6. Italy

Henri Ibi

1. INTRODUCTION

Instruments of direct democracy were introduced in Italy for the first time with the entry into force of the Constitution of the Italian Republic (Italian Constitution or Constitution) of 1948.¹ The constitutional provisions on said instruments were implemented by means of an ordinary law of the Parliament (Law n. 352/1970 entitled ‘Provisions on referendums provided for by the Constitution and on the citizen agenda initiative’) over 20 years later in 1970.²

The Italian political climate at that time, in a certain way, encouraged the passing of the legislation on direct-democratic instruments. A few months after the entry into force of Law n. 352/1970, a controversial law was introduced by the Parliament: the Law n. 898/1970 regulating divorce. The largest Italian party at that time, that is, the Christian Democrats, was against this law but renounced obstructionism in Parliament, since it obtained ‘in return’ the approval of the law implementing the instruments of direct democracy provided for by the Constitution. The aim of the Christian Democrats was to launch an abrogative referendum against the law on divorce and entrust directly to the citizens the final political decision on a subject deemed to be ‘sensitive’. In January 1971, the request for a referendum by the ‘National Committee for the Referendum on Divorce’, chaired by the Catholic lawyer

¹ The Italian Constitution was enacted by the Constituent Assembly – elected by universal suffrage on 2 June 1946 – on 22 December 1947, was promulgated on 27 December 1947 and entered into force on 1 January 1948. An English version of the Italian Constitution is available on the website of the Italian Constitutional Court: https://www.cortecostituzionale.it/documenti/download/pdf/The_Constitution_of_the_Italian_Republic.pdf, accessed 18 July 2020.

² The Italian version of the Law n. 352/1970 can be found at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1970-06-15&atto.codiceRedazionale=070U0352&atto.articolo.numero=0&qId=b62dd618-7d5e-4feb-b8c0-5ca87a433f54&tabID=0.3033092646952269&title=lbl.dettaglioAtto>, accessed 18 August 2020.

Gabrio Lombardi,³ with the explicit support of the Christian Democrats and the Italian Social Movement, was filed with the Supreme Court.⁴ The first abrogative referendum in Italian history was held three years later, on 15 May 1974. The referendum request to abolish the law regulating divorce was rejected by nearly 59.3 per cent of the voters and consequently the law remained in force. The abrogative referendum on divorce had the second highest turnout after the institutional referendum which was held in 1946: 87.72 per cent of the eligible voters participated in the popular vote. Since 1970,⁵ 72 national referendums have been held in Italy, including 67 abrogative referendums, one consultative (advisory) referendum⁶ and four constitutional referendums.⁷

With regard to the legal limits, the Constitution expressly regulates those imposed under Article 75(2) of the Constitution concerning the abrogative referendum. However, the most significant limits, both substantive and formal, have been introduced by the Italian Constitutional Court (Constitutional Court) as the latter is entitled to adjudicate on the constitutional admissibility of referendum requests by reviewing the compliance with those limits on the basis of the Constitutional Law n. 1/1953⁸ and Law n. 352/1970.

³ A Manifesto on the Divorce was published explaining the reasons of such referendum: *Un popolo al bivio. Referendum sul divorzio frontiera di libertà*, Comitato nazionale per il referendum sul divorzio, Roma 1972.

⁴ The Ordinance of the Central Office of the Supreme Court which formally admitted the request of the promoters is available in Italian language at: http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/1971.12.06_divorzio.PDF, accessed 18 July 2020.

⁵ The list does not include the so-called 'institutional referendum' which took place on 2 June 1946 in order to determine the Italian state form. This is the first time Italian citizens were called to vote in a referendum. 54.27 per cent of the registered electors (out of 89.08 per cent of all voters) voted for the republican form of state. The statistics on referendums are available on the website of the Department for Internal and Territorial Affairs at: <https://elezionistorico.interno.gov.it/index.php?tpel=F&dtel=17/04/2016>, accessed 18 July 2020.

⁶ For the first and only time a consultative/advisory referendum was held in Italy on 18 June 1989, alongside European elections, on the European Economic Community. That was a non-binding referendum called by all main parties by means of an *ad hoc* constitutional law, because the Italian Constitution does not allow this type of direct-democratic instrument. It was a derogation to the Constitutional system as the entire Italian political system wanted to re-affirm the popular support of Italy to the process of European integration. The referendum question was approved by a very large percentage of the voters, that is, 80.03 per cent.

⁷ For a complete overview on referendum quorums and questions see: <http://www.riformeistituzionali.gov.it/media/1241/storicoreferendumquorum.pdf>, accessed 18 July 2020.

⁸ The Italian version of the Constitutional Law n. 1/1953 is available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1953>

Before the substantive admissibility check of the Constitutional Court takes place, an *ad hoc* judicial panel called Central Office for Referendums appointed within the Supreme Court (Central Office) is in charge of checking the formal admissibility of each referendum request by reviewing compliance, in closed session, of said requests with the requirements laid down in Law n. 352/1970. Once the decisions of the competent courts have been taken, the President of the Republic, symbol of the unity of the Republic,⁹ in accordance with the existing legal provisions and by means of Presidential decrees, calls the referendum.¹⁰

2. EXISTING DIRECT-DEMOCRATIC INSTRUMENTS

The instruments of direct democracy provided for by the Constitution include – at national level – (i) the constitutional referendum, (ii) the abrogative referendum and (iii) the citizen-agenda initiative. According to the LIDD classification of direct-democratic instruments, both the Italian constitutional referendum and the abrogative referendum can be considered either as an institution-initiated referendum or a rejective citizen-initiated referendum, depending on the subject who submits the request for referendum. A popular initiative or – applying the LIDD distinction – a proactive citizen-initiated referendum which enables the citizens to make a proposal that is then submitted to a referendum is not foreseen.

