Referendum in Italy and Ireland: Two Different Ideas of Direct Democracy and Popular Sovereignty

by Claudio Martinelli

Abstract: This paper proposes a juridical comparison between Italian and Ireland constitutional systems about the crucial issue of referendum. Particularly, it focalizes this comparison to the constitutional referendum in both countries: a very interesting comparison field to understand some fundamental elements of these two constitutional Charters. In this context, the comparative perspective about direct democracy is very useful to show the different ideas of popular sovereignty inside Italian and Irish constitutionalism, and to argue about the historical and theoretical reasons of this difference.

Keywords: Constitution; Parliament; Referendum; Constitutional Amendments; Popular Sovereignty.

1. Introduction about sovereignty, people and constitutional changes

Arguing about fundamental elements of a legal or political discipline, particularly if in a very large perspective, is always a great pleasure. The matter of this book[1] by Richard Albert, a wide analysis of the constitutional revision methods offered in the comparative landscape, is crucial for the development of constitutional and comparative law, constitutional theory and constitutional history. I like to recall the Edmund Burke's quote from the last page of the book: «a state without the means of some change is without the means of its own conservation»[2]. As it is well known, Burke's perspective was basically focused on the British Constitution and the English constitutional history, but I think this fundamental concept would be fine to codify constitutions too.

As we know very well, sovereignty, people and territory have been the classic constituent elements of the modern State, since, with Machiavelli, European political and juridical culture began to think of the organization of power in organic, structural and functional terms. These concepts have been so much investigated by constitutional and political science and for such a long time that it is even possible to doubt that a reflection on them can still make sense. And yet, the political reality

[1] R. Albert, *Constitutional Amendments. Making, Breaking, and Changing Constitutions*, Oxford, 2019.

[2] See R. Albert, *Constitutional Amendments*, cit., 271.

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continuously presents new profiles and different problems, raising doubts and questions that were not even on the horizon before. Under certain circumstances these changes can touch, directly or indirectly, the fundamental concepts. Constitutionalism and constitutional science often had to go back onto considered acquired issues and in most cases that happened following moments of crisis, which sometimes even drew tragic turning point in history, like in the first mid-twentieth century.

I do not know whether the times we are living in will end up having such tragic characteristics, but certainly the changes in reality we are witnessing require us to return to think about the fundamental topics of our scientific disciplines, especially to understand whether the interpretative tools we own are sufficient or, instead, need an update and an enrichment.

Hence the topicality of an investigation on sovereignty, populism and constitutional politics. Sovereignty has never been a static concept, but today it is undergoing a particularly sharp evolution in relation to these two following factors of crisis: the twists of national sovereignty that are substantiated in the transfer of quotas in favour of higher levels (e.g. the European Union), and lower levels (the different forms of devolution); the construction of an artificial contrast between dominant elites and submissive peoples: a populist narrative so in vogue that it calls into question the usual canons of representative democracy and even to induce the less wise fringes of the population to be sensitive to the appeal of other autocratic and illiberal conceptions of political power.

2. Analogies and differences between the two constitutional systems

Of course, we face themes and problems declinable in multiple and varied research paths. I would like to propose a comparative reflection between two constitutional systems among the most interesting in the contemporary European landscape: Italy and Ireland.

These two countries show important differences from many points of view: the ways and times in which they asserted national independence, the size of the population and territory, the island character for Ireland and the peninsular for Italy, the roots of their respective legal cultures, the experience of the form of authoritarian State during the twentieth century that unfortunately saw Italy engaged in a leading role.

On the other hand, however, there are also clear aspects of history and national life to build a solid comparison on: both were territories of conquest and domination by other peoples and States, the common Catholic roots, the vocation to a long time practiced emigration, the membership of the European Union, the economic and social development pursued and achieved since the second half of the last century. And, precisely, the most important profile for our studies, namely the fact that they are both systems based on a written, rigid, democratic and pluralistic constitutional Charter.

Obviously, the areas of comparison to attempt a legal confrontation about the two systems could be many and varied: from the form of

government to the judicial system, from individual freedoms to social rights[3].

However, among all of them, understanding the different relationship existing in the two systems between direct democracy and popular sovereignty seems to me particularly relevant and significant in order to contribute to the general reflections on the cornerstones of the form of State: a relationship that, ultimately, tells us a lot about the different conception of democracy and constitutionalism at the base of the two Charters.

In addition to the present points of interest on a theoretical level, the subject is fairly central in constitutional history, as well as in the practice and in political debate of the two countries.

