

Short Notes Presented to the Honorable Japanese Diet Delegation (House of Representatives)

Rome, 21 July 2006

Note: this presentation follows the pattern of the “Question items and Research interest” document submitted by the Diet Delegation with reference to the specific question items concerning Italy (dealt with in A) and to the general questions (dealt with in B) (C.F.).

A) Specific question items and research interests for Italy

1. Consensus building process

(1) Constitutional amendment in 2006

As our guests will have heard the 2003-2005 reform had been initiated by the Berlusconi Cabinet in Sept. 2003. It was the first time that such a complex proposal of revision of Part II of the Italian Constitution had been submitted by the Cabinet alone. This arose widespread criticism emphasized by the particularly strained majority-opposition relations during the XIV Legislature (2002-2006). The project was immediately thoroughly rejected by all opposition parties. Government members and majority leaders frequently declared the text was open to amendment proposals by the opposition but these offers were mostly turned away.

It should also be said that the text had been carefully tailored in a way to meet some at least of the expected expectations (so to say) of the opposition: the provisions meant to re-inforce the Cabinet and the Prime minister were taken by previous proposals by center-left parties; the same can be said for the proposal to differentiate the two Chambers of the Italian Parliament which unlike the two Chambers of the Japanese Diet share the very same functions, including the confidence vote (the Italian Cabinet is probably the only one which must obtain a positive confidence vote by both Chambers).

The fact that much of the content of the reform could honestly be regarded as basically bipartisan did not change much for what we define in Italy as “political reasons” (the majority-opposition divide). It must be added that at least one party belonging to the Berlusconi coalition (the Northern League) had an interest in overly emphasizing the content of the provisions handing out more political powers to the

Regions in the name of a so-called “trend towards federalism” (the Region would have gained a full competence in three areas including education and health services). These provision were immediately branded as meant to split the country between “rich” and “poor” Regions and have always been rather unpopular in large areas of the Central and Southern part of the country.

In the end the Berlusconi coalition was completely unable (and possibly in part unwilling) to impose a different communication agenda and different catchphrases.

There was very little previous consultation of the public at large and no institutionalized procedure.

According to art. 138 It. Const. a constitutional revision must be voted twice, the second time with no less than half of the members + 1 in each of the two Chambers (Camera dei Deputati, Senato della Repubblica); then a referendum may follow if requested. No referendum is allowed if the second vote has been with a majority of two-thirds of the members of each Chamber. This means that bipartisan consensus is not absolutely necessary, bust strongly recommended (in fact what has occurred in 2006 demonstrates this).

In order to build such bipartisan consensus there must be either a bipartisan proposal or a very developed culture of bipartisanship: this is not the case in Italy where a majoritarian approach to politics is relatively recent and not well mastered yet. The result is that it is very difficult to introduce truly significant changes: truly significant changes very rarely can obtain a bipartisan support from the beginning; limited and not relevant changes can be passed but by definition don't really solve the issues which are to be faced.

Experience tells that constitutional changes tend to be at the same time the aim and the instrument of political confrontation among the variety of political parties which is typical of the Italian after WWII democracy. Italian Cabinets have always been based upon relatively large and at times very large coalitions formed by four, five, six, even seven different political parties. It is extremely difficult to keep a coalition together for the sake of governance and at the same time to face the difficulties of constitutional changes which by definition can be costly for some of the partners: this means that each even small partner obtains a *de facto* recognition of a sort of veto power on any major constitutional and electoral change. This has proven to be a major factor of conservation.

(2) Previous constitutional amendments.

