Nothing left to do but vote - The (almost) untold story of the Italian constitutional reform and the aftermath of the referendum

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A cloud of uncertainty hovers over the future of Italian politics after the failure of the constitutional referendum by which almost 60% of voters overwhelmingly rejected Matteo Renzi's constitutional reform. On Sunday 11th, Paolo Gentiloni, who headed the Ministry of Foreign Affairs, has been appointed prime minister-designate by President Sergio Mattarella to replace Renzi, who resigned the day after the resounding referendum debacle. After formal consultations, Gentiloni has been given the mandate to try to form a new government that will most likely be supported by the same cross-party coalition (including the Democratic Party and, among others, the center-right "Nuovo Centrodestra") that backed Renzi, after his opponents said that it was 'off the table' to govern in coalition with him. Particularly, among the forces that led the No campaign, the anti-establishment, euro skeptic, and populist Five Stars Movement and Northern League, trying to leverage the outcome of the referendum, have immediately called for new elections, while Berlusconi's center-right Forza Italia has taken a more prudent approach.

In addition, the degree of uncertainty is increased by the pending proceeding before the Constitutional Court where the electoral law adopted in 2015 (*Italicum*) has been challenged as unconstitutional. The next public hearing has been scheduled on 24 January 2017 and the judgment of the Constitutional Court is expected by many political parties to heavily impact the current scenario. Regardless of the outcome of the proceeding before the Constitutional Court, at this stage an asymmetrical system is in force: the scope of *Italicum* is limited to the Chamber of Deputies, as it was voted on the assumption that the Senate would have not existed anymore as such; accordingly, the election of the Senate would be governed by the controversial electoral law in force from 2005 as resulting from the Constitutional Court decision no. 1/2014 which struck down significant parts of the same (*Consultellum*). Should Italians go today to the polls, this background would make it almost impossible to have both chambers holding solid majorities, a requirement for a stable government to be formed.

What have Italians actually voted on?

But let's rewind for a while and try to focus on the content of the constitutional reform that was defeated in order to understand whether the promised changes behind the referendum would have actually marked a long-awaited turning point in Italy.

At the heart of the outcome of the referendum is a huge dilemma on whether Italians actually voted on the merits of the constitutional reform. Looking at the comments made by political leaders, whether supporting Yes or No, prior to and after the referendum, it comes out that only some of the voters were not driven by the political implications of the referendum. Renzi himself conceded, during the campaign, that he made a mistake in personalizing the referendum as a plebiscite on the (former) Prime Minister. Probably, the same supporters of the constitutional reform described too much far-reaching implications in case of rejection of the proposal. Likewise, some among the opponents of the reform speculated more on the political context than on the merits of the constitutional amendments. Media have not contributed to stick on the point as well.

A common sense of disappointment is shared by Italians as regards the way political leaders have failed to properly tackle an important step, regardless of the pros and cons of the reform. A question that is worth spending some time answering is whether, from a strictly legal standpoint, the content of the reform did justify such a debacle.

Basically, the reform took most likely the right way while trying to reform the bicameral system. This was one of the crucial and leading points of the bill released by the Parliament, along with the reframing of the relationship between the central government and the regions as to their respective legislative competences. The goal of abolishing the "perfect bicameralism", where both chambers have equal powers and competences and must approve the same text in order for a bill to pass into law, is of course one that may increase legislative efficiency by reducing the time necessary to approve legislation through diversification of the competences of the chambers.

It is worth noting that the same goal, that went hand in hand with the reduction of the number of senators from 315 to 100, was at the heart of the proposals of constitutional reform discussed from the beginning of '80 by various *ad hoc* bicameral committees. The first bicameral committee, headed by Senator Aldo Bozzi, ran from 1983 to 1985 and aimed at differentiating the competences of the chambers, by reserving to the Chamber of Deputies the legislative authority and attributing to the Senate a general monitoring power (but no veto power). Nonetheless, the Parliament did never examine the proposal delivered by the Bozzi Committee. The second bicameral committee, chaired by De Mita and Iotti, was established in 1992 in a climate of political distrust following Tangentopoli scandal. The committee released only an incomplete proposal, that was not even taken into account by the Parliament, where the reform of the bicameral system was intertwined with the rationalization of the legislative competences between the State and the regions. The last attempt to achieve a constitutional reform through a proposal delivered by a bicameral committee dates back to 1997, when the D'Alema Committee was appointed, albeit without success due to the inability of the political parties to compromise their respective views. However, the proposal aimed at reducing the number of both deputies and senators and limiting to certain residual matters the cases where both chambers must vote on the exact same bill.