In Italy, the first direct intervention of the electoral body dates back even to a moment prior to the adoption of the Constitution. On 2nd June 1946, the electorate was called upon to elect their representatives to the Constituent Assembly but, at the same time, also to decide whether the future Constitutional Charter should preserve the Monarchy or be shaped Republican. The second option prevailed by about 2 million votes. Thus, the electorate, for the first time by universal suffrage including also women, played a decisive role in the introduction of a constitutional principle marking a clear break with the past, not only with the fascist regime, of course, but also with respect to the monarchical imprint of the *Risorgimento* (the historical process which independence and national unity were achieved in the 19th century by) and the Italian liberal State. In the Constitution that came into force on 1st January 1948, which obviously focused on the canons of representative democracy, some non-marginal institutions of direct democracy have found space, such as the repeal referendum of ordinary law (art. 75 Cost.), and the constitutional referendum (Article 138, 2nd paragraph), which we will return to in detail.

Subsequently, for decades of republican life, these institutions of direct democracy have often been at the centre of political debate. The repeal referendum has been widely used in relation to laws crucial to social, institutional and economic life. Just think of the first in order of time, when the Catholic world in 1974 attempted to repeal the divorce law voted by the Parliament four years earlier, but faced an epochal defeat that changed Italian society forever and also its relationship with Church. Or just consider other questions asked in the 1980s and 1990s about abortion, nuclear energy, responsibility of magistrates, electoral laws, and so on.

The constitutional referendum was certainly less practiced (for reasons we will see), but no less important was its impact on the evolution of the political framework, especially in recent times.

Eventually, in recent years, direct democracy has been taken as the hub of its conception of democracy and of the Constitution by a new and emerging party, the Five Stars Movement, that, in my opinion, has changed the theorization of the spaces of participation for the electoral body moving it into a populist sense, based on a kind of opposition with

[3] For a comparison on many aspects of the two constitutional systems, with a particular focus on the two models of Judicial Review, see G.F. Ferrari, J. O'Dowd (Eds), *75 Years of the Constitution of Ireland: An Irish-Italian Dialogue*, Dublin, 2014.

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the representative institutions that has ended up demeaning and exploiting its role.

About the Irish Constitution, it is well known that there are two main institutions of direct democracy: the referendum on ordinary laws (Art. 27 Cost.), and the referendum on amendments to the Constitution (Art. 46 and 47 Cost.), often used, especially in recent decades, and concerning matters of considerable political depth[4]. Here, too, just think of some very significant examples, such as the most recent ones, namely the 2015 referendum on same-sex marriage and the 2018 referendum on abortion and blasphemy, and 2019 on divorce.

Therefore, we face very different constitutional institutions but pointing to a common imprint between the two constitutional Charters: the strongly representative character belonging to the two constitutional democracies, but in which a very significant space is assured to direct democracy, that is, the decision made directly by the people about ordinary laws or constitutional norms.

3. The comparison field

As a preliminary matter, it is necessary to design and limit the field of a possible juridical comparison. It would be rather difficult to try a comparison between the referendum on ordinary legislation, provided by article 27 of Irish Constitution and article 75 of Italian Constitution. First of all, since in Ireland this referendum has never been applied while in Italy, as we know, it has been applied a lot of times during the last four decades.

But the most important reason is not linked to the praxis but to a functional concept. In fact, in Ireland this type of referendum is a tool in the hands of majority of Seanad and a minority of *Dáil* (one-third) to ask the President not to sign a bill. And only if the President of the Republic considers that a bill of national political importance, after hearing the Council of State for an opinion, he can decide that it is appropriate to make the electorate express its transformation from a Bill into Act.

So we can affirm it is a constitutional provision inside the dialectical relationships between the two Chambers of the Parliament and the Head of the State. In other words, a game played into the representative

[4] A considerable number of referendums has concerned European Union matters, such as Irish membership or ratification of Treaties amendments. On these topics see F. Mendez, M. Mendez, V. Triga, *Referendums and the European Union. A Comparative Inquiry*, Cambridge, 2014, 57-60. These Authors underline very clearly the great importance of Supreme Court judgement in *Crotty v. An Taoiseach and others*, [1987] IESC 4; [1987] IR 713 (9th April, 1987), «in which the Irish Supreme Court famously ruled that an EU amending treaty going beyond the essential scope or objectives of the existing treaties would require a constitutional amendment and thus a referendum». On this judgement see G. Barrett, *Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence*, in 5(1) *European Constitutional Law Review* 32 (2009). About the Irish referendums on European Union see also S. Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation*, Oxford, 2012, 108-109 and 157-162.

institutions, that the people participate in only if the constitutional bodies act in a certain way. Whilst in Italy this is a very different game. In fact, the referendum on an ordinary statute is requested by a rate of the electoral body (500.000 electors) or five regional councils, to repeal, totally or partially, an ordinary act already in force.

