

## THE ITALIAN REFERENDUM EVOLUTION IN A COMPARATIVE PERSPECTIVE

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**Abstract:** *The paper proposes a review on the nature and the role of referendum in representative democracies and it develops a comparative study of the constitutional bases of this tool in Italy. Then, the essay focuses on the effectiveness of the use of the referendum tool on heated debated bioethical and moral issues in the States taken into consideration. Among the different ‘tools of democracy’, direct democracy (i.e. referendums and initiatives) and participative/deliberative democracy are gained increasing popularity. They are increasingly being used address problematic and complex issues that affect the citizenship rights, as well as the status of minorities. Lastly, the future referendum perspectives are attempts to reinvigorate the functioning of the Italian representative institutions through the direct democracy tools with a people’s initiative for a proactive referendum.*

**Keywords:** *Italy, direct democracy, referendum, people’s initiative, quorum*

### I. ITALIAN DEMOCRACY TOOLS: A NATIONAL AND A CROSS-NATIONAL COMPARATIVE PERSPECTIVE

Both Italian and comparative law recognize countless forms of popular participation.

Direct democracy tools can be classified according to: selection of political leaders (by means of primary elections and reappointment of local governance bodies and officials) on the one hand, participation in the decision-making process on the other (by means of referendums and popular initiatives; participatory democracy). E-democracy has increasingly become more and more popular worldwide, for it helps building a proper support system for policy initiatives. Ultimately, e-democracy can be a valuable tool to face the legitimacy crisis of bureaucracy.

In fact, it appears possible to distinguish further among the different existing democratic alternatives to parliamentary democracy. For example, there is an important debate on participatory, deliberative, or direct democracy tools. Further, this also helps distinguish the history of these tools: direct democracy is not only ‘increasingly’ used in Switzerland and the US, but also it is in both countries, particularly in Switzerland, a tool with a rather long constitutional history.

Furthermore, both direct democracy (i.e. referendums and popular initiatives) and participatory/deliberative democracy are well known for being quite popular as well. Such democracy tools are increasingly being used (particularly in Switzerland and in the US) to handle problematic and complicated issues regarding both citizenship rights and the legal status of minorities.<sup>1</sup> At European level, quite an interesting example is the Irish

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<sup>1</sup> SÁENZ ROYO, E., GARRIDO LÓPEZ, C. (eds.). *El referéndum y su iniciativa en el derecho comparado*. Valencia: Tirant lo Blanch, 2020; QVORTRUP, M. *The Referendum and Other Essays on Constitutional Politics*. Oxford: Hart, 2019; QVORTRUP, M. (ed.). *Referendums Around the World: the Continued Growth of Direct Democracy*. New York: Palgrave Macmillan, 2014.

Citizens' Assembly. In this regard, Brennan's works on epistocracy<sup>2</sup> within the French *Grand Débat National*<sup>3</sup> are also noteworthy.

All things considered, direct democracy institutions, referendum in particular, would seem to fit in the atmosphere of political competition raised by the elections: direct democracy institutions function as a sort of corrective measure of representative democracy, allowing the governed to control the governor. Popular consultations, indeed, are influenced by political leaders and parties, interest and pressure groups, civic movements, mass media, as well as by the interaction between referendum procedures and decision-making processes that involve both national governments and constitutional courts.<sup>4</sup>

In the last few years, the relation between representative and direct democracy has been undermined by clear signs of tensions: today's greatest challenge for democratic legitimacy is the crisis of representative democracy. The increasing use of direct democracy tools, especially referendum, which, incidentally, may have unpredictable outcome, has provided thought-provoking prompts about the implementation itself of referendum tools and consequences deriving from referendum outcomes, especially when it comes to governmental policy making. Hence why it is important to discuss this subject matter.

As regards direct democracy institutions, the situation in Italy appears to be as varied as it is deeply muddled,<sup>5</sup> which makes it difficult to adjust to the parliamentary form of government.<sup>6</sup> It must be said that abrogative referendums, as foreseen in Art. 75 Const., were progressively introduced in the Italian political system over the last three decades of the XX century. Following a case-by-case approach, abrogative referendums were conceived, accordingly, as acts of control,<sup>7</sup> legally binding acts,<sup>8</sup> or even as *ultra vires* acts.<sup>9</sup> Between 1974 and 2022, seventy-two referendum questions were submitted to popular vote, in most cases further to popular petitions signed by 500.000 citizens. Only nine referendum questions were put forward to popular vote by at least five Regional Councils.<sup>10</sup> The remaining direct democracy tools, such as popular legislative initiative, are absolutely irrelevant as they have a residual impact on both governmental and parliamentary policy making. Local and regional referendums have likewise slight impact when it comes to their respective topics of interest. This also relates to regional territorial referendums pursuant to Art. 132, Const. These referendums are usually called on issues of relevant national interest in so far as the legally required local consultation phase may lead to the im-

<sup>2</sup> BRENNAN, J. *Against democracy*. Princeton-Oxford: Princeton University Press, 2016.

<sup>3</sup> RODRIQUEZ, S. Una democrazia rappresentativa in declino: le nuove sfide per gli Stati contemporanei. *Riflessioni comparate. Studi senesi*. 2019, No. 3, pp. 505–24.

<sup>4</sup> MOREL, L., QVORTRUP, M. *The Routledge Handbook to Referendums and Direct Democracy*. London-New York: Routledge, 2018; ALTMAN, D. *Direct Democracy Worldwide*. Cambridge: Cambridge University Press, 2014.

<sup>5</sup> SALERNO, G. M. *Il referendum*. Padua: Cedam, 1992; DE MARCO, E. *Contributo allo studio del referendum nel diritto pubblico italiano*. Padua: Cedam, 1974.

<sup>6</sup> MEZZANOTTE, C., NANIA, R. Referendum e forma di governo in Italia. *Democrazia e diritto*. 1981, No. 1-2, pp. 51–75.

<sup>7</sup> PANUNZIO, S. Esperienze e prospettive del referendum abrogativo. In: VV.AA. (eds.). *Attualità e attuazione della Costituzione*. Rome-Bari: Laterza, 1982.

<sup>8</sup> PALADIN, L. *Le fonti del diritto italiano*. Bologna: Il Mulino, 1996.

