The 1948 Italian Constitution and the 2006 Referendum: Food for Thought

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Historical background of the Italian Constitution – Main features – Golden age of constitutional enforcement – Italian political renewal – Fathers and sons – The great reform proposal – The 2006 referendum – The upshot.

According to Article 138 of the Italian Constitution, the Constitution is amended by both Chambers through a double approval procedure within an interval of not less than three months. If the second approval is given by the majority of the members of each Chamber, then either 500.000 electors, one fifth of the members of each chamber, or five regional councils may request submission of the relevant act of parliament to a referendum. However, a constitutional act will enter into force without being submitted to a referendum if the second approval is given with a majority of two-thirds of each Chamber's members.

Since its entry into force on the 1st January of 1948, the Constitution has been amended thirteen times on marginal points with a two-thirds majority. In 2001, the Constitutional act 3/2001, re-organising the centre-periphery relationships, only obtained the absolute majority of votes in each Chamber of Parliament, and was then submitted to a referendum. The act was approved by a large majority of the voters, with a turnout of 34.1% of the electorate.[1]

The most far reaching attempt so far to change the Constitution, which is portrayed as the 'Great Reform', intended to amend 53 out of 139 Articles of the Constitution, which corresponded to almost the entire Second Part, concerning

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[1] *See* the website of the Ministry of the Interior at <http://www.referendum.interno.it/referendum/ind_ref.htm>, last consulted at 27 July 2006.

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the Republic's organisation. Passed in Parliament with an absolute, rather than two-thirds, majority of votes, it was then submitted to a referendum, which took place on 25 and 26 June 2006. The law was rejected by 61,3% of voters, with a turnout of 52,3% of the electorate. This attempt is the subject of the present article.

Given the importance of its content, and the clarity of its result, that referendum is likely to mark a watershed in Italian constitutional history. Where did the quest for a 'Great Reform' come from? Was the reform necessary for adapting the institutional framework to the transformations it underwent in the intervening sixty years? Was it suited to the whole of the constitutional design? To answer these questions, this article will first summarize the historical background and content of the 1948 Constitution, and then will concentrate on the political events and constitutional debates preceding the 2006 referendum.

Historical background and content of the 1948 Italian Constitution

In 1945, the Italian people were confronted with moral and institutional disaster following the Second World War and the demise of the fascist regime. Even the Crown was involved in that disaster, because of its inability to prevent the accession to power of Mussolini and the fascist party resulting from the 1922 authoritarian upheaval. The need for a new Constitution was widespread and was supported by the political parties which had struggled against fascism.

On 2 June 1946, the Italian people voted in a referendum on whether to maintain the Monarchy or establish a republic, and elected the members of the Constituent Assembly. The choice for a republic obtained only a slight majority. An overwhelming majority of the seats in the Constituent Assembly went to the antifascist parties.

These parties, however, were deeply divided about the ends and the institutional framework that should characterise the polity. The Communist Party and the Socialist Party, representing together roughly 40% of the Assembly, were driven by the Marxist ideal of equality, requiring strong State intervention and planned nationalisations in the economic field. On institutional issues, these parties followed Rousseau's view, vesting the core of public power in a single assembly representing the people. Christian Democrats, whose numerical strength was equivalent to that of the leftist parties, were attached instead to the ideals of freedom and dignity sustained by communitarian theorists, such as Jacques Maritain, and favoured, *inter alia*, parliamentary institutions representing the political as well as the territorial and professional dimension of persons and communities.

At the Constituent Assembly, accommodations between these competing views were found even after the break down of the antifascist coalition due to the impact of the Cold War on a deeply divided country. The politicians would search in the morning for a common understanding on constitutional principles and delay the daily political struggle to the afternoon. The will to accommodate competing views prevented the constitutional work from becoming a 'Penelope's web', and laid the foundation for adoption of a text which is among the best products of 20th century's European constitutionalism.

Why did parties restrain themselves from muddling their constitutional works with contingent politics? Did their self-restraint reflect an 'heroic' attitude, as it sometimes is being depicted now, compared to the 'prosaic' one taken by recent reformers?

