

The Social and
Political
Foundations of
Constitutions

The Italian Constitutional Conundrum and the Rise of Populism

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Policy Brief

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The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented. Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

Executive Summary

- One of the driving principles behind the contemporary populist vision of democracy is to no longer respect legal boundaries and constitutional constraints to the so-called 'Will of the People'.
- Moving from analysis of the contemporary Italian political situation, this policy brief will aim to highlight the basic *ideas on the Constitution* set forth in contemporary political thought by the 'ruling political movements', according to their emerging constitutional culture. The crucial issues about how the people, in this political vision, should try to reassess its role in the constitutional system will then be analysed.
- The policy brief addresses the following critical points: (1) conflicts between the needs of the people in the electoral spectrum and the deficit spending within the Euro system (are EMU fiscal rules part of the rule of law?) (2) the refugee crisis and the reshaping of the constitutional protection of fundamental rights; (3) criticism of the independence of the judiciary; (4) state democratic institutions and their capacity to rule within the EU system of government; (5) the call for EU constitutional changes, in order to open a new democratic legitimizing process of the European institutions.
- The policy brief concludes with a series of proposals for Italian constitutional changes called by the Italian parliamentary majority in order to make the people more closely integrated into the political and institutional system: (1) reducing the number of MPs; (2) reforming the referendum procedures; (3) implementing the role of the people in the legislative procedure by strengthening its capacity to promote legislative initiatives and by granting these proposals a stronger position within parliamentary procedures.

The Idea of Constitution in Contemporary Democracies:

Remarks on the Italian case

Introduction

One of the driving principles behind the contemporary populist vision of democracy is to no longer respect legal boundaries and constitutional constraints to the so-called 'Will of the People'. This raises questions concerning the current contradictions between democracy and the legal system. When the perception of democracy within our society loses its connections to the rule of law, this leads to the breakdown of constitutional democracy as the necessary shape of legal institutions. Scholars refer to an opposition between populism and *formalism*, the latter understood as the primacy of the law and the constitution.¹ Yet, the constitutional framework, in shaping constitutive procedures and rules, looks to be the principal way to spread consensus regarding the rule of law, a basis from which to promote political stability and legal certainty as well as to legitimize the procedural structure of the legal system. Only a shared settlement of the law-making process allows its content to be universally accepted, even by those whose personal interests are materially affected. This is true as long as it is coherent with the rule of law, which has, also, a *utilitarian* aspect, then: the certainty that the rule of law offers both helps to shore up democratic foundations and to strengthen the consensus of the people in legal and institutional systems.

No doubt, the real significance of the democratic process in contemporary societies rests on its capacity to express the will of the people through the mechanisms of political representation. But this should not blind us to the fact that any deviation which calls for an unlimited and un-ruled recourse to

the will of the people may be self-destructive for democracies themselves, once this consensus is untethered from any constitutional legitimacy. This brings us to the crisis of parliamentarism, which is to say, the will of the people within the framework of the constitution.

The loss of effectiveness of constitutional limits is the main casualty of a democratic deficit, or a deficit in representation and the subsequent fall of the principle of legitimacy of the democratic system. This legitimacy should be founded on the conjunction between the political power, popular sovereignty, and the constitution. Its lack explains the loss of a sense of direction among the populace, of inclusion, and of confidence in democratic institutions, as well as in their instruments, tools, and procedures, which has been exploited by popular sovereignty through the democratic representation model within the forms prescribed by contemporary constitutionalism.

Notwithstanding the popular sentiment nowadays, populism is a concept too often politically used as a synonym of democracy (as it has been, for example, by the Italian premier); in opposition to any legal constraint to the so-called will of the people.

This brings us to the Italian contemporary political situation. This policy brief will, therefore, aim to highlight the essential ideas on the constitution and constitutionalism set forth in contemporary political thought by the Italian government, and the 'ruling political movements', in order to arrive at, so to say, the emerging constitutional 'culture' of the contemporary ruling class.

I will divide this section into four points: (1) the criticism of the rule of law and the constitutional system by Italian politicians and members of the Cabinet itself, who in my view, are against any kind of legal constraints to the will of the people in the sense of the political powers of government; (2) the recent institutional history of Italy — focusing on the two massive constitutional reform attempts, both of which failed in the last twelve years — as well as the amendments to the electoral system; (3) the contemporary discourse of the Italian government regarding constitutional changes necessary to make the people somehow feel closer to the constitutional system intended as the law-making machinery; (4) the real short-circuit between the constitutional and the political systems.

