament. Statistics show that the Italian perfect bicameralism is not less productive than the Parliaments of the most European countries in which only a few laws are approved by both chambers. The problem is not due to its technicalities (the so called *navette*, ie the 'ping pong' between the two chambers in order to find the consensus on a law):[19] the problem is political. It is a question of simplification, transparency and comprehension, for the eyes of the voters, of the decisional process which democracy consist of.

Finally, my opinion is that the only possible reform of the Senate consists of its transformation in a federal or regional chamber. If this reform cannot be achieved or we think that it is not desirable or useful, the best way is to repeal the *Senato*. But here Norberto Bobbio's paradox reaches its top: the senators would have to approve a reform that eliminates them, and thus reform mechanisms of immediate implementation are impossible or very difficult to achieve.

## IV. The Dilemma of the Italian Regional Decentralization

The vicissitude of the Italian Regions may be represented with a parable: from 1970-1971, when the Regions were established, until the 1990s, we may look at the ascendant arm of the parable. It wasn't a simple achievement and was marked by three distinct transfers of powers from State to each Region (ie public servants, funds and equipment before belonging to State): by the first transfer (eleven decrees in 1971-72) Regions appeared no more than a big municipality; only with the second transfer (in 1977) were the Regions able to practice an important political role in the economic development and in the facilities (especially in the welfare: health and social aid) of their territories.

The peak was reached with the third transfer, from 1997 to 2001, with the so called 'Bassanini reform', from the name of the minister who achieved this result. The name of the reform, 'Federalism without constitutional reform' aptly explains the content of the reform, which was to introduce federalism in

[19] During the XVII legislature the time for the approval of a law was, on average, one hundred and seventy-two days when the initiative is governmental, and four hundred and twenty days when the initiative is of the members of Parliament: at the top of European efficiency…

Italy with a new massive transfer of powers from the State to the Regions and the municipalities. In short, to have a 'light State', free from active administrative functions and capable of concentrating on the great political choices and in the relations with Europe. The constitutional reform in 2001 was the final episode of this process, the constitutional recognition of the new set up of the relations between State and Regions.

From 2002 onwards, we may look at the descending arm of the parable: at first with many rulings of the Constitutional Court that were not favourable to the Regions; then with the failure of the enforcement of the so called fiscal federalism (legge delega 5 May 2009 no 42); finally with the economic and financial crisis after 2010, which saw the introduction of a rigid stability mechanism in charge of Regions and municipalities. This mechanism did not apply to the State: in 2016 the current expenditure of the State increased by almost six per cent; that of Regions and local Governments decreased by almost three/four per cent.

This short essay is not the occasion for inquiring into the reasons of this crisis: many of these issues are due to the Regions themselves – especially for their inefficiency and incapability to governing health regional services. After 2007, ten Regions exceeded the expenditure budget for health services, all of them in the South of Italy (except Basilicata) and Piemonte and Liguria; and many faults are due to the national political class. Two aspects, among the many contained in the Renzi's Government rejected constitutional reform of 2016, deserve our attention for the future.

The first concerns the question of flexibility in the separation of jurisdictions between State and Regions. This flexibility may appear as a paradox, because the *ratio* of the enumeration of regional (or state) powers in the constitutional text, since the US Constitution, means 'separation'; however the economic and financial crisis, the uncertainties on the future of Europe, the crisis of political representation and legitimacy of our political parties, all of this recommend prudence and flexibility. If a reform of the constitution every three or four years in order to adjust the distribution of powers to the economic and social conjuncture is impossible, it is at least possible to conceive a model of this distribution capable of being adjusted when necessary. In order to realize such model, however, a regional chamber is necessary, in order to involve the Regions in legislative decisions about the degree and the funding of decentralization.

This is one of the most important reasons, in my opinion, for the establishing of a regional chamber that can represent the voice of Regions in the national political process, especially in the decisions about the measure of the decentralization and its flexible adjustment to the changeable conditions of our economy.

The second issue consists of an apparent technicality: one of the innovations

contained in the Title V proposed by Renzi's Government was the substitution, in the functions entrusted to national state legislation, of the term 'principles' with the term 'general rules'. It may seem as a side issue; but, on the contrary, it may be a very important fact if we think of the increasing social and economic gap that, in the descending arm of the parable of the Italian regionalization, is differentiating Italian Regions, especially the underdeveloped Regions of the south with respect to the Regions in the north. This gap is becoming a serious threat to the enforcement and effectiveness of social rights in many Regions: so that a general state legislation (which cannot be derogated or enforceable by the Regions), enacted with the task of establishing greater homogeneity and equality in the access to social rights may depend on the set up and the concrete functioning (or malfunctioning) of regional welfare programs, especially those rights concerning health and social aid. This may be an important result for the citizens of many Regions with an economic and social gap.

However, it seems to me that our ruling class is now devoted to other political questions, possibly very interesting for its future, but I do not know how much these are important for Italians, and I am afraid that constitutional reform does not represent a priority, for the above mentioned reasons, in the national political agenda.

# 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.

# A Deadlock Difficult to Break

Giuseppe Franco Ferrari*

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

* Full Professor of Constitutional Law, Bocconi University, Milan.

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.

**THE ITALIAN LAW JOURNAL**

*An International Forum for the Critique of Italian Law*

Special Issue

# *The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome*

edited by Paolo Passaglia

# Part III

## *Views from Abroad*

Four constitutional scholars, who are foreigners or Italians established abroad and who closely follow the evolutions of the Italian system, comment the process of constitutional reform and the outcome of the referendum from a comparative point of view. All of these contributions question the appropriateness of asking the people to decide, by means of a referendum, such a technical issue as constitutional reform. In this regard, Peter Leyland draws a comparison with the referendum held in June 2016 on the United Kingdom's membership of the European Union; in the same vein, Pasquale Pasquino sees, in constitutional referenda, both a formal deference to popular sovereignty and a demise of the principle of reasonableness. Jason Mazzone, instead, focuses on the impact of the rejection of the constitutional reform, and, comparing the Italian and the US experiences, expresses the fear that an enduring 'amendmentphobia' will be the ultimate result of the 2016 referendum. A similar concern is emphasized by Dian Schefold, who, although conceding that Italy needs reforms, questions whether there is a real need for *constitutional* reforms.

*Views from Abroad*

# Referendums, Constitutional Reform and the Perils of Popular Sovereignty

Peter J. Leyland*

## I. Introduction

At the time of writing, the constitutional systems of Italy and the United Kingdom (UK) are still reverberating from the shockwaves caused by the respective referendums held in 2016. Although the constitutional context and the subject matter of the referendums were quite different certain illuminating points of comparison can be identified both in respect to the regulation of holding of referendums, and the difficulty of reforming core pivotal constitutional institutions. The first part of this essay interrogates the use of referendums as a device for testing popular sovereignty against established constitutional practice in the United Kingdom. The resort to the Brexit referendum by a Prime Minister in order to resolve the conflict within his own party on the issue of UK European Union (EU) membership highlights the absence of constitutional rules limiting their use. In the case of the Italian referendum, the Prime Minister (PM) regarded constitutional reform as a vehicle for consolidating his political leadership. PM Matteo Renzi deliberately turned a technical question of constitutional reform requiring formal approval, into a plebiscite for himself, and his Government, by promising to resign if he failed to achieve the desired outcome. A common denominator then between the referendums conducted in the UK and Italy in 2016 was that in each case the Prime Minister was seeking voter endorsement to consolidate his own political standing. The next section looks at recent UK constitutional practice in order to consider whether any clear rules can be established to prevent the manipulation of the procedure for political advantage, and, at the same time, determine when national referendums might be conducted as a legitimate form of consultation. The final section proceeds to evaluate the substantive issue of second chamber reform. The evolving constitutional role of the House of Lords as a second chamber is considered before the discussion turns to the reform of the Italian system. This analysis is framed around the concept of 'elective dictatorship'

* Professor of Law, School of Oriental and African Studies, University of London. I would like to thank Professor Andrew Harding for his helpful comments on an earlier draft of this paper.

which has also been applied to the UK system to describe the trend towards executive dominance in respect to the functioning of Parliament.

## II. Referendums, Deliberative Democracy and the British Constitution

The use of a national referendum to determine questions of major political and economic complexity in the United Kingdom is out of step with previous constitutional practice. It is instructive to glance back to the constitutional crisis of 1909 which arose when the House of Lords used its veto powers to prevent the approval of a budget in defiance of a strong convention recognizing the predominance of the Commons over money bills. The crisis was resolved after elections were held to provide confirmation of a majority in the House of Commons in support of fundamental reform of the House of Lords. Once victory for the Liberal/Irish Government had been demonstrated at the election in 1910, if necessary, King George V was prepared to appoint sufficient peers to overcome the Conservative majority in the House of Lords. The popular will was expressed through the holding of a general election and not by holding a referendum.

Indeed, the importance of representative democracy over direct democracy might be regarded as an integral part of the constitutional orthodoxy recognized by Albert Venn Dicey but also elaborated by other writers, including Edmund Burke a century earlier.[1] Of course, the classic counter argument to resorting to referendums in a democracy is founded on the basis that elected politicians are better placed to make decisions on behalf of the people. They are elected to parliaments, assemblies, or local councils with procedures for debate, and possess the expertise and experience to make decisions on behalf of the electorate. At the same time, they are equipped to take into account the complexity and interrelatedness of controversial public policy questions. These influential nineteenth century writers concerned with the dangers of the 'tyranny of the majority' advocated 'representative government' based on what was then a limited franchise.[2] On the other hand, it was argued that ordinary voters may be prone to make ill-informed choices without adequate deliberation. For example, there is considerable evidence that many voters in the Brexit referendum delivered their preference because of other concerns, ranging from the perceived inadequacies of immigration control to the funding of the National Health Service.[3] In other words, the resort to referendums on a

[1] A. Dicey, *An Introduction to the Study of the Law of the Constitution* (Basingstoke: Macmillan, 10th ed, 1959), 82.

