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## **The Advantages and Disadvantages of Italian Referendum Tools**

**Abstract:** Direct democracy or pure democracy is a form of democracy in which people decide on policy initiatives directly. The article focuses the referendum as the main instrument of direct democracy in Italy and the main purpose of the analysis is to discuss the benefits and handicaps of Italian referendum tools. Particularly the abolishment of the quorum for the prerogative referendum that is the main goal for the development of the Italian direct democracy. The contributors demonstrate in eleven main reasons why the turnout requirement should be abolished, the vote should be free and decisive, meaning that citizens who participate in a referendum should be aware that their vote will be decisive, whereas those who choose not to go to the polls implicitly delegate their vote and decision to other voters. The future is the ongoing people's initiative referendum draft which provides just a very reasonable approval quorum of 25%.

**Keywords:** direct democracy, representative democracy, referendum, popular initiative, Italy

### **1. An Overview on the Italian Direct Democracy Field**

Direct democracy may not always be the best – or paradoxically even the most democratic – form of government, but sometimes it's a great breath of fresh air. The direct vote has an illustrious history in Italy, wherein 1946 a solemn referendum (in which women voted for the first time) abolished the monarchy that had ruled Italy since 1861 and established a republic<sup>1</sup>. A historic vote in 1974 roundly rejected a Catholic-sponsored referendum that would have struck down the new law

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1 L. Komáromi, *Representative Government and Direct Democracy. Italy and the Main Direct Democratic Traditions in Europe in the 19th-20th Centuries*, "Iustum Aequum Salutare", 2014, no. 2, pp. 145-153.

permitting divorce. Since 1997, however, the voters have been called to the polls six times for numerous referendums, and a quorum has never been reached.

On 2016, April 17, Italian citizens voted the country's 67<sup>th</sup> popular referendum. The constitution allows for two types of binding referendums: abrogative and constitutional. How do they work, and how common are they? In 2016, January, Italy's Constitutional Court gave the green light to a national referendum on the duration of oil and gas drilling concessions in the country. It was the 67<sup>th</sup> abrogative referendum of Italy's history, and (with three constitutional referendums, one advisory referendum, and the institutional referendum) 72 in total. A referendum is a direct vote in which an entire electorate is asked to vote on a particular proposal. Italy has two main types.

500.000 voters, or five regional councils (just in 2016 about gas drilling concessions), can ask to hold a general referendum to repeal in whole or in a part, a law or a measure having the force of law. In the Italian system, these referendums are referred to as "abrogative". They are considered valid as long as the majority of those with voting rights have voted. So far, 67 abrogative referendums have taken place in Italy. 42% of them like 28 did not reach the required quorum.

The second most common type of referendum in Italy is the so-called "constitutional referendum". Following the approval of a law that modifies the constitution, either one-fifth of the members of a House, or 500.000 voters, or five Regional Councils can request a popular referendum to confirm the changes. This kind of referendum has no quorum. The first constitutional referendum took place in 2001 (approved), and the second in 2006 (rejected). With the last rejected constitutional reform there was the third constitutional referendum in 2016.

Besides these two types of referendums, Italy's history witnessed two exceptions. In 1946 Italian citizens were asked to choose between monarchy and republic. In 1989 an advisory referendum was held on the European Economic Community. The non-binding referendum was called with a special law because the Italian Constitution does not speak about this type of referendum. The Italian political spectrum wanted to re-affirm the popular support of Italy to the process of European integration, particularly giving to the European Parliament a popular, constitutional mandate in event of a future European Constitution.

The main purpose of the article is to discuss the advantages and disadvantages of Italian referendum tools and particularly the research hypothesis is to demonstrate why the turnout requirement should be abolished waiting for the work in progress people's initiative referendum draft without the participation quorum.

## 2. Introduction: Participatory Democracy and New Challenges: the Crisis of Democracy

Direct democracy is characterized by the fact that the people are an organ of the state that, in addition to the classical electoral competences, exercises specific powers in constitutional, conventional, legislative or administrative matters. It is dependent or “domesticated” when the exercise of these powers depends on the intervention or on the will of another state body, the Parliament or the Head of State. It is independent or “real” when the time and the issue on which the people intervene depend not on the will of the latter, or on an objective criterion on which other organs of the state have no influence. So defined, direct democracy does not oppose but completes representative democracy<sup>2</sup>.

Direct democracy has its roots as far back as in ancient Athens and Rome<sup>3</sup>, nevertheless, its history, which is characterized by the possibility to hold referendums and by popular initiative can be divided into four main periods: an ancient period, from the Middle Ages to early XX century; the first half of the XX century, from early to mid-XX century; the second half of the XX century, from 1950s until the collapse of the USSR; modern times from collapse of the USSR to present day.

Nowadays, the institutes of direct democracy are embodied in almost all Constitutions of European countries. Although direct democracy can be put into practice in a large variety of forms, in general, there can be observed certain tendencies in the period of modern times: issues of national importance are submitted to the voters for decision-making in a national referendum which is initiated by the governing bodies; it is the case of further development of popular initiative<sup>4</sup>.

Democracy is experiencing a critical phase, marked by the low credibility of both politics and democratic institutions. The challenge is to identify new forms of public involvement aimed at building confidence among citizens and restoring the credibility of institutions. This is not an isolated, exclusively Italian issue, because several other countries in Europe are faced with the same challenge. This is

2 A. Auer, *La justice constitutionnelle et la démocratie référendaire – Rapport de synthèse*, in AA.VV., *Justice constitutionnelle et démocratie référendaire*, Strasbourg 1995, p. 149.