Criticisms of the rule of law and the constitutional system

A quick scan of the daily news would be enough to see in which direction Italian politics is heading, both domestically as well as with regard to the EU. To examine the phenomenon from a more technical perspective, we could comment on the latest events as arising from the conflicts between the needs of the people, in the electoral spectrum, and the reality of the difficulties set forth by the problems emerging in effective government activities: European fiscal rules on deficit spending within the Euro system; the refugee crisis and the reshaping of the constitutional protection of fundamental rights vis-à-vis the Italian Constitution (at the global level and within the European system); criticism of the independence of the judiciary and of any other counter-majoritarian institution; and state democratic institutions and their capacity to rule within the EU system of government. Members of the Italian government make daily pronouncements on any of these issues.

Let us start from the conflict arising after the Italian government presented the draft budget to the EU institutions, and was asked for a total reshaping of it, when it refused in principle a policy of deficit spending which contravened the pending fiscal rules (23 October 2018). We do not need, here, to deal with the merits of this question; neither to look for the reasons

for the Italian government acting this way; nor to deal with the contents of Economic and Monetary Union (EMU) fiscal rules and their functioning. The issue at hand is to understand how Italian politicians are now facing the rule of law, in this case the European rule of law. Is it fair to talk about EMU fiscal rules as part of the rule of law within the Euro system and, as such, within the Italian constitutional framework, as I think we should? This would seem to be the case, at least after the balanced budget rule became part of the Italian Constitution, by the 2012 constitutional amendment of Article 81. The question, then, becomes whether these rules binding the government are a form of unlimited discretionary powers?

I will not make any further comment on this issue, besides highlighting that this is again an instance in which the so-called will of the people is brought into conflict with the rule of law or, at least, with the legal framework, the constitutional limits on politics and politicians. Should the EU political and legal system be reformed as well? Probably yes, of course. Could the austerity strategy be criticized and modified? Yes again, I would answer. Those of us who live in Europe know the democratic deficits of that institutional system all too well. But how should a democratic government itself act on this issue? The call for EU constitutional changes, in order to open a new, democratic legitimizing process of the European institutions is, of course, an important contemporary necessity. Producing more public debt, even compromising the state's financial equilibrium, on the contrary, is a suicide, as not only the European Commission, but especially international financial markets will be confronted by unsustainable Italian public debt. And this is a situation that Italy should not bring about.

As the authors of a recent article in *Social Europe* state,

The populist government of M5S and Lega is ideally placed not only to benefit from these upcoming political storms, it may also seek to artificially manufacture such crises for its own political gains, in what resembles a self-fulfilling prophecy.²

The refugees crisis has been another opportunity for populist attitudes in Italy to manipulate popular

consent and to capitalize on it in term of votes and poll ratings, just as it during the UK referendum campaign on Brexit in 2016. I will focus here, however, on a different but related issue: the recent, persistent criticisms raised by the Italian government and by politicians in Parliament against the independence of the judiciary and of any other counter-majoritarian institution. These criticisms are directed at the Constitutional Court; the judiciary; market authorities; the Italian Central Bank; the European Central Bank; the Presidency of the Republic and the President himself; the Parliamentary Budget Office, again an independent authority; and every public officer in whatever way competent for a sound budget and in any way deemed responsible. To quote an example, the president of the national social security authority has been under severe political attack, through the newspapers, social networks, as well as by members of government, because of his warnings on the pension reform act, warnings described in his prescribed advice.

As any financial authority, he is called on to assess the real costs of any change in the pension and social security system, and to weigh the future financial sustainability of such reforms. Such personal attacks are shameful, and hardly belong in a discussion of the rule of law. The latest reproaches essentially move from challenges of the scope of his role to the widespread idea that 'to be entitled to deal with government decisions *held in the name of the people*, one has to be first candidate and then elected in Parliament.'³ This opinion has been circulated, firstly, as the position of the Italian government, and has subsequently been magnified in the opinions expressed by the politicians of the majority parties and by members of the government through newspapers and media, such that they have somehow become a conventional and widely accepted narrative in the public sphere.

According to the logic of this ridiculous narrative, no one is allowed to discuss government plans, or acts and statutes, even when mandated by law, unless they themselves have been elected! In this way, of course, our government tries to manipulate or hide from 'technocratic experts ... unbiased information

upon which policymakers can and should rely to make decisions,⁴ including macroeconomic data and other such fundamental tools of policy analysis.

This is probably because, as Ginsburg and Huq argue,

populists assert a 'moralized antipluralism' based on a belief that 'they, and they alone, represent the people' ... a 'noninstitutionalized' notion of the 'people'.

Populists' view of the people is based on a 'claim of immanent and noninstitutionalized popular will'. It could sound paradoxical, but the populist discourse tends to 'eliminate the pluralistic character of the public sphere and even ... democratic contestation'⁵

Failed attempts at Italian constitutional reform

Carl Schmitt, in his masterpiece *Legalität und Legitimität* (1932),⁶ focused on, among other issues, the natural tendency of any weak government, exceptionally in power, but with an expectation of being out of it in the next future, to challenge the constitutional and electoral system in order to remain in power for longer. By maintaining a strong majority for a period of time, that government could find itself in the favourable position by which it could attempt to change constitutional and electoral rules, in order to draw further advantage from its majority supremacy to consolidate its power in government in the future.