[2] R. Crossman, 'Introduction' to W. Bagehot, *The English Constitution* (London: Fontana, 1963), 6.

[3] See M. Goodwin and O. Heath, 'Brexit vote explained: poverty, low skills and lack of

routine or unprincipled basis will tend to marginalize the elected institutions and thereby undermine fundamental assumptions about the role of representative democracy.[4]

In the UK there is an absence of constitutional law or clear conventions governing the holding of referendums as opposed to general elections. The constitutional position changed in 1975 when PM Harold Wilson decided to call a *post facto* national referendum on the continuation of European Economic Community (EEC) membership. He did this to manage the divisions mainly within his own party. Apart from the Brexit vote in 2016, the unsuccessful referendum in 2011 on a proposal to change the electoral system from first past the post to alternative vote (discussed below), is the only other national referendum. In addition, referendums have also been used in relation to the introduction of devolved government and to approve the introduction of directly elected mayors at local government level.

## III. When Should Constitutional Referendums Be Held?

The Italian Constitution provides that national referendums must be held as part of the constitutional amendment procedure[5] and in relation to a limited range of other issues.[6] In the absence of a codified constitution or a specific law concerning the prerequisites for referendums the lack of constitutional and legal regulation arises as a serious problem in the United Kingdom.[7] Once referendums become accepted as a constitutional device the obvious difficulty is determining in what circumstances a referendum should be held and whether the result should have binding effect. Some commentators argue that an adequate system of regulation can prevent, or at least minimise, the elite control and manipulation of referendums.[8] Against a backdrop of emergent populism in the UK with UK Independence Party (UKIP), and in Italy with Five Star Movement and the Northern League, a fundamental problem is to avoid the arbitrary manipulation of a popular vote for political advantage. The task of deciding whether, in principle, a referendum should be held to test opinion on an issue of constitutional importance is extremely problematic.[9]

opportunities' available at https://www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities?gclid=CMbC4eOHitECFa0W0wodsLkEEw (last visited 20 March 2017).

[4] P. Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution', in Id, R. Rawlings and A. Young eds, *Sovereignty and the Law* (Oxford: Oxford University Press, 2013), 147.

[5] Art 138 of the Italian Constitution.

[6] See eg Arts 75, 123 and 132.

[7] P. Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution' n 4 above.

[8] S. Tierney, 'Direct Democracy in the United Kingdom: Reflections from the Scottish Independence Referendum' 4 *Public Law*, 633-651 (2015).

[9] S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*

For instance, it would be convenient to argue that the 2014 referendum in Scotland was a legitimate exercise because, first, it concerned the issue of secession which, as a matter of principle, was relatively clear cut and needed to be determined by consulting the Scottish electorate. Second, that the vote itself was preceded by mature debate over a two year period which allowed genuine reflection on the political and economic arguments. The high turnout of eighty-five per cent demonstrated the degree of public engagement. Although in the end the vote was not in favour of independence, the Government responded to the popular mood emerging from the campaigns and expressed by the closeness of the result by greatly strengthening the system of devolution in place in Scotland.[10]

The independence referendum in the short term defused a contentious issue and provided the basis for a new phase of devolution commanding popular support. By way of contrast, although the Brexit referendum concerned the apparently simple question of UK EU membership, in practice, apart from being extremely divisive, this was a deceptively opaque issue because voters exposed to the routine criticism of the EU by a hostile press were largely unaware of the role of the EU, and therefore of the wider implications of Brexit. For this reason it has been suggested that the highly technical economic and political debate should have been conducted by parliamentarians in Parliament. The parliamentary process, notwithstanding its shortcomings, is geared up to consider such questions as part of the legislative process. Ministers, Members of Parliament (MPs) and Peers sit on specialist committees and they are informed by specialist advisers. In my view this line of argument is difficult, if not impossible to sustain. It is hard to envisage any rules concerning the holding of referendums which would not allow for the calling of a Brexit referendum in order to consult the electorate. This is because UK EU membership is fundamentally about a core constitutional issue, namely, the prospect of a change to the sovereign status of the United Kingdom. Not only is this a central constitutional question, but also, the 1975 referendum mentioned earlier provides a precedent for the holding of a referendum on this very question. In comparing these two examples the Scottish Referendum and the Brexit Referendum, the credibility of the process might only be contested on the quality of the ground rules regulating the way each of the respective referendum campaigns were conducted.[11]

The only other national referendum in the UK, the Alternative Vote referendum in 2011, was conducted to honour the commitment in the coalition agreement drawn up between Conservatives and Liberal Democrats

(Oxford: Oxford University Press, 2012), chapters 4 and 5.

[10] See Scotland Act 2016.

[11] S. Tierney, 'Was the Brexit Referendum Democratic?' (25 July 2016), available at https//ukconstitutionallaw.org/2016/07/25/stephen-tierney-was-the-brexit-referendum-democratic/ (last visited 20 March 2017).

following the 2010 general election. The Liberal Democrats were committed to allowing the electorate to make a choice on reforming the electoral system. This is because the first-past-the post system put the party at a severe disadvantage. The Alternative Vote method was the agreed choice to replace the current system which was put to the electorate in the referendum. It is also worth mentioning that this referendum was clearly intended to be legally binding.[12] The statute specified that if the vote was in favour of change the Minister must issue an order to bring into force the alternative vote provisions.[13]

In the *Miller* case there had been an attempt to argue that by inference the referendum result was intended to be binding on the Government but because of the way the 2015 statute was drafted, this argument was not repeated on final appeal.[14] The majority judgment in the *Miller* case in the Supreme Court held that legislation would be required to trigger Brexit under Art 50. As mentioned below the decision was crucial as it also confirms that popular sovereignty as expressed in the result of a consultative referendum had not replaced the legal sovereignty of Parliament.[15]

Even where the constitutional implications are far reaching in their effect, the holding of a referendum is not necessarily the appropriate method for determining the matter in question. The introduction of English Votes for English Laws (EVEL) might be regarded as one such issue. The introduction of devolution in Scotland, Wales and Northern Ireland in 1999 was a radical re-allocation of power which set up democratically elected law-making bodies in Edinburgh, Cardiff and Belfast. The constitution of the UK is uncodified which meant that all these changes were all achieved by ordinary legislation followed by referendums in the home nations.[16] While not satisfying nationalist parties, devolution was a genuine response to the centralising tendencies of the Westminster Government, and it has provided considerable scope for policy divergence to suit local needs. Furthermore, devolution has been extended to meet the evolving political situation in the devolved parts of the United Kingdom. In terms of institutional reform, devolution might be regarded as a positive response to a pressing problem of over centralisation which also redefines the constitution.

At the same time, devolution was a piece meal reform package which has impacted on the functioning of many other aspects of the constitution. In

[12] By way of contrast the Referendum Act 2015 merely makes provision for the holding of a referendum on whether the United Kingdom should remain a member of the European Union. No specific requirements were set out as part of the 2015 Act in the event of a vote for Brexit.

[13] Parliamentary Voting System and Constituencies Act 2011 sections 9 and 10; Schedules 10 and 12.

[14] R (Miller) v SS for Exiting the European Union [2017] UKSC 5, para 31.

[15] S. Tierney, *Constitutional Referendums* n 9 above, 299.

[16] These referendums were a requirement of the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998.

particular, England was not offered an equivalent intermediate level of government. The block grant funding arrangements for Scotland, Wales and Northern Ireland (NI) remained the same under the Barnett formula, but perhaps most conspicuously, the legislative role of the Westminster Parliament was left unchanged. Indeed, the so-called West Lothian question meant MPs at Westminster elected in Scotland, Wales and NI could continue to vote on bills concerning England but MPs elected in England no longer had any direct input in relation to legislation falling under the devolved Scottish Parliament and the assemblies in Wales and NI.

In view of the difficulty in gaining support for a federal or regional solution, the Conservative Party going into the 2010 and 2015 elections favoured a reform based on the idea of restricting the voting rights of Westminster MPs representing Scottish, Welsh and NI constituencies. The reform was known as English Votes for English Laws (EVEL).[17] The EVEL proposal was included in the 2015 Conservative Party election manifesto, and after the Conservatives were elected to Government with an overall majority in the House of Commons, the reform was adopted by way of a procedural amendment to standing orders (which regulate legislative procedure within Parliament) for a trial period. The Government had a mandate despite considerable opposition in Parliament. This change to the voting rights of MPs raised many technical issues relating to the drafting and scrutinising of legislation, but it was also highly controversial. Just at the moment when the Scottish Nationalists had achieved virtually a clean sweep of seats in Scotland the role of Westminster as a Parliament for the entire United Kingdom was called into question. Certain categories of MPs (those from Scotland, Wales and NI) were deprived of some of their voting rights under the new procedure. Moreover, the change suited the Conservatives as they nearly always have a large majority in England. As a result, Conservative Governments will have the capacity to legislate for England without effective opposition in the House of Commons. Even if Labour form a future Government on the basis of winning a majority of seats in Scotland and Wales under these rules they will no longer have a majority to pass English legislation. This reform is significant at a constitutional level. It affects how the sovereign will of Parliament is expressed, and so, from a technical standpoint might satisfy a constitutional or legal requirement for the holding of a referendum prior to adoption. But it will also be apparent that EVEL is a highly technical procedural change. As such, the matter is unsuited for resolution in a national referendum. Rather, given the controversial nature the change, it should have been introduced by legislation.

