**8. The REFERENDUMS AND THE PEOPLE’S LEGISLATIVE POWERS**

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1. **Foreword**

Referendum is a typical figure regulated by the Constitution. It was conceived in order to enable the people to express their views with respect to a given draft law. Typically, this is an ordinary law which is suggested to be repealed). A referendum may be launched in order to either: (i) repeal an existing law or (ii) amend, supplement or change the Constitution. As it will be described in this chapter, further categories of referendum are also contemplated.

The Italian Constitution also provides for an additional possibility to give the floor to electors: this is the so-called “*people’s right of initiative*”, *i.e*., the power of electors to submit a project of law to the Parliament.

Referendums are regulated by both the Constitution and by scattered pieces of legislation (ordinary laws adopted by the Parliament). In particular, according to art. 75 of the Constitution, “*a referendum is not admissible in respect of tax, budget, amnesty and pardon, as well as on the authorization or ratification of international treaties. All citizens eligible to vote for the House of Representatives have the right to participate in referenda. The referendum is approved if the majority of voting rights have voted and a majority of votes validly cast have been reached. The law shall regulate referendums in detail”.*

In addition, referendums are regulated by the Law of 25 May 1970, no. 352, setting out the main procedural norms which have to be followed in order to launch a new referendum. According to the applicable rules, referendum promoters must fulfill the following requirements (but please consider that new procedural norms are in the process of being introduced as a consequence of the recent Constitutional reform approved by the Italian Parliament):

 - at least 500,000 citizens / 5 members of a Regional Parliament (*Consigli Regionali*) must promote the referendum;

- The referendum must be formally opened by a Decree of the President of the Republic

- The referendum is aimed at repealing a law or an act assimilated to ordinary laws (*e.g.*, a Legislative Decree). No referendum may be proposed with respect to an act other than an ordinary law.

**2. Scope of referendums**

As mentioned, there is a number of items (or matters) in which a referendum is constitutionally prohibited. These are: *tax, budget, amnesty and pardon, as well as on the authorization or ratification of international treaties.* It should be ascertained whether such list is to be held as exhaustive, or some additional item/matter must be also included, although article 75 of the Constitution does not expressly refer to them. According to the opinion of the majority, the list contained in article 75 of the Constitution does not include all matters in which a referendum is prohibited: the following additional matters should be also held as falling outside the scope of referendums (and, thus, prohibited):

- Laws amending the Constitution

- Constitutional laws

- Law-decrees

- Laws delegating the Government to act

- Laws by which the Parliament approves the Regions’ By-laws

- Planning laws

- Laws “implementing” the Constitution

- Laws impacting on fundamental freedoms

- “Framework-laws” adopted by the Parliament (joint competences with Regions, pursuant to Art. 117 of the Constitution)

In addition, in the light of specific decisions of the Constitutional Court, a request to set up a referendum should be rejected if envisaging an intervention in the following matters:

- items having constitutional coverage

- laws which are “bound” by the Constitution (which could not be otherwise implemented)

- unclear, confused, cryptic, illogical, contradictory or inconsistent proposals

- “miscellaneous” proposals

**3. Other procedural rules**

The applicable legislation provides for the following procedural rules (please consider, however, that the recent constitutional reform will impact on the current legal framework). As regards time schedule, no petition for referendum may be filed during the year before the expiry of the Parliamentary term, or during the six month-period following the formal start of the elections (“*convocazione dei comizi elettorali*”). According to the general opinion, such rule was set out in order to avoid any overlapping between referendums and the general political elections (given that any such overlapping may potentially create distortions on the Parliament renewal; people should be called to express their views on separate occasions, depending on the decision to be made: renewal of the Parliament or repealing existing legislation).

According to multiple opinions, the above rules lead to significant limitations to the right to promote a referendum, and should justify proposals aimed at cancelling (or mitigating) such limitations, in order to grant people with wider possibilities to the express their views and impact on the legislative process (without the intermediation of the Parliament).

Further, petitions for referendum must be filed with the Supreme Court (*Corte di Cassazione*) between 1 January and 30 September of any year, but no later than 3 months of the date when the sheets (containing the signatures supporting the referendum) were sealed and certified by the competent officer.

The Supreme Court officers, in turn, check that all formal and procedural requirements were met. Promoters may be requested to intervene and to provide clarifications or more detailed information on the proposed referendum; even irrespective of a specific request by the Supreme Court, promoters may voluntary file deeds or papers supplementing the petition. The Court fixes the “tile” of the referendum (the original suggestion by the promoters might be disregarded or changed, to the extent that the Supreme Court deems that the latter is not appropriate to ensure a clear presentation of the proposal to citizens).

As mentioned, the referendum is opened by a decree of the President of the Republic, upon resolution passed by the Government. The referendum date must be a Sunday between 15 April and 15 June of any year.

If the referendum is successful (*i.e*., the majority of citizens vote in favor), the law in question is formally repealed by virtue of a Decree issued by the President of the Republic. In other words, the law is not *automatically* repealed, as a consequence of the referendum being approved: a subsequent deed (a Presidential Decree) needs to be adopted. This confirms that the referendum must be held as one of the sources of law.