The Constitution was the product of hard times, the most genuine reaction to a moral disaster. It was also written in a vacuum. Contrary to Japan and, to a lesser extent, West Germany, Western Allies did not intervene in Italy's decision-making process. On the other hand, one could not afford the pre-fascist constitutional tradition, represented by some elder statesmen at the Constituent Assembly, to provide points of reference for the newly established democracy. Nor could major parties rely on their own cultures, which had grown outside, if not against, the State, for that would have created uncertainty about their respective intentions.

The Assembly, therefore, proceeded under a thick veil of ignorance, which forced the Framers to put aside their own immediate objectives and concentrate on the Republic's future. The Constitution's drafting was a unique opportunity, both for drawing on a principled dimension deriving from each political position and for common deliberation.

The result is reflected particularly in the First Part of the Constitution, recognising citizens' fundamental rights. Liberty and equality, far from being tools for identifying rival ideologies, are mutually reconciled in light of the 'full human person's development' enshrined in Article 3, which is made the cutting edge of constitutional principles. Civil, political, social and economic rights are accordingly recognised and granted. Particular attention is paid to the rights of the individual within communities, such as families, schools, unions, parties and churches. Social, not less than political, pluralism has become part of the constitutional landscape.

The Second Part of the Constitution, concerning the Republic's institutional framework, articulates public power both as shared among diverse institutions at the central level (Parliament, Government, President of the Republic, referendum, Judiciary and Constitutional Court), and among the State and local authorities, including Regions, Provinces and Municipalities. This articulation is

more sophisticated than Montesquieu's separation of powers, reflecting not only the need for granting citizens liberties, but also a pluralistic view of democracy.

Here, however, political arrangements partly diverged from those affecting the First Part. Confronted with institutional issues, the Framers were in fact more careful in safeguarding the parties' role. This emerges particularly from the provisions concerning Parliament's structure, the relationship between parliament and government and the territorial organisation of the Republic.

The structure of Parliament

With respect to Parliament's structure, political positions differed strikingly. The left wing favoured a single-chamber solution, while the Christian Democrats would divide Parliament into a Chamber of Deputies, elected by the people, and a Senate composed of representatives of social 'categories', such as workers, entrepreneurs and professionals. After hotly debating the issue, the Framers reached a middle-way solution, based on two Chambers, both of which were elected by the people,[2] and entrusted with identical functions (legislation, giving confidence to Government, scrutiny of governmental activities). The fact that the Senate's structure and functions duplicate almost exactly those of the Chamber of Deputies has of course raised the question of the Senate's utility. This forms the 'Achilles' heel' of the institutional framework.

The relationship between parliament and government

The Framers structured the parliament-government relationship in accordance with the parliamentary model. Once the Prime Minister and, on his advice, the Ministers are appointed by the President, the Government is bound to request the confidence of both Chambers, which conditions its maintenance in office. The President, in turn, is entitled to dissolve one or both Chambers, which in practice occurs whenever there is no feasible majority. These rules lie at the core of the parliamentary model, but their proper functioning depends, to a great extent, on the political system's structure. Given the Italian multiparty system, governments can only be sustained by party coalitions, which might threaten the stability of the executive. In these cases, further institutional devices, e.g., the 'constructive no-confidence vote' (*konstruktive Misstrauensvotum*) provided by the German Constitution, are generally deemed convenient for limiting the chances of a cabinet

[2] The only exception is established under Art. 59 of the Constitution, providing life-tenure Senate seats for the former Presidents of the Republic, and for five citizens, whom the President may appoint for having brought honour to the Nation through their exceptional accomplishments in social, scientific, artistic and literary fields. Life-tenure Senators, however, are a tiny minority of the whole Senate, whose number of elected members is fixed at 315 (Art. 57). The total number of Deputies is instead 630 (Art. 56).

crisis occurring. The Constituent Assembly rejected such proposals, inspired by the suspicion of a strong executive due to the fresh memory of the Fascist regime. However, poor institutional tools to prevent cabinet crises, combined with an electoral system founded on proportional representation, paved the way for governmental instability.

