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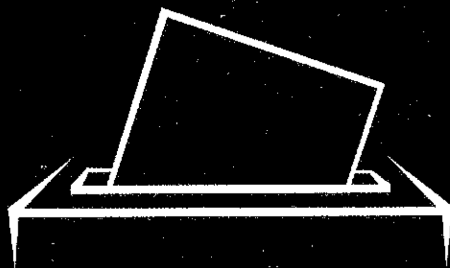

AKTUALNE PROBLEMY REFERENDUM

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Wstęp

Od kilkudziesięciu lat obserwuje się w państwach demokratycznych wyraźną tendencję do ożywienia instytucji referendum i przekazywania suwerenowi możliwości decydowania nie tylko o zmianie konstytucji czy ratyfikacji najbardziej istotnych traktatów, ale także o przeprowadzaniu istotnych reform ustrojowych lub rozstrzyganiu najważniejszych spraw ze społecznego punktu widzenia.

Dyskusja towarzysząca referendum ogólnokrajowemu z 2015 r. stymulowała wzrost zainteresowania tą instytucją w Polsce nie tylko w naukach prawnych, ale również w politologii oraz wśród osób uważnie obserwujących życie publiczne. Prawnicy musieli podjąć próbę rozwiązania problemów, które pojawiły się w praktyce referendalnej. Wszystko to nie pozostało bez wpływu również na intensyfikację badań nad referendum zarówno w płaszczyźnie wewnętrznej, jak i komparatystycznej.

Uwagą szeroko pojętej opinii publicznej cieszy się nie tylko referendum ogólnokrajowe, ale również lokalne. Przyczynia się do tego stosunkowo częste w ostatnich latach w Polsce korzystanie z tej instytucji demokracji bezpośredniej i podejmowanie dzięki temu istotnych rozstrzygnięć dla społeczności lokalnych.

W niniejszym tomie zebrane zostały prace dotyczące zarówno referendum ogólnokrajowego, jak i lokalnego. Rozważania poszczególnych Autorów obejmują nie tylko istotne zagadnienia legislacji i praktyki referendalnej w Polsce, ale poruszają też płaszczyznę porównawczą. Mieszczą się w niej zarówno kraje o ustabilizowanym systemie demokratycznym, jak i – co może być szczególnie ciekawe dla Czytelnika polskiego – państwa, w których demokracja została przywrócona po 1989 r. lub te, w których proces transformacji nadal trwa. Omówione zostały także zadania organów władzy publicznej w przeprowadzaniu referendów.

Mamy nadzieję, że wszystkie opracowania zgromadzone w tej książce dostarczą materiału do pogłębionych refleksji nad współczesną istotą referendum i jego znaczeniem w praktyce ustrojowej państw demokratycznych.

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The Law-Repealing Referendum in Italy in Light of the Constitutional "Renzi-Boschi" Reform

1. Premises

Art. 75 of the Italian Constitution establishes the "law-repealing referendum" as an instrument of popular sovereignty to be exercised within very precise procedural and substantial "limitations" (i.e., the statutes mentioned under para. 2 of art. 75 cannot be repealed by referendum). In their intentions, the Italian Constitutional Framers defined the instrument exclusively as a tool of "direct democracy", therefore available to civil society – as clarified by the Italian Constitutional Court – but not affecting "choices of institutional politics". Indeed, it is outside the instrument's scope to "propose plebiscites or popular votes of confidence towards complex and indivisible political choices by parties or by organized groups that proposed and supported the referendum initiative". Indeed, in this latter case, the instrument would end up being used to alter the functioning of representative democracy (decision n. 16 of 1978 of the Italian Constitutional Court).

Such constraints do not mean to deny "political" meaning, in general, to the law-repealing referendum: both in the very fragmented-party context, resulting in coalition governments, and after the majoritarian evolution of the Italian political system, the referendum "drive", notwithstanding the effective function of the instrument as evidenced by law scholarship – of either "contrast" or "control" of the choices by the representative political bodies – acted anyway as a factor stimulating innovation: both in the political field (e.g., the 1993 referendum, which abrogated the electoral system applicable to the Senate and implemented a majoritarian uninominal electoral system) and in the social field (e.g., the 2005 referendum on medically assisted procreation that failed to reach the required turnout mandated by art. 75 of the Constitution, but the constitutionality of the statute was however been taken into account by the Constitutional Court in its most recent decisions regarding law n. 1 of 2004).