With regard to the regional level, it is worth mentioning that consultative referendums are provided under Articles 132 and 133 of the Constitution for the possible merger between existing Regions, for the creation of new Regions and for the detachment and incorporation of the Provinces and Municipalities from one Region into another one. Furthermore, Article 123(2) of the Constitution states that Statutes, which are to be considered as the fundamental laws governing the functioning of the Regions, ‘shall regulate the right to initiate legislation and promote referendums on the laws and administrative measures of the Region’. Typical examples of implementation of Article

-03-14&atto.codiceRedazionale=053C0001&atto.articolo.numero=0&qId=03a41bae-8b97-4f56-a742-9f10dce7f0cf&tabID=0.3033092646952269&title=lbl.dettaglioAtto.

⁹ Art. 87 Constitution.

¹⁰ Art. 15 and 34 Law n. 352/1970.

123(2) of the Constitution are Lombardy¹¹ and Trentino Alto Adige,¹² which have expressly regulated the referendum in their Statutes.

Finally, a certain number of direct-democratic instruments are also provided for by sub-constitutional provisions at municipal and provincial level. A very interesting case is the City of Bolzano, which has a very extensive list of instruments of direct democracy in its Statute, with very detailed provisions with regard to the procedure.¹³

This chapter will cover only the national state level instruments of direct democracy in detail. As mentioned above, the requirements and the procedures governing the direct-democratic instruments are regulated not only by the Constitution, but also by Law n. 352 of 25 May 1970 and, to some extent, by significant rulings of the Constitutional Court which have become more and more decisive with specific reference to the interpretation of the legal limits.

2.1 Constitutional Referendum

Article 138(2) of the Italian Constitution provides that:

1. laws amending the Constitution
2. other constitutional laws

must be submitted to a popular referendum when, within three months of their publication, such request is made by either one-fifth of the members of a House or 500,000 voters or five Regional Councils, unless the constitutional amendment and/or law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members according to Article 138(3). The constitutional referendum – which can be requested by the above-mentioned subjects in case of an approval of the constitutional amendment and/or law by less than a two-thirds majority – cannot be considered a law-initiated referendum, as a specific request to hold a referendum has to be submitted by the above-mentioned actors.

¹¹ An Italian version of the Statute of the Region Lombardy is available at: http://normelombardia.consiglio.regione.lombardia.it/NormeLombardia/Accessibile/main.aspx?exp_coll=lrst2008051400001&view=showdoc&iddoc=lrst2008051400001&selnode=lrst2008051400001, accessed 18 July 2020.

¹² An Italian and German version of the Statute of the Region Trentino Alto Adige is available at: http://www.regione.taa.it/Moduli/933_STATUTO%202018.pdf, accessed 18 July 2020.

¹³ Both the Italian and the German version of the Statute of the City of Bolzano are available at: http://www.comune.bolzano.it/UploadDocs/8023_Statuto_ita_aggiornato_maggio_2015.pdf, accessed 18 July 2020.

In all cases, the President of the Chamber which has approved a law amending the Constitution or another constitutional law shall communicate to the Government whether the approval has been made by a two-thirds majority or less of the members of the Parliament. The request for a referendum under Article 138 of the Constitution must contain an indication of the law revising the Constitution or the constitutional law to be submitted to the popular vote, and must also mention the date of its final approval by the Chambers and the date and number of the Official Journal in which it was published.¹⁴ In case no request for a referendum has been submitted within three months after the publication of the amendment and/or law, the President of the Republic shall promulgate the law which then enters into force.¹⁵

As the referendum can be requested by different subjects, the procedure regulating the referendum is structured differently depending on who is asking for the referendum.

According to Article 6 of Law n. 352/1970, if the request is made by one-fifth of the members of the Chamber, their signatures shall be authenticated by the secretariat of the Chamber to which they belong. It must attest that they are actually Members of Parliament in office. Three delegates chosen among the deputies requesting the referendum are in charge of filing such request with the Chancellor's office of the Supreme Court.

In case the request for a referendum is submitted by 500,000 citizens, it can be classified as a citizen-initiated rejective referendum. The promoters of the request, in number of not less than ten, must submit the request to the Chancellor's office of the Supreme Court, in order to start the procedure. Each initiative is announced in the Official Journal of the following day by the Office.¹⁶ As far as the specific requirements of the signatures are concerned, it should be noted that the relevant sheets must have specific dimensions and must contain at the beginning of each side, whether printed or stamped, the declaration of the request for a referendum, with the indications as prescribed by the applicable law.¹⁷

Lastly, the constitutional referendum can be initiated by a formal request coming from five Regional Councils as well. Under Article 10(1) of Law n. 352/1970 the Regional Councils requesting a referendum must adopt a specific resolution in this regard. It has to be approved by a majority of votes of the councillors and must contain the indication of the law in respect of which the referendum is requested. Once the first Regional Council, which could be

¹⁴ Art. 4 Law n. 352/1970.

¹⁵ Art. 5 Law n. 352/1970.

¹⁶ Art. 7 Law n. 352/1970.

¹⁷ Art. 7 Law n. 352/1970.

called ‘initiator’, has adopted its resolution, it is officially communicated to the rest of the Regional Councils. They are requested, in case they adopt the identical resolution, to inform the first Regional Council that has taken the initiative, so that it can follow it up.¹⁸ In case the identical resolution is adopted by at least four other Regional Councils, five delegates have to be nominated in order to draw up or sign the deed of request, and present it in person to the Supreme Court, together with certified copies of the decisions taken by each of the Regional Councils requesting the constitutional referendum.