3 D. Held, *Models of Democracy*, Cambridge 2006.

4 L. Morel, M. Qvortrup (eds.), *The Routledge Handbook to Referendums and Direct Democracy*, London 2018; D. Della Porta, M. Portos, F.V. O'Connor, *Social Movements and Referendums from Below: Direct Democracy in the Neoliberal Crisis*, Bristol 2017; M. Qvortrup, *Direct Democracy: a Comparative Study of the Theory and Practice of Government by the people*, Manchester 2017; S.P. Ruth, Y. Welp, L. Whitehead, *Let the People Rule? Direct Democracy in the Twenty-first Century*, Colchester 2017; J. Asimakopoulou, *Social Structures of Direct Democracy: on the Political Economy of Equality*, Chicago 2015; D. Altman, *Direct Democracy Worldwide*, Cambridge 2014; M. Qvortrup, *Referendums Around the World: the Continued Growth of Direct Democracy*, New York 2014; M. Suksi, *Bringing in the People. A Comparison of Constitutional Forms and Practices of the Referendum*, Dordrecht-Boston 1993.

accompanied by a constitutional debate at the scientific and political level aimed at developing new models of democratic involvement. The credibility of institutions is severely undermined by a number of factors, including the economic and financial crisis, the gap between politics and citizens, the scandals and corruption cases involving several parties and their representatives, and a distorted use of immunity. In Italy, an additional problem is represented by the electoral system in use, which assigns the choice of candidates entirely to party leaders and deprives voters of the chance to express their preference, thus widening the gap between voters and elected officials. Attacks on the political world, however, may result in unjustified prejudice, fuelled by the exploitation of discontent towards a caste of “Brahmins”. Such prejudice may throw general discredit upon all, including those who actively pursue the common good, and embrace all policymakers, democratic institutions and the very foundations of democracy, thus triggering a very dangerous process.

A number of solutions are on the table. Seeking a broader involvement of all elements of society through a new form of “governance”, pursuing increased autonomy, regionalism or federalism, or a more direct democracy, are options that vary in organizational terms but are all based – each in its own distinct way – on a common goal: in this increasingly broad, distant and globalized world, citizens wish to feel part of their community and a more identity and fulfilling role at regional level; they wish to cooperate and jointly pursue their interests, or – to use a more sentimental expression – find a new “Heimat”, a safe place which they can call their own.

In this context, many traditional political concepts such as sovereignty, citizenship and democratic representation, based on reliance on a relatively homogeneous nation-State, were questioned.

In order to restore balance within society and rebuild the basis for democratic participation, constitutional reforms appear increasingly necessary. Such reforms should be adopted within individual States and at European level, through EU framework legislation<sup>5</sup>.

Two opposing trends are influencing traditional State organization<sup>6</sup>. On the one hand, we are experiencing closer cooperation at European/international level and witnessing the establishment of supranational bodies in Europe. On the other, those very supranational bodies, distant from the public, are the main reason behind the pursuit of a more manageable local dimension and a return to the local and regional level, where participatory democracy can be directly experienced. Politics is

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5 R. Bellamy, V. Bufacchi, D. Castiglione, *Democracy and Constitutional Culture in the Union of Europe*, London 1995, p. 10.

6 *Ibidem*.

denationalized; the nation State is no longer the linchpin of political activity and the privileged space for political life<sup>7</sup>.

### 3. Strong Principles and Parties Versus Weak Democracy and Parliament

Unlike other Mediterranean countries like Greece, Portugal, and Spain, Italy became a relatively stable democracy right after the Second World War. In the 1950s, Italy contributed to the establishment of the European Community and was one of its founding countries. It experienced a quick, if uneven economic growth and a remarkable modernization process<sup>8</sup>. From 1950 to 1990, the gain in Italy's per capita income was almost unparalleled. Its growth rate ranked second after South Korea. To make comparisons across Europe, by the end of that period per capita income had grown so rapidly that it was close to that of Germany and France<sup>9</sup>.

Notwithstanding its exemplary Constitution based on profound ethical and democratic values, conceived by our Constitutional Fathers to spell out any dictatorial drift, Italy has a fragile democracy. It has an independent judiciary, a democratically elected parliament and a government based on parliamentary confidence; however, the three powers are not balanced. The balance is compounded by the fourth power where a quasi-monarchy position prevails, especially in the broadcast industry<sup>10</sup>. Parliament is increasingly constrained in the exercise of its functions as representative of the people by the predominance of Government. The latter resorts more and more frequently to emergency decrees, which Parliament can only amend and ratify a posteriori, and to the passage of bills through a vote of confidence, which smother parliamentary debate and any chance to introduce amendments. Parliament is required to pass Government's so-called «maxi-emendamento», a text containing a number of different measures, without having any say on its content.

If we compare the world's major democracies, the United States is the only country where people representation finds its central expression in Parliament. Pasquino

7 A. Scott, *The Fragmentary State of the Twenty-first Century: an Elementary Conceptual Portrait*, Indiana 2008, pp. 1-2.

8 M.J. Bull, M. Rhodes (eds.), *Crisis and Transition in Italian Politics*, London-Portland 2009, pp. 1-13.

9 M. De Cecco, *Italy's Dysfunctional Political Economy*, "West European Politics" 2009, no. 4, pp. 763-783; R. Dornbusch, W. Nölling, R. Layard (eds.), *Postwar Economic Reconstruction and Lessons for the East Today*, Cambridge-London, 1993; A. Boltho, A. Vercelli, H. Yoshikawa (eds.), *Comparing Economic Systems: Italy and Japan*, Basingstoke-New York 2001.