<sup>9</sup> AZZARITI, G. Referendum, leggi elettorali e Parlamento: la «forza» delle decisioni referendarie nei sistemi di democrazia rappresentativa. *Giurisprudenza costituzionale*. 1995, No. 1, pp. 88–103.

<sup>10</sup> RATTO TRABUCCO, F. L'iniziativa regionale per il referendum abrogativo nazionale: correttivo del parlamentarismo italiano? *Ambientediritto.it*. 2021, No. 1, pp. 197–270.

plementation of state laws on the alteration of territorial status, i.e. municipal/provincial detachment or aggregation, in other words creation of new regions/attachment of two or more regions.<sup>11</sup> It follows that the aforementioned types of referendum differ from the one regulated by Art. 133, para. 3, Const. This foresees the possibility to establish new municipalities or to change municipal districts and denominations, which, instead, falls within local competence if it leads to the enactment of a regional law.<sup>12</sup> Italy's referendum history records only one case of referendum held, quite grotesquely, in compliance with an *ad hoc* constitutional law, i.e. Law No. 2, 1989 on European Integration.<sup>13</sup>

The constitutional referendum on Art. 138, para. 2 and 3, Const., deserves specific mention due to its merely confirmatory nature. In this case, indeed, the referendum served as legal suspensive condition, i.e. as act of control, since the article submitted to popular vote was already impeccable.<sup>14</sup> Thus, the electorate played an important oppositional role in the safeguard of those political minorities that did not approve the legislative project put forward by the Parliament. This is confirmed by major differences existing between Art. 138 and 75, as only in the case of constitutional referendum parliamentary minorities (1/5) are allowed to campaign for popular vote. In turn, the lack of a participation quorum as core requirement for referendum validity can be explained only in so far as the referendum itself serves as mere act of control, irrespective of the number of electors involved in the vote. Pursuant to Art. 138, such kind of referendum somehow reminds of facultative prevention-oriented referendums acknowledged in many legal systems outside of Italy. The preventive nature of such referendum addresses to both territorial minorities and autonomous entities which has led experts to make a comparison with the Swiss legislative referendum. It follows that the Italian constitutional referendum is less unpredictable, hence less susceptible to diversified use compared to the abrogative referendum.<sup>15</sup> In Italy, incidentally, there have only been four constitutional referendums so far: three of them were held in view of the implementation of important reforms, though undeniable criticalities concerned the homogeneity of the referendum question.<sup>16</sup>

On the contrary, the abrogative referendum, once conceived as a sort of modern veto,<sup>17</sup> turned out to be a good multi-purpose tool to which the Radical Party (now known as +Europa), quite an atypical political movement within the Italian party system, mainly resorts. After all, it was precisely thanks to the commitment of Italian political parties that it was

<sup>11</sup> TRABUCCO, D. *Le variazioni territoriali delle regioni nella Costituzione*. Naples: Jovene, 2014; RATTO TRABUCCO, F. *Riflessioni sulla prima attuazione dell'art. 132, secondo comma, Cost., dopo sessantuno anni di vita: l'esame del disegno di legge di variazione territoriale regionale e l'acquisizione dei pareri regionali sulla scorta del caso Alta Valmarecchia. Istituzioni del federalismo*. 2009, No. 3-4, pp. 1–26.

<sup>12</sup> BARRERA, P. *Il referendum negli ordinamenti regionali e locali: bilancio e prospettive*. Naples: Jovene, 1992.

<sup>13</sup> KREIS, G. *Why Italy was for Europe. On the history of the 1989 advisory referendum*. Basel: Schwabe, 2020; CARAVITA, B. *Il referendum sui poteri del Parlamento europeo: riflessioni critiche. Politica del diritto*. 1989, No. 2, pp. 319–27.

<sup>14</sup> MAZZONI HONORATI, M. L. *Il referendum nella procedura di revisione costituzionale*. Milan: Giuffrè, 1982; CICONETTI, S. M. *La revisione della Costituzione*. Padua: Cedam, 1972.

<sup>15</sup> BATTELLI, M. *Le istituzioni di democrazia diretta*. In: P. Calamandrei – A. Levi (eds.). *Commentario sistematico della Costituzione italiana*. Florence: Barbera, 1950.

<sup>16</sup> PESOLE, L. *Evoluzione e criticità del referendum costituzionale. Costituzionalismo.it*. 2019, No. 2, pp. 1–55.

<sup>17</sup> BERGONZINI, G. *Il referendum abrogativo come strumento per disporre diversamente (in the margin of Judgment Nr. 10 of the Constitutional Court, 31 January 2020). Federalismi.it*. 2020, No. 26, pp. 1–23.

possible to persuade and mobilize the electorate towards referendum participation. Political players, indeed, had quite a major impact in this respect, by creating political alignments for targeted purposes: whether for mobilizing the electorate and encouraging political competition, or, on the contrary, in order to push towards abstention from voting and, as a matter of fact, towards total demobilization of the electors. According to the constitutional law on referendum absolute majority, in 28 cases (totally, 41% of the abrogative referendums held in Italy) the vote was ultimately declared null.

Many lessons can be drawn from Italy's referendum history, yet, one in particular can be useful for anyone who cares for the preservation of liberal democracy: all electors are equal, though, in the case of referendum, non-voters are more equal than voters.

It should be pointed out that Italian political parties have learned to effectively cope with referendums, playing a key role mainly in terms of quorum achievement required by the Constitution. They also steer electoral preferences and monitor the implementation of referendum results in the Parliament, sometimes even repeatedly when necessary. The only question is whether this should be interpreted as a sign of strength or weakness from political parties. After all, the unsteadiness of Italian democracy could be explained as a result of an established latent political tradition based on «a poor scruple-oriented decision-making process»<sup>18</sup> rather than as a result of intense conflicts in the public political debate.

The history of Italian referendum shows that Italian political parties still prefer a compromise-oriented attitude, even in the face of the yes-vs.-no referendum logic. In this sense, referendum quorum represents a sort of paradox. So, the 1999 referendum on the introduction of the so-called first-past-the-post election system in the Italian Chamber of Deputies ended up with a result just below the required quorum. The 1990 referendum ended up with a similar result: three questions were submitted to popular vote, which eventually failed to reach the quorum. Consensus, indeed, stuck up at 38%; still a better result than the one obtained in the 1995 referendum: this time, the twelve referendum questions on which electors were called to give their opinion collected a minimum of 25,3% of “yes” votes and a maximum of 32,5% of the total registered voters.

