Populism and Constitutional Amendment

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Introduction

Populism is a harshly debated and controversial concept. Only recently, it attracted growing attention from legal scholars, and from public law scholars in particular. In a relative short span of time, it has taken centre stage in the public law realm. Debates over constitutionalism and populism are flourishing all over the (western) world: doctoral theses are assigned on the topic, and workshops, seminars and conferences are being organized on this complex relationship. In addition, the relevant literature has grown exponentially in the last years. However, there is no other field where the disagreement reigns on the same identification of the research field. Not by chance, "What is populism?" (Müller 2016) is the title of one of the most quoted books that was recently published on the matter. A quantitative look into the table of contents of the many special issues and monographic volumes devoted to the topic reveals a disproportionately high attention for what populism is, compared to the attention ever devoted to the definition of "liberal constitutionalism" (Oklopcic 2019a, b). However, definitional challenges are always very ambitious, and in the present case, the field is already packed with prominent studies on a far

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from settled definition. Therefore, in the present chapter, we will not deal with such an ambitious definitional question: On the contrary, the chapter adopts the most commonly acknowledged definition of essential characters of populism, namely its anti-elitist and anti-pluralist polemic.

Starting from these definitions, we will explore a rather under-investigated relationship, namely between populism and constitutional amendment. First, we will provide a conceptual framework of this relationship, by analysing the use, misuse and abuse of constitutional amendment by populists. To do this, we will focus on a very specific species of the populist genre: that is—populism in power. In fact, constitutional amendment is a legal tool that is only available to populists in power. In fact, whatever procedures and machineries a specific constitution requires to be amended, all constitutions require one (or more) deliberation(s) from a parliamentary majority to start the constitutional amendment procedure. Therefore, we will focus on the most commonly acknowledged experiences of populism in power to analyse whether this species of populism makes use of constitutional amendment, and, if so, what are the recurrent patterns of the investigated use of constitutional amendments by populists in power. My chapter will argue that, if constitutional amendment is correctly understood, populists in power usually stay at large from constitutional amendments: they rather prefer to replace the Constitution or to disable it in concrete. In fact, populists tend to reject any distinction between "constitutional" and "ordinary" politics. This denial is central to our argument: populism tends to deny any distinction between ordinary legislation and constitutional legislation, as constitutional rigidity is a typical machinery inherited by liberal-democratic constitutionalism. However, we will argue that there are some cases where populists in power made (instrumental) use of constitutional amendments to occupy the state and mobilize the constitution around their own specific and partisan goals.

Then, we will explore possible constitutional remedies against the populist (ab)use of constitutional amendment: procedural mechanisms and doctrines of unconstitutional constitutional amendment. Within this picture, the chapter argues that constitutional machineries designed to slow down the process of constitutional amendments may be more effective than the doctrine of unconstitutional constitutional amendment. Subsequently, I will test the conceptual map designed in the first part of the chapter to the Italian case. Constitutional developments in the last 30 years in Italy have been characterized by a never-ending debate on overarching constitutional reforms. However, this debate has rarely led to

the positive conclusion of any project of constitutional amendments. Nonetheless, this permanent mobilization of the constitutional amendment power has some resemblances with the populist approach to constitutional amendments. However, the identification of some disturbing resemblances with the populists' (ab)use of constitutional amendments only emerges if one adopts a purely methodological perspective. In fact, substantially, the most important attempts of overarching constitutional reforms in Italy did not share their most classic aims, such as the capture of counter-majoritarian institutions and the removal of the essential pluralist character of post–World War II constitutions. Finally, the chapter will argue that the procedure required by the Italian Constitution to be amended was able to disable populist impulses so far.

Setting the Scene: Populism, Anti-Pluralism and Contemporary Constitutionalism

The exploration of the relationship between populism and constitutional amendment requires, if not a proper definition, some approximate understanding about what we mean with the two terms: "populism" and "constitutional amendment". The definition of populism is one of the most controversial topics currently debated in a lively transnational scholarly debate (Müller 2016; Mudde and Rovira Kaltwasser 2017). Within this scholarly global conversation, disagreements probably outnumber agreements, and the concept remains indeterminate and vague. Populism is usually not considered a traditional ideology, but a strategy, a discourse, a style of political mobilization, a "thin-centered ideology" (Mudde 2004: 544), a meta-ideology, that considers society to be ultimately separated into two homogeneous and antagonistic groups: "the pure people versus the corrupt elite" (Mudde 2004: 543). As a meta-ideology, populism can accommodate many different substantive political projects. Observers have identified many variates of populism, which applies the above-mentioned division with specific set of economic policies, ideas of social justice and so on.