10 M. Hibberd, *Conflict of Interest and Media Pluralism in Italian Broadcasting*, "West European Politics" 2007, no. 4, pp. 881-902.

(2007) laments that the opposite is true in Italy<sup>11</sup>. The Italian Parliament only seems to play a central role when it passes the initial vote of confidence in the Government, and not in the Government's final stages, as is the case in Germany or Spain.

Unlike those democracies, Italy does not envisage a constructive vote of no-confidence. A number of governments replaced one another over time, and every Government's end originated, in Pasquino's view, outside Parliament. One of the main weaknesses of Italian democracy has been a lack of executive stability, especially before the 1993 electoral reform. From 1945 to 1989 there were as many as 43 Governments, each lasting on average twelve months. The common objective of reforms was therefore to increase stability at central government level.

Moreover, the Parliament does not play the central role it should in terms of political representation. It is constrained by the Executive, on the one hand, and by political parties, on the other; in fact, the latter play the leading role themselves. Before the major political corruption scandals of the late 1990s and the 1993 electoral reform, a multitude of parties existed in Italy, the most powerful being the «Democrazia Cristiana (DC)» (Christian Democracy) party, which remained in power for fifty years (1944-1994) with different centrist coalitions.

#### 4. The so-called First Republic and Second Republic

In spite of a succession of governments, political stability, i.e. parties' stability, reigned. From the end of the 1940s until the early 1990s, the Christian Democratic party was the political driving force, which, along with four smaller allies (Socialists, Social-Democrats, Republicans, and Liberals), determined the destiny of the Italian Republic.

The political system remained unchanged until the early 1990s when many prosecutors uncovered wide-ranging political corruption involving the use of bribes to fund political parties<sup>12</sup>.

The 1993 electoral laws<sup>14</sup> introduced a mixed system, whereby most seats were allocated under a plurality system (first past the post) and a smaller percentage by proportional representation. This paved the way to an adversary system in which political forces gravitated around two large right- and left-wing groups. With the new

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11 G. Pasquino, *Parlamento e Governone in l'Italia repubblicana*, "Rivista italiana di scienza politica", 2007, no. 1, p. 6.

12 S. Fabbrini (ed.), *L'Europeizzazione dell'Italia*, Roma-Bari 2003, p. 205.

13 On Italy's transition from central to regional State: A. Grasse, *Italiens langer Weg in den Regionalstaat: die Entstehung einer Staatsform im Spannungsfeld von Zentralismus und Föderalismus*, Opladen 2000.

14 Laws August 4, 1993, no. 276 and no. 277.

2005 electoral law<sup>15</sup>, the role of political parties was further strengthened<sup>16</sup>. Single-member constituencies were abolished: a new proportional system presenting voters with a closed list of candidates has replaced the old system based on preferential votes. Voters can only express a preference for a list but not for a specific candidate, as candidates are chosen and assigned a certain position in the closed list by the party leader. As a result, about 90% of MPs are chosen by party leaders. As Sartori pointed out nearly fifty-five years ago, in 1963, MPs are more afraid of alienating party leaders than voters<sup>17</sup>. As evidence of this, Pasquino stressed that Italy's leading politicians traditionally make their most important speeches at party meetings. None of the major political leaders comes from a parliamentary background. De Gasperi, Togliatti, Nenni, Fanfani, Moro, Craxi, De Mita and Andreotti are cases in point. So are, Pasquino says, a few heads of government lacking parliamentary experience, like Berlusconi, Prodi, Renzi, and, lastly, Conte<sup>18</sup>.

After a long period when Italy's Government and Parliaments, unlike those of other countries, did not deem it necessary to revise the Constitution, in the 1980s policy-makers realized that the State and the Constitution needed reforming. After several failed attempts, the Constitution was revised in 2001, with the sole amendment of Title V, Part II. The weakness of direct democracy tools was there to stay.

## 5. The Direct Democracy in Italy

In accordance with Art. 1, second para., of the Constitution, the Italian democracy remains a primarily representative democracy<sup>19</sup>.

Early forms of direct democracy – for the purposes of supplementing indirect democracy – were introduced in Switzerland as early as the 19th Century and were later enhanced and extended. Through hundreds of *referendums* held over more than 100 years, Swiss citizens have learned to make decisions on important political matters at federal, cantonal and municipal level<sup>20</sup>.

In Italy, however, direct public involvement tools are limited to three, only partially developed, tools. Italy's direct democracy tools are: a) referendum; b) petition; c) legislative initiative.

15 Law December 21, 2005, no. 270.

16 L. Bardi, Electoral Change and its Impact on the Party System in Italy, "Western European Politics" 2009, no. 4, pp. 711-732.

17 G. Sartori, Dove va il Parlamento?, Napoli 1963, pp. 281-386.

18 G. Pasquino, Parlamento e Governo..., *op. cit.*, p. 7-9.

19 A. Barbera, C. Fusaro, Corso di diritto pubblico, Bologna 2010, pp. 211ff.

20 B. Kaufmann, R. Büchi, N. Braun, Handbuch zur Direkten Demokratie, Marburg 2008, p. 11.

### 5.1. The Referendum

In Italy, referendums are often identified with referendums to repeal laws, the first of which was held 38 years ago. The 1974 referendum on divorce was followed by 66 more referendums grouped in 17 voting days till, lastly, in 2016 on oil drilling<sup>21</sup>.