For this type of referendum a turnout quorum is not provided for by the Constitution. The amendment and/or law submitted to the referendum shall not be promulgated by the President of the Republic if it has not been approved by a majority of valid votes of the citizens taking part in the popular vote.¹⁹

Only four constitutional referendums have taken place so far. The first constitutional referendum took place on 7 October 2001 on ‘Title V of the Constitution’. The promoters aimed, by rewriting Title V of the Constitution, to give more power to the Regions by assigning them legislative competence in all matters not expressly reserved to the central State. The electors approved the referendum question by a large margin (64.21 per cent of the voters, despite a low turnout, that is, 34.05 per cent). The second constitutional referendum was held on 25 June 2006 asking for confirmation of several amendments relating to the second part of the Constitution aiming, among others, at reducing the number of the parliamentarians, overcoming equal bicameralism and increasing the powers of the Prime Minister. It was rejected by 61.29 per cent of the voters. On 4 December 2016, the constitutional referendum aiming at overcoming equal bicameralism, reducing the number of parliamentarians, containing the operating costs of the institutions and revising Title V of Part Two of the Constitution proposed by the Renzi Government was rejected by 59.12 per cent of the voters.²⁰ More recently, on 12 October 2019 the Parliament approved a constitutional amendment reducing the number of parliamentarians provided for in the Constitution to 400 deputies and 200 elective senators. As far as the instruments of direct democracy are concerned, no amendment to the system in force has been proposed. The text of the amendment was published in the Official Gazette of 12 October 2019.²¹ As the amendment had not been approved by a two-thirds majority, a referendum under Article 138(3) of the

¹⁸ Art. 10 Law n. 352/1970.

¹⁹ Art. 138(3) Constitution.

²⁰ For the percentages see the website of the Department for Internal and Territorial Affairs at: <https://elezionistorico.interno.gov.it/index.php?tpel=F&dtel=17/04/2016>, accessed 18 July 2020.

²¹ https://temi.camera.it/leg18/provvedimento/tl18_riforme_costituzionali_ed_elettorali.html, accessed 18 July 2020.

Constitution was requested by the required number of the parliamentarians. The referendum request was declared admissible by the Central Office on 23 January 2020. The referendum was initially supposed to be held on 29 March 2020, but on 5 March 2020 the President of the Republic postponed the date of the constitutional referendum due to the Covid-19 pandemic. On 17 July 2020 the President recalled the referendum to be held on 20 and 21 September 2020²²; the referendum question was approved by 69.96 per cent of the voters.

2.2 Abrogative Referendum

The abrogative referendum can be considered the most significant instrument of direct democracy in Italy. It requires a long and complicated procedure, and in many respects the Law n. 352/1970 regulating the procedure seems unclear. It can be initiated either by 500,000 citizens or five Regional Councils.²³ According to Article 75(1) of the Constitution ‘a popular referendum shall be held to abrogate, totally or partially, a law or a measure having the force of law’. Under Italian law typical ‘measures having the force of law’ are legislative decrees and law decrees.²⁴ Article 75(2) of the Constitution imposes the express legal limits by excluding from the scope of the abrogative referendum certain types of laws: namely those relating to tax, budget, amnesty and pardon, and laws authorizing the ratification of international treaties. These limits will be covered in the next section dealing specifically with the legal limits.

The specific requirements of the referendum request are regulated by Law n. 352/1970, starting from Article 27 and the following. As far as the request

²² The text of the referendum question was as follows: ‘Do you approve the text of the constitutional law concerning amendments to Articles 56, 57 and 59 of the Constitution regarding the reduction of the number of parliamentarians, approved by Parliament and published in the Official Gazette of the Italian Republic – General Series – No. 240 of 12 October 2019?’

²³ Only once has the abrogative referendum been admitted to take place on a formal request of the Regional Councils. On 19 January 2016 the Constitutional Court admitted the referendum request concerning the ‘Extension of oil extraction concessions within 12 nautical miles’ jointly requested by the Regional Councils of the following regions: Basilicata, Calabria, Campania, Liguria, Marche, Molise, Puglia, Sardegna and Veneto.

²⁴ These are two different legislative instruments that are alternatives to the ordinary law passed by the Parliament. They are both legal acts having the force of law enacted by the Government in situations of necessity and urgency or for complex and articulated disciplines. The difference between these two measures is that the legislative decree can be adopted by the Government only if the Parliament has previously granted authorization for this purpose by means of an ordinary law, approved by an ordinary legislative procedure whereas the law decree can be adopted by the Government without express authorization and it enters immediately into force.

proposal and the signature gathering are concerned, reference can be made to the procedure relating to the constitutional referendum, apart from some peculiarities. In the case of the abrogative referendum the promoters can request to repeal not only the entire text of a law or of a measure having the force of law but also a partial abrogation. In the event they file a request to abrogate, for example, specific sections or specific parts of a section of a law, they must indicate the relevant sections and their full text.²⁵

The filing of the signatures with the Chancellor's office of the Supreme Court has to be carried out within three months starting from the date of the stamp affixed to the sheets in accordance with the last paragraph of Article 7 of the Law n. 352/1970. However, in order to avoid possible overlapping with general elections, no request for a referendum can be filed in the 12 months prior to the end of the legislature or in the 6 months following parliamentary elections.²⁶ Requests for referendums may be deposited each year from 1 January to 30 September.²⁷

As in case of the constitutional referendum, the request for a referendum under Article 75 of the Constitution can be submitted by five Regional Councils as well.²⁸ In this case, the request itself must contain, in addition to the question and the indication of the legal provisions to be abrogated, the indication of the Regional Councils which have decided to submit it, the date on which it is to be submitted and the respective decision taken by the Regional Council to hold the referendum.

Once both the preliminary legal review carried out by the Central Office²⁹ and the subsequent admissibility check of the Constitutional Court have taken place,³⁰ the President of the Republic calls the referendum by setting its date on a Sunday between 15 April and 15 June.³¹ The decision takes the form of a decree upon a resolution of the Council of Ministers.

The abrogative referendum result is legally binding if the majority of citizens entitled to vote have participated in the popular vote. Unlike the constitutional referendum, the abrogative referendum thus requires a turnout quorum in order to be valid.³² Once the turnout quorum has been reached and in the event the majority of the participants vote against the referendum request for abolishing a law or a measure of law having the force of law, then a new

²⁵ Art. 27 Law n. 352/1970.

²⁶ Art. 31 Law n. 352/1970.

²⁷ Art. 32 Law n. 352/1970.