The problem arises when considering the official number of voters registered in the electoral list: one of the most random, alterable at will and less credible phenomenon in the Italian political landscape whose causes cannot be examined in depth in the present paper. A similar situation to the Italian one has been spotted in Denmark, where the Constitution provides that a referendum for constitutional revision shall be considered valid only if at least 40% of “yes” votes were cast (45% until 1953). Experience has shown that major political parties can jeopardize the adoption of constitutional amendments by simply remaining passive, whereas even smaller political parties and other political movements can change the course towards the approval of an amendment upon agreement among the biggest and the most influential political parties.<sup>19</sup>

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<sup>18</sup> PIZZORNO, A. *Le radici della politica assoluta e altri saggi*. Milan: Feltrinelli, 1993, p. 285.

<sup>19</sup> BLONDEL, J., SINNOTT, R., SVENSSON, P. *Institutions and Attitudes: Towards an Understanding of the Problem of Low Turnout in the European Parliament Elections of 1994*. Badia Fiesolana: European University Institute Press, 1996, pp. 38–40.

Just like Italy, other countries' constitutions also provide for a referendum quorum – from Portugal to some democracies of Central and Eastern Europe.<sup>20</sup> In Hungary, for example, the 2011 Constitution states that referendums are valid only if at least 50% plus one of the voters take part in the vote.<sup>21</sup> The quorum requirement undoubtedly affects free, democratic competition, which is why quorum is not provided in the Swiss legal system. The key problem undermining the political course of a democracy is exactly the more or less explicit influence exerted by political players and parties over the electorate towards abstention from freely expressing their vote.

At the opposite pole, the practice of mandatory voting, which is well established in Australia, tends to compromise, to some extent, the quality of political life.<sup>22</sup> A solid turnout is surely desirable, yet provided that it is genuine expression of both interest and attention of the electorate toward the public good rather than the consequence of coercion. Whenever the validity of a referendum depends on quorum achievement, way too much weight is given to voters that abstain from voting or cast a blank/invalid vote.

In conclusion, there are at least two lessons that can be drawn from Italy's experience with abrogative referendum. The first one is that the more referendum questions voters are confronted with, the greater their dependence on political parties will be in terms of exposition to their suggestions and voting recommendations. The greater, therefore, the scope of action of political parties to control the vote of the majority of the electors. The second lesson is that, as already mentioned, all electors are equal, though, in the case of referendum, non-voters are more equal than voters. Quoting Cato's the Censor *Carthago delenda*, when referring to referendum, though way less unpretentiously than Cato, one could call for: *Quorum delendum*.

## II. THE GRADUAL EVOLUTION OF THE ITALIAN REFERENDUM PRACTICE

The wide variety of symptoms of crisis from which the Italian political-institutional system suffers includes difficult acclimatization to the constitutional substrate of the referendum institution. A frequent phenomenon in Italy consists in the frantic blur of intense and controversial discussions on whether holding this rather than that referendum. Lately, the main ambassadors of the referendum cause on issues related to the reform of the legal system have been the former Radical Party and the Lega Nord Party. This specific symptom seems to (apparently) confirm both enduring vitality and relevance of the referendum institution in the Italian political debate. Thus, although a lot has already been said and written about referendum, it is still worth spending a few words. It is, of course, desirable to do so on the basis of analytical study, keeping short-term dramatizations at a distance.

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<sup>20</sup> AGUIAR-CONRARIA, L., MAGALHÃES, P. C. Referendum Design, Quorum Rules and Turnout. *Public Choice*. 2010, No. 1-2, pp. 63–81; BRUNNER, G., HOLLANDER, P., HOFMANN, M. *Verfassungsgerichtsbarkeit in der Tschechischen Republik: Analysen und Sammlung ausgewählter Entscheidungen des Tschechischen Verfassungsgerichts*. Baden-Baden: Nomos, 2001, pp. 222–23.

<sup>21</sup> RATO TRABUCCO, F. The evolution of referendum experience in Hungary. *The Journal of Comparative Law*. 2017, No. 1, pp. 173–97.

<sup>22</sup> KOBACH, K. W. Switzerland. In: D. Butler – A. Ranney (eds.). *Referendums Around the World*. Washington: American Enterprise Institute, 2001.

The first approach to the referendum subject matter should necessarily proceed from the interpretation of the Constitution, particularly from a systematic reading of Art. 75, Const.

In this regard, a clear distinction should be made between two different perspectives promoted in the most recent political-doctrinal debate so far – without taking into account radical positions oriented towards the minimization of the referendum issue with respect to the broader juridical system it functions in,<sup>23</sup> or towards the alleged incompatibility between representative democracy (or, more accurately, the parliamentary regime)<sup>24</sup> and the referendum institution.<sup>25</sup> The first and, incidentally, the most appreciated approach embraces an organic (i.e. subordinate) interpretation of referendum with respect to representative democracy. The second perspective, instead, is more inclined towards interpreting referendum and representative democracy as two different forms of expression of popular sovereignty, from which it follows that they stand in a conflictual relationship. These two positions, especially in their most extreme versions, are mostly typical of the political, intra-party debate. Contrarily, the doctrinal debate is generally characterized by greater caution and problemativeness (yet, sometimes, also by a less strict consistency, since the main issues arising from the doctrinal analysis of the referendum case study are not necessarily untangled in accordance with institutional-oriented options, broadly speaking).<sup>26</sup>

The respective key points on which the two perspectives on referendum described above are based can be outlined as follows: the first interpretation relies on the firm certainty concerning the fundamental uniformity of public services and primary public authorities, whereas the second one somehow suggests a sort of radical “heresy” when referring to the coexistence of the “two democracies”. There is, indeed, a big difference in terms of basic assumptions the two schools of thought at issue start from. The first one postulates the hypothesis that precisely representative democracy is the bedrock of the Italian constitutional system, from which it derives a functional interpretation of Art. 75, Const.: so, representative democracy opens up to direct democracy. The second one, instead, rather tends toward an autonomous view of the referendum institution as a decision-making tool – at least ideally speaking. So understood, referendum can serve as a promising alternative to traditional mediums that representative forms of government offer to the people to express their opinion. By means of referendum, it is therefore possible to achieve greater depolarization and decentralization in the decision-making process.<sup>27</sup>

Apart from this general difference in terms of currents of thought, the two approaches to referendum described above differ in various other respects. For example, the first may lead, on the one hand, to way too much narrow-oriented opinions considering referen-

<sup>23</sup> RESCIGNO, G. U. *Costituzione italiana e Stato borghese*. Rome: Savelli, 1977, p. 36.