The Italian 1948 Constitution has been amended thirteen times; three times during the first 40 years (1948-1988) and ten times thereafter (1989-2003). No change has occurred since 2003. Most of these revisions have concerned single articles or single institutes of the Constitution (ten); only three have been somehow “broader” in scope: the 1963 minor revision of Parliament; the 1999 and the 2001 total revision of Title V of part II of the Constitution concerning the powers of the Regions, the Region’s statutory power and the State-Regions relations. The reason why the 1999 revision of the regional governmental institutions was truly bipartisan basically depends on the determination of the regional ruling classes of both coalitions to obtain a change in that specific direction. Mayors had already become directly elected by the voters since 1993, while the Regions’ Presidents were not. This simply meant that the legitimation of – let us say – the President of Tuscany was reduced in comparison to the legitimation of the Mayor of Florence, the same for the President of Lazio and the Mayor of Rome, and so on. Therefore there was a true support and pressure from below in order to introduce the direct election of the Regional Governments before the 2000 regional elections would take place. For what the following 2001 revision of no less than 15 articles of Title V is concerned, it proved to be the first revision passed in Parliament with an extremely narrow majority (four votes in the Chamber). This became the often recalled precedent of the centre-right approach to the reform in 2003-2005. There were differences but the outcome was the same. However the most important element which should be emphasized is that the center-right opposition to the center-left reform of 2001 was an opposition against a project regarded as not sufficiently radical in the direction of a “federalization” of Italy; it was not an opposition in the other, 180° different, direction. This explains why in Parliament the right voted against, but when the issue was brought to the people in Autumn 2001 the center right coalition which had won the election just said: these reform is not much, we’ll do way better and we will introduce the true federalism, but we don’t really care how you vote; you don’t even need to go and if you go, vote the way you feel, we will change the reform anyway. So simply there was no opposition whatsoever to the text in spite of the fact that it could not be defined as bipartisan

2. National referendum system

(1) Importance of the national referendum system in Italy

Since 1970 (in fact the first one took place in 1974) we have had 59 (fifty-nine) referendums in Italy, that is to say an average of nearly two every year with a record of 12 referendum in one day (in 1995). No other nation has had as many apart from Switzerland. In 24 instances the requested participation threshold was not reached; in 16 cases the proposals were rejected and in 19 cases they were approved, the last time

in 1995, over ten years ago (in spite of the fact that we have had 21 referendum thereafter).

There is little doubt that the nation referendum has played a major role in reflecting the deep changes in society and in shaping or at least in strongly influencing the political process at least until recent years. Referendum have proven to be an instrument to determine part of the political agenda of the nation (a major incentive for law makers); it has also proven a very effective instrument apt to work as a sort of “saftey valve” of Italian democracy; it has even become an effective instrument for concurring to law making. I would like to remind that only voters (in the number of 500.000) and Regional assemblies (at least five of them) can initiate a referendum, that is to say that the Italian referendum is a referendum from below. Political parties have had a variety of roles in relation to referendums: they have promoted some of them, opposed some of them, ignored some of them, tried to sabotage some of them. And basically never liked them.

(2) Publicity and national referendum

- publicity of a national referendum is conducted neither by Parliament nor by the government (the same applies to all sort of votes)
- the law which regulates both electoral and referendum campaigns is the same (Act 22 February 2000, no. 28) which provides for extremely detailed rules; State owned radio and tv (RAI) is regulated in a different way than private Channels; two different bodies control them: a parliamentary Committee formed by MPs is in charge with RAI, an independent Authority with the private networks;
- the same law (Act 3 June 1999, no. 157) regulates the reimbursement of expenses met for the purpose of electoral and referendum campaigning; however parties as such receive money only in relation to what they spend for the election of the European Parliament, the two Chambers and the regional presidents and assemblies;
- Italy still lacks an independent institution (as the Electoral Commission in the United Kingdom set up by the Blair Government in 1999 or the older Federal Electoral Commission in the United States); elections and referendum are entirely regulated by Parliamentary Acts and some very limited executive regulations, and are entirely administered by national and local governments; in change these governments are not allowed to use their administrative means in order to support individual candidates, lists of candidates or any position in a referendum. A limited amount of general and independent information – generally in the form of 60’’ or 120’’ tv and radio ads is granted by the Public Radio and Tv Network (RAI) adn by private networks (the broadcasting of them is mandatory); the difficulty of evaluating the content of these ads and promos;

- Very definitely each party's stance has an effect on publicity and campaign in the national referendum; according to resources available (and there always is a lack of resources) and according to the relevance of the potential outcome of the referendum political parties decide if and how much they intend to invest in the campaign in favour of one of the two answers or – at times – although this stance tends to be criticized, even in favour of *not* taking part to the vote. With few exceptions it can be said that parties invest extremely little in referendum campaigns.