²⁸ Art. 29 Law n. 352/1970.

²⁹ Art. 32 Law n. 352/1970.

³⁰ Art. 33 Law n. 352/1970.

³¹ Art. 34 Law n. 352/1970.

³² Art. 75(4) Constitution.

request for a referendum to repeal the same law cannot be submitted before the expiry of a period of five years.³³ It could also be the case that a law, or parts of it, are abrogated before the referendum already called takes place. In this particular circumstance, Article 39 of Law n. 352/1970 provides that the Central Office must withdraw the entire referendum process.

2.3 Citizen-agenda Initiative

The citizen-agenda initiative foreseen by Article 71 of the Constitution gives 50,000 persons eligible to vote the right to initiate legislation by proposing a bill drawn up in sections. This type of direct-democratic instrument is scarcely regulated by Law n. 352/1970 as the only provisions concerning the citizen-agenda initiative are provided by Articles 48 and 49 of said law.

The draft law must be submitted, accompanied by the signatures of the voters, to the President of one of the two Chambers.³⁴ The Chamber where the proposal is submitted is in charge of verifying and calculating the signatures of the promoters in order to ascertain the regularity of the submission of the draft law.³⁵

With regard to the content of the request, the proposal must be presented in form of a draft law drawn up in sections and accompanied by a report explaining its aims and objectives.³⁶ As far as the signature gathering, the authentication process and the submission procedure are concerned, reference can be made to Articles 7 and 8 of Law n. 352/1970 which regulate the procedure for the other types of direct-democratic instruments. With specific reference to the legal limits, the legal provisions both on the constitutional and statute level do not expressly specify any limits imposed on the citizen-agenda initiative.

The citizen-agenda initiative is addressed to the Parliament, but neither the Constitution nor Law n. 352/1970 contain any provisions regarding the consequences in case the Chamber does not formally react by, for example, submitting it to a vote in Parliament. Even though there is no formal obligation to react to a citizen-agenda initiative, an obligation to complete the work on the proposed text within three months was introduced with the amendment of the Senate's regulations in 2018. After this deadline, the draft popular law is automatically entered in the calendar of the Assembly's work.³⁷ This is still not an obligation to put the draft to the vote of the members of the Parliament, but

³³ Art. 38 Law n. 352/1970.

³⁴ Art. 49(1) Law n. 352/1970.

³⁵ Art. 49(2) Law n. 352/1970.

³⁶ Art. 49(2) Law n. 352/1970.

³⁷ Art. 74 of the Senate's regulations at <http://www.senato.it/1044?articolo=1066&sezione=150>, accessed 18 July 2020.

at least it could be considered a first serious step to take into consideration the citizen-agenda initiative coming from the people.

In practice, this instrument of direct democracy has proved to have had a limited power. Parliamentary bodies are not obliged to give an opinion on citizen-agenda initiatives, nor are there mechanisms in place to guarantee significant procedural priorities. An exception is Article 74 of the Senate's Regulations, which requires the competent Commissions to start the examination of the citizen-agenda initiative drafts assigned to them no later than one month after the referral.

In order to make the citizen-agenda initiative more effective, the Chamber of Deputies has approved in its first deliberation a draft law for a constitutional law amending Article 71 of the Constitution in so far as it regulates the citizen-agenda initiative, introducing a 'reinforced' procedure that can be concluded, if certain conditions are met, by holding a referendum. This is to be considered only the first step of a very long procedure, but at least the legislator demonstrates that it is trying to better implement the instrument.³⁸

3. LEGAL LIMITS

The only substantive limits expressly provided for direct-democratic instruments in Italy relate to the abrogative referendum as specified in Article 75(2) of the Constitution. The Constitution itself does not provide for an admissibility procedure for the abrogative referendum. The admissibility procedure was introduced, as we have already seen, by means of *ad hoc* Constitutional Law n. 1/1953. In contrast, there is no explicit regulation of the formal limits of referendum questions. The Constitutional Court's case law relating to the legal limits has had unpredictable contours over the years.³⁹ Starting from a restrictive interpretation of what is excluded by Article 75(2) of the Constitution and the topic of the referendum proposed, the Court has extensively introduced new substantive and formal limits.

3.1 Substantive Limits Provided for under the Constitution

Article 75(2) of the Constitution sets out only a few cases of exclusion regarding the matters of the abrogative referendum:

1. fiscal laws;

³⁸ The draft of the proposal of the relevant law can be found at: https://temi.camera.it/leg18/provvedimento/tl18_riforme_costituzionali_ed_elettorali.html, accessed 18 July 2020.

³⁹ Bin-Pitruzzella, *Diritto Costituzionale* (Giappichelli Editore Torino 2018) 511.

2. budgetary laws;
3. amnesty and pardon laws;
4. laws authorizing the ratification of international treaties.

When the Constitutional Court decided on the constitutionality of the referendums relating to divorce and abortion – respectively in 1972 and 1975 – it adopted a restrictive interpretation in the sense that the request for an abrogative referendum is only declared inadmissible if the referendum refers to one of the topics expressly excluded under Article 75(2) of the Constitution.⁴⁰ The Court stated that since these two requests for a referendum did not concern one of the excluded matters falling within the scope of the Article 75(2) of the Constitution, they were to be considered constitutional and admitted them. In these very first decisions, the Court interpreted narrowly the exclusions of Article 75(2) of the Constitution as it considered that its role in connection with referendums was limited to verifying that the law subject to a referendum request belongs to one of the categories of law not explicitly covered by Article 75(2) of the Constitution.