Thus, the role of the electorate is not to settle a dispute between the Houses of Parliament, but to change the order through the repeal of an existing law. Of course, this does not mean that political parties are necessarily unrelated to this procedure. Indeed, it very often happened that the collection of 500,000 signatures was ensured by the will of one or more parties, perhaps even strongly minority, in order to cancel a law they opposed, and not being able to make their own will in the Parliament, they had to appeal to the people. However, the collection of signatures always expresses a specific will of a part of the population and the referendum to be valid requires that at least half of the claimants participate, otherwise its celebration will be *tamquam non esset*.

For all these reasons it is an opportune decision to limit the comparison to the constitutional referendum in both countries[5]. As we shall see, the constitutional revision presents a common ground where looking for similarities and differences will be possible and convenient. Nevertheless, we always have to remember that this comparison presents a specific problem. In Ireland a lot of constitutional referendums have been held since 1959. Precisely, at the moment, 41 (30 approved, 11 rejected)[6], while in Italy it has happened only three times (1 yes and 2 no), the last one in 2016. So, we can suppose that some differences between them are caused more by this different practice rather than by some juridical provisions.

In this context, I would like to argue about some fundamental issues in a comparative perspective: first, an analysis of the characters, functions and procedures of the constitutional revision in the two Charters, followed by a rough description of the content, as well as a description of the role played by the Courts of Justice in the two procedures. At this point we will be holding all the necessary elements to propose some reflection on the relationships between direct democracy and popular sovereignty in both two constitutional systems and some questions about the plebiscitary or democratic nature of these two referenda. Then I would like to obtain some learning from each of these topics.

4. The constitutional change procedure in the two Charters

[5] The constitutional referendum in Ireland is a very fruitful ground for comparison, especially when it is understood as the realisation of fundamental constitutional principles, as the reading of the essay by M.L. Paris, *Popular Sovereignty and the use of the Referendum – Comparative Perspectives with Reference to France*, in E. Carolan (Ed.), *The Constitution of Ireland: Perspectives and Prospects*, Dublin, 2012, 279-306.

[6] For a reconstruction of the referendum practice updated in September 2015 see the following reports of the Department of the Environment, Community and Local Government: *The referendum in Ireland*, Dublin, September 2015; *Referendum Results*, Dublin, 2015. Of course, these reports exclude the two referendums in 2018 and the 2019 referendum.

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Thus, the comparative arena so far outlined in this way must be explored on the level of constitutional rules and their review procedures.

Both constitutional Charters are characterized by the rigidity issue as they provide for a specific procedure for the production of constitutional rules, more complicated than ordinary laws[7]. However, the respective characteristics of rigidity differ considerably, both in terms of the parliamentary process and in relation to the function of the referendum and then in the role of the electoral body, and, perhaps above all, in terms of legal limits to the constitutional revision. Therefore, it is essential to describe in a succinct but precise way what is provided by the respective constitutional norms, in order to appreciate the elements of similarity but also to bring out the aspects of considerable differentiation.

Art. 138 of the Italian Constitution governs the process for the production of those laws regarding revision of the Constitution and other constitutional laws. This last reference encompasses laws not intended to amend the Constitution but to integrate the fundamental text or to implement it where there is a reserve of constitutional law and not a mere reserve of ordinary law. Therefore, the procedure provided in this article serves for the production of all the rules contained in sources of constitutional law: constitutional changes and other constitutional laws.

The first paragraph provides for procedural burden. The Italian Constitution embraces the principle of so-called perfect or equal bicameralism. This means that the two Houses of Parliament, despite having a rather different structure, have the same functions and prerogatives. Among the consequences of this (questionable) principle, there is also the fact that any Bill to become an Act has to be approved by both branches of Parliament in the same text.

Ordinary laws only need one passage for each Chamber and only if they keep on voting on different texts, it will occur the so-called *navette*, that is the continuous ping-pong of the legislative text between *Camera* and *Senato*.

Under constitutional laws, however, there are at least four parliamentary readings, grouped into two "first readings" and two "second readings", to be kept at a distance of no less than three months apart. Let us assume, for example, that the text begins its course from *Camera dei Deputati* and, after extensive discussions and deliberations on each single article, is approved. At this stage, a simple majority is sufficient. At this point it comes to the attention of the *Senato della Repubblica*, that can decide in total autonomy to travel several paths. If it decides to reject the text, the project will immediately end its ill-fated journey. Instead, if it was amended, the project would have to return to the *Camera* for an examination of the amended text, which of course would still fall into the "first reading" category, thus creating a shuttle with potentially indefinite number of steps. If, on the other hand, the Senate approves the text already voted by the *Camera*, then the "first readings" phase will be over and it would move on to the next step.

[7] For a broad and in-depth discussion of constitutional rigidity in the theory of constitutionalism and comparative law see M.P. Viviani Schlein, *Rigidità costituzionale. Limiti e graduazioni*, Torino, 1997.