(3) Turnout requirement in a national referendum

As I mentioned previously 24 out of 59 referendums were declared not valid and their outcome (either in favour or against the proposal submitted) nulled. In fact art. 75 of the 1948 It. Const. establishes that «the proposal submitted to referendum shall be approved if a majority of those eligible have participated in the voting and if it has received a majority of valid votes». The rationale for this provision is that our founding fathers were largely in favour of representative democracy and regarded the referendum as an exception reserved to those supposedly rare instances in which a cleavage would have developed between voters and the majority of Parliament. Still insofar as the Italian referendum on ordinary laws is a negative one (an instrument given to the people in order that occasionally it may contradict Parliament: it's a referendum concerning the repeal of an act), the fathers of the Constitution expected that such a rare and serious decision (to go against and to nullify Parliaments will) ought to be taken with the support and the participation of the legal majority of the people. In this sense it can be regarded as a “conservative clause”, a clause meant to favour the conservation of the existing law.

The requirement we are talking about worked well until 1990. In 1990 for the very first time some rather strong interests groups (hunters and rifle producers and farmers) with no direct endorsement by any political party realized that being a minority of the active voters, they could have obtained the desired outcome better by persuading voters *not to show up*, than to *show up and vote “no”*. It was Summer and hot, and this was an easy way to win: in fact electoral data had proven from the very beginning in 1974 (although it was the most participated and spectacular referendum in Italian history) that while participation for Parliamentary elections was at the time around 90%, participation for regions and cities was around 80% and participation for referendum was never over 70%, with a 20% negative difference. If you apply the same ratio to a changed political society in which even the most competitive political election never obtains a turnout of over 80-82%, one can see that no referendum can really count on more than a potential participation of 55-65%. This means that if a group or a party is able to prompt even 5-8% of the voters not to show up they can obtain the same outcome like convincing 25-30% of the voter to vote “no”. Since 1990, to truly oppose the approval of an ordinary referendum means

to campaign for *not* showing to the poll station rather than for going and voting “no”. (To all this one can add that due to the Italian system of automatic permanent voter’s registration combined with a very generous citizenship legislation the total amount of voters is particularly high: and it is hardly ever duly updated for what concerns those citizens living abroad who are included among the eligible voters but have not been canceled as yet after death, for instance. The case of the 1999 and 2000 referendums...when if the lists would have been “cleaned” of the dead voters, the referendums would have been approved...).

It must be added that the Italian experience tells that there have often been perverse side-effects of not valid referendums: with a constant tendency of both media and opinion makers to regard absentees as “no” voters (this can be true for “additional” absentees but of course not for those voters who never show up anyway whichever the issue! No less than 30-40% in the Italian case).

For these reasons I strongly recommend not to provide for a participation threshold or at least not to provide for a high participation threshold (a threshold ought to be measured taking into account the average expected participation in ordinary elections and also the fact that virtually anywhere eligible voters show up less for referendums than for elections).

On the other side there is no *turn out rule* for what constitutional referendum is concerned (see art. 138 It. Const.). The rationale for that is based upon an implicit favour towards conservation of the existing (constitutional) provisions. It should be stressed that in the case of the art. 75 referendum the aim of the initiative is the *repeal* of an existing legislative provision (and the Constitution “helps” so to say the latter by requesting a(n high) minimum turn out); in the case of the art. 138 referendum the aim of the initiative is to prevent an already approved constitutional revision to enter into force (and the Constitution “helps” the “old” Constitutional provisions by *not* requesting a minimum turn out in order to contradict – in this case – the parliamentary decision). It takes a particularly strong voter’s determination to overrule Parliament on ordinary legislation; to overrule Parliament on a constitutional revision it enough to be one more voter than those in favour of it).

B. Question items and Research interests common to all the countries to visit

1. Process of building consensus in Parliament (see above)

The resort to special procedures and special Bicameral Parliamentary Committees with drafting powers (in 1983-85; in 1992-94; in 1997-98). Ordinary procedures vs. special procedures. See A. 1. (1).

The specific issue of procedures and of the ballot (*see below*, point 3).

2. Measures of publicity

(1) General issue on a national referendum system

Art. 75 It. Const.

Art. 132 It. Const.

Art. 138 It. Const.

Statutes of the 20 Regions

Statutes of the Municipalities and the Provinces

Initiative (voters, Regional Assemblies; 1/5 of the members of each Chamber).