Local autonomy

Under Article 5 of the Constitution, the Republic, one and indivisible, recognises and promotes local autonomy, ensuring a broad decentralisation of services depending on the State and the adoption of principles and methods of legislation meeting the requirements of autonomy and decentralisation. This broad partiality to local autonomy lies at the core of the creation of the 'Regional State', as distinguished, on the one hand, from the Napoleonic model of the State, to the extent that Regions are invested with legislative, and not only administrative functions, and, on the other hand, from the federal model, usually presupposing a fusion into a Federation of formerly sovereign States. Nonetheless, Title V of the 1948 Constitution's Second Part, while concretely dividing powers among the State and the Regions provided with ordinary autonomy,[3] tended to limit the powers of the latter. Regions were entrusted only with legislative powers enumerated in a very restrictive list of subjects, and within the principles established by national legislation. Moreover, the Constitution empowered the central government to check whether laws approved by regional councils violated either the State's prerogatives or constitutional principles, or the national interest. The first two questions were to be decided by the Constitutional Court on an application by the government; the last was to be referred to Parliament by the government. Even the Regions' administrative functions, exercised within the fields of their autonomous legislative powers, were subjected to powers of intensive oversight. These restrictions were adopted by the Constituent Assembly for contingent political reasons, above all the concern of governing parties for different majorities in the centre and the periphery.

The first decades of the Republic and the 'golden age' of constitutional enforcement

The above-mentioned arrangements were likely to create difficulties for the polity's proper functioning. However, these were to be perceived only in the long run

[3] As distinguished from Regions provided with special autonomy, granted by a Statute adopted under the same procedure as for constitutional laws (Sicily, Sardinia, Valle d'Aosta, Friuli-Venezia Giulia, Trentino-Alto Adige, and the two autonomous Provinces of Trento and Bolzano).

since, during the first decades of the Republic, other priorities were at stake in constitutional affairs.

Immediately after its entry into force, the Constitution was 'frozen'. The centre-Right coalition at that time delayed the implementation of constitutional rules, including the establishment of Regions, through the so-called 'majority's obstructionism'. Moreover, ordinary judges denied the binding force of constitutional principles. According to these judges, the Constitution was nothing more than a political document, providing broadly framed objectives placed at Parliament's disposal. From this, it followed that the legislation enacted prior to the Constitution would not be subjected to constitutional review, and could only be changed by Parliament.

In its first decision (No. 1/1956), the Constitutional Court challenged these assumptions, affirming that all constitutional provisions were endowed with legally binding force, and that constitutional review was extended also to the laws enacted before 1948. Ordinary judges thus were invited indirectly to refer to the Court questions of constitutionality of the laws, irrespective of their date of approval.

That decision, and the subsequent case-law, succeeded in changing the general attitude towards the Constitution. Since this change was both very gradual and driven by an independent institution, the Court, all political parties accepted the Constitution as a rule of recognition for the entire legal order. While the Court struck down the legislation enacted prior to the Constitution, which contrasted with constitutional principles granting civic liberties, Parliament enforced the Constitution in many respects, including provisions recognising social rights such as health, education and pension rights.

Some scholars would later recall this period with nostalgia, as if it were the 'golden age' of the Constitution. The expansion of the constitutional dimension of public life was certainly successful. However, it is worth inquiring into its reasons and its costs. Constitutional enforcement was perceived by the dominant political culture as coinciding with the modernisation of the country at large. The Constitution was deemed to contain principled choices to which modernisation processes driven by Parliament were expected to correspond.

This conviction was shared both by the centre-left coalition, which, with few interruptions, led the government for thirty years (1963-1993), and by the Communist Party, representing roughly a third of the electorate. The laws enforcing the Constitution therefore were approved by majorities far larger than those sustaining the cabinet. Moreover, the Communist Party's approval was given despite its permanent exclusion from the cabinet (the so-called *conventio ad excludendum*), which was due to the intention of that party to maintain an antagonistic attitude towards the 'system', no less than to the Cold War.

Such exclusion did not concern municipalities and, after the regions' establishment (1972-1977), regional governments. On the other hand, enforcement of constitutional provisions regarding regions failed to accomplish the constitutional promise of pluralism, not only because national laws restricted as far as possible the conferral of powers to regions, but also because of the strength of national parties at the local level. Rather than representing the autonomous dimension of local communities, regions thus were conceived as bureaucratic agencies of the centre.