Some commentators have suggested that the apparently increasing resort to referendums has opened up the possibility for the expression of 'people

[17] See generally 'English Votes for English Laws' House of Lords, Select Committee on the Constitution, 6th Report of Session 2016-17, 2 November 2016, HL Paper 61.

power' and that, as a result, parliamentary sovereignty in the UK has been replaced by popular sovereignty as the central principle of the British Constitution.[18] In fact, quite the reverse is the case. The *Miller* decision by the UK Supreme Court has confirmed that, notwithstanding the referendum result, it must be primary legislation approved by Parliament which triggers the formal Brexit withdrawal process. For the present at least, any such claim concerning the predominance of popular sovereignty must be viewed as both tendentious and inaccurate. To date, we have seen there have only been three national referendums. The determination of UK membership of the EU was and still is a wholly exceptional issue which has twice in the last fifty years been put before the electorate in referendums.

## IV. Constitutional Reform: Rebalancing the Constitution

Certainly as far as the general public were concerned, the new EVEL procedure almost slipped under the radar as a technical reform, but it potentially opened the way for the introduction of a new form of executive dominance. It is perhaps ironic that such an eventuality raises the sort of nightmare scenario envisaged by the academic opponents of the Senate reforms in Italy. Before turning to briefly consider the situation in Italy, it is useful to assess the constitutional importance of the House of Lords in light of very recent developments (1999-2017). In fact it is extraordinary that almost by accident the House of Lords has emerged at the beginning of the twenty first century as a genuine counter balance to the House of Commons. After the constitutional crisis of 1909-1911 (referred to above) the Parliament Acts of 1911 and 1949 restricted the House of Lords to a one year delaying power over legislation. The reform was left incomplete as there was no consensus on the precise form of an elected upper house. The Lords was therefore left composed exclusively of hereditary peers, most of whom were supporters of the Conservative Party. The new category of Life Peers, established in 1958, provided scope to widen the composition of the House and to appoint a substantial number of women as life peers. However, the overwhelming support in the Lords for the Conservative Party was ended with the House of Lords Act 1999. All but ninety-two of the hereditary peers lost their right to sit in the Lords. Since then the numbers have increased and the political allegiances have been distributed more evenly. Currently, the main political groups among the eight hundred and four members are Conservatives (two hundred and fifty-two), Labour (two hundred and two), Liberal Democrats

[18] V. Bogdanor, 'After the Referendum the People, not Parliament, are Sovereign' *Financial Times*, 10 December 2016; 'Brexit and the Transformation of British Politics' Monitor 64: October 2016, The Constitution Unit, available at https://constitution-unit.com/2016/10/24/monitor-64-brexit-and-the-transformation-of-british-politics/ (last visited 20 March 2017).

(one hundred and two) and Cross Benchers having no declared allegiance (one hundred and seventy-seven). In consequence, this situation means that no single party has anything approaching overall control. Moreover, the whips are in a much weaker position in the House of Lords since peers are in place for their lifetime, or until retirement, and are not looking over their shoulders at the electoral implications when they vote on a contentious issue.

The amendment of the Brexit Bill in March 2017 supports one of the main conclusions of the recent study by Professor Meg Russell indicating that the House of Lords is now increasingly influential on policy matters and in determining the final form of legislation. She explains that:

> '(…) the key reason is the chamber's "no overall control" character, where neither government nor opposition has a majority, and policy must be carefully negotiated with non-government peers. This change has brought a significant degree of consensus politics to the heart of Westminster (…)'.[19]

Notwithstanding the shortcomings relating to its unelected composition and consequent limited legitimacy, this evidence confirms that the House of Lords makes an active contribution to the parliamentary process. But under the so called Salisbury Convention the House of Lords does not normally block the manifesto commitments of an elected Government. The heightened profile of the House of Lords illustrates some of the benefits of having a two chamber Parliament. A lack of consensus has undermined repeated attempts at completing the reform by introducing an elected second chamber, such as an elected Senate for the Regions as proposed by the Labour Party in its 2015 election manifesto.

## V. Elective Dictatorship UK and Italy Compared?

The Italian referendum in 2017 was held as the final stage of the procedure for amending the constitution. In contrast to the United Kingdom, Italy has a rigid constitution which is relatively difficult to amend. This is because there is a special procedure which involves legislation having to go through both Houses of Parliament twice, and if it fails to receive a two thirds majority on the second occasion a referendum is required to approve the change. Achieving a majority for the Senate reform would almost certainly have been challenging, given that it amounted to a radical transformation of one of the prime elements of the original constitution. Constitutional rigidity serves an important purpose by entrenching fundamental characteristics of

[19] M. Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford: Oxford University Press, 2013), 7.

the constitution, and the Italian Constitution was designed to minimise the possibility of executive dominance.

Quite apart from its political impact, the referendum held in Italy on 4 December 2016 was an event of special interest for academics and commentators because an affirmative vote would have given the green light to a constitutional reform which would have transformed the functioning of Parliament at the heart of the political game.[20] In terms of the fashioning of its parliamentary system, the Italian Constitution of 1948 is unusual in that it created a two chamber Parliament where both houses were remarkably similar (sometimes termed perfect bicameralism), not just because they are popularly elected bodies, but also in their respective powers and functions, particularly in regard to their law-making capacity. As David Hine pointed out:

> 'The Italian Parliament, with its fragmented party system and its independently-minded members, appears to be a far more formidable obstacle to the concerted will of the political executive than in any other Western European democracy'.[21]

The proportional voting system seldom, if ever, gave a single party a majority in both houses. There have been attempts at reforming the electoral system by partly reducing the proportional element in favour of first past the post.[22] Such changes adjusted the balance somewhat by encouraging parties to fuse together but, nonetheless, the two chamber Parliament presented a formidable obstacle to any Government.

Now turning to the UK, what Lord Hailsham famously termed 'Elective Dictatorship' has been regarded by many commentators as one of the problematic characteristics of the UK parliamentary system.[23] The UK retains a system of first past the post elections which has frequently resulted in an overall majority in the House of Commons for either the Conservatives or for Labour. This outcome can be achieved with well under forty per cent of the popular vote.[24] Once elected the Government is able to force through its legislative programme by using the party whips in the House of Commons to maintain its parliamentary majority. Of course, failing to get a bill passed followed by losing a vote of confidence could precipitate an early general election. The upshot is that Governments rarely lose a second or third reading

[20] See G. Delledonne and G. Martinico, 'Yes or No?' Mapping the Italian Academic Debate on the Constitutional Reform' in this issue.

[21] D. Hine, *Governing Italy: The Politics of Bargained Pluralism* (Oxford: Oxford University Press, 1993), 166.

[22] See J. Luther, 'Learning Democracy from the History of Constitutional Reforms' in this issue.

[23] A. King, *The British Constitution* (Oxford: Oxford University Press, 2007), 83.

[24] P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Oxford: Hart Publishing, 2016), 110.

vote on a major bill in the House of Commons. The problem is that the executive is, in effect, in command of the legislature and the capacity for Parliament to critically scrutinise legislation is reduced because MPs, both at second reading stage and in committee will, rather than considering the merits of the issues before them, tend to defer to the government line dictated by the Whips.[25] While Parliament, and especially the House of Commons, has faced the accusation of being no more than a rubber stamp for government legislation, the flip side of this coin is that a Government with a majority can usually achieve its legislative objectives, and this allows any Government with a parliamentary majority to make decisive policy changes in line with its manifesto commitments. However, it should be noted that Lord Hailsham set out this view in the mid 1970s well before the House of Lords, relieved of nearly all its hereditary peers, emerged as a more consistently effective counter balance to the House of Commons.

Returning to the Italian reform, the constitutional question to assess was whether, the reformed and slimmed down indirectly elected, Italian Senate of around one hundred members, representing the Regions and local government, would have been adequate to take on its revised constitutional role. For example, this concerned questions of legitimacy, as it was going to be indirectly elected; and it concerned the extent to which the streamlining of the legislative process could be achieved while maintaining effective executive oversight. Viewed more widely, it appears that a perceived difficulty with these proposed changes to the Italian Senate was the fact that the reform was coterminous with a change to the electoral law for the Chamber of Deputies. The revised electoral system, known as *Italicum*, is a form of proportional voting, but it provides for top up majorities to assist in forming a Government in the Chamber of Deputies.

The point of engineering such a change was to overcome the previous tendency towards inertia in legislative productivity that characterised the system. Enhanced efficiency would have been achieved by facilitating the election of a majority government, but also by sacrificing some of the qualifying effects of the two chamber Parliament as originally conceived as part of the 1948 Constitution. A central part of the controversy was whether this change would have granted too much power to the Government and the executive while also supporting a tendency towards centralisation. In other words, it might have produced a kind of 'elective dictatorship' Italian style. To put the issue slightly differently, did the proposed reform adequately adjust the system of checks and balances to compensate for these far reaching changes? The answer to this kind of question is likely to be extremely complex and, of course, well beyond the scope of this article, as it would have to take account of first: the precise role of the reformed Senate as a counter balance of

[25] See Lord Hailsham, *The Dilemma of Democracy* (London: Fontana, 1978).

the Chamber of Deputies. The continuing importance of retaining a check on the first chamber is demonstrated well with the resuscitation of the House of Lords alluded to in the discussion above. Second, the application in practice of the technical rules and conventions governing the actual functioning of the reformed Senate. Third, the fact that constitutional changes of this magnitude will tend to have a knock on effect, in the sense that they will require further, often unforeseen, changes in procedure and in constitutional practice in other areas.