If we examine recent Italian political history, we might recall the two attempts at constitutional reform, held in 2006 and in 2016, both of which were overturned by popular vote in a referendum. They were launched by two governments — the former headed by Silvio Berlusconi, the latter by Matteo Renzi — which shared strong parliamentary consensus, built up through hyper-majoritarian electoral machineries. Both reforms foundered on the well-functioning amendment to legal procedure set forth in the Italian Constitution. As prescribed by Art. 138 of the Italian Constitution, if the parliamentary majority cannot reach the threshold of two-thirds of MPs when approving a constitutional amendment, the people itself (once 500,000 signatures are secured), parliamentary minorities, or five regional assemblies are given the opportunity to call for a

popular referendum in order to decide the law-making process of reform. And this is what eventually halted both efforts to enact extensive constitutional reform.

Turning to the issue of the electoral machinery, we have sadly to point out that Italy is perhaps the only country to have adopted four different electoral regimes in only fifteen years. Among those: one, although entered into force, was never enforced, and eventually changed itself, while two of them have been ruled unconstitutional by the Italian Constitutional Court. This latter state of affairs represents (at least from the point of view of a theoretical analysis) probably one of the most controversial, I would say even oddest, institutional crises in the contemporary era.

If we direct our gaze further back to the former electoral system, in 1993, a piece of legislation introduced, after a referendum, a majority electoral system in which 25 per cent of seats were chosen through a proportional system; then in 2005, a new legislation changed the electoral machinery into a proportional system with a very strong majoritarian effect: 340 of the 630 seats went to the party that reached the relative majority of votes as a majority prize, which we refer to as majority surplus of seats — this without the opportunity to choose a preferential vote! All MPs, through this kind of multiplier, are chosen by party leaders rather than by their own constituencies (this legislation was ruled unconstitutional by the Italian Constitutional Court in Ruling 1/2014). The subsequent electoral system, introduced through Law no. 2015/52, has also been ruled unconstitutional by the Italian Constitutional Court (Ruling 35/2017).

The latest electoral system was introduced by Statutory Law no. 165/2017 (entered into force in October 2017), and has been enforced for the first time in the course of parliamentary general elections in March 2018. As a matter of fact, one third of MPs are now elected in single-member constituencies, while two thirds of them are elected in short lists by a proportional system.

All of these examples, taken from the contemporary Italian political situation, help us to fine-tune a little

better our reflections on the role of the people in the constitution — in a 'post-populist constitution'. I will shortly describe some of the proposals that are going to be presented and discussed by the Italian government, yet I hardly believe it could be possible to achieve a new constitutional dimension through constitutional amendments alone. One of the primary means to reassess the people in the constitution, in the Italian case at least, would be to reshape the electoral system to enable the people to effectively participate and be represented, instead of having their MPs appointed by political leaders.

Integrating the people into the law-making machinery

The latest proposals for constitutional reform launched by the Italian parliamentary majority are intended to make the people more closely aligned with the political and institutional system; to integrate them into the law-making machinery as a whole. The proposals include: (a) a reduction in the number of MPs; (b) reforms to the referendum procedure; (c) enhancing the role of citizens in the legislative process by strengthening their capacity to initiate legislation, by assigning such legislative bills a stronger position within parliamentary procedures. Wide-ranging though these proposals may be, there has, as yet, not been a word on reforms to the process of selection of candidates before the elections, in order to reduce the appointing power of political leaders. Could not we have, in the contemporary political situation, a piece of legislation to draw up the compulsory legal framework for such a reform?

The short-circuit between the constitutional and political systems

As recently affirmed by Kaarlo Tuori, what is really needed to ensure that societies and political systems are reshaped within a constitutional framework is 'a robust, civic and political constitutional culture'.⁷ Unfortunately, such a culture has been superseded in contemporary societies by vehement expressions of nationalism.

Recalling on the words pronounced by Umberto Terracini in the Italian Constituent Assembly, in the opening session of the general discussion on the Italian Constitution (1947), Mario Dogliani⁸ points out the centrality of the capacity of the representative bodies to act as role models. Dogliani concludes that the actual situation has been determined by the incapacity of the political class, the ruling class, to set a good example for the governed; to be and act as an example, as a guide for the people.

It would be difficult to find a more accurate way to explain the contemporary crisis of political representation, or a more accurate interpretation of the distance, if not the break, between political leadership and civil society, the chasm between parliamentary institutions and the people, which are cause and effect of the deep feeling of opposition and contempt towards the political establishment and, by extension, towards representative institutions. Crucially for our conception of populism, this severance of the representative circuit may have been initiated at the top levels of society, before the more contemporary, 'bottom-up' populist movements gained traction, in what we might read as a betrayal by the elites.