<sup>24</sup> BOBBIO, N. Democrazia rappresentativa e democrazia diretta. In: Guido Quazza (ed.). *Democrazia e partecipazione*. Turin: Stampatori, 1978, p. 22 ff.

<sup>25</sup> NEGRI, A. Alcune riflessioni sullo «Stato dei partiti». *Rivista trimestrale di diritto pubblico*. 1964, No. 1, p. 110; CARRÉ DE MALBERG, R. Considérations théoriques sur la question de la combinaison du référendum avec le parlementarisme. *Revue du droit publique et de la science politique en France et à l'étranger*. 1931, Vol. 48, No. 2, p. 225 ff.; GUARINO, G. Il referendum e la sua applicazione al regime parlamentare. *Rassegna di diritto pubblico*. 1947, No. 1, p. 30 ff.

<sup>26</sup> BALDASSARRE, A. La commedia degli errori. *Politica del diritto*. 1978, No. 5, p. 570.

<sup>27</sup> BETTINELLI, E. Itinerari della razionalizzazione della convenzione antireferendaria. *Politica del diritto*. 1978, No. 5, pp. 519–20.

dum as a mere supplementary mechanism of representative institutions.<sup>28</sup> This approach emphasizes the *extrema ratio* nature of referendum, which, incidentally, cannot influence the course of the political line of thought of the government majority. On the other hand, the other approach may lead to the opposite attitude, considering referendum as a corrective means of control, guarantee and counter-power with respect to both democratic mechanisms of representation and political parties submitted to such mechanisms. Another argument is that referendum may lead to conflicting results with the ones achieved at representative level.<sup>29</sup> Some even hold the view that referendum may produce a so-called sovereignty advantage in favor of the electorate (once achieved the threshold of 500.000 signatures) – highlighting in this way the autonomous nature of the referendum institution compared to the constitutional system as a whole.<sup>30</sup>

Considering the “unfair” application of representative democracy, as it happens in such a “stuck democracy” like the one in Italy, the gap existing between the institutional significance of referendum and the one provided by the Constitution is quite an unavoidable circumstance.<sup>31</sup> Italy’s major issue, indeed, is its low democratic performance caused by the inability to overcome the impasse the country is stuck in – consider, for example, Italy’s political inability to secure a solid majority and minority government or to assure a unitary form of state government. Particularly, whenever it is called on the people so that they could express their opinion on relevant public issues – unless it is not the case of a strategic move aimed at “stimulating” legislative institutions into action – it always ends up instrumentalizing direct democracy mechanisms in view of a “political sham” that evidently goes far beyond the scope of the issues submitted to popular vote. Such issues are actually exploited like test subjects due to their sensational attractiveness and potential to easily give rise to political tensions, compromising in this way the political balance of the country.

As a result, the regulatory function of referendum slips into the background (it is also taken for granted that referendum as such always produces regulatory effects), though being of paramount importance from a constitutional point of view. Attention is rather focused on the potential “halo effect” following the referendum outcome, which may undermine, to a greater or lesser extent, the overconfidence of the two houses making part of the Italian bicameral system concerning their representativeness supremacy (potentially leading to their dissolution). In other words, it may arise the concrete risk of «a vote of no confidence».<sup>32</sup>

<sup>28</sup> GRECA, G. Referendum e sovranità popolare. *Democrazia e diritto*. 1976, No. 3, p. 572 ff.

<sup>29</sup> RODOTÀ, S. *Il dettato costituzionale in tema di referendum e poteri della Corte di Cassazione e della Corte costituzionale, le otto richieste radicali di referendum*. Roma: Gruppo parlamentare radicale, 1978, p. 81; MEZZANOTTE, A. Comitato dei promotori e conflitto fra i poteri dello Stato. *Democrazia e diritto*. 1978, No. 1, pp. 83–90.

<sup>30</sup> BETTINELLI, E. Referendum abrogativo e riserva di sovranità. *Politica del diritto*. 1975, No. 3, p. 305 ff.

<sup>31</sup> PIZZORUSSO, A. Presupposti per una ricostruzione storica del referendum: i referendum «di stimolo» e i referendum di «rottura». In: E. Bettinelli – L. Boneschi (eds.). *Referendum, ordine pubblico, Costituzione*. Milan: Bompiani, 1978, p. 160 ff.; BARILE, P. Realtà politica e realtà costituzionale nelle attuali tendenze legislative in materia di referendum e ordine pubblico. In: *ibid.*, p. 14; ROLLA, G. Il referendum abrogativo e l’esperienza del 12 maggio 1974. *Diritto e società*. 1975, No. 2, p. 249.

<sup>32</sup> KELSEN, H. *I fondamenti della democrazia e altri saggi*. Bologna: Il Mulino, 1970, p. 49; CRISAFULLI, V. Aspetti problematici del sistema parlamentare vigente in Italia. In: VV.AA. (eds.). *Studi in onore di Emilio Crosa*. Milan: Giuffrè, Vol. I, 1960, p. 654; BISCARETTI DI RUFFIA, P. Governo. *Novissimo digesto*. 1961, Vol. VII, p. 1167; MARTINES, T. Il referendum negli ordinamenti particolari. In: VV.AA. (eds.). *Scritti giuridici in onore di Giovanni Salemi*. Milan: Giuffrè, 1961, pp. 236–37.

It is not always easy (nor possible) to decipher the political significance of a referendum – which could be rather explained in the wake of potential political elections that may take place after the referendum (in case of the above-supposed dissolution of parliament). This interpretation problem is strictly related to the objective difficulty to correctly place such a basic decision-making process like referendum in a mixed electoral system characterized by a highly polarized multi-party framework as it is the Italian one.