All were referendums designed to repeal laws<sup>22</sup>. In an actual, modern direct democracy, this should not be the sole type of referendum in use and certainly not the most important one. Direct democracy is an encompassing notion that should go beyond such constraints. The 1947 Constituent Assembly did not provide Italian voters with such tools as citizens' binding legislative initiative and optional confirmatory referendum for ordinary State laws, or citizens' constitutional initiative. Now that the Italian Republic is in its sixties, it is time to address this shortcoming.

The Constitution provides for the referendum at national, regional and local level:

- a) constitutional referendum (Art. 138(2) and (3) of the Constitution);
- b) referendum to repeal a law or a measure having the force of law (Art. 75 of the Constitution);
- c) territorial referendum (Art. 132(1) of the Constitution: for the merger of existing Regions or the creation of new Regions; Art. 132(2): to enable one or more provinces or municipalities to be merged into another Region)<sup>23</sup>;
- d) regional referendum on regional legislation and administrative measures (Art. 123(1) of the Constitution);
- e) regional referendum on the regional charter (Art. 123(3) of the Constitution);
- f) local referendum on matters under the sole local jurisdiction (Arts. 6 and 8 TUEL)<sup>24</sup> and the establishment of the metropolitan city (Art. 23 TUEL; Art. 23(1) Law 5 May 2009, no. 42).

We shall focus on the first two tools and those that are lacking at the national level.

21 This part of the study is based on the report accompanying constitutional Senate bill no. 1428 by Peterlini and others, tabled before the Senate on March 4, 2009 and drafted in cooperation with the Bolzano representatives of "Democrazia diretta", Benedikter and Lausch.

22 Besides these, two confirmatory constitutional referendums were held, in 2001, 2006 and 2016, and one consultative referendum in 1989 (based on constitutional Law April 3, 1989, no. 2) giving to the European Parliament a popular, constitutional mandate.

23 F. Ratto Trabucco, *Riflessioni sulla prima attuazione dell'art. 132, secondo comma, Cost., dopo sessantuno anni di vita: l'esame del disegno di legge di variazione territoriale regionale e l'acquisizione dei pareri regionali sulla scorta del "caso Alta Valmarecchia", "Le Istituzioni del federalismo"* 2009, no. 3-4, pp. 603-628; *Ibidem*, *Sulla presunta incostituzionalità del quorum della maggioranza assoluta sugli iscritti alle liste elettorali per i referendum territoriali ex art. 132 Cost.*, "Le Istituzioni del federalismo", 2007, no. 6, pp. 843-869.

24 TUEL: Consolidation Law on Local Government (Legislative Decree, August 18, 2000, no. 267).



## 5.2. The Constitutional Referendum

The Art. 138 of the Italian Constitution runs:

- «1. A law to amend the Constitution and other constitutional laws shall require adoption by each House after two successive debates at intervals of no less than three months, and approval by an absolute majority of the members of each House in the second round.
2. Such law may be submitted to a popular referendum if, within three months of its publication, such request is made by one-fifth of the members of a House or five-hundred thousand voters or five Regional Councils. A law thus submitted to referendum may not be promulgated unless approved by a majority of valid votes.
3. A constitutional law which was passed in each House with two-thirds majority of votes in the second round may not be put to the referendum».

No quorum/minimum turnout is required for the referendum to be valid. Three constitutional confirmatory referendums were held respectively in 2001 (on amendments to the Constitution submitted by the Romano Government), 2006 (on the amendments submitted by the second Berlusconi Government) and 2016 (on the amendments submitted by the Renzi Government). In line with the provisions regulating this type of referendum, no minimum turnout requirement was in force, although the three referendums concerned matters of the utmost importance, i.e. substantial constitutional amendments. In this sense, they represented the true essence of the tool of the referendum as implemented in other countries, where the outcome is determined by those who go to the polls, while those who choose to abstain implicitly delegate their decision-making power to the actual voters.

## 5.3. The Referendum to Repeal Laws

The Art. 75 of the Italian Constitution runs:

- «1. A general referendum may be held to repeal, in whole or in part, a law or a measure having the force of law, when so requested by five hundred thousand voters or five Regional Councils.
2. No referendum may be held on a law regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty.
3. Any citizen entitled to vote for the Chamber of Deputies has the right to vote in a referendum.
4. The referendum shall be considered to have been carried if the majority of those eligible has voted and a majority of valid votes has been achieved.
5. The procedures for holding a referendum are established by law».

This type of referendum seems to have long entered into a critical phase, not because of a lack of hot political issues or public involvement, but because of a repeated failure to reach the minimum turnout. Except for the 2011 referendum

on nuclear power, water, privatizations and legitimate impediment (a law whereby cabinet members facing trials could be exempted from appearing in court on account of political engagements), the previous six referendums (and last in 2016), held between 1997 and 2009 and involving 24 different items, were declared invalid for failure to reach the required quorum. Turnout was between 49.6% (in 1999) and 23.8% (in 2009), which resulted in a progressive loss of confidence in the referendum tool. The fact that referendums have generally been owned by parties, rather than promoted by citizens, associations and *ad hoc* committees, may also explain people's estrangement. Furthermore, some parties ran abstention campaigns, advising their supporters not to go to the polls, and later repeatedly tried in Parliament to thwart the outcome of the referendum. The tool itself is inappropriate, and so are the rules for its implementation, which are not in line with the needs of a modern direct democracy. This type of referendum, with its restrictive implementation criteria – the quorum requirement – is inadequate in terms of ensuring public involvement.