## VI. Conclusion

Perhaps it is stating the obvious to point out that the drafting of constitutional laws is a highly controversial business. It is no co-incidence that the adoption of new constitutions, or the introduction of major constitutional reforms, tends to coincide with momentous historical events which force contesting parties to compromise and agree to a given constitutional formula. One only has to look back to the twentieth century to observe the flurry of constitution-making that followed the end of the second world war, the dismantling of empire, the end of Soviet influence in Europe and Asia, and the collapse of the apartheid regime in South Africa. These experiences teach us that it is crucial to seek as much consensus as possible before embarking on ground breaking constitutional reform. The testing of opinion in a referendum may assist in turning over a new leaf, as has been the case in Scotland after the independence referendum in 2014, or they may serve to amplify a potentially divisive issue, as with the UK Brexit referendum or the Italian constitutional reform referendum. Equally, the reform itself needs to be sensitive to the wider political context. The problem is that we are living through turbulent times for democratic constitutionalism with the many current challenges to the fundamentals of democracy presented by increasingly extreme oppositional parties. Perhaps the question is whether it is better to rely on tried and tested institutions or to embark on a metaphorical leap in the dark with innovatory strategies for reform. If nothing else, the discussion of 'elective dictatorship' and the recent contribution of the House of Lords set against proposals for the transformation of the Italian Senate, demonstrates that any reform package will be a trade off between often conflicting characteristics rather than a step on the path to a new sort of constitutional Nirvana.

*Views from Abroad*

# Amendmentphobia

Jason Mazzone*

Constitutions are not set in stone. When a constitution does not work or does not work in a way that is desirable, it should be altered or in extreme cases abandoned and replaced with a new governing document. A constitution's amendment procedure provides the mechanism for correcting the constitution's deficiencies. Amending a constitution is serious business; amendments should not be adopted on a whim. At the same time, constitutions should not take on a timeless quality, with the amendment tools effectively read out of the document and textual change rendered near impossible. Among constitutions, amendment procedures, of course, vary. Some constitutions can be amended more easily than others. Some constitutions set explicit limits upon the changes that may be made through the amendment process. Nonetheless, like empires, no constitution is forever. Constitutions do not arrive from on high. They are made and can be remade by human hand.

Apart from the ease or difficulty of the formal amendment procedure itself, fear of amendment – amendmentphobia – can stand in the way of constitutional change. That is, even though there might be a general consensus that provisions of the constitution are not serving the people well and that altering or abolishing those defective provisions would be a useful corrective, amendments can fail because of anxiety about making a revision – any revision – to the constitution.

Amendmentphobia has long afflicted the United States (US). However serious a deficiency may be, whatever the level of support for reform, amending the US Constitution is no longer viewed as a viable option for improving the system of government. Rather, large portions of the American public and of their leaders view the US Constitution in sacred terms such that amending it is at best unwise and at worst akin to sacrilege. Amendments proposed in the US Congress thus die in committee without any further action. Indeed, even talk of amendment signals a lack of connection to reality and raises suspicions of infidelity and treachery.

While amendmentphobia shuts off legitimate uses of a constitution's

* Professor of Law, Lynn H. Murray Faculty Scholar, and Co-Director, Program in Constitutional Theory, History and Law, University of Illinois at Urbana-Champaign.

amendment procedures, it does not inevitably leave a constitution to stagnate. Instead, with formal amendments foreclosed, *courts* gain power to adopt, in the name of constitutional interpretation, reforms they themselves view desirable. Such reforms might or might not track popular opinion about needed corrections to governing arrangements.

The text of the US Constitution has been amended just twenty-seven times since it took effect among the original thirteen states in 1789. Reading the US constitution, including those twenty-seven amendments, takes about thirty minutes. Yet that exercise would give a very incomplete understanding of the US Constitution's meaning at various historical periods, how the document has changed, and what it means today. To know those things requires doing what every American law student does when studying the US constitution: reading also thousands of pages of decisions by the US Supreme Court (and lower courts as well). For instance, the US Constitution protects the following rights (among others): to marry a person of the same gender; to burn the American flag without being subject to punishment; to have a state-supplied attorney during police interrogations and at criminal trial; to send one's child to a parochial school; to move from one State to another; to view pornography; to abstain from voting; to refuse medical treatment; to purchase and use contraception; and to obtain an abortion. None of these rights are mentioned in the constitution; none of them came about because the original document was amended to expand the roster of individual liberties. Instead, each of these rights has resulted from judicial interpretation of text that has remained immune to change.

Constitutional change via judicial interpretation has an uneasy relationship to formal constitutional amendment. Popular judicial rulings can fuel amendmentphobia because if the courts can keep us all on the right track, there is no need to gear up the amendment machinery. So, too, if, as a result of the practices of judicial interpretation, a constitution comes to be viewed as the domain of the courts (rather than of the people) and the province of judicial expertise, intervention through amendment can appear additionally problematic and undesirable. On the other hand, correcting an unpopular judicial ruling is all the more difficult when, as a result of a lack of use, the amendment procedures have gone rusty and seem unavailable. As a result, courts can be ever more confident that changes they pursue through rulings on the meaning of the text will not be subject to reversal through the amendment process. Acquiescence to judge-led reforms on the part of political actors and the public thus means also paralysis with respect to judicial rulings, even those that generate criticism and opposition. Once it takes root, amendmentphobia resists displacement.

Compared to the situation in the United States, Italians have been more willing to revise their constitution. That difference might soon disappear. The

failure in Italy of the proposed 2016 reforms raises a serious prospect of amendmentphobia taking hold among Italians, thereby rendering future amendments to the Italian Constitution more difficult. That is, the practical outcome of the 2016 referendum, in which a large majority rejected the proposed reforms, is not limited to a preservation of the pathologies of the existing Italian political system. Instead, the 2016 experience may well make other amendments – however sensible, however desirable – harder to achieve in the future. As a result, future constitutional change in Italy, may, as in the United States, come to depend upon courts (or perhaps other governmental actors) exercising power to interpret and apply the Italian Constitution in ways that achieve reform without any textual modifications to the constitution itself.

Two particular features of the 2016 reforms make amendmentphobia likely in Italy. The first is the very nature of the referendum itself. The process unwisely combined the big and the small. On the one hand, the proposed reforms involved sweeping substantive changes to the Italian Constitution: to alter fully one-third of the existing constitution by amending forty-five articles and repealing a further two out of the one hundred thirty-four articles in force (and one hundred thirty-nine of the original text). On the other hand, voters were presented with a compact yes/no question that read (my translation) as follows:

> 'Do you approve the text of the constitutional law concerning 'Provisions for exceeding the equal bicameralism, reducing the number of parliamentarians, the containment of operating costs of the institutions, the suppression of the *Consiglio Nazionale dell'Economia e del Lavoro* (CNEL) and the revision of title V of part II of the Constitution' approved by Parliament and published in the *Gazzetta Ufficiale* no 88 of 15 April 2016?'

The problem is that the above text does not reflect anywhere near the actual reforms on the table. Indeed, by itself, the provided text verges on meaningless. The ordinary voter (busy with work, family, and other matters of daily life) who had not paid attention to campaign materials or media reports and who had not consulted the *Gazzetta Ufficiale* would have little idea what the actual referendum question was. Even voters who had followed closely the preceding informational campaigns and debates and who had taken steps to inform themselves of the proposed reforms could easily arrive at the poll confused about the full significance of a yes vote. It would be the rare voter indeed who could have reliably explained what the revised constitution would look like should the yes votes prevail.

A vaguely-worded referendum question that conceals the full scope of proposed change and assumes access to a governmental gazette to find out

what is afoot does not generate trust on the part of voters or their confidence in the officials who seek approval of a proposed constitutional amendment. Going forward, suspicion towards uses of the amendment tools is likely to linger and to arise with respect even to referenda on a small scale (for example, involving individual components of the 2016 package) or in which the ballot question better reflects the precise reform. As a result of the 2016 experience, Italian voters are now primed to wonder whether the question they are asked in any future referendum truly captures the actual scope of the proposal or whether there is some built-in assumption that they have acquired from some other source the necessary information to understand what they are being asked to decide. Under such circumstances, whatever the merits of the proposed change, the natural inclination is simply to vote no.

The second disconcerting feature of the 2016 referendum was Prime Minister Matteo Renzi's announcement that he would resign should the voters reject the proposed reforms. Elections are the opportunity for voters to choose, retain, or replace their political leaders. The amendment process is quite different. Because it results in a change to the Constitution that will apply regardless of who is in power at any particular moment, the amendment process should not be tied to the interests or fate of any political leader or party. Thus, once Renzi made the reforms a *de facto* confidence vote in him and in his Government, voters could no longer be expected to view the referendum purely as an effort to improve the foundational arrangements of the system. Instead, with Renzi's posture, a yes vote represented some degree of approval of Renzi himself.

Muddying constitutional reform with ordinary politics does not bode well for the amendment process going forward. In the future, voters are again likely to view proposed amendments through thick political lenses. Whether or not leaders threaten to resign if the result is not to their liking, amendments will raise suspicions of political opportunism. The reformist who promotes an amendment in a genuine effort to better the polity inevitably bears the mark of political hack and will be suspected of deploying the tools of constitutional reform for partisan gain. Voters can be expected to resist such efforts. Amendmentphobia is the natural result.

Context also matters. In Italy, as in the United States, large numbers of citizens hold their respective national constitutions in high regard. In such contexts, misuses of the amendment tools are readily noticed and condemned. For Italians who revere their constitution, the missteps of 2016 are not easily forgiven or forgotten.

If fear of amendment blocks future changes to the text of the Constitution itself, the question in Italy becomes: how else will reform occur? In the United States, courts have pioneered constitutional reform. That approach, however, has come at significant cost: increasingly, We the People are replaced by We

the Judges. Perhaps Italians can resist a similar displacement of popular authority. Doing so requires an accounting of and a grappling with the full effects of the failure of 2016.

*Views from Abroad*

# The Un-constituent Power of the People. Article 138 of the Italian Constitution and Popular Referendum

Pasquale Pasquino*

I. On 4 December 2016, Italian voters rejected by referendum a constitutional revision enacted by the Parliament to reform the exceptional bicameral structure of the country[1] and the partition of legislative competences between the Regions and the central Government.[2] The rejection happened in accordance with a constitutional provision that allows an undefined number of Italian voters to veto a constitutional reform that the Parliament has approved by absolute majority.[3]

* Global Distinguished Professor of Politics, NYU; Senior Research Fellow, Centre National de la Recherche Scientifique – Centre de Théorie et Analyse du Droit, Paris.