Nothing new came under the sun, then, with Renzi's reform but a concrete opportunity for Italy to go beyond a perfect bicameralism that constitutes an *unicum* in Europe and has been challenged as one of the cause of the systemic problem of legislative inefficiency. The reform tried to pursue this objective through a comprehensive – one of the most extensive, but not as such extensive as the Calderoli bill, that failed to come into force after the defeat at the 2006 referendum – affecting several other and heterogeneous aspects of the Italian Constitution. This is, most likely, one of the main reasons why the No prevailed, despite the rather common view that the perfect bicameralism was to be put aside.

More than a reform of bicameralism

Which were the other parts of the constitutional reform surrounding the elimination of the bicameral system?

1. First of all, the reform pursed the goal of reducing the importance of the Senate in its relationship with the government. The latter, in the constitutional reform, was in fact depending only on the confidence of the Chamber of Deputies. This change was supposed to grant governments more stability in Italy, in order to reverse a trend where 64 governments have been formed since the Constitution entered into force in 1948. As said, furthermore, most of the legislative competences were supposed to rest in the hands of the Chamber of Deputies, while the Senate still held legislative powers but only in limited cases and under specific circumstances.

Additionally, the composition of the Senate was entirely changed by the bill in order for this chamber to represent local authorities. 95 of the 100 members of the Senate would in fact have been nominated by the regional councils amongst the members of the same (74) and amongst the mayors of the most important cities (21), while 5 members would have been

appointed by the President of the Republic for a seven-year term.

However, the proposal contained several inconsistencies and mistakes in this respect, including in the distribution of seats among the regions, in the definition of a high number of "honorary senators" compared to the size of the Senate (5%) and in the establishment of tight deadlines for senators to examine a bill that were incompatible with the ill-concealed assumption of a "part-time" Senate.

The most critical remarks, however, concern the absence of mechanisms of direct election of the senators, that may result in a lack of representation. This problem could probably be resolved, as Renzi argued a few weeks before the referendum, through the adoption of an *ad hoc* electoral law requiring to distribute seats in the Senate in accordance to the preference votes expressed at the elections of the respective regional councils.

The composition of the Senate described by the failed constitutional reform reflected for many nuances the model of the German Bundesrat, even though the proposal differed therefrom to the extent that no reference was made to the obligation for the Senators to vote in accordance with a binding mandate received by the respective regions.

2. The constitutional reform also introduced different legislative procedures. The adoption of a model of "imperfect" bicameralism required, in fact, to distinguish the legislative procedures depending on whether the Senate would have had or not a say in the relevant matters.Particularly, the reform provided for a limited group of "bicameral laws" on which both the chambers equally held legislative competences, including, among the others, constitutional reforms, constitutional laws, laws concerning territorial autonomies and laws related to the Senate or to the status of senators.

On the other hand, except for certain specific cases, any other law had to be passed by the Chamber of Deputies only and the Senate could play a role only when one third of its members requested to examine a bill within ten days as of the date of approval by the Chamber. In the absence of such a request, the bill would have been passed into law.

The scheme embodied by the constitutional reform has been identified as a source of complexity compared to the Constitution in force. Even though the text of the amendments was likely to raise some uncertainties and was full of redundancies, different legislative procedures according to whether the chamber representing local authorities holds legislative competences are provided also in other legal orders (including Germany and Spain).