Separation between pure people and elite is one of the recurrent and characterizing elements of populism, along with another feature, namely its anti-pluralism. In reality, the anti-elitist and anti-pluralist characters of populism are tightly connected, as both stems from the specific understanding that populism adopts of the concept of the "people": the peoples

are viewed not only as sovereign (in fact, popular sovereignty is one of the essential pillars of liberal-democratic constitutionalism), but also as "homogeneous, pure, and virtuous" (Akkerman et al. 2013: 1327). This specific understanding of the people mirrors the populist *pars-pro-toto* understanding of the majority (Arato 2016: 269; Blokker 2019: 544): the "good people" (Albertazzi and McDonnel 2008) as opposed to the corrupted elite, are the only morally legitimate representatives of the real people. Therefore, other representative claims are by definition illegitimate and not worth of respect.

Anti-pluralism[1] is, in its roots, following the populists' denial of any conflicts within the society. By definition, there might be no conflict within a homogenous people, and therefore social conflict is excluded by the populist discourse. This is a crucial point from the point of view of constitutional studies: in fact, the essential character of post–World War II constitutions, and the normative justification underpinning them, is the institutionalization, and precisely constitutionalization, of the social conflict. In fact, whereas the mainstream narrative identifies constitutional rigidity as one of the most distinctive features of post–World War II constitutionalism (vs. the flexible character of liberal constitutions), there is a far more profound distinction between the constitutions of the liberal period and the contemporary constitutions. While liberal constitutions kept social conflict outside of constitutional bodies by limiting franchise, post–World War II constitutions incorporate and regulate social conflict through constitutional bodies and laws (Bin 2007).

This is why post–World War II constitutions include diverging principles and values in their texts and only trace the field for political settlement of conflicts. Post–World War II constitutions, far from denying social conflict, constitutionalizes it by including possible diverging principles in the texts. The 1948 Constitution of Italy, for instance, simultaneously establishes the principle of formal (Art. 3.1 It. Const.) and substantial (Art. 3.2 It. Const.) equality; the liberal principle of protection of private ownership (Art. 42.1 It. Const.) and a social understanding of private ownership, admitting limitations to it if this aims at social purposes (Art. 42.2); freedom of enterprise (Art. 41 It. Const.) and public interventions in the economy (Art. 43 It. Const.).

[1] The anti-pluralist character of populism emerges in a particularly evident manner in forms of right-wing populism, as pointed out by Galston 2018.

Populism, by denying conflict, rejects the primary mission of post–World War II constitutionalism. This is the conceptual reason that explains why populism is usually credited as incompatible with constitutionalism.[2] In fact "[d]espite the great divergence of approaches to understanding populism, … many observers appear to agree on one point – namely, that whatever else it is, populism is inherently hostile to the mechanisms and ultimately, the values commonly associated with constitutionalism" (Müller 2016: 60). Even though Müller includes among these values constraints on the will of the majority, checks and balances, protections for minorities and even fundamental rights, the consideration of the social conflict seems the most privileged perspective to clarify the contrast between populism and post–World War II constitutionalism: while the first denies it, the second one constitutionalize it, by including potentially diverging principles in the text of the constitution, and by giving to ordinary politics the task of refining the composition of these diverging principles through ordinary legislation.

In other words, post–World War II constitutions are pluralistic and therefore consider social conflict as constitutionally physiological. On the contrary, populists "understand conflict as an inherently problematic phenomenon" (Blokker 2019: 544), incompatible in its roots with the populists' understanding of the people. A pure and homogeneous people tolerate no conflict: this denial implies the denial of the "distinction between ordinary politics (in which conflicts between different social forces play out) and foundational or constitutional politics" (Blokker 2019: 544), in which the rules of the game are fixed, or—to adopt another author's point of view—in which the boundaries of the social conflict are set (Bin 2007). As a consequence, populists attempt at giving an ultimate answer to a problem that post–World War II constitutionalism consciously leaves open, namely the locus of sovereignty. In fact, contemporary representative democracy consists of a process that reveals that power does not belong to anybody, neither to the representatives who exercise it in the name of the people, nor to the people in whose name power is exercised (Lefort 1988: 13 and ff.). Constitutional democracy makes sure that the

[2] Some notable exceptions are to be mentioned. Among recent defenders of populism, Laclau believed that populism fosters a democratization of democracy (Laclau 2007), while Rovira Kaltwasser problematizes the relationship between democracy and populism as ambivalent (Rovira Kaltwasser 2012). Within this picture, also Paul Blokker has repeatedly underlined how the relations between constitutionalism and populism are much more complex than their straight incompatibility (for further details, see his chapter in this volume).

will of the people "remain the permanent creation and recreation of the democratic process itself" (Urbinati 2017).