2. Direct-democracy instruments in the context of the proposed constitutional reform of 2016

The draft of the constitutional reform, the so-called Renzi-Boschi law, already approved by the Parliament in April 2016 and to be finally approved (or rejected) by the Italian citizens next autumn, proposes to amend the Italian Constitution through the abrogation of perfect bicameralism, the reduction of the number of representatives and the institutions' managing costs, the abolition of the CNEL[1], and the reform of Part II of Title V. The proposed reform intervenes quite strongly – unlike what it might

[1] National Council of the Economy and Work.

seem *prima facie* – also on the traditional direct–democracy instruments (popular law–making initiative, and in particular the referendum) in order to favour "citizens' participation in the determination of public policies" (art. 11 of the Constitutional Law, published on the Italian O.J. n. 88 of April 15th 2016).

For this purpose, the text finally approved by the Parliament strengthens the protection of popular law–making initiative, established by art. 71 of the Constitution: together with an increase in the number of signatures necessary to call for the popular initiative (from 50.000 to 150.000), the text also contemplates the guarantee and certainty of a final discussion and deliberation by the Parliament, according to procedures to be later established by parliamentary standing orders (even though it would have been preferable to establish such rules in the same constitutional text, rather than postponing its determination to the parliamentary majority, which could potentially pass different procedures for the two Chambers of the Parliament).

3. cont.ed: the new "proposing" and "directing" referendum

The reform proposal statute introduces a new type, at least in the Italian experience, of referendum: the "proposing" and "directing" referendum (whose exercise and related effects will later be regulated by constitutional law), which, together with additional types of consultation, including of social formations (to be also later implemented by a bi–cameral law), ought to establish a new system of "participatory democracy".

For what concerns, in particular, the law–repealing referendum – regulated by art. 75 of the Const. – the new Constitutional–Law draft introduces an exceedingly important innovation regarding its validity requirements (art. 15). According to such requirements, the proposal, to be presented to the popular vote, is approved by the majority of the votes. The votes in question, though, are not only those of the eligible voters – as required by the current law – but also those of the majority of the voters who actually cast the ballot in the last elections for the Chamber of Deputies, provided, in the latter case, that the referendum proposal is initiated by a larger number of voters, 800.000, rather than the 500.000 otherwise required by the current art. 71 Const.

4. cont.ed: problematic issues regarding the law–repealing referendum introduced by the constitutional–law draft

It is not difficult to grasp the underlying objectives of the just–outlined reform proposal: on the one hand, the intention is to overcome the merely abrogative design of the referendum, as conceived in the wording of art. 75 Const., allowing eligible voters, in the most inclusive interpretation of the reform, to participate also in the law–making process or, so to say, "positively", even though the functioning of the proposing and directing referendum will be established in the future. On the other hand, the reform purports to give new life, so to say, to the referendum instrument

itself, aligning the required turnout to the majority of voters registered at the most recent political elections, thereby making it easier to reach the participation requirement for the referendum's validity.

However, both objectives feature some problematic issues, which (statutory and constitutional) lawmakers will have to consider upon approval, provided that the "Renzi–Boschi" reform will be approved by popular vote according to art. 138 Const.

First of all, one might ask if the new type of referendum, outlined in the reform and extending the direct exercise of sovereignty to the formulation of "proposals" – in addition to "directions" for the representative bodies – excludes the manipulative or approving efficacy of the referendum; or rather allows, upon implementation of the reform, to stop conceiving referenda as merely negative instruments (meaning, only producing a "subtraction of normative content": cfr. Const. Court, decision n. 36 of 1997), to use them also on the "construction of new norms" (cfr. Const. Court, decision n. 26 of 2011), as for instance is the case of the French system, in which (as established by art. 11, para. 3, of the 1958 Constitution), popular consultations can be called on to approve bills with specific subject matters.

The Italian Constitutional Court – which has always excluded any "positive" law–making power of the instrument – has produced a rich case–law on the admissibility of the law–repealing referendum (competency which it exerts, as well know, according to Const. Law n. 1 of 1953), declaring inadmissible referendum questions presenting a "manipulative character" or that were "surreptitiously propositional", meaning referenda from which the so–called "resulting norms" (the ones remaining in place as a result of the repealing effect) lack immediate applicability, or whose wording attempts to replace the object of the referendum with another different law, foreign to the regulatory context.[2]

In April 1993, 77% of eligible voters participated in an important consultation on the law regulating the election of the Senate of the Republic (law of February 6th 1948, n. 29). The Constitutional Court allowed the referendum to take place, because approving the referendum question would have left untouched some self–applicable residual norms, so that, even legislative inertia would guarantee the continuous activity of the representative body; 82.7% of the voters approved of the abrogation, paving the way for a mixed electoral system, mostly majoritarian with a single turn, later regulated by Laws n. 276 of August 4th 1993 and n. 277, regarding the election of the Senate and of the Chamber of Deputies respectively (the so–called *Mattarellum*).