The "second readings" phase shows some peculiarities compared to the previous one. First of all, each house cannot decide on the text before at least three months starting from the vote which adopted the text by. In addition, the articles can no longer be amended and therefore the Member is to vote again on the articulation he had already expressed about and, hopefully, in the meantime he will have thought deeply about. Finally, at second reading the law passes if it gets at least an absolute majority in each Chamber.

At this point the project is published on the Official Journal (the magazine that notifies the approval of a law to citizens), but only to give way to what is established by the second paragraph of Art. 138, that is, to trigger the three months during which 500.000 voters, five regional councils or a fifth of the members of a Chamber, have the opportunity to request the submission of the constitutional law text to a popular referendum. If these three months pass without one of these requests, the law will be enacted by the President of the Republic, published again on the Official Journal and will come into force. If, on the other hand, one of those who are entitled takes advantage of this passage, the President will hold the referendum to ask the citizens if they want the text approved by Parliament to come into force, or if they want to oppose it. In the latter case, the project will immediately cease to exist and will never come into force, while in the event of a successful outcome it will be promulgated and published, thus becoming a full-fledged constitutional law.

However, everything provided in the second paragraph, will not take place if both Chambers approve the text, in the two "second votes", with a qualified majority of two-thirds of the members, as expressly provided for by the third paragraph of Article 138 Cost.

Therefore, it is clear that the constitutional revision procedure in the Constitution of the Italian Republic is deliberately complex, detailed, structured and participatory.

All the elements of procedural burden aim at highlighting the existence of a quality leap between ordinary legislation and constitutional legislation, and as well as they contain a strong appeal to the Houses of Parliament and also to each member of Parliament, in order to insist on the relevance of what they deliberate and on the need to fully reflect before making a decision.

All this legislation is based on a theoretical premise rooted in the crucial historical moment when the Italian Constitution was written. Constitutional norms are the common home of all people, given by the people, through their representatives at the Constituent Assembly, to the people themselves and norms where each citizen must be able to recognize himself.

Therefore, this rank of rules, at the top of the hierarchy of the sources of law, must be removed from the political dialectic between the forces present in Parliament, between majority and opposition. This is the typical arena of ordinary legislation, namely, the instrument to give legal concreteness to the political direction. The meaning of constitutional rigidity is found in this fundamental distinction between sources of law, a distinction absent in the *Statuto Albertino* (Italian former Constitution), that, in fact, the fascist regime had no difficulty in freezing, even from a

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strictly legal point of view, for twenty years, by means of authoritarian and illiberal legislation. An historical tragedy that republican Constituent wanted to avoid and, therefore, while writing a Charter based on anti-fascism principles, the Constituent Assembly wanted to insert several legal mechanisms in order to protect the supremacy of constitutional norms, first among all the rigidity of the procedures.

But the rules of the second paragraph concerning the referendum are also consistently part of this conceptual framework. If Parliament expresses itself by an absolute majority, that is, wider than the simple one (sufficient for the typical decisions of the sphere of political direction, such as the granting of confidence to the Government or the approval of an ordinary law), but not so great as the aggravated one, then the popular vote is possible, but it is not automatically convened. Therefore, the intervention of the electoral body is only possible and depends on the manifestation of will in this sense of the collective actors who hold this prerogative. If all this does not happen, parliamentary deliberation becomes law. In other words, we can say that the referendum can have an adversarial function.

In this relationship between representative and direct democracy, the third paragraph of Art. 138 is consistently included. In fact, if the Parliament voted in both Chambers with qualified majorities of two-thirds, the Constituent felt that there could not be such a sharp difference in direction in the same public opinion that had elected its representatives and therefore the referendum vote was unnecessary.

On the whole, we can affirm the Italian Constituent, despite having introduced important instruments of direct democracy, saw with a negative eye an excess of opposition between referendum and democratic representation. His first target was to revitalise the institutions of representative democracy precisely because they had been erased, in form and substance, by two decades of authoritarian regime and therefore he was very concerned that it could cause reasons for weakening for Parliament.

And in my opinion it is possible also to claim that the juridical framework of the constitutional revision procedure governed by the Constitution of the Republic of Ireland is very different, although apparently it involves the same subjects: the two branches of Parliament, the Electoral body and the President of the Republic.

Under Articles 46 and 47 of the Irish Constitution, a Bill which wishes to introduce amendments to the Constitution must not be approved by aggravated procedure, as in the Italian case. In fact, in the first phase of the procedure, the one inside Parliament, the only predictions that differentiate it, compared to the ordinary bills, relate to its heading, which has to expressly contain the words "an Act to amend the Constitution", to have its own origin in the *Dáil*, and must not contain any other proposal.

The constitutional rigidity, however, shows up in the second phase, by the intervention of the electoral body as a protagonist. After the usual parliamentary examination, the Bill has to be submitted to a constitutional referendum and it is approved if a majority of valid votes are in favour.