The Populist Denial of the Distinction Between Constitutional and Ordinary Politics

As largely explored by prominent studies in the field, the anti-elitist character of populism does not make "populism in power" impossible, wrongly assuming that populism is a primarily opposition movement, protesting against the government. On the contrary, when populists win elections and formally become the ruling elite, they still manage to identify new elites to be blamed, at home or abroad. Populists in power continue to behave like victims, even though they turned a parliamentary majority (Müller 2016: 42). While its anti-elitist character needs to adapt to the new situation (by easily finding "new elites" to fight against), its anti-pluralistic polemic remains untouched.

Populists in power, however, might use new legal tools from their ruling position. They can now mobilize law in the name of their collectivist project (this pragmatic approach characterizing populists in power was referred to as "instrumentalism" (Blokker 2019: 545). In particular, when populists in power gain enough power to amend the constitution, they do so, by mobilizing the constitution for merely instrumental aims. This is what happened in Hungary, where the conservative coalition led by Fidesz gained 52.7% of the votes in the general parliamentary elections in 2010. This electoral majority resulted in a two-third parliamentary majority due to the disproportionately majoritarian effects of the electoral system (Scheppele 2018). The two-third majority was enough to change the Constitution, which occurred 12 times in its first year in office (Scheppele 2015). A first set of controversial amendments concerned taxation, media and the reduction of the number of MPs. Another set of amendments shared a common rationale: removing most of the institutional checks that could have prevented the replacement of the Constitution. Above all, Art. 24(5) of the 1989 Constitution, establishing the four-fifth rule for constitutional amendment, was repealed, making a constitutional revision possible with a two-third majority.[3] The populist project of constitutional replacement succeeded, with the entry into force of a new Constitution on

[3] The constitutionality of the repeal of the four-fifth rule was far from uncontroversial: see Arato 2010: 40.

1 January 2012. Its text was drafted quickly, with an extremely limited (if at all) impact of opposition parties and civil society on its content (for this reason it was referred to as a "one-party constitution"; see Scheppele 2015: 112), an unprecedented compressed parliamentary debate (it took approximately one month to be completed), the promulgation by a president appointed by the same Fidesz parliamentary majority and no popular ratification via referendum. Additional amendments have also been enacted after the entry into force of the new Constitution in 2012. These amendments are characterized by the common denominator of including in the text of the Constitution day-to-day policy decisions,[4] making the Constitution a policy-oriented legal tool, rather than the legal framework where all political players may find support for their legitimate political objectives.

Within this picture, the constitution—that usually serves the role of setting a framework for politics—is treated as a purely partisan instrument to capture the polity. It turns, in one word, into a "partisan constitution" (Dani 2013). Some have referred to this process as "state occupation" (Müller 2016; Urbinati 2017) or (using Ackermanian categories) as a permanent mobilization of constitutional norms in daily politics (Blokker 2019: 545).

Populists in power aim at creating a constitution of its own and finally a democratic regime that reflects closely the characteristics of its representation of the people. The populist constitution "is an entrenched constitution, filled with policy points traditionally left to ordinary legislative processes. As such, the populist Constitution seeks to eliminate any distinction between constitutional and ordinary politics, so critical to the maintenance of a liberal democratic order" (Brodsky 2014). Paradoxically enough, populists in power end up to overconstitutionalize the political debate, in short by doing what the EU—one of their anti-elitist propaganda preferred target—is criticized for (Grimm 2015).

[4] To provide a specific example, we could mention the constitutional amendment to Article L of the (new) Hungarian Constitution. The amendment introduced the following text: "Article L) (1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children". On this constitutional amendment, see Venice Commission 2013.

Provided that populism in power is of course much more problematic in the perspective of liberal—democratic constitutionalism, as a populist majority may be in the position to make use of legal and constitutional means to realize its anti-pluralistic objectives. On this point, we should distinguish between different conceptual categories, and precisely between constitutional amendment, constitutional replacement and constitutional sabotage.