5. The crisis of the referendum instrument and the issue of the required turnout

Even more problematic is the outcome of proposed reform, which aligns the

[2] For instance, one can recall decision n. 13 of 1999, regarding the election of the Chamber of Deputies. In that occasion, the Constitutional Court noticed that the request for a partial repeal of the law approved by the legislator, concerning the allocation of the 25% of the seats, did not result in replacement with another absolutely different regulation, foreign to the normative context, that the question and the electoral body "can neither create *ex novo*, nor construe directly".

required turnout, for the validity of the popular consultation, to the majority of the voters registered in the last election for the Chamber of Deputies, together with an increase in the number of the signatures required to initiate the referendum itself.

For some time now in Italy, the instrument of the law–repealing referendum has experienced a profound crisis.

Even though it tends, for its very nature, to give voice to the sovereign people, citizens' mistrust towards political *élites* and representative institutions derived, among other things, in a profound disaffection towards the direct exercise of sovereignty through participatory democracy's institutions.

The first referendum consultations held in Italy easily reached the required turnout (i.e., the participation to the vote of the majority of the eligible population), registering moreover a very high participation rate: 87,7% of eligible voters took part in the referendum concerning the Fortuna–Baslini Law (n. 898 of December 1st 1970 on the "Norms concerning the dissolution of marriage") – the first in Italy's republican history, made possible by the entry into force of the implementing law of the referendum's constitutional mandate (Law n. 352 of May 25th 1970) – and 59,3% of the participants voted against the abrogation of the law that had introduced the divorce.

That was the beginning of a real "referendum season" – sponsored above all by the radical party on a wide range of political and social issues concerning, among others, public order, fundamental rights, public funding of political parties, civil liability of the judiciary or the placement of nuclear sites (for instance, in 1981, the referendum on the abrogation of life–sentencing registered a turnout of 79,4%, even though it was rejected by 77,4% of the voters; similarly, the referendum proposing the abrogation of some norms of Law n. 194 of May 22nd 1978, with the purpose of somewhat facilitating recourse to abortion, registered a turnout of 79,4% and was rejected by 88,4% of the voters).

Since 1977, we have been seeing a solid trend reversal: no less than 25 consultations – the last one was the referendum of April 27th 2016, which was proposed, for the first time, upon an initiative of at least five Regional Councils (art. 75 Const.), the abrogation of the norms extending the duration of the permits to extract oil at sea (within 12 sea miles from the coast) until the exhaustion of the useful life of the respective rigs – have not reached the required turnout, registering in the worst cases a turnout just above 23% of eligible voters, even on issues of strong relevance for democratic participation, such as the electoral system. This is the case of the referendum concerning the Law n. 270 of 2005 (so–called *Porcellum*), which introduced, for the Chamber and the Senate, an adjusted–proportional electoral system, featuring coalitions, majority premium and elections of representatives with no indication of preferences. An electoral system that the Constitutional Court recently deemed unconstitutional with regard to the majority premium and the voters' impossibility to express their preferences on the candidates (decision n. 1 of 2014).

A remarkable exception to this downward trend is given by the referendum

of 2011 concerning local public services of economic relevance, nuclear power and legitimate impediment (abrogation of the differentiated norms of legitimate impediment to attend hearings, applicable only to those in governmental offices), which notwithstanding the controversy against the government, inflamed by waste of public finances for failing to schedule the referendum together with the contemporaneous administrative elections – have just exceeded the required turnout and even obtained a result which could be considered plebiscitary in favour of the abrogation (94–95%).

It is worth remembering now that the required turnout mandated by art. 75 Const., giving validity to the law-repealing referendum, features, in line with intentions of the Constitution's Framers, an essential element for a serious proposal and, in particular, sets out the fundamentals of the functioning of "popular deliberations" in a strict analogy with the requirements mandated for "parliamentary deliberations" by art. 64 of the Const.