A few years later, the Court started to use a wider interpretation of the exclusions under Article 75(2) of the Constitution. In its fundamental decision n. 16/1978⁴¹ the Constitutional Court stated that the literal interpretation must be supplemented, if necessary, by a logical-systematic interpretation, in order to exclude from the referendum those provisions which are strictly connected to the scope of operation of the exempted laws expressly indicated in Article 75(2). Therefore, abrogative referendums are inadmissible not only with regard to laws authorizing the ratification of international treaties as expressly provided, but also with regard to those laws which are necessary to execute them (the Court specifically argued that the execution laws of the Lateran Treaty between the Italian Republic and the Vatican State could not be subject to the abrogative referendum).⁴²

Furthermore, according to the Constitutional Court, the limits operate also in case of laws which the Italian State must enact as a result of an obligation under an international agreement, where there is a lack of discretion of the legislature. Such laws have been called ‘internationally imposed laws’. They

⁴⁰ Decisions 10/1972 and 251/1975 of the Constitutional Court.

⁴¹ The Constitutional Court was asked to determine if the eight different referendum questions were to be considered admissible and therefore to be put to a referendum in accordance with Art. 75(2) of the Constitution. The questions concerned the abrogation of specific provisions of the following laws relating to the military judicial system and the Military Criminal Code, the public funding of the political parties, the execution of the Lateran Treaty, the mental institutions, criminal law code and the public order and were decided together by the Court.

⁴² Decision 16/1978 of the Constitutional Court.

are not technically executing laws of international treaties but produce effects that are closely linked to the scope of operation of the treaties themselves. Therefore, they can only be abrogated by an act of the Parliament.⁴³ The same reasoning has been made by the Court with reference to so-called ‘necessary European laws’, on which an abrogative referendum cannot be held because the Italian State could be held liable for failure to fulfil a specific obligation imposed by the European Union.⁴⁴

As far as budgetary laws are concerned, the Constitutional Court, in numerous decisions, has stated that the express limits according to Article 75 apply – as strictly connected – also to the annual and multi-year budget laws, measures connected to budgetary laws and those laws which are deemed necessary for the implementation of financial and budgetary goals.⁴⁵

3.2 Implicit Substantive Limits

Besides the expressly imposed limits provided by the Constitution, the case law of the Constitutional Court has introduced additional implicit limits which can be inferred from the constitutional system and especially from the nature of the abrogative referendum. The latter has been defined as an act which has the same force of law as the ordinary law.⁴⁶

For example, according to the Court, the Constitution, the laws amending the Constitution and the other constitutional laws may not be subject to an abrogative referendum. The Court stated that, if it were otherwise, this would be in contrast with the characteristic of the Constitution itself which can be amended only by means of constitutional law or if the conditions are fulfilled for starting a constitutional referendum.⁴⁷ The same prohibition applies with regard to laws with a ‘particular passive force’ (*forza passiva peculiare*), which cannot be repealed by subsequent ordinary laws (such as the abrogative referendum, which, as said, is considered to have the same force of law as the ordinary law). For example, the execution laws of the Lateran Treaty between the Italian Republic and the Vatican State – entered into force in 1929 and revised in 1984 – have that particular passive force in the Court’s view.⁴⁸ The laws with particular passive force are special, reinforced, atypical in form, strength and competence as they are enacted through special legislative

⁴³ Decision 30/1981 of the Constitutional Court. See also Decisions 26/1993, 8/1995, 27/1997 of the Constitutional Court.

⁴⁴ Decisions 4 and 45/2000 of the Constitutional Court.

⁴⁵ Decisions 2/1994 and 12/1995 of the Constitutional Court.

⁴⁶ Decision 29/1987 of the Constitutional Court.

⁴⁷ Decision 16/1978 of the Constitutional Court.

⁴⁸ Decision 16/1978 of the Constitutional Court.

procedures according to the Constitution. Therefore, the execution laws of the Lateran Treaty cannot be abrogated by means of an ordinary law of the Italian Parliament and subsequently cannot be subject to an abrogative referendum either.

In the same decision n. 16/1978 the Court argued that the abrogative referendum cannot be used with regard to those ordinary laws that have a content which is closely connected to the Constitution and thus have to be considered as 'mandatory constitutional laws'.⁴⁹ These are legal provisions that are so directly connected to the constitutional system that their elimination would affect the fundamental constitutional principles and the functioning of fundamental Organs of the State.⁵⁰ These types of law can only be repealed entirely by the elected Bodies of the Republic and cannot be challenged by an abrogative referendum as the latter is considered not to be an adequate instrument to take an appropriate decision with regard to such fundamental laws (such as electoral laws). In the Constitutional Court's view these rules can only be repealed as a whole by replacing them with new rules, a task which only the representative legislator, that is, the Parliament, is in a position to fulfil.⁵¹

A very interesting part of the case law of the Constitutional Court with regard to the limits concerns the electoral legislation. The electoral laws have always been considered as 'necessary constitutional laws'. The main reason for their importance is that a regulatory vacuum would occur in the legal system if they were repealed. The Court preliminarily stated that since the electoral laws are not comprised in the limits under Article 75(2), an abrogative referendum on these laws could be held.⁵² But since the electoral laws are considered as 'necessary constitutional laws', they could not be repealed as a whole, but only partly, so that the renewal of the Constitutional Organ (the Parliament) or the election of its members is guaranteed at any time. As a result, in order to have an admissible abrogative referendum on electoral laws, the referendum has to necessarily be partial, in the sense that it may address only specific and connected parts of the law. Once the referendum has taken place, the resulting law in force must be able to eventually be applied in case of general elections.

Over the years many electoral referendums have been held and the case law of the Constitutional Court in dealing with them has developed fundamental principles of law which have had a huge impact also on the development of legal literature and the successive case law relating to the direct-democratic instruments in general. The electoral referendums have been characterized as

⁴⁹ Decision 16/1978 of the Constitutional Court.

⁵⁰ Decision 16/1978 of the Constitutional Court.

⁵¹ Decision 29/1987 of the Constitutional Court.