Constitutional amendments in a strict sense is a form of constitutional change that keeps the constitutional identity of a given constitutional system untouched (Schmitt 1928). This minimal definition of the notion of "constitutional amendment" is enough to raise very serious problems as for the topic discussed in the present chapter. In fact, populism aims at touching a polity's constitutional identity. As long as the understanding of the notion of constitutional identity stays within a liberal-democratic range, from a normative perspective it must include the essential characters of constitutionalism, namely the democratic principle, separation of powers, the rule of law and protection of fundamental rights. This is a common heritage of liberal-democratic constitutionalism. Any given constitutional system may add local specificities, but these need to be compatible with essential core values of constitutionalism—otherwise we would not deal with constitutional identities but with unconstitutional identities.[5] However, if a merely descriptive perspective is adopted, constitutional amendments may be (ab)used (and have been used) in violation of the essential pillars of liberal-democratic constitutionalism—characterizing a normatively preferred understanding of constitutional identity—with the aim of turning a "constitutional constitution" into an "unconstitutional-populist-constitution". On this point, we are persuaded by the idea that populist constitutionalism is a contradiction in terms,[6] while it is perfectly fine to conceive populist constitutions.

In the first case (populist constitutionalism), the noun "constitutionalism" refers to the normative idea of constitutionalism, that is the doctrine

[5] A growing abuse of the concept of constitutional identity is reported in the legal scholarship, for example, by Fabbrini and Sajó 2019.

[6] This point is harshly contested and I will not elaborate on further. A different, but finely motivated, perspective is offered in the chapter by Paul Blokker in this volume.

of legal limitations to political power. In the second case (populist constitutions), the noun refers to a descriptive idea of constitutions (i.e., the fact of having a constitution). Therefore, it is perfectly fine to conceive a populist constitution, but is an oxymoron to conceive populist constitutionalism (in the same sense, see Halmai 2018; for the opposite perspective, see Blokker 2019).

Nevertheless, constitutional amendments might be used to turn a liberal-democratic constitution into a populist one. In other terms, to turn a constitutional constitution into a populist one. Populist in power seek to not only perpetuate their power (and this is not a specific characteristics of populism, but is a fundamental rule of politics), but also perpetuate what they consider as the proper image of morally pure people (what has been called "the proper constitutional identity" (Müller 2016: 63), which we would rather call "a corrupted understanding of constitutional identity"). Populists in power seek to turn all constitutional institutions into their constitution. While this is easy (if not natural) for political "majoritarian" institutions, and does not need any constitutional amendment, it is not easy at all for counter-majoritarian ones. Consequently, populists in power have often mobilized the constitution against counter-majoritarian institutions, trying to disable them. The preferred targets of populist in power are the independence of the judiciary, constitutional courts and independent supervisory bodies. In short, populists in power will try to mobilize all available means (including constitutional amendments) to design a constitution that not only limit the power of political bodies in general (this would sound perfectly fine for a constitutional constitution), but also (and primarily) limits the power of non-populists.

This is what might happen in theory, and at times, in practice. However, this kind of state occupation rarely occurs through constitutional amendments. Populists in power usually stay away from constitutional amendment and tend to prefer constitutional replacement, or unilateral major constitutional changes, as in the cases of Venezuela, Ecuador and Turkey (Landau 2018: 527). Constitutional replacement may be preceded by specific amendments, removing any possible constitutional hurdles to the populist project of constitutional replacement. This was the case in Hungary. However, constitutional amendment is not always available as a constitutional tool (in the sense used by Blokker's "instrumentalism"; see Blokker 2019) serving populists' projects of constitution-making. This might depend on the specific rules governing constitutional amendments, in particular when they require very high super-majorities. In these cases,

populists attack the Constitution without formal constitutional change, but through other available means leading a constitutional sabotage. This usually occurs mainly through an extremely partisan appointments of member of highest judicial and administrative authorities and through a general deconstruction of the administrative state.[7]

The populists' pragmatic preference for constitutional replacement is perfectly in line with the theoretical framework designed above. In fact, populist majorities tend to deny the distinction between ordinary and constitutional politics, and—when needed and possible—they tend to take on the role of constituent power.