#### 5.4. The Citizens' Legislative Initiative

The Art. 71 of the Italian Constitution states:

- «1. Legislation may be introduced by the Government, by a Member of Parliament and by those entities and bodies so empowered by constitutional amendment law.
2. The people may initiate legislation by proposing a bill drawn up in sections and signed by at least fifty thousand voters».

In Italy, the citizens' right to introduce legislation, i.e. the free and constructive expression of the will of the sovereign people, which can result in referendums on important bills signed by hundreds of thousands of people, is on the wane. The tool currently in force – the citizens' legislative initiative – does not ensure the full enjoyment of this right. Proposals that may have required huge efforts in terms of the collection of signatures in order to be submitted cannot be put to the vote if they are rejected by Parliament. Many such bills are not even discussed in Parliament. Over 90% of bills submitted during the 1996-2001 term still await consideration, not to mention those submitted after 2002.

Just recently in the current XVIII legislature, the government by Five Stars Movement and Ligue for Salvini's Party proposed the popular initiative constitutional reform draft that also introduces the reduction of the quorum at 25% of favorable votes with the abolishment of the distortive participation quorum<sup>25</sup>. The approval quorum is therefore intended to discourage the practice of abstention as a useful tool, to those who oppose the content of a referendum, to invalidate the consultation. But what would happen if the Chambers, following the parliamentary debate, had to

25 See <http://www.camera.it/leg18/126?leg=18&idDocumento=726>.

approve a proposal that was partially different from the original one presented by the citizens? In this case, if the proposing committee does not renounce the original text, a referendum is indexed both on the initial text and on that approved by Parliament: if both proposals are approved, the law that has obtained more preferences is promulgated. Citizens who express themselves favorably to both proposals are entitled to indicate which of the two texts they prefer.

The proposal also provides for limits to the matters that may be the object of a proactive referendum. For example, a referendum will not be held if the proposal violates the intangible constitutional rights or if it does not provide adequate financial coverage.

### 5.5. Lessons Learned from 44 Years of Italian Referendums to Repeal Laws

After 44 years of referendums to repeal laws in the Italian constitutional practice, three main lessons may be drawn.

In Italy today there is a shortage of referendum-related rights, i.e. the main tools that are commonly found in a mature direct democracy system are lacking. These are citizens' legislative initiative and optional confirmatory referendum also for ordinary laws. Citizens' right of initiative to amend the Constitution is also lacking. This was the first right claimed and ultimately secured by the Swiss popular movement for direct democracy in 1860 and is also to be found in the United States system as of the early 1900s.

The rules regulating referendum-related rights are too restrictive. Several provisions of Law 25 March 1970, n. 352, regulating referendums should be amended, namely: the power of the constitutional court is too broad, a referendum may not be held on the same day as an election, there is no guarantee on its outcome, signatures must be certified by a public official, no campaign refund is available for the organizing committee, there is no obligation on public authorities to inform voters, referendum campaign funding totally lacks transparency and there is no cap on the collection of signatures.

The maximum turnout set at 50% of registered voters is useless and damaging because it has eroded the credibility of this tool and millions of Italians do not even bother to go to the polling station anymore one referendum day. The minimum turnout rule means that abstentions are counted together with the noes, which makes it very easy for parties or vested interests opposing a referendum to tacitly coalesce with the uninterested by inviting voters to go to the seaside or to the mountains on a voting day, rather than to the polling booth. Today, what with people's frustration and longing for strong government, politician-bashing and voting for strong leaders have become more appealing than striving to strengthen the tools that put more power in the hands of citizens.

## 6. Conclusions

If the goal is to bridge the gap between citizens and government, or citizens and political parties, the present direct democracy arrangements are to be changed. If political engagement is to be promoted under the fourth para. of Art. 118 of the Constitution and the positive effects of direct democracy are to unfold, the relevant articles of the Constitution must be revised, including Arts. 73, 74, 75 and 138, with a view to facilitating recourse to a referendum.

My comments on and criticism of the present unsatisfactory provision on direct democracy in Italy have informed a bill submitted to the Senate of the Republic in 2009. In cooperation with the Bolzano-based movement Initiative for More Democracy, there a draft for a constitutional amendment bill, which was co-signed by eight more senators<sup>26</sup>. The constitutional bill no. 142 proposes to amend Arts. 70, 71, 73, 74, and 75 of the Constitution and strengthen citizens' initiative<sup>27</sup>.

A commitment to strengthen participatory democracy should move from the following key issues.

### 6.1. Providing Voters with Throttle and Brake

First of all, the present narrow notion of direct democracy should be overcome. Citizens should be vested with actual legislative power, through the two main tools of a fully accomplished system of direct democracy: the legislative initiative to provide citizens with a space for action and optional confirmatory referendum to enable citizens to halt legislation which does not enjoy the support of a majority of voters. This means providing voters with both throttle and brake. They may thus use the throttle pedal when urgent reforms are not being introduced or are not making progress in parliament or push the brake pedal when the parliamentary majority seeks to impose its policies on a supposedly unconvinced public. These two rights were unjustly overlooked in the Constituent Assembly in 1947-1948. Today, a referendum cannot be solely used as a defense tool, as foreseen by the Constituent Assembly but should be considered the most important vehicle to promote political engagement under the fourth para. of Art. 118 of the Constitution, whereby «The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiative of citizens, both as individuals and as members of associations, in the framework of activities of general interest, on the basis of the principle of subsidiarity». Referendums to repeal laws have been used for 30 years as a surrogate for citizens' initiative, i.e. the legislative referendum, but on the basis of the experience in Italy and elsewhere, they may not be used to propose legislation, as was clearly

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26 Senate constitutional bill no. 1428 of March 4, 2009 by Peterlini, Ceccanti, Negri, Pinzger, Poretti, Procacci, Adamo and Perduca.