The Decree of the President of the Republic enters into force the day after publication on the Official Gazette. However, the President may postpone the effective date to a later date (but no later than 60 days of publication of the Decree on the Official Gazette).

On the other hand, if the referendum is unsuccessful, no further petition may be filed on the same subject during the following five years.

**4. Referendum as a legally binding instrument**

In case that a referendum is launched, unusual scenarios might take place. In particular:

1. the law which forms the object of the referendum may be voluntarily repealed by the Parliament (or as a consequence of a judgment of the Constitutional Court) *before* the voting date fixed by the referendum promoters/the Supreme Court (therefore, before the referendum actually takes place); or
2. even in case that a referendum turns out to be successful (*i.e*., the majority votes in favor), as a matter of fact, the Parliament ignores or disregards (in whole or in part) the outcomes of the referendum and adopts laws or acts in conflict with the latter.

In the situation under (i), based on the applicable law, it is unclear whether the referendum should take place anyway, regardless of the fact that it could be useless (since the ultimate aim of the referendum has already been achieved). According to the majority of opinions, the referendum proceeding should be stopped (*inter alia*, costs, expenses and other burdens arising from the referendum could be easily avoided, since these would no longer be justified by the need for the referendum to take place).

With respect to the situation under (ii), it should be ascertained whether the referendum is actually binding on the legislative bodies (*i.e*., the Parliament, the Government and the Regions). According to the view which is generally taken, If the Parliament ignores the outcomes of a referendum (typically, by approving laws in conflict with the referendum outcomes), a conflict between sources of law arises. As clarified in Chapter 2, any such conflict should be solved according to the principle of hierarchy and, therefore, the source holding a higher raking should prevail over the other. In the Italian system of law, laws of the Parliament hold a higher position (as opposed to referendums): as a first conclusion, therefore, referendums may be overturned by the Parliament, which could disregard the outcomes of consultations and adopt acts in conflict with those. However, conflicts may not be fixed by just resorting to the principle of hierarchy. Other principles may also come into play (*e.g.,* fundamental freedoms or special rights protected by the Constitution: in case that a conflict arises between a referendum “linked” to Constitutional freedoms/rights and an ordinary law, a petition may be submitted to the Constitutional Court: the latter may be requested to issue a judgment declaring that the law of the Parliament is invalid and must not prevail over the referendum).

**5. Referendum on strategic matters (referendum “*di indirizzo*”)**

The Constitutional Law no. 2/1989, promoting a referendum on the approach to be adopted with respect to the EC’s evolution towards the Union: “*Ritenete voi che si debba procedere alla trasformazione delle Comunità europee in una effettiva Unione, dotata di un Governo responsabile di fronte al Parlamento, affidando allo stesso Parlamento europeo il mandato di redigere un progetto di Costituzione europea da sottoporre direttamente alla ratifica degli organi competenti degli Stati membri della Comunità?“.*

Such referendums are typically launched if the people’s opinion is requested on political or general strategic issues (irrespective of any specific law to be repealed).

It is generally held that the above does not create a new kind (or “category”) of referendum (in addition to the referendum repealing existing laws and Constitutional referendums). However, much wider room for such kind of referendum may be available in the light of the recent Constitutional reform.

In general terms, to date, referendums on strategic matters are generally held as deprived of any legally binding effect. In other words, they are not binding on the political (legislative) bodies. In the above example, the referendum (in which, by the way, the overwhelming majority voted in favor), no legally binding effect could be envisaged, since, otherwise, a paradoxical consequence would have been triggered: the Italian representatives within the EU Parliament would have been under a *legal obligation* to procure a shift in the structure of the European Communities into a “Union” (such goal could not be achieved by the Italian members of the EU Parliament, since the evolution of the EU is clearly a historical phenomenon, which does not simply rely on the individuals’ will, but, rather, depend on more complex factors, which are often not connected to the individuals’ political choices).

**6. The Constitutional referendum**

Once both Chambers of the Parliament approved (twice) a law amending the Constitution, within 3 months of the relevant publication date, the following subjects may promote a referendum (to confirm or reject the law):

- 500,000 citizens

- 1/5 of members of any Chamber of the Parliament

- 5 Regional Parliaments (*Consigli Regionali*)

However, if, upon the second reading, a 2/3 majority of member of the Parliament approves the law, there is no room for referendum.

**7. The people’s right of initiative**

As mentioned, in addition to referendums, the Italian Constitution also provides for an additional possibility to leave the floor to electors: this is the so-called “*people’s right of initiative*”, *i.e*., the power of electors to submit a project of law to the Parliament. If the following requirements are met, a project of law may be submitted to the Parliament (which, however, is not legally bound to transpose the people’s suggestion into a law, nor even to take this in consideration):

 - 50,000 citizens must promote the draft new law;

- a project of law (in its technical sense) must be drafted, article by article;

- a report must be attached to the draft law, highlighting the relevant aims and explaining its contents;

- the project of law must be filed with the President of either Chamber of the Parliament.