Fathers and sons: The new challenges affecting the Constitution

The wind changed during the 1980s. The belief that the Constitution should drive the transformation of society through legislation was waning gradually. The increasing importance of the European Union and of a market-based economy, together with the emancipation of social groups from party ideologies, appeared to be the main factors of modernisation. In addition, since these changes required well-functioning institutions, attention was focused on problems affecting the institutional framework.

Political and media discourses on the Constitution shifted from the great ends characterising its First Part to the need for reformation of the Republic's organisation as provided in its Second Part. Two Parliamentary Commissions (the Bozzi Commission (1983) and the De Mita-Jotti Commission (1991)) attempted to reach an agreement on the reform. It deserves note that these attempts, although unsuccessful, were conducted by parties already represented at the Constituent Assembly. This ensured a certain continuity. Constitutional reform was aimed at enhancing the functioning of the public powers, without subverting the principles enshrined in the First Part.

In 1993, things changed even in this respect. Many MPs of the majority in power, party leaders included, were accused of corruption and of other crimes committed against the public administration and forced to resign. An entire political class was eliminated.

People's anger at the discovery of widespread political corruption was unexpectedly channelled through the referendum of 1993, which struck down the proportional system for the Senate's elections that was considered to be the symbol of the dominance of political parties in society. Accordingly, the widely diffused propaganda for the Westminster model led to the introduction by law of the majority system for three-quarters of the seats of the Senate; the remaining fourth were elected through proportional representation. Another law adopted the same rules for the House of Representatives.

The media depicted the 1993 referendum, and the following electoral legislation, as the 'advent of the Second Republic'. Although incorrect on constitutional grounds, this term gives an impression of the changes that had occurred. Parties symbolising the 'First Republic' were either destroyed or, in the case of the Communist Party, forced to transform themselves. In the meanwhile, Silvio Berlusconi, a broadcasting tycoon, entered politics through the foundation of a new party and, most importantly, the creation of a centre-right coalition, which won the 1994 elections.

This event, rather than the new electoral legislation, was decisive in structuring the political system into two stable, albeit heterogeneous, coalitions, alternatively gaining the majority of seats in each electoral turn. While in the previous decades, the majority's turnover was impeded by the presence of the heirs of Fascism at the right and of the Communist Party at the left, since 1994 all parties are equally legitimised in acceding to government. In this respect, the new political system enhanced democracy's functioning. It remained to be seen, however, what the perception of the 1948 Constitution was among the leaders of the new parties.

The question of whether and why sons should maintain the Constitution written by their fathers goes back to the 18th-century's debates between Jefferson and Madison in the United States, and between Sieyès and Barnave in France. In spite of the absence of similar debates, that very question lies at the core of the paradoxical situation produced by the 1993 turmoil in Italy.

While the political sons of the Framers corresponded to the centre-left coalition, centre-right leaders felt themselves wholly alien to the 1948 Constitution's spirit, either because of their Fascist legacy (in the case of *Alleanza Nazionale*), or because of their own parties' recent birth (in the cases of *Forza Italia*, Berlusconi's party, and of the *Lega Nord* ('Northern League'), strongly pressing for federalism, or, alternatively, for secession of the Northern Regions from the rest of the country). This is not to say that those leaders were averse to the Constitution. Only Gianfranco Miglio, a political scientist, favoured 'a breach' of the 1948 Constitution. Centre-right leaders were rather indifferent to it, and thus ready to change constitutional provisions whenever they did not fit the momentary political objectives.

Differences of opinion between the parties over the Constitution and, consequently, constitutional reform, corresponded therefore to the main political cleavage. However, would the electorate reflect the same divisions? The answer remained unknown until the 2006 referendum.

Recent developments, and the strange case of the 'great reform'

The last decade was marked by three main constitutional events: the attempt to reach a broad parliamentary agreement on constitutional reform (1997), the ap-

proval of constitutional law 3/2001 concerning the regions, and the adoption of a constitutional law modifying almost the entire Second Part of the Constitution, which was subsequently rejected by the electorate at the June 2006 referendum.