27 T. Benedikter, Più democrazia per l'Europa: la nuova iniziativa dei cittadini europei e proposte per un'Unione europea più democratica, Lavis 2010, pp. 123-134.

shown recently when all the efforts made to change the electoral law were nullified by the ruling of the constitutional court, which declared the referendum question not receivable<sup>28</sup>. Citizens need a space for action and appropriate direct democracy tools to guide policies and Government action.

### 6.2. More Transparent and Simpler Tools and Procedures

Implementation rules should be redesigned so as to expand democracy, to meet the requirements of the modern citizen by, amongst other things: limiting the power of the constitutional court; increasing the sectors which can be regulated by referendum – e.g. by including foreign and tax policies; introducing an obligation to deliver an official information booklet to every family; adopting strict rules on equal access to the media, introducing caps on campaign and counter-campaign spending; mandating full transparency of funding; liberalising the collection of signatures and so on.

The problem today lies not in the proliferation of referendums, owing to the accessibility of such tool. The problem lies in the fact that Italian citizens today, in their communes, regions and at the national level, do not see direct democracy as an ordinary tool of democratic debate and engagement. Referendums should be given the same role as they have enjoyed for centuries in other democratic societies: they should be an expression of the will of the people, free of political party brokering.

Referendums would thus gain a new political role – beyond the political composition of Parliament, which reflects a given historical moment – and would supplement representative democracy in a proactive (legislative) or reactive (confirmatory) way<sup>29</sup>. The present form of the referendum to repeal a law would thus be subsumed in the broader legislative referendum, or citizens' initiative, only aimed at deleting a provision rather than introducing or amending one.

### 6.3. The Citizens' Legislative Initiative

One of the main reasons to strengthen the tool of the referendum (in its dual capacity as a tool to produce citizens' bills and to confirm laws and legislative amendments) is the need to open new spaces for public involvement by fully implementing the fourth para. of Art. 118 of the Constitution and restoring the thrust of an active involvement for the common good.

Citizens' initiative, as presently regulated, lacks the impact in democratic life that it deserves, because it does not commit Parliament to take follow-up action, as is amply demonstrated by the number of citizens' bills submitted to Parliament over the last few years. Most of these proposals, even ten years after their submission, still await

28 Constitutional court, ruling January 12, 2012, no. 13.

29 A. Capretti, *Direkte Demokratie in Italien*, in H.K. Heussner, O. Jung (eds.), *Mehr direkte Demokratie wagen. Volksentscheid und Bürgerentscheid: Geschichte, Praxis, Vorschläge*, Munich 2009, pp. 170-171.

the response. Also at the regional level, the legislative initiative has failed to motivate citizens and is therefore rarely used, again because the public has no further say in the matter if their proposal is rejected or indefinitely put on the back-burner by the regional council. For this reason, a region and one district with special status (Friuli-Venezia Giulia and the autonomous districts of Trento) have introduced legislation whereby the local legislative assemblies have an obligation to consider a proposal submitted by the citizens within a certain timeframe, failing which the citizens' bill is automatically put to the vote by referendum. This arrangement, however, has one major shortcoming, in that it fails to vest actual legislative power with the citizens. The autonomous region of Valle d'Aosta and the autonomous district of Bolzano have rightly gone further: the legislative initiative has been conferred on the citizens through a procedure whereby a quorum of signatures may produce a properly drafted bill to their respective regional/provincial legislative council. Should such bill fail to progress through the council – in part or substantially – it would automatically be put to a referendum. This arrangement, along with the optional confirmatory and constitutional referendum, is the main direct democracy tool that has worked – to the full satisfaction of the people – for 140 years at all levels of government in Switzerland and for over 100 years at State and city level in 26 US States. Parliament must enjoy a right to submit its own alternative proposals. With respect to any type of referendum on any eligible topic, Parliament should be entitled to consider a draft measure which is neither that of citizens nor the *status quo* and which might be at the opposite end of the citizens' proposal. Such a draft measure by Parliament would thus be a third option laid before citizens. If Parliament passes its own proposal, then the committee of initiators (consisting of the citizens enjoying voting rights under this bill) shall vote on whether to withdraw their bill or to put it to the general vote. It would be up to the committee to decide whether the bill passed by Parliament incorporates the principles and goals of the measure proposed by the citizens or is totally different to the citizens' proposal.

Because both proposals might obtain a majority of valid votes, a casting question should also be posted on the ballot paper, such as: «Which of the two proposals should take effect if both are preferred over the existing law?». If both the citizens' and Parliament's proposals are approved, this third question would define the outcome of the vote. Should neither proposal obtain a majority in the replies to the third question, the popular initiative would be rejected and the existing law would remain in force. Such an exercise – even if inconsequential in terms of amending the legislation – would provide Parliament with a clear indication of the will of the people, which should be taken into account in future reviews of the subject matter.