[1] The Italian constitutional system is characterized by a quite unusual bicameral structure for a parliamentary regime. To govern, the cabinet needs a vote of confidence in both the House of Representatives and the Senate, each of which can independently pass a vote of no-confidence in the executive. The members of both chambers of the Parliament are directly elected by the voters, but the age for exercising the voting right is eighteen years for the House and twenty-five for the Senate, with the possible consequence of different majorities in the two chambers, which makes, among other reasons, the duration of Italian executives fragile.

[2] This partition was the result of a previous constitutional reform approved in 2001 assigning to Regions a significant but vague set of legislative competences. The consequence has been a large caseload in the Constitutional Court, which has been trying since then to specify what is the legislative competence of the central Government and what is that of the Regions. The constitutional reform was an attempt to clarify the partition.

[3] Art 138 of the Italian Constitution, concerning constitutional amendments, runs as follows: 'Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members'. Similar provisions in other liberal-democratic constitutions include either *super-majoritarian* parliamentary approval or a quorum for the turnout of a popular referendum. In the Spanish constitution of 1978, the popular referendum may be called only after a super-majoritarian decision of the Parliament: Section 167 '(1) Bills on constitutional amendments must be approved by a majority of three fifths of members of each House. If there is no agreement between the

The reform was vetoed by fifty-eight point forty-two per cent of the voters representing thirty-eight per cent of the electorate, and therefore by a minority of citizens, though it should be noted that the overall turnout – sixty-five point forty-seven per cent – was, incidentally, quite high considering the technical nature of the object of the referendum.[4]

In the following remarks, I will focus on three questions: 1. The odd character of the provision for constitutional revisions in the Italian constitution, which is a *rigid* one; 2. The doctrine of the constituent and amending power (or derivative constituent power); 3. The short – and medium – term consequences of the rejection of the reform for the Italian political system.

II. The Founding Fathers of the Italian Republican Constitution after the experience of the Monarchical Constitution[5] opted for a rigid Constitution, which means, in the tradition of French and American constitutionalism – theorized by James Bryce[6] and Hans Kelsen[7] – special rules for amending the Constitution. *De facto*, this special quality is the impossibility for the elected representative majority to modify alone, without the agreement of a

Houses, an effort to reach it shall be made by setting up a Joint Committee of an equal number of Members of Congress and Senators which shall submit a text to be voted on by the Congress and the Senate. (2) If approval is not obtained by means of the procedure outlined in the foregoing subsection, and provided that the text has been passed by the overall majority of the members of the Senate, the Congress may pass the amendment by a two thirds vote in favor. (3) Once the amendment has been passed by the Cortes Generales, it shall be submitted to ratification by referendum, if so requested by one tenth of the members of either House within fifteen days after its passage'. Art 16 of section 8 of the Swedish Instrument of government says: 'Art 16. A referendum shall be held on a proposal concerning fundamental law which is held in abeyance over an election, on a motion to this effect by at least one tenth of the members, provided at least one third of the members vote in favor of the motion. Such a motion must be put forward within fifteen days from the date on which the *Riksdag* adopted the proposal to be held in abeyance. The motion shall not be referred for preparation in committee. The referendum shall be held simultaneously with the election referred to in Art 14. In the referendum, all those entitled to vote in the election are entitled to state whether or not they accept the proposal on fundamental law which is being held in abeyance. The proposal is rejected if a majority of those taking part in the referendum vote against it, and if the number of those voting against exceeds half the number of those who registered a valid vote in the election. In other cases, the proposal goes forward to the *Riksdag* for final consideration'.

[4] In the two previous constitutional referendums, the results were the following: 2001, turnout thirty-four point ten per cent (yes sixty-four point twenty per cent), 2006, turnout fifty-two point forty-six per cent (no sixty-one point twenty-nine per cent).

[5] The *Statuto Albertino* that was supposed to govern the country after unification in 1861 through the Fascist period and World War II. On the nature of the Statuto, see: F. Ferrari, 'Original intent e rigidità dello Statuto Albertino' *Quaderni Costituzionali*, 3, 36, 609-638 (2016).

[6] J. Bryce, 'Flexible and Rigid Constitution', in J. Bryce ed, *Studies in History and Jurisprudence* (Oxford: Clarendon Press, 1901), 124-213.

[7] 'Since the constitution is the basis of the national legal order, it sometimes appears desirable to give it a more stable character than ordinary laws. Hence, a change in the constitution is made more difficult than the enactment or amendment of ordinary laws. Such a constitution is called a rigid, stationary, or inelastic constitution', H. Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1949), 259.

significant section of the parliamentary opposition, the constitutional norms. In light of this choice, it is not easily understandable why Art 138 of the new Republican Constitution allows this same majority to revise the Constitution under the simple control of whatever minimal number of citizens participate in a popular referendum with the power of approving or rejecting the reform. The absence of a quorum for the validity of the referendum is quite astonishing given Art 75 of the same Constitution, which allows popular referendums to cancel ordinary statute laws, but requires a turnout quorum of fifty per cent plus one of the citizens having the right to vote for such a legislative referendum to be valid.[8]

It is difficult to make sense of this absence of a quorum, and I do not know any satisfactory explanation for it. Even in the debates of the Constituent Assembly (1946-1947), which were long and thorough, the question of the turnout quorum for constitutional referendums was not discussed, and one could even imagine that it was inadvertent that the article concerning revision of the Constitution did not mention a quorum for the validity of a constitutional referendum.

There was, indeed, a quite interesting debate in the committee preparing this section of the Constitution and on the floor of the Assembly when the question of constitutional revision came up.[9] Two points were the subject of discussion: the extent of rigidity of the Constitution, and the role of the 'people' in the process of constitutional amendment. The perspective that the Constitution could be amended by a simple absolute majority motivated Tomaso Perassi, a public and international law professor and a prominent member of the constitutional committee of the Constituent Assembly, to assert during the debate that rather than a rigid Constitution, one should qualify the Italian Constitution as *quasi-rigid*, because of the potential ability given to the elected majority to modify it. Some other members of the Constituent Assembly presented the argument that a rigid Constitution should avoid being too rigid. The solution to this conundrum was found, so to speak, by shifting the grounds of the debate and recurring to the mythology of the 'constituent power of the people' — reduced to a possibly very low number of voters approving or rejecting the revision voted by the majority of the elected representatives. I shall come back soon to the question of the constituent

[8] Art 75: 'A general referendum may be held to repeal, in whole or in part, a law or a measure having the force of law, when so requested by five hundred thousand voters or five Regional Councils. No referendum may be held on a law regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty. Any citizen entitled to vote for the chamber of deputies has the right to vote in a referendum. The referendum shall be considered to have been carried *if the majority of those eligible has voted and a majority of valid votes has been achieved*' (italics mine).

[9] All the elements of the debate are available at http://www.nascitacostituzione.it/03p2/06t6/s2/138/index.htm?art138-009.htm&2 (last visited 20 March 2017).

power, but here I want to suggest, as a simple speculation, a tentative hypothesis to explain the absence of a quorum for the popular referendum.

The Italian Republican Constitution was the upshot of a compromise between the two major political actors present in the Constituent assembly: the Social-Communists and the Christian Democrats. Each could anticipate that one of the two groups would get an absolute majority in the next legislative assembly and so tried to modify the constitutional compromise. By excluding the qualified majority as the sole mechanism to modify the constitutional equilibrium, in order to avoid change of the Constitution by the winning majority, each thought that they both controlled enough voters to be able to veto a reform. Introducing a quorum would have had the consequence that, if the quorum were not reached, the reform would have been adopted only on the basis of a vote of absolute majority in Parliament, without the agreement of the opposition.[10]

I do not have evidence for defending this interpretative hypothesis. Better explanations are welcome. Be that as it may, I will turn now to discuss the problem of the role of the so-called constituent power of the people in constitutional reform.

III. In their seminal work, Emmanuel Sieyès and later Carl Schmitt, connected the doctrine of the *constituent power of the people* with the

[10] On different mechanisms of constitutional amendments in a comparative perspective, see G. De Vergottini, 'Referendum e revisione costituzionale: una analisi comparativa' *Giurisprudenza costituzionale*, II, 1339-1400 (1994), who writes that '*Dal punto di vista dottrinale il ricorso alla legittimazione popolare* (of a constitutional amendment) *può imputarsi a una concezione plebiscitaria del potere*' ('According to scholars, the search for popular legitimacy (of a constitutional amendment) is attributable to a plebiscitarian vision of the power') (1395). It is worth mentioning the case of the French constitutional referendum *ex* Art 89 of the French Constitution: 'The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution. A Government or a Private Member's Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of Art 42 and be passed by the two Houses in identical terms. The amendment shall *take effect after approval by referendum* (Italics added). However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly'. Consider, first, that in general the *Sénat* has a majority different from the one controlling the *Assemblée Nationale*, so that agreement between the two houses is the equivalent of a qualified majority. Second, that so far, all the constitutional revisions passed during the Fifth Republic did follow the super-majoritarian parliamentary procedure of para 3: the three-fifths majority of the *Congrès* (the meeting of the two Chambers), with a single exception, the reduction of the mandate of the President of the Republic from seven years to five years, was approved through a popular referendum by seventy-three point two per cent of voters, although turnout was just thirty point two per cent (!). Guy Carcassonne in his commentary on the French Constitution writes: '*L'article 89 est muet sur l'organisation de ce referendum*' ('Article 89 says nothing on the organization of this referendum'). See G. Carcassonne, *La Constitution* (Paris: Seuil, 2004), 377.

modern idea that the Constitution is an artifact, and not just a given self-establishing status of the public law.