Constitutional Remedies Against the Populist Attack on the Constitution

Most of constitutional and, more generally speaking, legal approaches to populism try to address the puzzling problem of possible remedies to the populist attack on liberal democracy. These approaches are, often, truly disappointing (see for this idea, and some alternative approach, Barberis 2020). They commonly conclude by affirming that the populist challenge spurs us to confront and response to the weaknesses in liberal democracy that give legitimacy to populist (un)constitutional projects (see, e.g., Landau 2018; Howse 2019). It is probably true but not enough to state that "populism is a mirror of democracy" (Panizza 2005) that currently reflects a rotten image of the health of our liberal-democratic institutions (Doyle et al. 2019).

It sounds reassuring to just claim for a truly liberal-democratic renaissance. Even though we might agree on the necessity of this renaissance, we think that as public law scholars who still believe in the values of liberal-democratic constitutionalism we are probably called to do more and to try to assess constitutional machineries that work better than others in face of the current populist challenge to liberal-democratic constitutionalism. Therefore, we think it is possible to identify four possible constitutional remedies to the use of constitutional amendment (and, more generally speaking, to constitutional change) by populists aiming at transforming a liberal-democratic constitution into a populist (un)conti-

[7] Poland is often reported as the brightest case study in this field (for a detailed overview of these techniques, see Sadurski 2019), but also the case of President Trump is sometimes included within this category see Landau 2018: 526.

tutional constitution: (a) eternity clauses; (b) speed bumps; (c) bicameralism; and (d) supranational constraints.

Eternity clauses and doctrines of unconstitutional constitutional amendments are the first and most obvious mechanisms to protect constitutional constitutions against unconstitutional amendments. These doctrines are flourishing and migrating from one constitutional system to another (Roznai 2017). However, eternity clauses risks being constitutional remedies for good times only. In fact, eternity clauses require a powerful constitutional court to be considered as an effective remedy against unconstitutional constitutional amendments. However, populists in power immediately learned the lesson that constitutional courts are the first institutions to be captured. Once constitutional courts are captured, it is rather unlikely that they might use the unconstitutional constitutional amendment doctrine to react to a populist transformation of the constitution.

More promising are procedural mechanisms aiming at slowing down processes of constitutional change (for a comprehensive overview of these procedural mechanisms see Albert 2019). Constitutional amendment mechanisms might prove successful in contrasting populist constitutional amendments when these mechanisms require a long time to pass to complete the constitutional amendment procedure, with long intervals between multiple rounds of voting. In fact, populists are "impatient with procedures" (Crick 2005: 626; Müller 2016: 60–61). And populists are impatient, as all of those who seek to realize a constitutional revolution, they need to fight against time (Ackerman 2019), as it is likely that after a certain period of time their legitimation will be eroded. Therefore, speed bumps may work, as time works against populists. The counterproof is that when populist succeed in staying in power for longer periods of time, they tend to introduce constitutional changes "increasingly and overtly opposed to liberal democracy" (Landau 2018: 523).

Similarly, bicameralism may efficiently play the role of a retarder of populist captures of the constitution, in particular, if the bicameral system is designed so to realize a significant differentiation of the composition in the two houses. In this sense, Upper Houses usually favour a balanced separation of powers through restraints of governmental powers and the perfection of the deliberative process (Russell 2001; Uhr 2008). Not by chance, Hungary is a unicameral system and the Fidesz supermajority derived from an election where Fidesz gained 53% of votes. The populist assault on the Hungarian Constitution could have encountered much more robust hurdles in a bicameral system, provided that both are required

Houses take part to the constitutional amendment process and that the legitimation and composition of the two Houses differs.

Finally, the fourth and final legal arrangement that might be opposed against a populist assault on the constitution by means of constitutional amendments are supranational constraints. Similarly, supranational constraints may work at least as retarder of populist (un)constitutional occupation (Landau 2018: 542). The Polish and Hungarian examples are often quoted as proofs of a limited efficiency of supranational constraints. Exploring this dimension in detail would lead us too far (Müller 2015). However, and as weak as counterfactual arguments always are in social sciences, we would exclude that the state of constitutionalism in Hungary and Poland would be in better shape if these countries would not be subject to the current set of (certainly) imperfect supranational constraints.

The Populist Impulses Accompanying the Never-Ending Italian Experience of Constitutional Reform

Populists in power exist and make an instrumental use of constitutional change. They might use constitutional amendments to reinforce their position and to try to turn a pluralistic constitution into their partisan constitution. They tend to deny any distinction between constituent power and day-to-day politics. In this chapter, we will explore whether this scenario applies to the stormy seasons of Constitution reforms taking place in Italy since 30 years.