#### **6.4. The Optional Confirmatory Referendum**

An optional confirmatory referendum is only admitted in the Italian constitutional system in cases of amendments to the Constitution. Such a tool should

be extended to ordinary State laws. Both in theory and in the long-established practice of countries with a modern system of direct democracy, this tool provides the public with an emergency brake. Under the proposed law, a certain number of citizens or five regional councils may sign a petition requesting that a law that has been passed but has not yet entered into force be swiftly subjected to a referendum in which all voters take part. The sole exception to this is the Budget Law. This arrangement, which is widely used in Switzerland and the US, vests confirmatory and veto power in the citizens. Requesting a confirmatory referendum simply means that there are strong doubts on the correspondence of views between the public and the majority in Parliament. The tool also enables Members of Parliament to confirm that their proposal for the regulation of a given subject is supported by the people.

The bill to amend the second para. of Art. 75 of the Constitution would enable the enactment of urgent legislation for a short period of time. Such legislation may be challenged by an optional confirmatory referendum. The new para. of the Constitution should read «If Parliament declares a law to be urgent, such law shall be enacted by the deadline provided therein and a confirmatory referendum under Art. 74 above may be requested only after the law has entered into force. If a confirmatory referendum is held and an outcome unfavorable to the law is returned, such law shall be repealed within a year of its passage by Parliament and may not be introduced again». This measure would comply with Parliament's need to adopt urgent measures. A law thus passed would enter into and remain in force until the optional confirmatory referendum is completed. If it fails the test of the referendum, the law is repealed, as is presently the case with laws repealed by referendum. Once voters have rejected such urgent measure, the law may not be proposed again, thus ensuring that the will of the people is complied with.

### 6.5. The Citizen's Constitutional Initiative

Constitutional amendments proposed by citizens should follow a more complex process than ordinary laws. A properly drafted constitutional amendment bill is to be supported by at least 50 thousand sponsors whose signatures are to be gathered within no longer than six months. Once this stage has been completed, a pre-test is conducted to assess whether the proposal is receivable. After this, one million signatures are required. By introducing a two-stage process, the frustrating experience of many organizing committees to see their proposals rejected by the constitutional court after one million signatures have been collected would be avoided. Under this proposed procedure, 50 thousand voters would be entitled to submit their constitutional amendment bill to the constitutional court for a receivability assessment. Once this certainty has been obtained, the organizing committee may engage fully in the collection of one million signatures. Also, in this case, Parliament may introduce an alternative proposal, which would be submitted to voters under the same procedure as ordinary laws.

### 6.6. Why the Turnout Requirement Should be Abolished?

The bill proposes an amendment whereby – in all referendums – the proposal put to the vote is passed if it is approved by a majority of valid votes cast. The vote should be free and decisive, meaning that citizens who participate in a referendum should be aware that their vote will be decisive, whereas those who choose not to go to the polls implicitly delegate their vote and decision to other voters. Why would the abolition of the turnout requirement make sense? The main reasons are the following.

A) Abstaining is the same as voting “No”.

Because of the turnout requirement, a voter not going to the polling booth is actually casting a vote against, even though there might be a number of different reasons why a person may be prevented from voting: a lack of knowledge on the subject matter of the referendum, indifference, lack of interest, and many other personal reasons. Though these can be good reasons to abstain or not go to the polling station in an election, they would not imply a vote against as only valid votes for parties and candidates are counted. Therefore non-participation in a referendum ought to be considered as such, i.e. an abstention without any consequence on the final outcome.

B) The turnout requirement may be used in a manipulative way.

Boycotting a referendum may easily result in a turnout lower than 50%, that is below the threshold required for the outcome of the vote to be valid. Thus, referendum opponents exploit this mechanism to try to invalidate the outcome by urging voters in their camp to abstain so as to add their number to those who would not vote anyway. By resorting to this practice they do not need to put forward alternative arguments or proposals to convince voters; they can confine themselves to calling for a vote boycott. But, if no minimum turnout is required, then both proponents and opponents are obliged to make their points clear to convince a majority of voters.

C) The turnout requirement rewards lack interest in politics and penalize citizens who do not participate in politics.

Politically active citizens endeavor to be well informed and to form their own opinions ahead of the vote. Uninterested people and advocates of vote boycotting simply do not go to the polls. If a referendum fails to reach the minimum turnout required, involved citizens are penalized while boycotters and uninterested people are rewarded for a choice that effectively prevents a meaningful democratic debate.

D) Vote secrecy may be jeopardized.

The right to a secret ballot is somehow infringed by the turnout requirement.

A voter who goes to the polling station against all calls to boycott the vote is automatically viewed as an antagonist by referendum opponents.

E) No minimum turnout is required for constitutional referendums.



Confirmatory referendums both on laws amending the Constitution (Art. 138, second para., of the Constitution) and on legislation concerning the form of government at the local level (Art. 123, third para. of Constitution, e.g. election laws and laws regulating direct democracy) need not meet a turnout requirement.

F) Elections do not require a minimum turnout to be valid.

No minimum turnout is needed in any election at any level. Only actual voters decide.

G) No risk that a minority may gain the upper hand.

Fears that a small but very active minority might pursue their own interest and impose their choice to a passive majority are unjustified. Research into voters' behavior has shown that in any controversial vote the turnout is high and the majority of citizens clearly express their rejection of the minority's proposition on the ballot paper. At any rate parties and unions, who claim to represent the majority of society, are free to mobilize their supporters and urge them to vote against a referendum that is thought to reflect minority interests.