Procedure for the collecting of the requested number of signatures; requirements; controls. Legitimacy verification by the *Central referendum office at the Supreme Court of Cassation*.

Admission verification by the Constitutional Court. Related issues of great complexity. Substantive and formal requirements which the question to be submitted to the voters must meet (art. 75 It. Const. forbids referendums on taxes, yearly budget, pardon laws, international treaties; furthermore the Court has decided that no referendum can be admitted if its approval determines a situation conflicting with any constitutional provision; also referendum question must necessarily be formulated in a way that the voter is presented a clear and understandable option).

Voting and counting ballots. Announcement of the outcome by the *Central referendum office at the Supreme Court of Cassation*. No judicial remedy according to the law.

Legal consequences of the outcome of a referendum: in case of “no”, in case of “yes”, in case of “no turn out”. If “no” prevails the law 352/1979 says that no similar referendum can be introduced for the next five years.

1974	Divorce law	NO
1978	Public funds for parties	NO
	Security custody	NO
1981	Security custody	NO
	Life sentences	NO
	Gun licence	NO
	Abortion law	NO
1985	Cost of living bonus	NO
1987	Responsability of judges for damages	YES (Following the referendum a new law was passed introducing a very limited form of responsibilities in case of blunt negligence or carelessness)
	Building of nuclear	YES (no nuclear plant has ever been built in Italy)

	plants	afterwards; the one in constructions has been transformed in a coal plant)
1990	Hunting limitations	Not valid
	Employment of pesticide	Not valid
1991	Chamber electoral law	YES (it was “self-executing)
1993	Senate electoral law	YES (the 1993 new electoral laws for both Chambers)
	Public funds for parties	YES (substitution of public funding of parties activity with a more limited reimbursement of electoral costs)
	Drug consumption as crime	YES (self-executing)
1995	Privatization of RAI corporation	YES (virtually disapproved and ignored)
These of 1995 were the last referendums ever approved unto now		

(2) Voting age

Voting age is 18 because entitled to vote are all citizens who have attained their majority (age): art. 48.2 It. Const. Majority age is 18 according to art. 2 of the It. Civil Code. Art. 2 of the C.C. was amended reducing majority age from 21 to 18 years by Act 8 March 1975, n. 39.

School curricula include “citizens education”. History courses often include the study of the Italian Constitution.

(3) Voting system/Form of the ballot paper

The only present legal criteria is that the entire Bill passed by Parliament is submitted (upon request) to the voters as a whole: therefore if the Bill includes one amendment, one amendment will be voted (yes/no) with one ballot; if the Bill includes 50 amendments again they all will be voted (yes/no) with one single ballot. Therefore it depends on the choice of the legislative body (Parliament): it up to Parliament to divide the entire project into more acts or include in entirety in one.

No discussion was there ever until the second part of the Nineties. And in 1997 when const. Act 1/1997 was passed establishing the (Third) Bicameral Parliamentary Committee for the revision of Part II of the Constitution, the constitutional law openly provided for a *single unitary vote* on the entire draft. The main reason precisely was the hope to promote consensus, based upon previous negotiations.

The debate. Pros and cons. In favour of a sort of popular legitimation of a Parliamentary proposal or in favour of a more real decision making power on specific issues recognized to the voters. The risk of a “constitutional rules shopping”. The risk of expropriating the voter from a true choice. It must be emphasized that to submit a variety of coordinated amendments to a sequel of single separated votes hampers or makes extremely difficult to strike parliamentary deals meant to foster bipartisan consensus.

(4) (5) (6) Basically I have answered above.

(7) Action for nullity of a national referendum (*see 2 (1), above*)

No remedy exists (although one could attempt to raise a *constitutional powers conflict* in front of the Constitutional court, possibly).

Note

The most comprehensive, authoritative and at the same time recent academic work concerning the referendum in the Italian jurisdiction is:

Luciani, Massimo (2005)

La formazione delle leggi. Tomo I, 2. Il referendum abrogativo, in *Commentario della Costituzione* (fondato da G. Branca e continuato da A. Pizzorusso), Bologna-Roma, Zanichelli-Il foro italiano (745 pages)

The most comprehensive political history of referendum in Italy is:

Barbera Augusto & Morrone Andrea (2004)

La Repubblica dei referendum, Bologna, Il Mulino

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