In 1997, a Parliamentary Commission was established with the aim of reforming the Republic's organisation on the basis of an overall political consensus, thus reciprocally legitimising the coalitions which emerged from the 1993 turmoil. The Commission's project provided an institutional model similar to that of the French Fifth Republic, including popular election of the President of the Republic, and a robust enhancement of territorial autonomy, consisting, *inter alia*, in giving regions the legislative power not explicitly reserved to the State, and in abolishing the previously strict oversight over regional legislation and administration. The proposal for transforming the Senate into a Chamber representing regional governments, similar to the German *Bundesrat*, instead was rejected by the Commission.

However, for political reasons, centre-right leaders suddenly decided to boycott the project's further proceeding. The centre-left majority reacted by approving a bill containing amendments of the Constitution concerning Regions, which largely corresponded to those unanimously adopted by the 1997 Parliamentary Commission. The electorate approved that law through referendum (Constitutional law 3/2001). Since 1948, the approval of an important constitutional change by absolute majority in the Chambers, failing a two-thirds majority and necessitating a constitutional referendum, had never occurred. At the same time, such approval was due to the very political wing which was still attached to the 1948 Constitution. This marked a precedent in terms of parliamentary convention, in the sense that the other coalition, once in power, would not feel obliged to seek the opposition's consent on constitutional reform either.

In fact, after the 2001 general election, the new centre-right majority immediately seized the occasion for marginalising the opposition from the process of reform. On the other hand, the *Lega Nord*, while exploiting the North's malaise for its unfair contribution to the national budget, pressed for a constitutional reform giving Regions an overall legislative power on strategic issues, such as health, education and security. The approval of such a reform was presented by the League as the condition for it to remain within the coalition.

In summer 2003, four 'wise men', representing the majority's parties, met in the Alpine hut of Lorenzago, and reached an agreement on constitutional reform. Acceptance of the League's request was exchanged with that of the little 'flags', which each of the other parties wished to insert into the Constitution. These were mainly Parliament's scrutiny over regional laws contrasting with the 'national interest', the strengthening of the Prime Minister's role and the introduction of the 'Federal Senate'. The 'Great Reform' of the Second Part of the Constitution resulted therefore from the sole need for maintaining the majority's cohesion.

The constitutional bill following the Lorenzago agreement revealed striking contradictions and, at the same time, a dangerous conception of democracy. Parliament's scrutiny of regional laws contrasting with the 'national interest', already established by the 1948 Constitution but repealed by Constitutional law 3/2001 given the fact that such scrutiny was never exerted by Parliament, was reintroduced. In spite of its name, the Senate was not federal, since its members still were elected by the people. Attempting to demonstrate the 'federal' nature of that Chamber, the bill entrusted the Senate with the task of legislating on a list of issues connected with regional competences, leaving national issues to the Chamber of Deputies and providing shared competences for the two Chambers on a further list of issues. Conflicts deriving from such a provision were likely to paralyse parliamentary work.

Finally, and most importantly, the bill centred on the Prime Minister's powers connected with the functioning of the parliamentary system, including the dissolution of parliament. In the Italian context, characterised by coalition cabinets and the enduring instability of the parliamentary majority, the power to dissolve Parliament is conferred on the President of the Republic not only on formal grounds, but also for ascertaining whether another cabinet might obtain the confidence from the Chambers in their existing composition. In this context, conferring on the Prime Minister the substantial power to dissolve Parliament would be equivalent to giving him a blackmail device in the interest of the majority in power. According to the bill, the opposition was not likely to play any role. Contrary to the German *konstruktives Misstrauensvotum*, a constructive no-confidence vote was permitted provided that it did not overrule the parliamentary majority as issued from the last general election. The result was that Parliament could change only the Prime Minister, but not such majority.