Paradoxically, the attempt to maximize the potential of referendum as one form of expression of direct democracy not only proves its structural subordination to representative democracy (which definitely holds primacy over direct democracy), but also, most importantly, threatens the people's claim of decision-making power. The opposite effect consists in the highlight of those latent contradictions deriving from the odd integration of the referendum institution in a system dominated by political parties.<sup>33</sup>

Considering the perverse plot between explicit content (a law to repeal) and the implicit one (the “political test” generally speaking),<sup>34</sup> the political forces in power will always be inclined to voraciously maintain party mediatization, sacrificing the possibility of resorting to popular vote, which would be a more spontaneous option (on the contrary, referendum is frequently subject to hypostasis, being blamed for the detachment of the top from the bottom of the political system).<sup>35</sup> As a result, the so much invoked (as well as manipulated) popular mobilization inevitably ends up into nothing.<sup>36</sup> The apparently paradoxical consequence of the above is that referendum as direct democracy tool eventually turns into means of power at the disposal of political parties for their so much questioned “colonization” plan of the society.<sup>37</sup>

### III. TAKING STOCK OF THE REFERENDUM INSTITUTION IN ITALY

On the one hand, the instrumentalization of referendum by so-called “intense minorities” is to some extent understandable from a social-political point of view. Likewise, one could turn a blind eye to all these provocations coming, sometimes inappropriately, from various institutions that are part of the Italian political landscape. In the latter case, it could be argued that benefit might result from their attempt to disrupt political balances that are overly established at system level. Nevertheless, on the other hand, this shall not represent an excuse from expressing negative opinions, in terms of both political efficiency and constitutional legitimacy, on the drastic application of referendum which is, as it is worth recalling, just an “accessory” institution provided by the Constitution. As to the political-institutional aspect of the problem at issue, I hold the view that – setting aside the pathological withdrawal tendency of the Italian political system – the proper application of the referendum institution is inextricably linked to a realistic assessment of the physiological bounds that the referendum tool itself sets, especially when it comes to conflicts

<sup>33</sup> BURDEAU, G. Democrazia. *Enciclopedia del Novecento*. 1977, Vol. II, p. 58.

<sup>34</sup> FLORIDIA, G. Il dibattito sulle istituzioni. *Diritto e società*. 1978, No. 2, p. 317.

<sup>35</sup> STAME, F. *Movimenti e istituzioni nella crisi*. Rome: Savelli, 1979, pp. 78–79.

<sup>36</sup> BOBBIO, N. Crisi di partecipazione: in che senso? *Rivista internazionale di filosofia del diritto*. 1970, No. 1, p. 56.

<sup>37</sup> TARROW, S. Aspetti della crisi italiana: note introduttive. In: L. Graziano – S. G. Tarrow (eds.). *La crisi italiana*. Turin: Einaudi, 1979, p. 17.



arising from the acclimatization of the referendum practice within modern representative democracies. Particularly, objective complications concern the attempt to harmonize referendum with a representative-oriented governmental form, yet strongly proportionalistic, like the Italian one. In other words, the theoretical superiority claim of direct democracy institutions over representative democracy is directly related to the necessity to historicize, avoiding by doing so any form of “democratic primitivism”, both extent and impact of the first, taking into account the current evolution of modern political systems<sup>38</sup> (incidentally, it should be reminded that direct democracy institutions are not exempted from criticism and reservations concerning both atomizing conception of the electorate,<sup>39</sup> and effectiveness of direct democracy itself as a tool for popular participation).

After a reasoned evaluation of both functionality and performance of the referendum institution, it clearly emerges that direct democracy hardly suits the complexity of contemporary mass societies, requiring more articulate and sophisticated decision-making tools than referendum – which is quite elementary and non-calibrated. Being more inclined to properly understanding power mechanisms (and related decision-making processes), western democracies’ scholars have highlighted the limitations of referendum in highly complex systems like «our extremely complicated and fragile democracies». <sup>40</sup> The risk is that referendum, especially when used injudiciously, may intensify and stir up pre-existing conflicts.<sup>41</sup> Referendum, indeed, is a typical «non-zero-sum decision-making tool» (which means that the winner takes it all, whereas the losing side loses everything)<sup>42</sup> based on «a war-like conception of politics». <sup>43</sup> According to this conception, the majority principle largely prevails, pushing into the background both needs and values of so-called «intense minorities». <sup>44</sup> Such reflections of general nature take on particular significance when considering a political system like the Italian one where the proportional principle is deeply rooted thanks to the key role played by the Parliament, to the detriment of the majority principle.

Forgiving, on the one hand, the negative aspects of the legislation on referendum implementation,<sup>45</sup> it could be noticed, on the other hand, that “mosaic-like” laws do not properly suit such an elementary and clearly majoritarian decision-making tool like referendum. Yet, it should be also added that holding a referendum in a basically consociational political context – at least legislatively speaking – entails clear acclimatization difficulties at systemic level. The heart of the problem is the political perspective shift produced by referendum – from a mediation-oriented approach to an antagonistic one – that may be difficult to handle for political powers involved. Furthermore, taking charge of the objective needs of the political system does not necessarily involve unquestioning acceptance of the latter. It is evident that such an uncritical approach would produce detrimental implications, given the lack of corrective countermeasures capable of opposing

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<sup>38</sup> MARTINES, T. *Diritto costituzionale*. Milan: Giuffrè Francis Lefebvre, 2020, pp. 330–31.

<sup>39</sup> BOBBIO, N. Quali alternative alla democrazia rappresentativa. *Mondoperaio*. 1975, No. 10, p. 32.

<sup>40</sup> SARTORI, G. *Tecniche decisionali e sistema dei comitati*. Bologna: Il Mulino, 1974, p. 39.

<sup>41</sup> *Ibid.*, pp. 38–9.

<sup>42</sup> *Ibid.*, p. 38.

<sup>43</sup> *Ibid.*, p. 23.

<sup>44</sup> ROLLA, G. *Il referendum abrogativo e l'esperienza del 12 maggio 1974*. p. 240.