⁵² Decision 47/1991 of the Constitutional Court.

being in a certain way ‘manipulative’ as they have, in effect, ‘introduced’ new pieces of legislation by abolishing numerous provisions of existing electoral laws.⁵³ For example, in 1993, as a result of the referendum against specific parts of the electoral law regarding the Senate, the existing system was effectively replaced by a new one by eliminating single articles, sections, sentences or even only parts of them.⁵⁴

3.3 Implicit Formal Limits

Neither the Constitutional provisions nor the ordinary laws provide for any formal limits with regard to the abrogative referendum. It has, again, been the Constitutional Court that has developed principles which the referendum questions must comply with. It is useful at this stage to point out that an abrogative referendum request submitted by the promoters can also contain different questions which can address also different laws. While the Central Office is in charge of the legality review of the request (see Section 4.2), a crucial part of the assessment of its constitutionality by the Constitutional Court concerns the interpretation of formal limits by addressing every single question that the referendum request contains.

According to the Constitutional Court’s case law, the referendum question must be homogeneous, coherent and intelligible. Referendum requests which contain numerous and heterogeneous questions (that is, questions with a lack of unity) have been declared inadmissible by the Court. It has stated that a lack of unity is contrary to the aim of the abrogative referendum itself, considered to be an instrument of genuine expression of popular sovereignty.⁵⁵ The referendum question must permit voters the possibility of choice. If, with the same referendum, a great number of questions lacking unity are posed to the voters, their freedom of vote is violated (by violating Articles 1 and 48 of the Constitution).⁵⁶ In fact, the very concept of the referendum implies the possibility of choice. Therefore, the essence of the referendum is undermined if the freedom of vote is violated because the wording of the referendum question is not clear.

The referendum question shall be simple, clear, not contradictory and complete. If the formulation of the referendum question is not clear and simple or even contradictory in the sense that it requests the removal of a certain law provision which is closely connected to others, it becomes impossible for the

⁵³ Decisions 47/1991, 5/1995 and 26/1997 of the Constitutional Court.

⁵⁴ Bin-Pitruzzella (n 39) 407.

⁵⁵ Decision 16/1978 of the Constitutional Court.

⁵⁶ Decision 16/1978 of the Constitutional Court.

citizen to choose. It cannot be argued that the referendum campaign could help in this regard, by simplifying or making coherent the referendum question, because in any case the choice of the voters would be to some extent affected since 'they are not given any other possibility of choice than either to express a vote that is not genuine, or to choose not to choose'.⁵⁷

In a more recent decision concerning a referendum request for the abrogation of Law n. 883/1978 (regulating the Italian healthcare system), or more precisely specific sentences of its Article 63(2), the Constitutional Court stated that in the event the referendum request aims to repeal single parts of a law or single sentences of articles of a law, the requirements with regard to the clarity of the request are even stricter, so that the voters can effectively choose.⁵⁸ The aim of the referendum request was to maintain the principle of compulsory health insurance for all citizens, but to allow the alternative of using forms of insurance other than the National Health Service. With reference to the case at issue, the Court argued that the referendum question could not reach the goal of abrogating what the promoters effectively had in mind as even with the abrogation of the sentences they proposed the law would have had the same obligations. Consequently, the referendum question did not allow the electors to correctly express their will, as they were presented with a false alternative.⁵⁹

One of the latest decisions of the Constitutional Court dealing with the limit of clarity of referendum questions should be mentioned as well.⁶⁰ On that particular occasion the promoters, by means of two differently formulated referendum questions, pursued the same objective: abolishing the electoral legislation in force by returning to the one that had been in force in 1993 (without expressly mentioning their intention in their request). The Court, with regard to the first question, argued that – also referring to its early case law on this specific matter⁶¹ – electoral laws could be subject to a referendum on condition that a residual and immediately applicable electoral legislation still remains in force to ensure, even in the event of legislative inertia, the regular functioning of the elected bodies. As a consequence, the question to totally abolish the electoral law in force was declared not admissible by the Court because it did not allow the electors to distinguish which specific law would have come into force as a result of the abrogation of the existing electoral law. In fact, many electoral laws had been introduced and successively amended since 1993.

The Court considered inadmissible the second question of the referendum request as well. On the one hand, the question was considered to be contra-

⁵⁷ Decision 27/1981 of the Constitutional Court.

⁵⁸ Decision 39/1997 of the Constitutional Court.

⁵⁹ Decision 39/1997 of the Constitutional Court.

⁶⁰ Decision 13/2012 of the Constitutional Court.

⁶¹ Decisions 13 and 32/1993 of the Constitutional Court.

dictory as it could not realize the purpose of abolishing the law it requested to repeal. On the other hand, it lacked clarity as it seemed impossible to exactly determine which laws the electors were called to abrogate or to interpret the abrogating effect produced by the removal of single paragraphs of articles of a law. Moreover, this latter circumstance would have led to certain difficulties with regard to the interpretation of the remaining law provisions, which according to the Court must be avoided.⁶²

Lastly, it is worth mentioning that the Constitutional Court in one of its earliest and most important decisions has suggested that a preliminary check with regard to the simplicity, unity of the form and coherence of the referendum questions should occur even before the signature gathering in order to make citizens willing to sign the referendum request aware of the topic.⁶³ However, Law n. 352/1970 has clarified neither the criteria for preliminarily assessing the homogeneity of the referendum questions nor the body in charge of this assessment or its timing.

A future reform of the above-mentioned law should obviously address the crucial issues raised by the Court and at the same time incorporate the formal limits already introduced by the judgments of the Constitutional Court. The legislature has clearly failed in this regard so far.

4. INSTITUTIONAL AND PROCEDURAL FRAMEWORK

4.1 Constitutional Referendum

In order to launch the constitutional referendum, no matter if the referendum request comes from either one-fifth of the members of the Parliament or five Regional Councils or 500,000 citizens, a formal request to the Chancellor's Office of the Supreme Court must be submitted. Once the request is registered, a specific *ad hoc* Office within the Supreme Court is established, composed of all the section presidents of the Supreme Court and presided over by the eldest of them.⁶⁴

The Central Office is the only competent judicial body that verifies that the request for referendum is in accordance with the provisions of Article 138 of the Constitution and Law n. 352/1970.⁶⁵ The control of the Central Office is a legality review as it has to verify, for example, the authenticity and the

⁶² Decision 13/2012 of the Constitutional Court.