Without entering into details, I wish to draw attention to the fact that from a legal point of view, the constituent power of the people is in reality a constituted power.[11] The people are, indeed, the citizens-voters, who either authorize through their vote a text written by a few people or, alternatively, choose *ex ante* the representatives who will be the authors of that normative text, the constitutional norms, or both. If this distinction between authorship and authorization is clear, since it is never the 'people' that write the Constitution,[12] it should also be clear that the selection of the individuals chosen to ratify the Constitution is a constituted power. The 'people' are, indeed, legally speaking, just a list of names that is produced by some organ that is not the 'people', but some preexisting (provisional) authority. The 'people' means not less and not more than the set of individuals on that list (the electoral body), who act and vote following, moreover, rules that they, the 'people', did not create. So, the 'people' are a result of the positive, heteronomous established law. Not its author.

When the Constitution represents a radical break with a previous legal order, a change in the foundation of legitimacy of the political authority (as from the monarchy to a republic) or a change in the form of the state (unitary vs federal) or of government (presidentialism vs parliamentarism), it requires popular authorization. Particularly in a democratic regime the popular authorization represents a useful mechanism that binds legally both the citizens and the political actors, who follow the rules they (the authors) produced and that had been approved and authorized by the voters, meaning by the people. From a sociological perspective, authorization is needed to foster the authority and, hopefully, the stability of the new constitutional order, but from a legal vantage point, the people are always a constituted organ: a list of names (the citizens-voters) and a set of rules (voting or other legal authorizing rules, to begin with) to produce a collective will that cannot exist without rules written by someone who legally and materially preexists the 'people'. So, the constituent power of the people is no more but also no less than a principle of legitimacy, authorizing and limiting the exercise of public authority.[13]

[11] H. Kelsen wrote 'the people – from whom the constitution claims its origin – comes to legal existence first through the constitution. (…) It is further obvious that those individuals who actually created the constitution represented only a minute part of the whole people'. See H. Kelsen, n 7 above, 261.

[12] I present this argument in P. Pasquino, 'Constituent Power and Authorization', in V. Ingimundarson, P. Urfalino and I. Erlingsdóttir eds, *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction* (Oxford: Routledge, 2016), 230-239.

[13] Very important on this question is E.W. Böckenförde, 'Die verfassungsgebende Gewalt des Volkes: ein Grenzbegriff des Verfassungsrechts', in H. Dreier and D. Willoweit eds, *Würzburger Vorträge zur Rechtsphilosophie, Rechtstheorie und Rechtssoziologie* (Frankfurt: Metzner, 1986), 4.

In the case of the so-called derivative constituent power (the amending power or power of revision), the popular intervention, notably in a case of rationalization of a parliamentary system, does not make much sense and is excluded, for instance in Germany concerning constitutional reforms in general.[14] The amendment of any rigid Constitution ought to follow the principle of the inclusion of the opposition into the transformative process, since the fundamental law cannot be the law of the majority – representative or popular – and even less the possible decision of a tiny popular minority, as is the case in Italy because of the absence of a quorum for a popular constitutional referendum. Constitutional amendments like those concerning the rationalization of parliamentarism, the structure and competences of a bicameral system, and respective legislative competences of the central Government and the Regions are complex questions, and the voters are mostly unable to understand them and even more so to foresee the consequences of their choice. A large body of comparative analysis exists now in political science showing that in such referendums, voters express in reality more often a judgement on the political authority at the origin of the referendum than a clear opinion on the substance of the question they are asked to answer, and, in addition, with a crude *yes* or *no*.[15]

The reason to include popular participation in the process of constitutional amendments (which more and more are produced mostly through constitutional interpretation, largely monopolized by Constitutional Courts) seems a bow to the myth of popular sovereignty and the demise of the principle of reasonableness in a constitutional *Rechtstaat*.

IV. It is unlikely that the thirty-eight per cent of Italian citizens who voted against the constitutional reform realized the consequences of their vote for the political and constitutional system of the country. First of all, viewed from abroad the vote has been perceived as further evidence of the fact that Italy seems unable to reform its institutions, and as a failure of its ability to join the family of the older European constitutional democracies. Protest, which seems to have been the main motivation for the rejection, is neither the expression of a will to reform, nor a conscious defense of the constitutional

[14] 'Any such law (amending the Constitution) shall be carried by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat*', Art 79 para 2 (Amendment of the Basic Law) of the German Constitution.

[15] On the nature and limits of referendums, E. Kaufmann, *Zur Problematik des Volkswillens* (Berlin: Walter de Gruyter GmbH, 1931) is still very important. Guy Carcassonne commenting on Art 11 of the French Constitution of the Fifth Republic says: '*Toute l'ambiguïté du référendum français est là: le monopole donné en fait au chef de l'Etat conduit fatalement à que les électeurs répondent non seulement à la question, mais aussi, dans une proportion variable, à son auteur*' ('The ambiguity of the French referendum is entirely there: the Head of State's de facto monopoly inevitably results in the fact that voters do not answer only to the question, but also, in variable proportions, to its author') G. Carcassonne, n 10 above, 97.

*status quo* – which, incidentally, has been the subject of general criticism for years. In fact, the *status quo ante* has been modified, bringing the country back to the 1980s when the Italian electoral system was based on proportional representation. The bicameral system with identical functions will survive as a consequence of the referendum. The Senate, because of a decision of the Italian Constitutional Court,[16] has to be elected according proportional representation. The rejected constitutional reform sought to abolish the Senate power to vote confidence in the executive, and the Renzi Government passed in 2015 a majoritarian law for the election of the House of Representatives. More recently, the Constitutional Court also cancelled an important section of this law.[17] The Parliament seems unable, according to general opinion, to write a new electoral law for the two Houses. It is likely that, after the next election, which should take place at the beginning of 2018 (if the Government survives until the natural end of the legislature), there will be no governmental majority in the Parliament because of the proportional electoral system – a situation similar to the one in Spain in the recent past. But Italy has a much higher public debt and an economy growing much more slowly than the Spanish one.

For now, the season of needed constitutional reforms, which started in Italy thirty years ago, seems over again. The country appears to be trapped in a quite dysfunctional system. Still, the need for change remains and will not disappear.

[16] Corte costituzionale 13 January 2014 no 1 (English version) available at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf (last visited 20 March 2017).

[17] There is not yet an English translation of this decision (Corte costituzionale 9 February 2017 no 35). The Italian text is available at http://www.cortecostituzionale.it.

*Views from Abroad*

# Constitutional Reform and Constitutional Unity

## Reflections on the Constitutional Referendum of 4 December 2016 and on the Judgment of the Constitutional Court no 35/2017

Dian Schefold*

## I. The Need for Constitutional Reforms

It is obvious and well-known that the Italian Constitution of 1947 contains several problems, much discussed in the academic and political debate of the last decades, which have not yet been resolved. Solutions such as the perfect bicameralism with a Senate whose roles under the Constitution, to maintain a position in the system of checks and balances, its traditional representation of élites and its representation the Regions, are functions that can and may be reconsidered. The principle which follows from that situation, under which the Government is responsible to both chambers of the Parliament is obviously a handicap, underlined by political fragmentation, the political party system and in consequence, instability of Governments. The decentralized system, based on Regions, Provinces and Municipalities, as modified in 2001, has raised new and in the current financial and economic environment, compelling difficulties. European unification, essential for the current constitutional process, is not included in any regulation in the text of the Italian Constitution; the list goes on, although with less important issues. No wonder that a seventy year-old constitution must address new challenges.

Most of these problems have been addressed in political, constitutional and administrative process and in several cases this has led to pragmatic solutions. To provide some examples, one might refer to the following: Constitutional articles regarding international law, the place of Italy in the international order, defense and limitations of sovereignty (based on Arts 10 and 11 and since 2001, on Art 117, para 1, of the Constitution) have been used in constitutional case law and legislative and administrative procedure as the legal basis for participation in international agreements or treaties. This seems satisfactory because of their flexibility and convenience regarding issues of European unification, the North Atlantic partnership and international protection of rights, in contrast to the more detailed constitutional provisions

* Emeritus Professor of Public Law, University of Bremen (Germany).

that were introduced in other countries. Furthermore, the international protection of rights provisions were integrated into the Italian system, thanks to constitutional case law. The revised Title V of Part II of the Constitution has been interpreted by the Constitutional Court in a way that the obvious weakness arising from the reformed constitutional provisions might be overcome. The National Council of Economy and Labor has lost all its significance. Notwithstanding these concrete improvements, substantial difficulties remain unsolved. The main issues are those relating to the stability of government, even though it seems possible to deal with them in a meaningful way.

In the light of the above, the foreign observer is surprised when reading that for over thirty years an enormous effort has been employed to address the issue of institutional reforms, besides the reform of specific articles of the Constitution that have been passed in the same period. What is impressive is the amount of literature concerning the reform bills.[1] These very controversial debates, even if the field of fundamental rights with its attendant political and economic controversies has been excluded, have led to voluminous proposals that often were not even voted upon; in other cases, laws amending the Constitution were passed. But in the context of heated political controversies, these laws, even when passed in simplified ways,[2] were contested and adopted by the Chambers with only an absolute majority that did not reach the threshold of two-thirds of the members of Parliament though, according to Art 138 of the Constitution, a referendum may be requested to allow the people to have the final word on the reform. A referendum of this kind led to the adoption, in 2001, of the above-mentioned reform of Title V of Part II of the Constitution, one that created several difficulties that were later overcome in practice. A second and more incisive constitutional reform was rejected in the popular referendum of 2006 and a further proposal for reform was rejected with the popular referendum of 4 December 2016. This account shows the difficulties of these institutional reforms and raises the question as to whether or not the means of adopting them in controversial ways is a reasonable path.[3]

[1] See, among many others, the great debates that recently were launched, eg in *Quaderni Costituzionali*, 219-353 (2016) and in *Lo Stato*, 261-328 (2016). The contributions to these debates will be quoted and taken into account in the current review. This special issue is, of course, another example of the outcome of the debate. However, this paper cannot consider the whole Italian debate; therefore, it is limited to some issues and contributions that seem to be of greatest importance.

