



COUNTRY REPORT: ITALY **Public and Private Interests in Water**

Nicola Lugaresi*

Introduction

The main issues for Italian environmental law in 2011 relate to two referendums on water services held in June. Not surprisingly they were at the center of both the legal and political agenda, provoking a heated and, unfortunately, ideological debate. This focused on general principles, forgetting that the referendum is a precise institutional tool to abrogate a specific piece of regulation. Instead of considering the consequences of the repeal, Italian parties and social groups, followed by the media, engaged in a theoretical fight based on self-serving interpretations and misrepresentations. The discussion revolved round domestic political matters, becoming a poll against (or in favour of) the Government, reflecting a well-established and distressing habit of Italian politics.

The two referendums were known as the 'referendums for public water'. The 'yes' supporters (that is, the people who wanted neither private management of water services, nor private profits from water services) put forward a sort of syllogism: water is a vital resource for individuals and communities (major premise); law should protect people's life and dignity (minor premise); water must be a fundamental right water must be public itself and managed by public bodies and water must not be a tradable good (conclusions). The major premise is correct, but too general: water in a developed country has a different value than water in an underdeveloped and thirsty country. The minor premise is correct, although not always implemented. The

* Professor of Law, Trento University Law School, Italy. Email: nicola.lugaresi@unitn.it.

conclusions must be revised, taking into account the specific situation of a developed country.

Leaving aside politics and focusing on the legal aspects, the two referendums, which are technically complex, intervened on different levels. The first referendum was commonly known as the referendum against privatization of water services, the second one as the referendum against profit on water services. To be more precise, the first could have been described as a referendum against (legislative and administrative) biases in support of the privatization and private management of water services; the second one as a referendum against the explicit inclusion of private profit in water services tariffs. The 'yes' won, the two pieces of legislation were repealed, but the two referendums themselves were not able to directly lead to a robust legal context, calling for more legislative steps to resolve the un-answered challenges.

The Italian poll had the merit of drawing attention to important water issues (the right to water, the management of water services, the costs of water), but the legal arrangements for water services regulations are still to be redefined. The referendums merely limited the possibility of advantaging public management over private management and ruled out the option to include private profit into water pricing.

A Critical Consideration of the Recent Domestic Developments

The two referendums are connected - even if in a different and lesser way than was depicted by media and political parties. The first 'water referendum' did not concern only water services. The abrogation of Article 23-*bis* (Decree-law n.112/2008) affected all local public services of general economic interest, removing the legislative favour for their private management. The second 'water referendum' concerned the tariff for public water services. The abrogation of a (little) part of Article 154 (Decree-law n.152/2006), determined that the calculation of the tariff should not take into account the adequacy of the return on invested capital. Unfortunately, after the referendums, the substantial legal effects are not clear, leaving local public administrators waiting for an intervention from the legislator. This suggests that the citizens voted knowing what they were going to repeal (at least formally) but not what would replace the repealed regulations.

As for the first referendum, the main 'technical' issue was the relationship between private management and public management of water services (actually, all local services): the former (private management) was the rule; the latter (public management) was the exception. Article 23-bis (Decree-law n.112/2008) affirmed that derogations from private management must have been justified by peculiar economic, social, environmental and geo-morphologic characteristics of the specific territorial context. While the law emphasised the preference for the private management of public services, it is also true that local administrations have the duty to express the grounds for their decisions. In other words, regardless of the existence of 'peculiar characteristics', they should justify (and should have justified) the exercise of their discretionary powers, considering the public interest (efficiency of the service; reasonable costs; financial feasibility; environmental protection) as the fundamental criterion. If water services can be better managed by private parties, private management will be the option to choose, but if public agencies offer a more satisfactory management, the peculiarity of the characteristics is demonstrable as the basis of their decision.

Unfortunately the choice between private and public management becomes an ideological issue while it could be more reasonably driven by the common principles and rules of administrative law. Water interests are not better served affirming that water is a vital and fundamental resource (which water is), but are best served by finding the best management solutions.

As for the second referendum, ruling out the chance to compensate private investment with the tariff does not prohibit, nor makes unattractive, private management. The new version of Article 154 (Decree-law n.152/2006) does not include the return on invested capital among factors to be considered to determine the water tariff, but does not prohibit that private profit be considered and guaranteed out of the tariff. Such a guarantee affects the public budget and therefore weighs on general taxation. The part of water costs linked to private profit will not be covered automatically by water users, but by taxpayers, two categories that overlap almost completely. There will be some distortions from this reality. Italy is sadly known for the high rate of tax 'dodgers' and the incidence of water tariffs and taxes differs between individuals, according to their water consumption and (declared) income.

Relying more on taxes than on tariffs is an alternative. It can be appreciated or criticized for its social and economic consequences, but it is just a way to distribute costs: 'there is no such thing as a free lunch'. Moreover, water pricing in general, and water tariffs in particular, are (economic) regulatory means that can be used, and must be used (as it happens with Article 9, *EU Directive 2000/60/EC*) to protect water resources from excessive usage and waste, avoiding 'the tragedy of the commons'. A higher price for water (still low compared to other developed countries) can have functional and direct effects on promoting water savings (that may be lost in using general taxation as the means of payment for water).

In conclusion, the Italian water referendums (and the related political debate) show how fundamental, general principles (such as water as a vital and finite resource, and therefore a fundamental right; and socio-economic solidarity) can be used to justify different choices that should take into account all the factors involved. In particular, the right to water cannot and should not lead to 'one-size-fits-all' regulations in countries experiencing different levels of water stress, regulated by diverse legal systems and characterized by very different socio-economic conditions.

Possible New Research Agenda for IUCNAEL

IUCNAEL research could focus not only on general principles about water (the right to water; the alternative between private and public management; water pricing; water solidarity) but also on specific regulations enacted by different States and regional organizations. The research should compare solutions, provide guidelines and strategies to legislators and policy-makers, avoiding demagoguery and ideology, in order to adopt efficient, fair and consistent laws that can face water issues under a different, more coherent, perspective.