⁶³ Decision 16/1978 of the Constitutional Court.

⁶⁴ Art. 12 Law n. 352/1970.

⁶⁵ Art. 12 Law n. 352/1970.

number of the signatures required in case the referendum request has been submitted by citizens and the validity of the resolutions passed by the Regional Councils or the validity of the request of the members of the Parliament entitled to request the referendum under Article 138 of the Constitution.

The Central Office shall decide, by ordinance, on the legality of the request for referendum within 30 days of its submission. It notifies, within the same period, the promoters of the referendum of any given irregularity of their request. If, based on the following clarifications of the promoters to be deposited within five days, the Central Office considers the request to be legal, it decides to admit it.⁶⁶

The Central Office can either admit the request for constitutional referendum or reject it, if the requirements provided by law are not met. In the latter case and provided that the three-month deadline for launching the constitutional referendum provided by the Constitution has expired, the constitutional law and/or amendment must be promulgated by the President of the Republic.⁶⁷

In case the referendum has been admitted, it is then called by decree of the President of the Republic, upon resolution of the Council of Ministers, within 60 days from the communication of the ordinance of the Central Office deciding on it. The date of the referendum is set on a Sunday between the 50th and the 70th day after the decree of the President.⁶⁸ The Central Office validates and officially declares the results of the popular vote.⁶⁹ Should complaints relating to voting operations emerge, they have to be addressed to the Central Office, which shall decide in public session before counting the ballot sheets.⁷⁰

4.2 Abrogative Referendum

The abrogative referendum is subject both to a legality and an admissibility check. The Central Office is in charge of the legality check of the abrogative referendum request, which could be defined as a preliminary formal review.

The Central Office certifies that the referendum request is in conformity with the Law n. 352/1970. It has to verify – *inter alia* – that (i) the required

⁶⁶ Art. 12 Law n. 352/1970.

⁶⁷ Art. 14 Law n. 352/1970.

⁶⁸ Art. 15 Law n. 352/1970. Art. 16 provides for the following formula submitted to the electors: ‘The question to be put to the referendum consists of the following formula: “Do you approve the text of the law revising the article ...” (or articles ...) of the Constitution, concerning ... (or concerning ...), approved by Parliament, and published – in the Official Journal number ... of” or: “Do you approve the text of the constitutional law ... concerning ... approved by Parliament and published in the Official Journal number ... dated ...?”

⁶⁹ Art. 24 Law n. 352/1970.

⁷⁰ Art. 23 Law n. 352/1970.

number of signatures have been gathered, (ii) all the signatures have been authenticated and (iii) that the referendum request is addressed to a law or a measure having the force of law. If the request for abrogative referendum has been submitted by five Regional Councils, the Central Office verifies the validity of the resolutions passed by the Regional Councils requesting the referendum.

The preliminary legality check of the abrogative referendum carried out by the Central Office is broader than the one which occurs when the Central Office rules on the admissibility of the constitutional referendum. In fact, besides the already mentioned tasks, the Central Office can proceed to the merging of abrogative referendum requests which deal with very similar topics.⁷¹ The promoters can challenge the preliminary decision regarding the merging of the requests by submitting additional written clarifications to the Central Office, but the latter must decide, by means of an ordinance and by 15 December of each year, whether the request for a referendum is legal or not.⁷²

If the request is declared to be legal by the Central Office, the related ordinance is submitted to the President of the Constitutional Court. The admissibility check is up to the Constitutional Court in accordance with the Constitutional Law n. 1/1953⁷³ and Law n. 352/1970.⁷⁴ It consists of a substantive check which certifies that the law whose abrogation is requested does not fall into the exempted categories of Article 75(2) of the Constitution and the referendum request complies with the implicit substantive and formal limits. The Constitutional Court may rule on the admissibility of an abrogative referendum only after the Central Office has decided that the referendum request complies with the procedural requirements provided by Law n. 352/1970.

After receiving notice of the ordinance of the Central Office declaring the formal admissibility of the request for referendum, the President of the Constitutional Court shall fix the day when the decision of the Court must take place, which, in any case, shall not be later than 20 January of the year following in which the aforementioned ordinance was pronounced by the Central Office. No later than three days before the decision is taken in closed session by the Court, the promoters and the Government may, according to Article 33(1) and (2) of Law n. 352/1970, file with the Court memorandums on the constitutionality of the request for referendum. They are also entitled to

⁷¹ Art. 32 Law n. 352/1970.

⁷² Art. 32 Law n. 352/1970.

⁷³ Art. 2 Law n. 1/1953: 'It is the task of the Constitutional Court to decide whether requests for a referendum to repeal submitted pursuant to Art. 75 of the Constitution are admissible under the second paragraph of the same Art. 75 of the Constitution.'

⁷⁴ Under Art. 32 Law n. 352/1970 the Constitutional Court is empowered to decide on the admissibility of the abrogative referendum.

participate in the closed session of the Court and to discuss the already submitted written memorandums, even though this is not expressly provided by law.⁷⁵

Moreover, in its decision n. 16 of 2008, the Court expressly allowed persons other than those referred to in Article 33 of Law n. 352/1970 – who are nevertheless interested in the decision on the admissibility – to submit memorandums containing additional arguments to those already submitted by the promoters and the Government. In contrast, these persons are not entitled to take part in the closed session. Nevertheless, if the Court deems it appropriate, it may grant them the right to present their memorandums, before the persons referred to in Article 33 of the Law n. 352/1970 could present their respective positions in front of the Constitutional judges.

According to Article 33(4) and (5) of Law n. 352/1970, the Constitutional Court decides by 10 February on the admissibility of the referendum request. Despite the possibility that a great number of referendum requests could be discussed in front of the Court, the Court decides separately but in the same decision about each of them by simply declaring each ‘admissible’ or ‘not admissible’.⁷⁶ Within five days of its publication, the decision of the Court is communicated to the President of the Republic, then to the Presidents of the two Chambers, to the President of the Council of Ministers, to the Central Office, as well as to the promoters. Within the same period, the decision shall be published in the Official Journal of the Republic.