The bill raised serious criticism among scholars, irrespective of their own political orientations. Leopoldo Elia, dean of the constitutional scholars, denounced the dangers of an 'absolute premiership' wholly unknown to contemporary democracies.[4] Even the national association (*Associazione Italiana dei Costituzionalisti*), overriding its traditional self-restraint on constitutional reform bills, objected that that bill violated the checks and balances rule embedded in European constitutionalism.[5]

It is worth adding that, while the bill was presented and discussed, the parliamentary majority led by Silvio Berlusconi adopted a statute giving, *inter alia*, the

[4] L. Elia, 'Una forma di governo unica al mondo', in ASTRID, *Costituzione, una riforma sbagliata*, a cura di F. Bassanini (Firenze, Passigli 2004) p. 363.

[5] S. Bartole, *Invito al dibattito sulle riforme istituzionali*, 24.5.2004, in <www.associazione deicostituzionalisti.it>. Sergio Bartole wrote as President of the 'Associazione Italiana dei Costituzionalisti'.

Premier judicial immunities and other privileges conflicting with the principle of equality before the law.[6] On the other hand, the legislation concerning conflicts of interests affecting Ministers and other public office-holders did not prevent them from remaining owners, *inter alia*, of broadcasting companies, thus leaving the national media system in an alarming situation. These laws, and the related practices, were poisons injected into democratic life, threatening not only respect for specific constitutional provisions, but also the very idea of the Constitution.

Within this context, the bill suggested a practice of democracy exhausting itself by electing for five years the 'ruler of the country', and in looking at his image on television for the rest of the time. Its inherent danger did not consist of a *coup d'Etat* with the army on the roads, as frequently occurred in the 20th century. It consisted of the Republic's half-conscious shift into the category of 'illiberal democracies', where representatives are elected by the people but fundamental rights are not sufficiently respected. These regimes are widely spread in the 21st century.[7]

The 2006 Referendum

In Autumn 2005, the bill was finally approved with an absolute majority of the members of both Chambers. A referendum on the constitutional act was then requested by the instances provided by Article 138 of the Constitution, to wit twelve regions, the parliamentary opposition, and more than 800.000 electors. In the meanwhile, the government in power postponed the referendum until after the general election of April 2006, fearing the consequences of a possible defeat at the referendum on the voters' perception. The date, fixed for 25 and 26 June, did not favour a high turn out, both because of the hot climate, and because people were called to vote for the third time within less than three months, after April's general election and the following by-elections, which took place in many municipalities.

In turn, the participation of the political parties in the referendum campaign was limited to the last two weeks because of these electoral events. In addition, the information was not adequate on the issues at stake. State-owned TV channels rarely painted a clear picture of the reform's content, and channels owned by Berlusconi depicted the reform as a decisive occasion for institutional 'modernisation' and 'simplification'.

The situation was different at the grass-roots level. The 'No' Committee, chaired by the former President of the Republic, Oscar Luigi Scalfaro, and sponsored by

[6] The Constitutional Court's decision No. 24/2004 has struck down that provision.

[7] *See* F. Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (Norton, New York 2003).

the trade unions, collected an enormous amount of requests from local groups and associations seeking correct information about the reform's contents. These requests were partly satisfied through meetings with scholars aimed at explaining the main terms of the voters' choices.

Finally, a manifesto was signed by 183 constitutional scholars exposing both the contradictions and the dangers of the reform. An analogous position was taken by 14 former Constitutional Court's Presidents and Vice-Presidents, and by the former Presidents of the Republic Cossiga, Scalfaro and Ciampi.

The referendum's result is generally deemed surprising both for the high participation of the electorate and for the huge rejection of the reform. The fact that 25 million people, corresponding to more than half of the adult population of the country, chose to exert their own rights contrasted with the polls' predictions. The understanding of the referendum's implications among the people was also deeper than was presupposed by politicians and the media.

The reform's rejection by more than 60% of the voters was even more surprising, demonstrating that the popular attachment to the Constitution overrides the parties' division into the Framers' sons and those refusing such a legacy. The nightmare of the 'Great Reform', dangerously close to a Constitution's breach, is over. This is both good news for our Constitution, and a watershed for discussion on its reform. While further reflection on the Italian constitutional tradition is welcome, amendments should be limited to strictly necessary changes.

The popular vote in favour of balancing tradition with change also might in turn inaugurate an evolution in constitutional thought.