[2] For critiques of such solutions, see A.A. Cervati, S. Panunzio and P. Ridola, *Studi sulla riforma costituzionale: itinerari e temi per l'innovazione costituzionale in Italia* (Torino: Giappichelli, 2001).

[3] In this matter, see the doubts expressed by U. De Siervo, 'Possibili conseguenze della larga prevalenza dei no nel referendum costituzionale del 2016' *Lo Stato*, 303-318, 309 (2016) and V. Onida, 'Dopo il referendum: spunti di riflessione' *Lo Stato*, 325-330, 327 (2016).

## II. Rigidity of the Constitution and Constitutional Referendum

This question is closely linked to the problem of rigidity of the Constitution.[4] Rigidity is, primarily, a matter of its content, namely the values incorporated in the basic law. These were extensively debated in the Constitutional Assembly of 1946-47 under the influence of the memory and overthrow of Fascism and they were the result of decisions supported by the so-called '*constitutional arch*' ('*arco costituzionale*') that supported the adoption of the Constitution by a large majority. Consequently, the Constitution requires full recognition of its validity.[5] In this regard, the main and entire content embodied in the form of State cannot be subject to any revision (Art 139). Otherwise, while having regard to basic democratic principles, it provides for constitutional guarantees (Title VI of Part II of the Constitution) namely protection by the Constitutional Court (Arts 134-137) and in addition, the provision of a specific decision-making process for the reform of the Constitution (Art 138). Therefore, these constitutional guarantees are a compromise between stability and protection of values on the one hand and democratic innovation and new reflection on those values while maintaining the stability of the Constitution, on the other.

In consequence, simplified reforms of the Constitution are and must be prevented. This is the formal side of constitutional rigidity; Art 138 of the Italian Constitution provides for a complex process to follow and generally a decision by a two-thirds majority of the members in both chambers. A solution of this kind is not extraordinary; for example, the provision in the German Basic Law (Art 79) is similar and there are Constitutions with an even greater rigidity, such as the US one.

Nevertheless, Art 138 of the Italian Constitution provides for an exception. If the reform of the Constitution is adopted by less than two-thirds of the members of each Chamber but at least by the absolute majority in both chambers, a popular referendum may be requested by one-fifth of the members of a Chamber, five hundred thousand citizens or five Regional Councils. In these cases, a majority of votes in the referendum decides if the proposed reform is adopted.

Obviously, the popular referendum is an additional obstacle and this is the purpose of its provision. As a matter of fact, Constitutions that may be

[4] On this issue, see the comprehensive research by A. Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi* (Padova: Cedam, 1997); I have tried to link this subject with the German experience in *Scritti in onore di Alessandro Pace* (Napoli: Editoriale Scientifica, 2012), I, 329.

[5] An essential contribution, in this regard, is that by C. Mortati, 'Costituzione' *Enciclopedia del diritto* (Milano: Giuffrè, 1962), XI, 140, (separate edition under the title: *Dottrine generali e Costituzione della Repubblica Italiana* (Milano: Giuffrè, 1986). Similarly, see Corte costituzionale 29 December 1988 no 1146, *Foro italiano*, I, 609 (1989).

amended with only a mandatory popular referendum are normally[6] much less-often reformed than Constitutions that give the power to reform to Parliament. A comparison between the Constitutions of the German *Länder* (and the Federal Republic as such) that enables a reform by (special) parliamentary acts and the ones that require in every case a popular referendum can verify the assumption. In Bavaria and Hesse, where reforms of the Constitution, enacted in 1946, require a popular referendum, the Constitution was amended, respectively, only sixteen and nine times, while in the other *Länder* and at the federal level, reforms are much more frequent.[7] In Bremen, where between 1947 and 1994, the Constitution required a mandatory referendum if the Parliament did not decide unanimously, there were six reforms of the Constitution, all enacted by the Parliament in unanimous decisions. In 1994, the Constitution was amended with a popular referendum which allowed reforms with a two-thirds majority of Parliament. Since then, Parliament has amended the Constitution more than twenty times.[8] Apart from the 1994 referendum, no other constitutional referendum has taken place since 1947. Avoiding popular referenda seems to be a priority argument and prevents any reform.

Nevertheless, this rule allows exceptions; the Swiss example shows that the people can be accustomed to referenda. Italian constitutional history of the last twenty years may show a similar trend. But there is a crucial difference; while, in Switzerland, the popular referendum is part of a consensual democracy with frequent popular participation, the Italian constitutional referenda were used, in past decades, as a function of a bipolar system in a parliamentary democracy.[9] The Constitution served no longer as a common instrument of the political forces but as an instrument of a (parliamentary) majority which, without consensus, sought to determine the Constitution as well. While this was achieved in 2001, the two following referenda seem to prove the need for a more cautious attitude and reflection on the reform to be adopted.

[6] There are exceptions, especially in Switzerland, where popular referenda concerning reforms of the Constitution are mandatory, notwithstanding constitutional reforms are frequent. Switzerland has, however, a political tradition and culture of direct democracy and its peculiarities cannot be generalized.

[7] See, for details, the introduction of C. Pestalozza, *Verfassungen der deutschen Bundesländer* (Munich: Beck C.H., 10th ed, 2014), VI-VIII and nos 33, 39, 42. The difference is even more evident, because many revisions in Bavaria and Hesse were approved on the same day.

[8] Dian Schefold, 'Hundertfünfzig Jahre Bremische Verfassung', in Id, *Bewahrung der Demokratie* (Berlin: BWV - Berliner Wissenschafts-Verlag, 2012), 406 (418); see C. Pestalozza, n 7 above, VII.

[9] This seems to be the standpoint of B. Caravita, 'Italien nach der gescheiterten Verfassungsreform' *federalismi.it*, 8 February 2017, who compares and contrasts constitutional reforms based on compromises and plebiscitarian reforms.

## III. The Reform of the Senate

Analyzed from this point of view, the reform rejected by the constitutional referendum of 4 December 2016 was not convincing.[10] With regard to the crucial point of the reform, the new Senate, the main features were the abolition of perfect bicameralism and responsibility of Government to the Senate, combined with an indirect election of members of the Second Chamber, would have mitigated some of the above-mentioned difficulties of the system, yet ambiguity still existed in relation to the position of the Senate, since no clear definition was provided. Therefore, the Senate might still be regarded as a body representing the élites and territorial autonomies but also as a counter-majoritarian chamber. The indirect election reduced the role of the democratic principle, so that the issue of the form of the (democratic) State could be raised but there was not, in return, despite some arguments, a real legitimation by federated entities, as it is the case for the German *Bundesrat*;[11] after all, the independent mandate of senators was maintained. On the contrary, the project tended, against the reform of 2001,[12] to limit the powers of the Regions, to abolish Provinces, while preserving the State's authorities on local level (*prefetture*) without a local democratic influence and to stop any trend towards federal solutions. Therefore, the complex and bulky project did not produce a clear and consequent concept but it raised many objections, in general and against single proposals; clearly, not good indicators of a democratic consensus.

## IV. The Electoral Law

The difficulties associated with the operation of the democratic principle were sharpened by the fact that, with the abolition of the direct election of the Senate, only the Chamber of Deputies, being directly elected by the people, was endowed with the power to control the Government and was the only Chamber to which the Government was responsible. Furthermore, the electoral system designed for this Chamber was extremely controversial. The Constitutional Court's judgment no 1 of 2014, declaring the electoral law that was then in force (the so-called '*Porcellum*') partially unconstitutional, limited the possibilities to award the most-voted coalition bonus-seats, which was aimed at strengthening parliamentary majority. The legge 6 May 2015, no 52 (the so-called '*Italicum*') established new electoral provisions that shared the

[10] See the debate among Italian constitutional lawyers and the critical comments by U. De Siervo, n 3 above, 303

[11] See the debate in the Parliamentary Commission on Constitutional Affairs of the Chamber of Deputies with my contribution on 22 October 2014.

[12] In this regard, see A. D'Atena, *Tra autonomia e neocentralismo* (Torino: Giappichelli, 2016).

same purpose of ensuring a clear majority. As in previous legislation, bonus-seats that permitted reaching a majority of fifty-five percent of the seats were granted to the most-voted party list but unlike what happened with the law that was declared unconstitutional, only if the list reached at least forty percent of the votes. If no list reached this threshold, the legge no 52 of 2015 introduced a second turn of the elections between the two most-voted party lists. The winner of this run-off ('*ballottaggio*') would obtain fifty-five percent of seats. Consequently, even a list with less than forty percent of votes and therefore one with a relatively low number of votes, could achieve an absolute majority in the Chamber. Furthermore, the law was questioned with regard to its possible inconsistency with the need to express a preferential vote, since the heads of the lists were granted a preferred position irrespective of any preferential votes.

Taking into account these shortcomings of the electoral system for the only Chamber that was directly elected, it was quite understandable to express doubts about a reform that abolished the direct election of the Senate.[13] Italy recalled a second turn in the elections for a long period in the nineteenth century but that system was linked to electoral constituencies with only one seat to elect, which resulted in the possibility of selecting candidates at local level so as to enhance consensus by local voters. Transferring this heritage to a proportional system with a second turn between lists at the national level recalled certain Fascist attempts to influence the outcome of the electoral process, which had been experimented, particularly with the so called '*legge Acerbo*'.[14]

Besides the political controversy, the legal issue was related to the constitutionality of a law that, just like the previous legislation that was struck down by the Constitutional Court, granted a majority of seats to a list with clearly less than the absolute majority of votes. The system resulted in a clear reduction of the equal weight for each vote (Art 48 of the Constitution), since the voter choosing the list awarded with bonus seats had a greater influence on the composition of the Parliament than did the other voters. The German Constitutional Court, also quoted by the Italian Court in Judgement no 1 of 2014,[15] qualifies the issue as the need for equal success (*Erfolgswert*) of the

[13] This is admitted as well by B. Caravita, 'Considerazioni sulle recenti vicende sociali e istituzionali del Paese e il futuro della democrazia italiana' *Lo Stato*, 291-301, 293 (2016).