The 1948 Constitution of Italy is a rigid constitution, requiring a single degree of rigidity: no distinction is drawn between partial and total revisions of the constitution.[8] To begin with, the mere collocation of the articles regulating the amendment process in the Italian Constitution may be extremely telling for the purpose of the present chapter. In fact, Art. 138, providing for the constitutional amendment rules, is included in a section (technically: a title) named: "constitutional guarantees". As mentioned above, populists are generally impatient with procedures, and particularly with procedures expressing constitutional guarantees (see Pinelli 2019: 33). Specifically, the constitutional amendment rules provide for a particularly complex procedure. The amendment process requires a dou-

[8] Some authors argued that the Italian constitution only allows for limited amendments on specific points, and precludes overarching constitutional reforms: see, for example, Bettinelli 1995 and Pace 2013.

ble round of voting in the bicameral system, with reinforced majorities and a possible referendum (for further details, see Fusaro 2011). In particular, Art. 138 of the Constitution requires both houses of the Parliament to vote on the same constitutional bill twice. In the first round of voting, the constitutional bill is open to amendments, and a simple majority is required in both houses. When both houses voted in favour of the identical text for a first time, a second round of voting is required. At this point, no amendments are admissible; the approved text needs to be confirmed as it stands or rejected as a whole. The second round of voting cannot take place earlier than three months after the first round of voting in the same house.

At this point of the procedure, there are three alternative paths: (a) if one house approves the bill with a simple majority, but does not reach the threshold of an absolute majority (i.e. half of the members of the house plus one, regardless of the number of MPs taking part in the vote), the constitutional bill is rejected; (b) if both houses approve the act by a two-third majority, the constitutional amendment is immediately passed to the head of state, who is called to sign it and transmit it for publication in the official journal and entry into force; and (c) if, in both houses, an absolute majority is reached, but in one or both houses no two-third majority is met, the bill is published for mere informative purposes. In this case, a popular referendum may be called, if asked by the subjects entitled to do so by the Constitution. These subjects are a parliamentary minority (at least one-fifth of the members of one House), a territorial minority (at least 5 out of the 20 regional legislative assemblies), or an electoral minority (at least 500,000 voters). Once the referendum is called, no structural quorum is required and the constitutional bill is deemed passed if a majority of those who vote approve it.

Even though the number of constitutional amendments successfully passed in the Italian constitutional experience is rather limited (if compared with similar constitutional experiences in a comparable span of time),[9] the debate over constitutional reforms has been one of the central issues in the last 30 years, both in the institutional debate and in the academic circles. Attention has been devoted to many specific points, but

[9] The procedure regulated by Art. 138 is provided both for acts modifying the text of the Constitution and for acts introducing new constitutional laws, not to be incorporated into the text of the Constitution, but entitled with the same legal force of the Constitution. If one only considers acts amending the text of the Constitution, the count is limited to 14 constitutional amendments (in a strict sense). For an overview of passed constitutional amendments, see Luther 2017: 12.

some of them are particularly relevant for the purposes of the present chapter.

First, a controversial issue concerns the implications that may be drawn by the regulation of the optional referendum within the constitutional amendment process. In some author's view, only homogenous and specific constitutional amendments should be admitted, in order to put the voter in the referendum in front of a homogenous and univocal question and to avoid the unease situation of a voter who is in favour of one part of the constitutional amendment and against another part of it. This point has taken centre stage in the last decade of (failed) attempts of overarching constitutional reforms. Nonetheless, this debate dates back to the more remote origins of the scholarly and institutional debate over constitutional reforms in Italy (Bartole 2004: 370). However, the text of the Constitution does not give univocal reasons in support of this idea, and the constitutional praxis has pushed in another direction, with multiple examples of comprehensive and sometimes inhomogeneous constitutional reforms submitted to the popular approval via referendum.

A second point of debate is once again linked to the referendum, and relates to its deepest nature in the constitutional architecture. In fact, even though the constitutional regulation only requires the impulse of a parliamentary, electoral or territorial minority to activate the referendum, recent developments led to a political transformation of the original understanding of this option. In fact, it already happened in three occasions that a constitutional referendum was called not only by those MPs and parties who fought against the parliamentary approval of the constitutional revision bill, but also by MPs and parties who voted in favour of it and campaigned in support of the constitutional bill. A constitutional tool seemingly designed in favour of minorities, was finally turned into a constitutional arrangement (also) in the hands of the majority. In this way, political actors tried to turn the oppositional nature of the referendum into a sort of plebiscite. The constitutionality of this transformation has been largely debated and contested, even though (here as before) no textual elements supported the unconstitutionality of this understanding (Bin 2001). However, in two out of the three cases where political majorities contributed to call the referendum, the popular vote finally rejected the constitutional reform bill, concretely reaffirming the main oppositional nature of the constitutional referendum.