It is precisely on this point of participation and the expression of the vote where we can see the greatest convergences between the ways of constitutional revision in Italy and Ireland.

Both systems have a purely majority referendum and do not include any rules on any double majorities, for example calculated on a territorial basis, nor participation quorum for the referendum validity. It is, however, interesting to recall the different explanations that have been provided by the legal science of the two countries. In both cases, in fact, the absence of any threshold could raise some misgivings, also because the two Constitutional Charters provide it for the referendum on ordinary laws: in Italy, as already mentioned, a threshold of participation for the validity of the referendum amounting to 50% of electors; in Ireland a double majority to reject a bill: the proposal is held to have been vetoed by the people if the majority of the votes are cast against the proposal and such votes represent at least one-third of the presidential electors on the register of electors. Why is a minimum threshold provided in relation to an ordinary law and it is not for a law that modifies the Constitution and that, therefore, places itself at a higher level in the system of sources of law?

In the Italian case, the reason is in the repeal-in nature of the referendum on ordinary law. This means that the question, regarding an already in force law, asks voters whether they want to repeal it or not. As a result, the eventual victory of the "Yes" leads to a change in the current order, sometimes not insignificant looking back at the political prominence that many repeal referendums celebrated in Republican history have had so far. The constitutional referendum, on the other hand, has an opposing/confirming nature as compared to parliamentary deliberation, which means, it has got the power to cancel a project that has never come into force, which means, it has never been part of the current system.

Of course, in Ireland giving the same explanation is not possible, since both the amendment law of the constitution and the ordinary bill approved by *Dáil* alone under art. 23 Cost., are subject to popular vote before they become Act. Then, an explanation can be found in the *Report of the Committee on the Constitution* of 1967, whereby the absence of a threshold of participation did not constitute a danger because it is plausible that a proposal to amend the Constitution always arouses an interest in public opinion so intense that ensure adequate participation in the vote[8]. Maybe a little peculiar explanation, at first glance, but that, in reality, as we shall see, is fully consistent with the idea of popular sovereignty that shapes the whole Constitution.

Anyway, while the absence of legislation on the rules is a common element, certainly the two systems have significant differences both in relation to referendum practice and in relation to the control of the courts of justice over the referendum machinery.

As mentioned above, in Ireland the constitutional revision has been very practiced[9]. Each amendment covered a specific but often important

[8] See D.G. Morgan, *Lineamenti di diritto costituzionale irlandese,* Torino, 1998, 64-65.

[9] The numbers already mentioned must be added to the two amendments of 1939 and 1941, introduced with the transitional procedure, provided for by Art. 51 Cost., which did not include the compulsory celebration of the referendum.

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institutional, political and social issue: entry into the European Communities, the Senate, citizens' electoral rights, ethically sensitive civil rights, and so on.

In Italy too, we have had many specific constitutional revisions: the composition of the House and Senate, the establishment of new regions, the powers of the Constitutional Court and the duration of the judges' office, parliamentary immunity, principles concerning the criminal trial, and so on. As we can see, not secondary issues but precise and punctual. For decades these specific reforms, often agreed and shared between the majority and the opposition, were voted on in Parliament with a two-thirds majority and, therefore, were never subject to a referendum vote. Then, following the radical changes in the party system that occurred in the 1990s, the overall sense of the constitutional revision changed at the edge of the new millennium.

In 2001, 2006 and 2016, three major governments approved wide changes in the second part of the Constitution, that could modify some important features of the State form and even the form of government. Inevitably all the projects were submitted to a referendum and only in the first case the outcome was positive. The constitutional revision, begun as a technical process all inside the Chambers became a crucial point of political controversy, the ground where not only clashed different visions but on which sympathies and dislikes towards this or that political leader, so much that it is widely believed that the referendum vote now reflects more these dynamics between public opinion and party leaders than different opinions on the merits of the reforms at stake.

So, precisely because of this twist taken by the constitutional revision and the practice of the constitutional referendum, I think that a classification by subject matter is possible only for the constitutional referendum in Ireland because in Italy it has always come at the end of a revision process that involved whole sections of the Constitution and not singular subjects. So it seems to me that the constitutional referendum celebrated in Ireland can be divided into two groups: political-institutional and ethical-moral. The first one is connected to its emphasis on the centrality of the issue of popular sovereignty. The latter shows the intertwining of religious question and the national question, and are explained by the historical theme of this relief.

Moreover, as mentioned, one of the most different aspects of the two experiences regards the different role played by the courts of justice.