H) In the United States and Switzerland no minimum turnout is required.

In Switzerland, the United States, and many other countries there is no minimum turnout requirement. Though referendum participation levels in Switzerland traditionally fluctuate "only" around 40%, no political party has ever really demanded a quorum rule, knowing that this would open the way to political manipulation and tactical maneuvering.

I) Moderate turnout levels are required in Germany.

There are Germans who complain about the "high" turnout required in their country, even though it is actually quite low when compared to Italy's. In Bavaria, Hesse, and Saxony *Länder* ordinary laws are passed by a simple majority and no quorum is required. In all remaining German States, a minimum turnout or approval rate must be met, ranging between 15 and 33%, with the sole exception of Saarland where a 50% turnout has to be reached. Higher requirements have been set in Germany for the approval of constitutional referendums, unlike Italy where no quorum is required in this type of referendum. In Bavaria, for example, 25% of registered voters must cast a "Yes" vote, while the approval threshold is 50% in almost all remaining States, but just for constitutional decisions<sup>30</sup>.

J) Direct democracy promotes citizens' involvement.

Direct democracy is meant to promote citizens' participation rather than discourage it. One of its main goals is to encourage citizens' involvement under Art. 118(4) of the Constitution. A high degree of involvement cannot

30 B. Kaufmann, R. Büchi, N. Braun, *Handbuch...*, *op. cit.*, p. 245.

be reached by imposing legal obligations to meet a certain turnout. Thus, uninterested citizens would not be persuaded to vote because a quorum is required: quite the reverse. Having repeatedly seen referendums fail owing to low turnout, interested and motivated citizens eventually feel frustrated and lose confidence in this democratic tool as they are confronted with the boycott of other citizens. It is a vicious circle. Though originally intended as a way to encourage participation, today the turnout requirement is undeniably stifling debate and deterring engagement. This mechanism penalizes social minorities more than anyone else as they cannot reach out to the wider public.

K) The turnout requirement is the result of a lack of confidence in the people. Referendums today are tools for active participation rather than mere «defense of last resort». Any direct democracy procedure should aim at encouraging communication at all levels whereas participation thresholds and calls to boycott a referendum effectively hamper proper communication. It is easier to elude debate by inducing citizens not to vote than to face open public debate and a vote without a quorum.

The 50% turnout threshold is not a fundamental provision of the Italian constitutional system. In fact, it is only applicable to one of two types of national referendums. Taking other countries' successful models as an example, Italy can today abolish the quorum in national referendums as well as in regional and municipal ones.

However, the abolition of the turnout requirement must be accompanied by the introduction of another extremely important provision, i.e. the need to obtain a majority of valid votes both nationwide and in most regions. This new provision is meant to reflect the general course taken by the Italian political system towards a more accomplished regional state and to avoid a geographically imbalanced outcome of the referendum in which votes in favor may be concentrated in just a few regions. For example, a referendum approved in the 8 Northern regions would not pass because a majority of valid votes is needed in at least 11 out of 20 regions.

### **6.7. Raising the Majority Required to Pass Constitutional Amendments to 60%**

The majority electoral system calls for a revision of the majority required to pass constitutional amendment bills in the second vote. This should be increased from 50 to 60%, so as to avoid that constitutional amendments with far-reaching consequences for our legal system are passed by government MPs without the support of a larger majority in Parliament. At the same time, the majority required for these laws not to be put to the referendum would be raised from two-thirds to three-fourths of the members of each House.

## 6.8. The Direct Democracy Bills Submitted in the Two Last Parliament Legislatures

In the XVI Parliament legislature (2008-2013), according to an agreement between the Presiding Officers of the Chamber of Deputies and the Senate reached at beginning of the term, constitutional amendment bills have first to be passed in the Senate. Eight bills on direct democracy tools had been considered and discussed in the Senate Constitutional Affairs Committee, owing to a lack of political will by right majority parties<sup>31</sup>.

In the last XVII Parliament legislature (2013-2018) there was a lack of interest in this topic with just bills on direct democracy tools presented in the Deputies Chamber Constitutional Affairs Committee but without any discussion before the end of the legislature, again for the owing to a lack of political will by left majority parties<sup>32</sup>.

We can only hope that people will raise its voice and reform efforts will finally be examined in the current XVIII legislature (2018-2023). However with the people's initiative referendum draft above mentioned some questions are mandatory. Will the new referendum that the majority wants to include in the Constitution will be a tool in the hands of the lobbies? A weapon in the hands of «500 thousand signing professionals», as denounced by the opposition during the general discussion that opened January 16, 2019<sup>33</sup>. The parliamentary minority has reiterated that among the reserves on the limits of the subjects that can be submitted to a referendum. Limits at the moment very permissive. The alarm concerns the possibility of subjecting the spending laws and the criminal laws to the vote. Really, without corrective measures, Italy risks a Polish or Peronis drift? Surely and finally the lobbies will be revealed. So far they moved in the total shadow.

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31 Out of 124 bills under consideration in the Constitutional Affairs Committee of Senate, six are related to direct democracy.

32 Deputies Chamber constitutional bill no. 3124 of May 19, 2015 by Fraccaro and others and Deputies Chamber ordinary bill no. 4136 of November 4, 2016 by Mucci and others.

33 See <http://www.camera.it/leg18/126?tab=5&leg=18&idDocumento=726&sede=&tipo=>.

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