Indeed, such an analogy looks all the more functional to the law-repealing referendum put forward by the 1948 Constitution, which did not intend the referendum to be a "co-law making" instrument that would make the people different and autonomous holders of the legislative function – indeed, referenda cannot introduce new laws, unless such new norms, so to say, necessarily flow from the "resulting norms" – but rather, it intended referenda to be instruments of "contrary legislation" which, as such, stand as "*contrarius act*" by a "*collegium*" established with the same features contemplated for the parliamentary institution.

6. cont.ed: the "flexibility" of the required turnout

Now, going back to the "Renzi-Boschi" reform, it makes reaching the required turnout (i.e., the referendum's validity threshold) "flexible", by anchoring the necessary threshold to the majority of the voters registered in the last elections for the Chamber of Deputies. Such innovation goes very far from the original constitutional design of the law-repealing referendum requiring, for its own validity, the same criterion mandated for parliamentary deliberations (art. 64); the Constitutional reform instead introduces a very different criterion, the one of "politically active" citizens or the people that actually did vote.

It is also worth noticing that the proposed solution appears intrinsically contradictory. Indeed, because the reform proposal has maintained the original provision regarding the required turnout for the referendum's validity, identified in the majority of the eligible voters – evidently confirming the *ratio* of the analogy between popular vote and parliamentary deliberation – it seems unreasonable, in order to introduce an alternative to this requirement, "strengthening" the moment of the referendum initiative (requiring 800,000 signatures instead of 500,000). Indeed, if we keep the old requirement, the issue cannot be to give relevance, *ex ante*, to a certain number of proponents; but rather to decide whether to keep unchanged

or alter the analogy with the parliamentary deliberation. But this will be the choice taken later on by other law sources, which will establish whether the referendum instrument will keep a purely repealing character or rather will become a co-law making instrument.

To see the final effects, it will be necessary to wait first for the "Renzi-Boschi" referendum's outcome and, later (if voters do indeed approve), for the law implementing the "proposal" referendum and "direction" one. But the risk still remains to manifest at the Constitutional level of the negative effects of people's mistrust towards the functioning of the political representation; such effects cannot be positive for the existence of a democratic system (notice that in occasion of the last political elections of 2013, turnout was 75,16% for the Chamber and 75,23% for the Senate, thereby registering a decrease of 5% with respect to 2008 and of 8% with respect to 2006). The practical consequence would be to constitutionalize a more and more widespread social – and perhaps also political – trend, which deems unimportant and perhaps also useless to participate to the renovation of the legislative assemblies as a genuine "civic duty" (art. 48, para. 2, Const).

In this regard, it cannot be considered applicable the Constitutional Court's considerations (decision n. 372 of 2004) regarding the implementation of art. 123 Const., which as well known, assigns referendum subject matters in the regional sphere to the statutory competence of the Regions, stating that it is not "unreasonable in a situation of relevant electoral abstentions, to establish a structural, not-rigid but rather flexible turnout, which would keep the pace with the different electoral turnouts, having as parameter the participation of the electoral body to the last elections for the Regional Council, whose acts constitute the subject matter of the referendum's consultation". Indeed, this position cannot be transposed *sic et simpliciter* into the national design, where the referendum instrument as regulated by art. 75 Const. – as discussed above – is designed as an act of "contrary legislation"; indeed, the very above-mentioned decision properly remarks that "Regions are allowed to articulate differently their own norms regarding the kinds of referenda established by the Constitution, even innovating in certain respects, because every Region can more freely choose forms, ways and criteria of popular participation to the process of democratic control over regional acts".

7. Conclusions

The reform proposal, so-called Renzi-Boschi purports to modify, quite substantially, the original design of the Italian Constitution for what concerns direct-democracy instruments at the national level.

Undoubtedly, we welcome strengthening the protection of the right of popular law-making initiative. Indeed, the current constitutional set-up is unable to provide any obligation for the Parliament to express itself on the popular initiative.

On the other hand, the innovations regarding the referendum seem to strongly

affect the current design of representative democracy. The choice to "remand" to later law sources (both constitutional acts and statutes) the finalization of the design of the new final paragraph of art. 71 Const., which mentions types of "Legislative initiatives", places "proposal" and "direction" referenda within brand new dynamics in the Italian constitutional experience, to which also the law-repealing referendum will inevitably be "attracted".

Therefore, the implementing law will have to "rewrite" a coherent body of norms regulating a direct-democracy instrument destined to change its own identity.

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