<sup>45</sup> Act 25 May 1970, Nr. 352.

to the overall flattering tendency of conciliatory nature (which, incidentally, differs from the positive depolarization that the Italian political system is currently facing). Instead, such a bipolar tool like referendum could produce positive results in a political system characterized by an inwards flattening tendency – though without overestimating the effective potentiality of referendum.<sup>46</sup>

Starting from this premise, it is possible to grasp the most genuinely democratic significance of referendum, precisely by means of a two-way approach that takes account of both implementation of referendum and possible deviations of the decision-making process produced by referendum itself. This is particularly relevant in such a representative system like the Italian one where the natural struggle for consensus<sup>47</sup> is often accompanied by an ironclad negotiation logic. The latter influences the decision-making process, steering it towards the adoption of political strategies for the purpose of granting mutual favoritism to each political player involved. As a consequence, the real subject of debate, i.e. the very heart of each single question submitted to discussion, slips into the background. It follows that resorting to referendum may be sometimes a good solution, if not essential. Specifically, referendum could be helpful in case of negligence or withdrawal tendency displayed at party-institutional level towards both topics and needs deemed to be of primary importance by the public opinion, yet ignored by the main political players.<sup>48</sup>

In this situation, the potential benefits deriving from the choice to resort to referendum can be listed as follows: firstly, submitting a topic to popular vote may draw attention to the topic itself, resuming public discussions that, otherwise, would be avoided and dulled by the most influential, top-down-oriented political groups. Secondly, holding a referendum may help to reaffirm political values absorbed by the “colonist” logic of the party system. Thirdly and more generally, it could also help building a more genuine relation between the decision-making process that takes place at the highest level of the political hierarchy and popular will.

In turn, any attempt to expand referendum’s scope of performance (intended as corrective measure – though conflictual – of the decision-making process typical of party-representative political systems) in order to transform it into a sort of discussion platform with the ambition to run an alternative political project,<sup>49</sup> requires proper caution. On the one hand, it could be praised the idea of combining, as long as it is done wisely, utopian longing with “mystifying” popular mobilization. On the other hand, it should be clearly kept in mind to which extent it is possible to run the above-mentioned project, without turning upside-down, also formally speaking, both identity and structure of the referendum institution. At this point, it should be reminded that the Italian Constitutional Court refused to support both so-called thesis of «sovereignty advantage»<sup>50</sup> and impact produced by the latter on promoters of State power.<sup>51</sup> The above-outlined judgement of the Consti-

<sup>46</sup> BOBBIO, N. Intervento. In: *Partito radicale, Otto referendum contro il regime*. Rome: StillGraf, 1974, p. 51.

<sup>47</sup> FERRARA, A. *Il Governo di coalizione*. Milan: Giuffrè, 1973, 48.

<sup>48</sup> RODOTÀ, S. *Alla ricerca della libertà*. Bologna: Il Mulino, 1978, 55.

<sup>49</sup> BETTINELLI, E. *Itinerari della razionalizzazione della convenzione antireferendaria*. p. 533.

<sup>50</sup> Constitutional Court judgment Nr. 68 of 1978.

<sup>51</sup> Constitutional Court judgment Nr. 69 of 1978.

tutional Court not only keeps the distance from any form of exegesis derived from constitutional jurisprudence, as instead widely spread in the doctrinal discourse,<sup>52</sup> but also assumes a purely institutional interpretative apparatus.

On the one hand, the Constitutional Court apparently intended to reaffirm referendum's subordinate position in the hierarchy of representative democracy (as, incidentally, guaranteed by Art. 39, Law Nr. 352/1970, which was rearranged according to a balanced logic of compensatory nature – see also judgment Nr. 68, 1978), especially in view of the elusiveness risk potentially displayed by lawmakers. By doing so, the Court defended the potential inexhaustibility that the ordinary legislative function may unfold pursuant to Art. 70, Const. On the other hand, the institutionalization of the Commission for Referendum Promotion, being the official body representing the signatory community, deeply splits up signatories on the one side and the electorate as a whole on the other.<sup>53</sup> In this way, the Court intended to somehow legitimize – *a posteriori* – the pronouncement it had previously issued for guarantee purposes in case of abuse of power that may potentially lead to harmful consequences for the Court itself.<sup>54</sup>

However, the Constitutional Court went even way beyond that. The Court, indeed, ruled that it depends precisely on the wording of referendum questions, which shall be as homogeneous as possible,<sup>55</sup> whether it is ensured the anchor point between genuine expression of popular will and proper functioning of the political system, or not. If so, the first turns into keystone for the latter, so that referendum could properly fit within the bigger picture of representative democracy. It should be also noted that the Constitutional Court plays, additionally, the role of guarantor of the delicate balance between political-parliamentary mediation and moments of trial like whenever a referendum is held within a specific political system. By doing so, the Court stands up for the rights of the electorate, specifically for the decision-making power electors are entitled to exercise pursuant to Art. 1, Const. The majoritarian logic behind referendum makes it a good instrument for submitting to the popular vote issues of general scope such as national measures, whereas «complex issues concerning political parties, or organized groups of people in favor of the popular vote»,<sup>56</sup> are always exposed to the risk of extremism whenever they are submitted to referendum. The statement above clearly expresses the concern, shared by all political powers, to prevail (or succumb) *en bloc*. In this respect, the already mentioned majoritarian principle, which is basically unknown to the Italian political system, plays a key role in so far as it basically measures representativeness – which is verifiable only through electoral competition – rather than reflecting the spectrum of opinions of the electorate on

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<sup>52</sup> AZZARITI, G. Il modello della sentenza n. 16 del 1978 e il carattere abrogativo del referendum: un ritorno al futuro? *Costituzionalismo.it*. 2005, No. 2, pp. 1–4; MODUGNO, E, CARNEVALE, P. Divagazioni in tema di referendum abrogativo e di giudizio di ammissibilità delle proposte di abrogazione popolare a diciotto anni dalla sentenza n. 16/1978. *Giurisprudenza italiana*. 1997, No. 3, pp. 98–109; MERZ, S. Il referendum abrogativo dopo la sentenza della Corte costituzionale. *Giurisprudenza italiana*. 1978, No. 1, p. 1161.

<sup>53</sup> RESCIGNO, G. U. Referendum e istituzioni. *Politica del diritto*. 1978, No. 5, p. 619 ff.

<sup>54</sup> OLIMPIERI, P. Referendum, Comitato promotore e poteri dello Stato nella più recente giurisprudenza costituzionale in materia di conflitti di attribuzione (con particolare riguardo alla sentenza n. 49 del 1998). *Giurisprudenza costituzionale*. 1998, No. 2, pp. 1335–88.

<sup>55</sup> MOSTACCI, E. Eccessiva manipolatività: una clausola oracolare, di utilità incerta. *Giurisprudenza costituzionale*. 2020, No. 1, pp. 134–44.