In Ireland the courts have no jurisdiction in the legislative procedure and in the content of the constitutional amendments but they can take action to ensure compliance with the procedural rules in Article 46 of the Constitution. And in fact, especially in the last twenty years, they have often used this power of intervention. With decisions, become famous (for example: *McKenna v. Taoiseach* in 1995; *Hanafin v. Minister for the Environment* in 1996; *Coughlan v. Broadcasting Commission* in 2000; *Doherty v. Referendum Commission* in 2012)[10], the Supreme Court ruled the legal

[10] For an exploration of the main issues of this jurisprudence see P. McKenna, *Fair referendum campaigns in the light of recent Court decision*, in 14(1) *Hibernian Law Journal* 56 (2015).

supremacy of the Constitution with respect to natural law and played a key role in ensuring the accuracy of information to the electorate during the referendum campaign[11].

In addition, the indirect effect of its case-law, has convinced Parliament in 1998 to provide the possibility for the government to set up an *ad hoc* Referendum Commission for each referendum, setting the task of safeguarding the fairness of the referendum campaign and the freedom of public information.

The Italian Constitutional Court, however, has produced an abundant case law only with respect to the abrogative referendum, because the law provides its control in order to the constitutional admissibility only about this referendum.

5. Direct democracy and popular sovereignty

This comparison between the two systems about the constitutional revision procedures, the role of the referendum, the mutual differences and similarities in legislation and practice, allows to propose some systematic considerations that, through the themes covered, manage to dig into the theoretical roots of the two constitutional systems.

In my opinion, every comparative analysis on referendum in Ireland and Italy brings to a consideration about the different idea of popular sovereignty affirmed inside the two constitutions. Of course, we are examining two democratic constitutional systems. We must always bear in mind this starting point, but it is also the substance of the common ground that guarantees us the possibility of making a comparison. In fact, when facing orders belonging to different forms of State, the system of fundamental values and the legal solutions adopted are on separate levels and often look towards antithetical horizons.

In our case, however, the two constitutional systems firmly belong to the category of the constitutional rule of law, by which the contemporary democracies have established themselves in Europe since the 20th century. Nevertheless, inside the democratic form of State, we can find some different conceptions of what "popular sovereignty" means and what the results of this difference are.

In Ireland only the people can amend the Constitution. Or rather, as we have seen, the people must have the final say on the transformation into law of a draft constitutional revision. Instead, in Italy the protagonist of the constitutional revision is the Parliament, in the sense that the Chambers can avoid the use of popular decision if they find a very large majority within them. This is an important indicator of that difference. The two different legal solutions, in fact, are not the result of chance, but fundamental applications of the different variations of the principle of popular sovereignty.

[11] For a comparison of the role of guardian of the Constitution, and its limits, between the Irish Supreme Court and the US Supreme Court see C. O'Mahony, *Constitutional Amendment and Judicial Restraint: How Restrained Should an Irish Court Be?*, in E. Carolan (Ed.), *The Constitution of Ireland: Perspectives and Prospects*, cit., 161-178.

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The radical Irish conception of popular sovereignty depends essentially on historical reasons[12]. Irish Free State was born thanks to a war against a monarchical State in which the principle of the sovereignty of Parliament was in force. As it is well known, however, the 1922 Constitution, because of the way it was born and the judicial interpretations that were given, appeared as ambiguous and compromising. In particular, it had a flaw: it didn't clarify the system of the new State relationships with the United Kingdom and who held the ownership of sovereignty in the new Charter[13].

So, the 1937 Constitution had the task to remark its deep discontinuity from the 1922 one, characterized by institutions that prolonged the subordination of the island to the UK: the Dominion status (like Canada) providing a Governor-General, the oath of loyalty to the monarchy by the members of Parliament, the appeal to the Privy Council against the decisions of the Irish Supreme Court. Only after their repeal it was possible to proclaim the full State independence and sovereignty of the people, both contained in the republican form.

And, in fact, popular sovereignty as an instrument of constitutional legitimating was pursued since the plebiscite that approved the Constitution of 1937, as de Valera wanted to create a political and legal fracture compared to the Constitution of 1922 and how it had arisen. But even before the referendum, we can find in the same constitutive procedure the origin of the conception of the constitutional rigidity typical of Irish democracy: the *Dáil* gathers in the constituent assembly and produces a text that qualifies as "Constitution Project" by legislating, however, according to the usual rules on ordinary legislation. The popular vote is therefore not limited to certifying and approving the work of Parliament, but above all it has got the function of shifting the source of legitimacy of the legislative text as a constitutional Charter to the people themselves.

Actually, it is an idea showing its significant historical depth referring to the characteristics of the Irish independence path. In fact, it should not be forgotten that already Art. 50 of the 1922 Constitution stipulated that amendments to the Charter should be subject to popular judgment. However, the same rule established a transitional period of eight years in which the principle of flexibility was assumed because Parliament could revise the Constitution by ordinary procedures. And these modes were then used to extend this term to sixteen years: a procedure that also found the legitimacy of the Supreme Court in the case *The State (Ryan) v. Lennon*, in 1935.