Once the popular vote has taken place, the Central Office certifies the votes and proceeds with the official proclamation of the results in a public hearing with the intervention of the Attorney General of the Supreme Court.⁷⁷ In case the majority of the voters approve the referendum request, the President of the Republic, by means of his or her own decree, declares the abrogation of the law.⁷⁸

4.3 Citizen-agenda Initiative

Neither the Constitution nor Law n. 352/1970 provides for a legality and/or admissibility check with reference to the draft law submitted by means of a citizen-agenda initiative. According to Article 48(2) of Law n. 352/1970 only a signature check is required in order for the citizen-agenda initiative to be formally accepted by the Parliament.

⁷⁵ Decision 16/2008 of the Constitutional Court.

⁷⁶ Bin-Pitruzzella (n 39) 509.

⁷⁷ Art. 36 Law n. 352/1970.

⁷⁸ Art. 37 Law n. 352/1970.

5. CONCLUSION

As has been shown above, the Italian legal system provides for a diverse range of instruments of direct democracy. Moreover, the practice shows that all of them have been used quite often. The abrogative referendum has certainly been the most significant of these instruments. In fact, it has represented a fundamental tool of minority political parties to request the abrogation of controversial laws introduced by the governing parties. But at the same time, it has been effective to challenge the lack of decision-making of the Parliament on crucial political matters such as, among others, public funding of political parties, electoral legislation, medically assisted procreation, and so on. In fact, requests for abrogative referendums have always been submitted to push and influence political decisions or accelerate the approval of laws delayed because of the obstructionism of the parties represented in Parliament.

Part of the legal literature has pointed out that over the last 20 years, there has been a crisis of the abrogative referendum, which seems to have lost its driving force.⁷⁹ Various factors have played a role in this crisis, such as the difficulties of the organized participation of citizens in political life and the invitation of the opponents of the referendum not to take part in popular votes. As a result, many abrogative referendums have failed to reach the turnout quorum provided for in the Constitution: seven out of eight abrogative referendums held between 1997 and 2016 did not reach the turnout quorum.⁸⁰ With reference to the total number of abrogative referendums held since 1974, the turnout quorum was reached in 58.2 per cent of the popular votes.⁸¹ In those referendums where the turnout quorum was reached, the 'yes' vote prevailed in 59 per cent of the cases.⁸²

The abrogative referendum has also been used as a substitute instrument for other types of direct-democratic instruments not provided for in the Constitution, such as the popular initiative or the consultative referendum.⁸³

⁷⁹ M. Volpi, *Referendum e iniziativa popolare: quale riforma?*, (Costituzionalismo.it, October 2016), https://www.costituzionalismo.it/download/Costituzionalismo_201602_567.pdf, accessed 18 July 2020.

⁸⁰ M. Volpi, *Referendum e iniziativa popolare: quale riforma?*, (Costituzionalismo.it, October 2016), https://www.costituzionalismo.it/download/Costituzionalismo_201602_567.pdf, accessed 18 July 2020.

⁸¹ See online at, <http://www.riformeistituzionali.gov.it/media/1241/storicoreferendumquorum.pdf>, accessed 18 July 2020.

⁸² See online at, <http://www.riformeistituzionali.gov.it/media/1241/storicoreferendumquorum.pdf>, accessed 18 July 2020.

⁸³ M. Volpi, *Referendum e iniziativa popolare: quale riforma?*, (Costituzionalismo.it, October 2016), https://www.costituzionalismo.it/download/Costituzionalismo_201602_567.pdf, accessed 18 July 2020.

During the 1990s the massive use of the abrogative referendum has transformed it, to some extent, from an abrogative instrument into a ‘manipulative’ one. In fact, the promoters – especially with regard to the electoral legislation – have submitted referendum requests for abolishing even single expressions or words of articles of electoral laws. The result was that through the abrogative referendum, by means of this ‘manipulation’ of the wording of laws, ‘new’ legal and binding norms have been introduced.

In those cases, the ultimate scope of the abrogative referendum was exceeded, because the Constitutional provisions and the numerous decisions of the Constitutional Court are very clear in this regard: the abrogative referendum is a citizen-initiated or institution-initiated referendum by means of which it is possible to repeal or reject laws, measures having the force of law or single provisions from the legal system. So the main purpose of the abrogative referendum is to abrogate, rather than to introduce pieces of legislation. As mentioned before, the popular initiative, a proactive citizen-initiated referendum, does not belong to the direct-democratic instruments available under Italian law.

The introduction of the popular initiative in the Constitution, enabling citizens to directly submit systematic proposals of laws that are then submitted to a popular vote, could be a concrete response in order to restrict the inappropriate use of the abrogative referendum. But so far, no political party has been able to submit proposals to the Parliament and effectively deal with the issue, even after long discussions and debates in the literature and society.

During the years, different initiatives in order to amend the Constitution have been proposed. Not all these Constitutional drafts have contained proposals to amend the direct-democratic system provided for by the Constitution already in force. But the constitutional reform proposed by the Renzi Government did contain some changes in this respect. This proposal provided for a new form of citizen-agenda initiative, introduced by at least 150,000 voters, with a guaranteed discussion within the limits set by parliamentary regulations.⁸⁴ With regard to the abrogative referendum, only a marginal amendment regarding the quorum was proposed. As we know, the constitutional amendment was approved by both Chambers of the Parliament by a less than two-thirds majority, and in 2016 a request for referendum was submitted in accordance with the provisions of Article 138 of the Constitution. On 4 December 2016, the extended constitutional reform was rejected by nearly 60 per cent of the voters.

⁸⁴ The Italian version of the constitutional reform proposed by Renzi’s Government is available at: <https://documenti.camera.it/leg17/dossier/pdf/ac0500n.pdf>, accessed 18 July 2020.