<sup>56</sup> Constitutional Court, judgment Nr. 16, 1978.

single issues. In conclusion, it is thus reasonable to put juridical emphasis on the wording of referendum questions, assuming that structural inhomogeneity represents sufficient evidence to alter (as previously discussed) both significance and role of referendum.<sup>57</sup>

#### IV. FUTURE REFERENDUM PERSPECTIVES: NEW INITIATIVES AND UNPRECEDENTED REFORMS

It goes without saying that Italian pro-referendum Radicals (i.e. mainly members of the former Radical Party) deem Constitutional Court's judgment Nr. 16, 1978, to be profoundly stigmatizing of the political practice of the Radical Party itself<sup>58</sup> – since, through the above-mentioned judgment, the Court basically rationalized the anti-referendum tendency that would later become systemic. In other words, the Court has been the leading player of the referendum “sterilization” project carried out in Italy. Contrarily, it could be argued that the Court simply withdrew some aspects of referendum that were contemplated only at abstract or theoretical level, which means that they failed to fit harmoniously in the broader constitutional framework, hence the reason for the Court's decision.

The idea of shrinking both normative and political role of referendum definitely arose from a “reasonable” interpretation of the Constitution aimed at relieving the referendum institution from its counterproductive redundancies, yet without undermining its healthy democratic potential nor its obvious weaknesses (which are rather rooted in the critical sociopolitical context on which they depend). Despite the overly abundant “supply” role played by the Court – surely at least in some respects -, it seems that the future evolution of the referendum institution will be influenced by concrete political actions and initiatives taken at systemic level rather than by the rationalization process initiated by the Constitutional Court. Thus, it is perhaps an overstatement, as quite widespread in law academic circles (118), to fear that carrying on a “disruptive” referendum practice could be denied, or at least significantly hindered under these circumstances. Such a disruptive potential exercised by means of referendum (having its foundation in civil society and in the relationship between the latter and the political system), indeed, seems to be strongly contingent on the crisis situation that is currently interesting the Italian sociopolitical context. Therefore, the knot cannot be unraveled in a reductive perspective by means of legislative or jurisprudential adjustments,<sup>59</sup> though trying to comply with the basic principles of the Constitution. In parallel, the Italian political system can be compared to a paralyzed body at the mercy of all these physiological abnormalities and (unsolvable?) contradictions that hold it back instead of making it capable to meet social challenges, turning them into opportunities for growth. Contrarily, every social challenging situation is systematically met in Italy with political resistance and is labeled as anti-systemic. Another typical sign of systemic crisis is the inability, as is the case of Italy, to carry the burden of confrontation with ideological principles from which stems legitimacy of the

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<sup>57</sup> ROLLA, G. I quesiti delle consultazioni popolari. Considerazioni alla luce dell'esperienza referendaria in Italia. *Nomos*. 2018, No. 1, pp. 1–21.

<sup>58</sup> BETTINELLI, E. *Itinerari della razionalizzazione della convenzione antireferendaria*. p. 533.

<sup>59</sup> MARTINES, T. *Il referendum negli ordinamenti particolari*. p. 330.

political system itself. Likewise, it can be interpreted in the same way the refusal to embrace corrective measures (or their misuse), fearing them as potential forms of degeneration. If this is true, the question triggered by the abrogative referendum of 1974 does not concern the role of the Constitutional Court (which some, “to their surprise”, have discovered to be a politically, and not democratically, oriented judicial body), but rather, more generally, the role of the Constitution in a society that is experiencing deep crisis as well as the relationship between the written Constitution and the “living” one.<sup>60</sup>

However, the mix between the crisis of parliamentarism and the advent of new digital technologies has fomented public attention to such a degree that somehow reminds citizens’ participation in direct democracy. The echo of the debate initiated at public level eventually reached the Parliament, as some deputies put forward a legislative initiative that, incidentally, had been already discussed during the drafting process of the cross-party program agreement in support of the governing alliance Conte-I.<sup>61</sup> The draft laws approved at first reading and discussed in the Chamber of Deputies in February 2019 dealt with the introduction in the Constitution of the so-called propositional referendum.<sup>62</sup> It is a unique form of referendum in the European context, as outlined in several academic publications that can be described as indirect popular initiative.<sup>63</sup> On the one hand, propositional referendum has undoubtedly many innovative features, yet, on the other hand, there are also some critical aspects, as shows comparative analysis with other European legislative systems.<sup>64</sup>

In this regard, it should be brought up and questioned the unfounded statement according to which giving more space to direct democracy necessarily results in the enhancement of the democratic nature of the political system. The inaccuracy of the statement reported above comes clearly across by comparing the judgment issued by the Italian Constitutional Court on abrogative referendum and the earlier mentioned constitutional draft law on propositional referendum, which would allow electors to directly implement draft laws<sup>65</sup>. It should be also made mention of the key role played by digital marketing for political campaigns as well as for the political control of popular consensus, suggesting that illiberal democracies are more vulnerable than liberal ones when it comes to online disinformation techniques.<sup>66</sup>

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<sup>60</sup> BARTOLE, S. Considerazioni in tema di modificazioni costituzionali e costituzione vivente. *Rivista AIC*. 2019, No. 1, pp. 335–43.

<sup>61</sup> DE MARCO, E. Democrazia rappresentativa e democrazia diretta nei progetti di riforma del Governo del cambiamento. *Osservatorio costituzionale*. 2018, No. 3, pp. 1–10.

<sup>62</sup> Chamber of deputies, bill N° 1173; Senate of the Republic, bill n° 1089. CARNEVALE, P. A proposito del disegno di legge costituzionale AS n. 1089, in tema di revisione degli artt. 71 e 75 della Costituzione. Prime considerazioni. *Osservatorio costituzionale*. 2019, No. 1-2, pp. 184–99; NICOTRA, I. A. Referendum propositivo e democrazia rappresentativa: alla ricerca di una sintesi. *Federalismi.it*. 2019, No. 10, pp. 1–10.

<sup>63</sup> DE SANTIS, V. Iniziativa popolare indiretta e referendum propositivo: resoconto e qualche riflessione a margine della proposta di revisione dell’art. 71 della Costituzione A.C. n. 1173 XVIII Legislatura. *Osservatorio costituzionale*. 2018, No. 3, pp. 1–16.

<sup>64</sup> PISICCHIO, P. Referendum propositivo e democrazia diretta: riflessioni preliminari sul PDL costituzionale italiano e profili di comparazione con gli ordinamenti europei. *Rassegna Parlamentare*. 2019, No. 2, pp. 513–28.