[14] On the '*legge Acerbo*', see C. Ghisalberti, *Storia costituzionale d'Italia 1848/1948* (Bari: Laterza, 1987), 346.

[15] See, Corte costituzionale 13 January 2014, no 1, § 3.1., *Foro italiano*, I, 666 (2014), quoting BVerfGE 1,208; 51,222; 131,316, without taking account of the fact that the five percent threshold accepted for the election to the European Parliament in BVerfGE 51,222, was declared unconstitutional by BVerfGE 129,300, of 9 November 2011; in a later judgement of 26 February 2014 (nearly simultaneous with the Italian Judgment no 1 of 2014, BVerfGE 135,259), the German Court declared unconstitutional even a three percent threshold. Therefore, one might say that the German Court has become rather rigid with reference to this issue.

vote. Although admitting certain limitations of that success to ensure governability, such as the five percent threshold to be reached in order to take part in the distribution of seats, the German Court would reject any larger gap in votes' weight, so that provisions establishing bonus-seats, as did the Italian legge no 52 of 2015, would hardly be acceptable in the German system.[16] The Italian Constitutional Court accepted, in theory, bonus-seats but in Judgment no 1 of 2014 required a proper percentage of votes.

In the light of its previous case law, in its recent Judgment no 35 of 2017, the Constitutional Court addressed the issue questioning the reasonableness and the proportionality of the solution that was designed. Besides other criticism, the Court declared (§ 9.2. of the Judgment) that the second turn between the two most voted lists was, in terms of electoral results, a continuation of the first turn and thus did not provide sufficient legitimacy to the winning list. Therefore, apportioning fifty-five percent of seats to a list with less than forty percent of votes would be neither reasonable nor proportional. On these grounds, the Court declared the system unconstitutional. Therefore, bonus-seats could be obtained only if a list reached more than forty percent of votes. In consequence, it became very probable that the seats in the Chamber of Deputies were apportioned in proportion to votes. Obviously, this Judgment did nothing but confirm the failure of the whole attempt to reform the Constitution and in general, the framework of the institutional design. The problem of governability remains but the way to solve it by artificial measures now appears to be less easy to undertake.

## V. Referendum and Personal Plebiscite

The outcome of the constitutional referendum of 4 December 2016 may, and I think should, be interpreted as an expression of distrust and refusal of the call for acclamation by the President of the Italian Government. One may appreciate his research on consensus but in a political context in which, in fact, this consensus meant the approval of a political trend and at the same time, opposition to any others, namely those with good arguments among several minorities, the personalization of the constitutional referendum was

[16] The issue has never been decided in Germany; for the state of the art among the scholars, see M. Morlok, 'Artikel 38', in H. Dreier ed, *Grundgesetz*, vol 2 (Tübingen: Mohr Siebeck, 3rd ed, 2015), no 99; H. Meyer, 'Demokratische Wahl und Wahlsystem', in J. Isensee and P. Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol 3 (Heidelberg: C.F. Müller, 3rd ed, 2015), no 35, and H. Meyer, 'Wahlgrundsätze und Wahlverfahren', ibid, no 29. A political scientist like V. Best, 'Komplexe Koalitionen, perplexe Wähler, perforierte Parteiprofile. Eine kritische Revision jüngerer Befunde zur deutschen Koalitionsdemokratie und ein Reformvorschlag' *ZParl Zeitschrift für Parlamentsfragen*, 82-99, 97 (2015), argues, even for Germany, in favor of bonus seats for the most voted parties; nevertheless, he neglects the constitutional matters related to it.

incompatible with the material significance of the decision to be made. One might agree, even in presence of populist forces such as those that have emerged in other States, to distinguish between the vote on constitutional issues and the consensus of political leaders. While elections allow voters to express their confidence in political leaders, direct decisions on concrete issues and above all on constitutional reforms demand a rational and real debate on such matters. Either politicians decide the issues themselves (as far as the Constitution allows it) or they are supposed to accept the result of the public debate. The confusion of the two decision-making processes undermines the value of the decision and trust in democracy.[17]

## VI. The Need for a Reflection on Values

The statement above can be applied to the outcome of the 4 December 2016 Referendum, especially when combined with the new Judgment of the Constitutional Court. The outcome does not solve the problems nor does it overcome the weakness of the Italian constitutional and economic system. Furthermore, several commentators in Europe interpret the results of the referendum as a rejection of European unification, although this issue was not considered during the debate. In fact, the critiques on the reform were based on different grounds and it is precisely by embracing those critiques that the history of the reform and of its failure suggests a need for methodical reflection in four areas.

*On a practical level*, there should be considered whether or not the required institutional reforms really suggest a deep and comprehensive reform of the Constitution.[18] Obviously, there are more or less compelling problems *de constitutione ferenda* that must be debated and their solutions, where appropriate, should lead to specific constitutional changes. Reforms of this kind, like many of the reforms that have been passed since 1948, are possible and have a better chance of approval in Parliament or if necessary, by a popular referendum, than comprehensive reforms. The comparison between the outcomes of (specific) constitutional reforms adopted until now and those of the proposals of 2001, 2006 and 2016 suggests 'modesty' in addressing the issue of constitutional reform.

*Second*, the practice has confirmed the need for consensus when dealing

[17] See, in this sense, the comment by A. Dänner and F. Rehmet, 'Keine neue Verfassung' *Mehr Demokratie*, 22-23 (2017). A very critical view is expressed by A. Baldassarre, 'La personalizzazione del potere: una scommessa troppo rischiosa per il Paese reale' *Lo Stato*, 263-272 (2016).

[18] The same opinion is expressed in several contributions in *Lo Stato*, 7 (2016), eg R. Bin, 'Che fare? Riflessioni all'indomani del referendum costituzionale' (273: '*riforme non necessariamente costituzionali*'), and V. Onida, n 3 above, 325-328; on the contrary, B. Caravita, n 13 above, 296, seems to lean towards a larger reform package.

with the Constitution. The ordinary constitutional reform process regulated by Art 138 is conceived in this light and even a constitutional referendum may and probably should be used as a means of integration of all citizens. The Constitution is an instrument of national unity, not a political program to oppose counterparts, so as to prevail in a political competition. The Constitution represents the '*Repubblica, una e indivisibile*' (The Republic, one and indivisible).[19] Therefore, its use as an instrument in the hands of the parliamentary majority and the Government is inconsistent with the idea of a constitutional State.[20] The drafting of the Constitution by the '*constitutional arch*' in 1946-1947 is based on the idea of constitutional unity and the compromises that such an idea requires. The constitutional reform process is also conceived in this light, as a 'constitutional protection',[21] and ultimately as a means by which to ensure further developments of this type of decision-making.

*Third*, as a result, the crucial problem does not lie in technical adaptation, modification, or even manipulation of the Constitution but rather in reflection upon its values and the connected matters that emerge in a changing world and in civil society. In the debates on the institutional and electoral reforms, this issue was frequently masked behind technicalities. The need for re-consideration of the historical and social conditions of constitutional law, of the values that determine them and their changes is urgent. Quite surprisingly, such challenges are only seldom faced[22] and when they are, they do not have a great impact.

*Finally*, reflections concerning the issues that have been discussed so far cannot be limited solely to the text of the Constitution, since they are related also to political practice and economic policies. In fact, shortcomings are not always the result of mischief in constitutional provisions, since often political actors, political parties and the political class are responsible for misuses and incorrect implementation. Just to provide some examples, one might cite the fact that Art 49 granted political parties significant, maybe even excessive autonomy; nevertheless, parties' status could be regulated by law in order to ensure internal democracy and real control of party policies by affiliates.[23] The

[19] See Art 5 of the Constitution, the meaning of which I sought to analyze in 'La Repubblica divisibile e indivisibile. Limiti, condizioni e funzione dell'unità politica' *Diritto e Società*, 391-404, 400 (2013).

[20] A similar opinion is expressed by U. De Siervo, n 3 above, 315, who feared that the importance of the Constitution could be undermined by the rejection of the reform.

[21] '*Garanzie costituzionali*': see the Title VI of Part II of the Constitution.

[22] On this point, see A.A. Cervati, 'Diritto costituzionale, mutamento sociale e mancate riforme testuali' 1 *Rivista AIC*, 30 January 2017.

[23] The subject was analyzed in depth and for a long time by Paolo Ridola, recently in: P. Brandt, A. Haratsch and H.R. Schmidt eds, *Verfassung – Parteien – Unionsgrundordnung. Gedenksymposion für Dimitris Th. Tsatsos* (Berlin: Berliner Wissenschafts-Verlag, 2015), 57. Actually, see R. Bin, n 18 above, 279.

electoral law establishing a proportional system aims to equalize the chances of any party but does not adequately ensure the influence of voters in choosing candidates with regard both to their political orientation and their links with local communities.[24] Another example that can be cited concerns the duty of cooperation with which any member of Parliament is required to comply since he/she represents the whole nation (Art 67 of the Constitution). Those duties do not seem to have a significant impact in practice as the costs to the political system, having regard to Parliament and Government and administrative and judicial bureaucracy, can testify. These exorbitant costs raise ethical issues to be addressed by the political class. They do not seem to require institutional reforms but rather a clear debate on moral values and their impact on the life or institutions.

[24] The new Judgment Corte costituzionale 9 February 2017 no 35 (§§ 11, 12), *Diritto & Giustizia*, 23 February 2017, appears, in this regard, quite superficial.