Moreover, the constitutional discipline of the electoral formula itself, I believe, can be read as a manifestation of popular sovereignty, since the principles governing the relationship of representation are co-essential to the constitutional foundations, and their possible amendment is not left solely to the deliberations of Parliament, as it happens in all systems where

[12] For an analysis of popular sovereignty in the Irish Constitution and the role played by the constitutional referendum see E. Daly, T. Hickey, *The Political Theory of the Irish Constitution. Republicanism and the basic law*, Manchester, 2015, 21-54.
[13] On all these controversial aspects of Irish constitutional history see D.G. Morgan, *Lineamenti di diritto costituzionale irlandese*, cit., 54-58.

the electoral formula is not mentioned in the Constitution, but to the control of the "sovereign" in the referendum vote on an amendment to the Charter.

In the light of these reconstructions, I believe the Irish conception of popular sovereignty might be said to be a singular case in the comparative landscape of contemporary European democracies, a singularity explained by the depth of the link between the exercise of political sovereignty and the need for a strong affirmation of national identity, a necessity created by an historical context dominated by the conflicting relationship with the British, dating back to the dawn of the millennium.

The uniqueness of the Irish case is shown up in all its scope in the well-known distinction between the sovereignty of the State and the sovereignty of the people, affirmed with great authority and clearness by the Supreme Court in the 1972 case *Byrne v. Ireland*[14]. On the basis of the combined arrangement of Articles 1, 5, 6, 46 and 47, the Court clarifies that not only the State is a creation of the people's will and therefore is subordinate to it, but even that the people and the State are two separate entities: no longer the State as a political building representative of the people, but as a separate entity serving another and superior one[15]. It is a particular variation of republicanism, once again elaborated in opposition to British constitutional history: «Ireland, of course, is a Republic. Here we reject the concept of all power residing in one unelected individual. In Ireland thus it is the People, and not any King or Queen, who are "sovereign". The State, being the creation of the People, is not sovereign. The State is after all subject to an external control, the Constitution. The Constitution requires that the State perform certain tasks in a prescribed way. The Constitution, moreover, prevents the State from doing certain things, like creating a death penalty (Article 15.5.2) The State thus is subject to the will of the People. It cannot hence be described as truly sovereign»[16].

In these terms it is certainly a new concept, really different from the generality of other cohesive constitutional systems, showing reasons for a great systematic interest but that, at the same time, can also arouse many misgivings in terms of realism and effectiveness.

From all these points of view the constitutional referendum is a concrete example of the people's sovereignty and fundamental strength. It shows how the people called upon to intervene in the mandatory review of the constitution process, it is the real master of the Charter, the guardian of its deep spirit both when rejects a change, either when a change is considered appropriate.

For this reason it does not meet the limits of content in the ability to amend the Constitution, as also confirmed by the Supreme Court. The will of the people is the only source of constitutional legitimacy.

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[14] For a comment on this ruling and for a general overview of Supreme Court jurisprudence on popular sovereignty see M. Cahill, *Judicial Conception of Sovereignty*, in E. Carolan (Ed.), *The Constitution of Ireland: Perspectives and Prospects*, cit., 143-158.
[15] On this topic see J.M. Kelly, *The Irish Constitution*, Dublin, 2003, 93-98.
[16] F.W. Ryan, *Constitutional Law*, Dublin, 2002, 32.

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About these basic points of the concept of constitutionalism and democracy, it seems to me that the differences from the Italian Republic are manifold[17]. In Italy the protagonist of the constitutional revision is the Parliament. The Constituent Assembly was driven primarily by a desire to reinvigorate the representative institutions that Fascism had rendered meaningless. Parliament had to depend on the life of the government, the legislative output, and even the ability to bring changes to the Constitution.

As we know, in the latter area, the rule of representative democracy allows the people only possible interventions on the Constitution and only in the event that the parliamentary agreement on the reform text is less than 2/3 of the members of each House. Moreover, in this view it is explained a certain distrust of the Constituent Assembly to all institutions of direct democracy, the introduction of which was discussed in that Assembly, including the most important that you find in the Charter at the moment, the referendum to abrogate a law, which meets several limitations, such as the quorum of participation and exclusion of subjection to the question of some delicate matters.

But above all, both Parliament and the people encountered many limits extended to the changeability of the Constitution, enshrined in Article 139, which excludes the republican form from the constitutional revision, then clarified by the jurisprudence of the Constitutional Court, according to which the term "republican form" is to be understood as all the constitutional order of the supreme principles and other constitutional provisions that give them legal concreteness. Therefore, the Constitution contains a hard core of democratic principles, so strong as to prevent the Constituted Power to act against the resolution passed at the time by the Constituent Power. So, popular sovereignty does not exercise absolute power as, indeed, is confirmed by Art. 1, where it says that the people exercise sovereignty in the forms and in accordance with the Constitution.