The critical views may perhaps be revisited with respect to the special procedure that the Constitutional reform established with regard to the laws (excluded those on which the Senate held its competence) "essential for the pursuit of the Government agenda", on which the government was allowed to require the Chamber of Deputies to speed up the *iter legis* in order to get the law approved by 70 days as of the date when the proposal had been introduced to the Parliament. This procedure ("procedimento a data certa") would have likely resulted in shortening the room for parliamentary debate and the government sharply conditioning the agenda of the Camber of Deputies.

3. Another crucial part of the Renzi's failed reform lied with the elimination of the shared competences between the State and the regions. Article 117 of the Constitution attributes legislative competences according to a typical federal model: the State has exclusive competences on the matters specifically set forth by the Constitution, while the regions can exercise legislative powers on the so called "residual" matters, where the State has no competence. However, the same provision also carves out the category of the "shared competences", where both the State and the regions have legislative powers: the former to define the general principles governing the matter at hand, the latter to stipulate more detailed provisions within the aforesaid general framework.

The proposal aimed at removing and redistributing these "shared competences", which have been identified as a leading cause of the overload of work for the Constitutional Court, that will be deprived of the

time to discuss the cases where substantive constitutional law issues are at stake. However, looking at the record of the Constitutional Court, it comes out that the shared competences are not the source of any evil. In fact, most of the "constitutional litigation" stems from the uncertainty behind some matters where no shared competence is at issue but the exclusive competence of the State is so general to raise disputes on whether the matter falls therein or in the scope of the residual competences of the regions. In other terms, due to the general definition of some matters, the trend of the State is extending its exclusive competences in "grey areas" where the regions claim to have competence but no shared competence is concerned.

Also, the idea to mark a clear line to separate the competences of the State and those of the regions is unlikely to bring an end to all the problems. On the contrary, it may have more uncertain consequences, and even contribute, in the worst scenario, to increase the number of constitutional references pending before the Constitutional Court. This circumstance might have occurred, for instance, in light of the lack of clarity as to the definition of the appropriate legislative procedure to be followed in a given matter.

4. A last point is worth stressing, among the others. The proposed reform also impacted some institutional actors, including the Constitutional Court and the Head of the State. As to the Constitutional Courts, while under the Constitution in force five members are elected by the Parliament sitting in joint session, the reform provided for that Chamber of Deputies and the Senate separately elected, respectively, three and two members.

With respect to the President of the Republic, the constitutional reform increased to three fifths of the members of the Parliament in joint session the majority required to elect the Head of the State after the third round of balloting, while the Constitution provides for an absolute majority of the members. This modification relied on the option to recognize as much importance as possible to the vote of the members of the Senate (whose influence would have been quite limited with an absolute majority requirement).

However, the same amendment contained a significant mistake: from the seventh round, the majority of three fifth of the members of the Parliament who actually voted was required. This was an important loophole, creating the potential (even though in an extremely unlikely scenario) for the Head of the State to be elected by a few members of the Parliament only.

Pros and Cons outweighing each other

In light of the foregoing, can the question that we posed at the beginning of this post be answered? We were wondering whether, removing the very political and often superficial speculations that have affected the constitutional reform debate, there was just one option between approving or rejecting the proposal.

Even adopting a technical standpoint, it comes out that the constitutional reform contained both strengths and weaknesses.

As to certain points, and maybe on the general view taken by Renzi's constitutional reform (e.g. the elimination of the perfect bicameralism), there could be a rather broad consensus. But looking at the merits of the reform, pros and cons seem to outweigh each other. Probably, the scope of the reform was excessively broad and covered too many different aspects to prevent a general consensus from being reached.

What's next, now? As noted above, the electoral law has a crucial, more crucial than usual, importance. One of the more recurrent objections raised by supporters of No was that the combination between the constitutional reform and the *Italicum* would have deprived the Parliament of an actual representation, broadening once again the distance between voters and elected. Now, since the constitutional reform has been rejected, in the uncertainty of the political scenario and against the background of a Parliament that looks, with an eye, to the next elections, and, with the other, at the Constitutional Court, the electoral law is likely to become a new subject of political speculation.

Nothing left to do but wait for the Constitutional Court, then. Or, better to say, as the famous comedy film starring Troisi and Benigni suggests, *nothing left to do but cry*.

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