In other words, the latest political currents identified by more astute analysts as populist in nature may be well conceived as an extreme manifestation of the inability of the ruling political class to combine law and democracy, to give implementation to the will of the people within a democratic framework, namely the one expressed by popular sovereignty. Populisms split the will of the people from its natural implementation through formal constitutional mechanisms. Riding the public discontent will lead again, ultimately, to a betrayal of popular will, without a renewed, fair pact between the governed people and the governing elites, since no democracy can be conceived outside the boundaries set by the legal system. The Italian ruling class is not able anymore to mediate between electoral mandate and representative function.

Quoting Ginsburg and Huq in their recent work, *How to Save a Constitutional Democracy* (2018), institutional reform or legal change will never succeed fighting constitutional decay by populist pressure. They also say, in fact, that the 'only way to defend liberal democracy is to fight in elections against those who seek to erode it.'⁹ But this is a different issue from 'reassessing the people in the constitution'. Here a different perspective is at stake, the challenge being how to reconstruct a reciprocal legitimizing relationship between the citizens and their constitution. A new alliance between the people and constitutional democracy is what we should aim at, working to give the constitution a renewed and stronger political support. To deal again with the decay of the party political system; to implement a stronger political participation by individuals; to fulfil the lost *democratic atmosphere* — a concept which is not easy to describe but which we are all able to understand in its real substance — in our political societies through fair and respectful use of the new media.

In order to avoid the rise of charismatic leaders who rule without regard for the constitution and the rule of law, a decay of popular consensus in their screaming reasoning is needed. This question is quite easy to describe in fact. Without a strong, well-structured party system, mass democracy turns to what we call *plebiscitarianism*. Populism is a common feature of mass democracy when no cultural and legal mediation is ruled between constituencies and the institutional system.

Albert Venn Dicey used to call for a *constitutional morality* as the paradigm by which the actions of political actors and institutions of government could be considered lawful or unlawful. This embeds constitutional morality itself deeply inside political society, through the common law in tension with the sovereignty of Parliament. In this sense, political morality should be taken as a constitutional tool itself in fostering democracy by means of a legitimate political system.

Until now, legal tools provided for by the Italian Constitution succeeded in defending constitutional democracy against any formal attempt to erode its political roots, although this causes great political and institutional tensions in the process. As for the future, the temptation to attempt to stabilize temporary popular consent in permanent political power will remain a powerful imperative, of course, for any government with occasional strong majority. The only way to prevent this is to keep the *morality of constitutional culture* alive within society, which means respect for minorities, for individuals and

their rights, and for the principle of equality in any dealings with social, cultural, or economic divides: in one word, recourse to a 'common' rule of law.

Even though I do not feel so pessimistic, it is easy to see why some commentators view our contemporary political situation as harbouring echoes of the more extreme political discourses of 1930s Europe. Such a view, for the constitutional scholar, might be deemed either a challenging field of study, or a nightmare.

Notes

¹ I have already worked on this issue, see F. Bilancia, 'The Constitutional Dimension of Democracy within a Democratic Society', *Italian Journal of Public Law*, <http://www.ijpl.eu/>, forthcoming, 2018.

² V.A. Bruno and J. Downes, 'Is Italy's Populist Government Manufacturing the Next Political Crisis?', Social Europe, 23 October 2018, <https://www.socialeurope.eu/is-italys-populist-government-manufacturing-the-next-political-crisis>

³ See, among many, A. Sala, 'Salvini: "Boeri si dimetta poi si candidi". Attacco dopo l'audizione alla Camera', *Corriere della sera online*, 18 October 2018, https://www.corriere.it/politica/18_ottobre_11/matteo-salvini-chiede-dimissioni-presidente-dell-inps-boeri-de35a57e-cd38-11e8-9cab-4f8a118e4830.shtml

⁴ T. Ginsburg and A. Z. Huq, *How to Save a Constitutional Democracy*, University of Chicago Press, Chicago and London, 2018, p. 104.

⁵ *Ibid.*, pp. 78, 83.

⁶ Carl Schmitt, Italian translation, *Legalità e legittimità* (1932), in *idem, Le categorie del 'politico'*, Bologna, 1972, p. 234.

⁷ 'The Rule of Law Crisis in Europe', Seminar held at 'Sapienza' University of Rome, 1 October 2018.

⁸ M. Dogliani, *Rappresentanza, Governo e mediazione politica*, *Costituzionalismo.it*, 2 February 2017, 14 ff.

⁹ Ginsburg and Huq, *How to Save a Constitutional Democracy*, p. 4.



The Foundation

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