This difference in the approach between the two constitutional systems is also reflected consistently on procedural differences regarding the referendum: mandatory for the Irish; promotion from below, by signatures collected at the electoral body, the resolutions of the regional councils, or activation of the procedure by the parliamentary minority, for the Italian.

As well as ordinary laws giving effect to the constitutional provisions are affected by these differences: the Irish statute mainly provides the role of the Referendum Commission because it cares to entrust a third and neutral body compliance with the rules of the referendum campaign, whilst the Italian one is concerned above all to regulate the different procedural steps.

The references to the theory and practices I think can help us draw some final conclusion on the constitutional referendum in the two forms of government.

[17] On the principle of popular sovereignty in the Italian Constitution see T.E. Frosini, *Sovranità popolare e costituzionalismo*, Milano, 1997.

In Ireland, the constitutional revision and its referendum seem an integrative part of the governing instruments of the country, useful to call the people to cut the most difficult and decisive political problems[18].

In Italy, the popular participation in the constitutional revision is still an exception but is proving indispensable to provide legitimacy to the reforms wanted by a political rule that understands it has lost a significant part of its credibility and representativeness.

6. Popular sovereignty and the risks of a dangerous populist drift

What has been said is also useful to reflect upon the delicate and topical subject of the democratic or plebiscite nature of the constitutional referendum. In both jurisdictions the two referendums are expressly in their respective constitutions and governed, in their concrete implementation modalities, by Statutes of Parliament. Therefore, we should agree on their democratic and not plebiscitary nature. However, someone might wonder about the use by the political forces. It seems to me that in Ireland the constitutional revision and its referendum have been often used as a tool of political direction facing particularly delicate issues of public life. In Italy, it has started since 2001 a practice that sees the referendum request called by both the opposition and majority forces, a practice that fully shows the double nature of this referendum, oppositional and confirmatory, not excluded by the letter of the Constitution but rather different from the original idea of the Constituent Assembly.

The latest remarks open the field to a reflection on the risks of populist drifts present in the two constitutional systems. The common question can be formulated in the following terms: could constitutional referendums be subject to twists of meaning in the populist sense? From this point of view, the comparison with the Italian case can be very useful for Irish scholars because it shows that not even a Charter in which popular sovereignty meets important limits is immune from risks when populism succeeds in twisting political dynamics. In Italy, in fact, it is widely believed that in 2006 and 2016 the draft constitutional revisions were rejected in constitutional referendums because they turned into a judgment on the political forces that had promoted the projects, and in especially on their leaders (Silvio Berlusconi, first and Matteo Renzi, then), while the content of those reforms remained completely in the background. At the heart of the referendum campaign were not the important changes to the constitutional organization of the State, regarding on crucial issues such as the form of government or the relationship between the central State and the territorial autonomy. In both cases, the debate involved the general characteristics of the political direction of the governments in office at the time of parliamentary approval of the draft revision. Thus, public opinion ended up being seen in groups of factional supporters on the ground as it happens in a stadium, instead of focusing on the legal solutions adopted.

[18] On this issue see R. Sinnott, *Cleavages, parties and referendums: Relationships between representative and direct democracy in the Republic of Ireland*, in 41(6) *European Journal of Political Research* 811 (2002).

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While in 2006 the rejection of the referendum did not have major political consequences since a few weeks earlier the general elections that had been held, already decreed a change of majority (from the centre-right led by Berlusconi to the centre-left led by Romano Prodi), in 2016 it even had the effect of causing a crisis of government because during the referendum campaign Prime Minister Renzi had tied the fate of the Executive he presided over to the prevalence of votes in favour of the draft revision. Things went the other way (60% against) and Renzi resigned.

Subsequent political events, and in particular the 2018 election results with the following emergence of the current government formed by two "differently populist" parties (Movimento 5 Stelle and Lega), have shown that all these episodes related to the change of meaning of the constitutional referendum were only a small insight into the populist drift that was taking Italian political life, and certainly not because of the constitutional norms but essentially because of their distorted use made of them by the political forces. A populist wave that goes on more and more impetuously and that tries to overwhelm even some cornerstones of the constitutional order, such as the relationship of parliamentary representation and the prohibition of binding mandate, by drafting constitutional revisions that they have been leveraging an anti-political mood that has been running through public opinion for years.

From the Italian reality comes a warning for Irish politics because it helps to highlight how much the constitutional system would be exposed to plebiscite drifts if a populist and anti-political wind fell on the party system. As long as this latter is solid and representative of the nation the absence of constraints on constitutional revision remains a harmless tribute to the radical conception of popular sovereignty expressed in the Charter and endorsed by jurisprudence, but if the traditional parties were replaced by new forces with anti-system options, that concept could cease to be purely theoretical and could end up producing unexpected and undesirable results precisely for the Constitutional stability.

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