A third point of debate relates the impact of the electoral legislation on the constitutional amendment process and on related guarantees of minor-

ities. This aspect was particularly debated when the electoral legislation inaugurated an unruly transition towards a majoritarian electoral system (1993–2017). Within that picture, it was claimed that the constitutional amendment process implied proportional representation as an implicit condition and that the majoritarian turn in electoral legislation threatened the value of constitutional rigidity. In fact, the guaranteeing force of supermajorities changes its meaning under a majoritarian electoral legislation. Once again, this approach fell short of considering positive constitutional law: no constitutional provision requires proportional representation and, on the contrary, the Constituent Assembly explicitly rejected all proposals for the inclusion of provisions concerning the electoral system in the text of the Constitution. However, the incomplete transition from proportional representation to a majoritarian electoral system was recently abandoned, after the popular rejection of the latest attempt of an overarching constitutional reform in 2016 and the subsequent decision by the Constitutional Court to strike down the electoral legislation (politically, if not institutionally) linked to the rejected constitutional reform.[10]

Most successful constitutional revisions were passed with a very large majority. Until 1970 a large majority was the only option available, as the parliamentary act implementing the referendum was only approved in 1970. Previously, the unavailability of any implementing legislation of the referendum led to a prevailing (if not unanimous) interpretation of Art. 138 It. Const., in the sense it always required a two-third majority for a constitutional amendment to be passed. Even after the adoption of the referendum act, most constitutional revisions have been adopted by large majorities and only in three cases a constitutional referendum was called on a project of constitutional amendment. This happened in 2001, in 2006 and in 2016: only in 2001 a majority of voters approved the constitutional bill.

Since more than 30 years, it is widely acknowledged that the institutional architecture of Italy needs some robust modernization (Fusaro 2011, 2015). To this aim, many legislative terms were inaugurated under the ambiguous "self-definition" of "constituent legislative terms". This terminology referred not only to the ambitious project of modernizing the institutional architecture through overarching constitutional reforms, but also to the idea that constitutional reforms represented a central point in the government programme. This politicization of the constitutional

[10] Constitutional Court of Italy, Judgment 35/2017 (for further details, see Faraguna 2017).

amendment power is at odds with the genesis of the Italian Constitution. In fact, "according to standard studies in Italian constitutional history, and in spite of the dramatic national and international developments during those months, the Constituent Assembly and the Government of the day succeeded in preserving the distinction between, respectively, constitutional politics and day-to-day politics" (Delledonne and Martinico 2017: 59, drawing from Cheli 2008).

This process of political immersion of the discourse on constitutional reforms led to a growing involvement of the executive in the constitutional amendment process. Traditionally, constitutional bills were introduced by single members of the Parliament, keeping the Executive at large.[11] A significant shift in this praxis was inaugurated with the project of overarching constitutional reform introduced by the centre-right government led by President Silvio Berlusconi (Pinelli 2006). This project was introduced by initiative of the executive. It was finally approved by the Parliament in 2005, but rejected by a popular referendum in 2006. A similar path was followed by the project of constitutional reform introduced by the centre-left government led by President Matteo Renzi in more recent times. The latter was similarly introduced by initiative of the executive, approved by the Parliament in 2016 and eventually rejected through a popular referendum on 4 December 2016.

However, the inclusion of overarching constitutional amendments in the core of governmental programmes was even more evident in the experience of the government led by Enrico Letta (2013–2014). This is a highly significant example for the sake of our exploration of the relations between constitutional amendments and populism. In fact, the Letta government is largely conceived as one of the recent governmental experiences that are more distant to populism in Italy. On the contrary, his government was supported by a large coalition of traditionally political opponents and appointed many members of the so-called technocratic elite

[11] However, exemptions are not rare, as reported by Piccirilli, who points out that the main procedural novelty in the governmental approach to constitutional reform, is their inclusion within the National Reform Programme (PNR), a key document to be transmitted yearly to European Institutions. These documents detail the specific policies that EU Member States will implement to boost jobs and growth and prevent/correct imbalances, and their concrete plans to comply with the EU's country-specific recommendations and general fiscal rules. While the government led by Enrico Letta mentioned institutional reforms in the PNR, Renzi's government not only included these reforms in the PNR, but put them in the very first place (for further details, see Piccirilli 2016: 157).

