

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

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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<sup>1</sup> and the partition of legislative competences between the Regions and the central Government.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

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<sup>5</sup> opted for a rigid Constitution, which means, in the tradition of French and American constitutionalism – theorized by James Bryce<sup>6</sup> and Hans Kelsen<sup>7</sup> – 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'.

<sup>4</sup> 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).

<sup>5</sup> 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).

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

<sup>7</sup> '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.<sup>8</sup>

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.<sup>9</sup> 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

<sup>8</sup> 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).

<sup>9</sup> 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.<sup>10</sup>

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

<sup>10</sup> 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.<sup>11</sup> 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,<sup>12</sup> 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.<sup>13</sup>

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.<sup>14</sup> 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*.<sup>15</sup>

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

<sup>14</sup> '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.

<sup>15</sup> 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,<sup>16</sup> 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.<sup>17</sup> 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.

<sup>16</sup> Corte costituzionale 13 January 2014 no 1 (English version) available at [http://www.corte-costituzionale.it/documenti/download/doc/recent\\_judgments/1-2014\\_en.pdf](http://www.corte-costituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf) (last visited 20 March 2017).

<sup>17</sup> 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>.