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

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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

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ISSN 2421-2156

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.