among it ministers.[12] Nonetheless, as far as constitutional change is concerned, the government led by Enrico Letta approached constitutional amendment in a strikingly similar manner to the one usually adopted by populists in power. The government presided by Enrico Letta included constitutional reforms as the primary goal of its governmental action, making their realization as a *condicio sine qua non* to remain in office. To this end, the executive, following the praxis recently inaugurated by the Berlusconi government of playing a decisive role in the activation of the constitutional amendment process, introduced a new bill of constitutional law for an ad hoc procedure in derogation from Art. 138 and created a commission composed of constitutional lawyers that delivered a survey of the most relevant reform ideas.[13]

Two derogations were highly significant to our aims. First, the ad hoc procedure introduced a compulsory popular referendum at the end of the constitutional amendment procedure. Second, the agenda of the constitutional amendment process was slightly rescheduled, with the aim of reducing the total time needed to amend the constitution.[14] The project was eventually abandoned after the abrupt change of political conditions within the centre-left political spectrum that led to the resignation of President Enrico Letta and the subsequent appointment of Matteo Renzi as President of the Council of Ministers. This abandoned project of constitutional amendment in derogation of the constitutional procedure suggests that distinctive dimensions of populist instrumentalism "equally emerge in the discourse and actions of political actors, who are not normally or predominantly defined as populist" (Blokker, Forthcoming). This not only indicates a "potential *diffusion* of a populist-constitutional mindset into the political mainstream" (ibidem), but also suggests the risk of normalization of populist legal practices. This risk is rather limited as long

[12] The whole preparatory process was cumbersome and inspired to examples of "elite deliberation" rather than of civic participation, with an essential role played by ad hoc commissions of experts, before and after the formation of the Letta government. For further details of this "elitarian deliberative process", see Blokker 2017.

[13] Disegno di legge costituzionale 15 October 2012 no. 3520 "Disposizioni di revisione della Costituzione e altre disposizioni costituzionali in materia di autonomia regionale", available at http://www.senato.it/service/PDF/PDFServer/BGT/00680798.pdf (last visited 30 September 2019).

[14] Specifically, the constitutional amendment bill scheduled a maximum total time of 18 months for the whole process of constitutional amendment to be completed. To this aim, the constitutional bill aimed at introducing a shortened term of only one month between the two rounds of voting in each House.

as populist instruments are applied to non-populist objectives.[15] However, the risk would be multiplied in the moment the normalized populist mechanisms would finally be in the hands of sincere populist, aiming at subverting the pluralistic character of the post–World War II constitutionalism. However, as fare as the Italian constitutional experience is concerned, the combination of the constitutional architecture and the unruliness of the political system finally resulted in a striking stable and robust reaction of the constitutional system before any kind of (methodologically) populistic attack on the Constitution. In fact, all projects of overarching constitutional reform eventually failed,[16] some because of the sudden change of political conditions, some because of the negative outcome of the popular referendum, as designed by Art. 138 It. Const.

It goes without saying that this constitutional stability is mainly nominal and mirrors the difficulties in introducing any kind of constitutional reforms (with populist or non-populist methodologies, aiming at populist or non-populist aims). Constitutional conservatism both applies to populist impulses and those reforms that are—from the perspective of the author of this chapter—much needed to adapt, on the one side, the Italian Constitution to the unprecedented transformations occurred in Europe in the last 60 years, and to fix some of the original sins of the constitutional architecture as designed by the Constituent Assembly.

[15] The substantial assessment in terms of constitutional law of the failed constitutional reform projects rejected by popular referendums in 2006 and in 2016 is highly contested. While in the first case, legal scholarship generally opposed the project, in the second case the legal debate was subject to a strong polarization (for further details, see Delledonne and Martinico 2017). Some authors (Blokker 2017) tend to identify common threads in the two projects, with an emphasis put on governability and efficiency of the decision-making process. However, the two reform projects consisted of significantly different institutional arrangements: the 2005–2006 constitutional reform process aimed at the introduction of a sort of "absolute premiership", while the main focus of the 2016 constitutional reform project was put on the modification of the bicameral system.

[16] With the exception of the early 2000s constitutional reform of the state-region relations. However, even though the constitutional amendment touched many provisions of the Constitution, its scope is usually considered more specific and limited compared to the overarching constitutional reforms we are referring to.

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