<sup>65</sup> CARETTI, P. Il referendum propositivo: una proposta che mal si concilia con una democrazia rappresentativa. *Osservatorio sulle fonti*. 2019, No. S2, pp. 1–5.

<sup>66</sup> D’ATENA, A. Sul cortocircuito tra democrazia illiberale ed Internet. *Lo Stato*. 2019, No. 13, pp. 261–75.

The debate on the introduction of such a form of popular referendum with direct legislative implications is not new to the Italian constitutional system. Yet, propositional referendum, distancing themselves from the label of “negative legislation” that usually reminds of the abrogative referendum, would unwrap a new path for direct democracy in an utterly different way from direct popular participation tools already provided by the Constitution.

Furthermore, the Constitution still follows an alternative logic which is not complementary to representative democracy, although important changes have been made to the original wording. Examples include overcoming the restraint represented by so-called quorum zero in favor of a new quorum formula according to which the “yes” wins not only when it far exceeds the “no”, but also when the votes in favor are cast by at least one fourth of the electors. Particularly, when speaking of referendum, the major weaknesses of the Italian Constitution consist, on the one hand, in some legislative troublesome aspects, such as the inclusion of financial laws, as well as the reflex mechanism of holding a referendum even when the Parliament has already expressed itself in favor of the opinion supported by the promoters of the referendum. Resorting to popular vote is not really appreciated only in case of merely formal changes, yet, by doing so, the role of parliamentary mediation turns out to be drastically reduced and simplified.<sup>67</sup>

Another sensitive issue are interactions between the new form of referendum and the form of government. In the case of the parliamentary form of government, it is fundamental to examine the possibility that direct democracy institutions may alter, sometimes even profoundly, the relationship between the Parliament and the Government itself. This is mainly for two reasons: firstly, due to the potentially high institutional impact of propositional referendum, secondly, due to the fact that propositional referendum itself might lead to permanent contrasts between referendum promoters and parliamentary majority concerning enforcement measures planned on the Government's agenda or related to it. Speaking of the sources of law, propositional referendum raises some issues concerning, first of all, the conflict between two different sources of law (law for constitutional review vs. constitutional law). Secondly, a likewise controversial aspect is the disproportionately major role that the ordinary law-to-be on propositional referendum would play with respect to important issues that do not enjoy constitutional coverage.

As regards, instead, the content, propositional referendum “suffers” from excessive “unconventionality”. Additionally, there are a few other issues that raise some doubts. For example, one of these is the overly accentuated role that referendum promoters would get to play to the detriment of parliamentary prerogatives. Further examples include: constant monitoring by the Constitutional Court and the Central Office Referendum,<sup>68</sup> temporary “freezing” of legislative activity whenever draft laws are brought forward and discussed,

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<sup>67</sup> CECCANTI, S. Il referendum propositivo in Italia: più problema che risorsa in un sistema già in crisi. *Studi senesi*. 2019, No. 3, pp. 497–504.

<sup>68</sup> STERPA, A. Il disegno di legge costituzionale sull'art. 71: l'irruzione dei promotori e della Corte costituzionale nella produzione legislativa. *Federalismi.it*. 2019, No. 13, pp. 1–11.

acceptance criteria, participation quorum and, lastly, constitutional status of laws approved by means of popular vote.<sup>69</sup>

Moreover, the introduction of propositional referendum could encourage the verticalization of other political systems of institutional nature, strengthening political elites and alienating them from the citizens. This entirely proves that we are experiencing a transition from democracy to a new system of government, so-called “peoplecracy”. This new governmental form, in which authoritarian power revolves around the figure of a charismatic leader, is particularly inclined to resort to plebiscite. Thanks to it, especially thanks to new digital technologies, the leader gets to always be in touch with the infallible voice of the people and to their demands. Contrarily, the governmental system depicted above should be converted into a form of common democratic government in which not only the Parliament, i.e. as collegiate authority, is elected by the electorate, but also the Head of State, i.e. as, instead, monocratic governmental authority.<sup>70</sup>

Last but not least, comparative analysis at European level shows that propositional referendum is not at all widespread<sup>71</sup> and also that, according to predictions for the foreseeable future, propositional referendum might only interest sub-national entities,<sup>72</sup> except for Switzerland.<sup>73</sup> The main conclusion that can be drawn from this analysis is that propositional referendum is meant to be restricted to representative forms of government as well as that the implementation of legislative tools for popular direct participation poses significant issues and contrasts with respect to the representative structure of modern constitutional systems.<sup>74</sup> Similarly, the disruptive function of abrogative referendum has been extensively metabolized by the Italian political system, which, by contrast, proved to be quite reluctant to the introduction and the acclimatization with referendum in the view of greater harmony with the form of government in force.<sup>75</sup> In conclusion, the challenge that referendum sets to current political systems may seem risky at first, yet a quick glance at the Italian experience with referendum proves otherwise.

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<sup>69</sup> TARLI BARBIERI, G. Osservazioni sul d.d.l. A.S. n. 1089 (Disposizioni in materia di iniziativa legislativa popolare e di referendum). *Osservatorio sulle fonti*. 2019, No. S2, pp. 1–31.

<sup>70</sup> PIRAINO, A. Verso una nuova forma di democrazia. *Lo Stato*. 2019, No. 13, pp. 129–54.

<sup>71</sup> PASQUINO, P., LIETO S. Iniziativa legislativa popolare e referendum: nuove tendenze di riforma in Italia e in Francia. *Nomos*. 2019, No. 3, pp. 1–17.

<sup>72</sup> GIRAULT, Q. *Le référendum d'initiative populaire : proposition d'un modèle dans l'ordonnement constitutionnel de la V République en France*. Bruxelles: Bruylant, 2020.

<sup>73</sup> CECCANTI, S. Il referendum propositivo, tra politica, diritto e dottrina. Note dal Parlamento. *Diritto pubblico comparato ed europeo*. 2019, No. 5, pp. 131–44.

<sup>74</sup> PORENA, D. Il referendum legislativo nell'esperienza regionale italiana e nei sistemi costituzionali stranieri: materiali ed ipotesi per una lettura comparata del disegno di legge costituzionale in materia di iniziativa legislativa e referendum. *Federalismi.it*. 2020, No. 5, pp. 136–60.

<sup>75</sup> LUCIANI, M. Il referendum impossibile. *Quaderni costituzionali*. 1991, No. 3, pp. 509–25.