

The 2016 Italian Constitutional Referendum

Introduction

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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

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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 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.