Introduction and Acknowledgements

* This book is the outcome of two projects that I have coordinated over the last four years. The first one is a Jean Monnet project called European Public Law-ius (Eur. Publ.ius), which was funded by the Education, Audiovisual and Culture Executive Agency of the European Union. The project, which ended in 2019, was devoted to the current challenges faced by the European Union, and of course among them there is the rise of authoritarian populisms in Hungary and Poland with the well-known rule of law crisis.1 Within the framework of this Jean Monnet project I organised an international conference devoted to the relationship between populism and political constitutionalism, which was held at the Sant’Anna School of Advanced Studies (Scuola Superiore Sant’Anna) in Pisa on 20 September 2019. Some of the papers presented on that occasion were later published in a volume that I edited with Giacomo Delledonne, Matteo Monti and Fabio Pacini entitled Italian Populism and Constitutional Law: Strategies, Conflicts and Dilemmas.2

In 2018, Italy witnessed the formation of a populist government, which was the result of two different populist forces (Lega, previously called Lega Nord, ‘Northern League’ and MoVimento 5 Stelle, ‘Five Star Movement’), with very different agendas and voting constituencies, forming a coalition. Indeed, the results of the Italian political elections held in 2018 also represented the occasion for the second project I mentioned at the beginning of this Introduction, which is a brand new endeavour called POP.C.CON. (‘Populism Channelled Through Constitutionalism?’). POP.C.CON. is financed by the DIRPOLIS Institute (Law, Politics and Development) of the Scuola Superiore Sant’Anna.

One might think that the new wave of populism in Italy would have ended after the second Conte government, created by the alliance between the MoVimento 5

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Stelle and the Partito democratico, came into power, but this would probably be a mistake. Not even the advent of the Draghi government has killed the populist momentum, as the numerical strength of the populists in parliament has not changed. At the same time, it is not possible to reduce Italian populism to the success of the Lega. Indeed, the former Italian president of the Council of Ministers (i.e., ‘prime minister’ in Italy), Giuseppe Conte, has also repeatedly defined himself as a populist, so it seems that nowadays Italian political leaders do not avoid this label; on the contrary, they are happy to display it as a badge of honour. Even before Conte, Revelli and Ignazi considered Renzi’s government to be populist in many respects. Renzi has always claimed to be an anti-populist and he was the mastermind of the political operation that led to the end of the first and the second Conte governments respectively, in August 2019 and in January 2021, but the language and tone he uses create mixed feelings among scholars, as we will see. The political majority in parliament will not change in the short term, since elections will not be held in the near future (and they will not occur before the election of a new president of the Republic at the beginning of 2022), so the Five Star Movement’s political agenda will not disappear. The Five Star Movement remains the party with the most seats in parliament and, paradoxically, the demise of Conte could make them even more populist in the period remaining in the legislature. Renzi has proved himself to be a demolition man, and by fostering conditions for the Draghi government he may have deprived Draghi of the possibility of being elected president of the Republic. Finally, the sovereignist issue and the importance of European funds (discussed in Chapter 3) will remain central. Draghi has to decide

5 The second Conte government was also supported by a third party, Liberi e Uguali (‘Free and Equal’), LeU.
8 Unless the emergency situation ends before the end of 2021 and the Draghi government resigns at that point. Even in this scenario, however, there would be no shortage of difficulties, given the current president of the Republic’s ‘white semester’ (the last six months of his mandate) and the impossibility for President Mattarella to dissolve the chambers according to Article 88 of the Italian Constitution. Indeed, it would be necessary to find another president of the Council supported by the political forces after Draghi’s possible resignation. Technically, it would be possible for a president of the Council of Ministers to be elected president of the Republic. In practice, however, the president of the Council of Ministers would have to present his resignation immediately after the election to the current president of the Republic. Indeed, after the election by the chambers (Art. 89 of the Italian Constitution), the new president of the Council of Ministers would have to be appointed by the president of the Republic (Art. 92 of the Italian Constitution). Clearly, this would cause an interregnum of uncertain contours.
whether to use the European Stability Mechanism (opposed by the Five Star Movement and the League). Even if Salvini has decided to support the Draghi government, I am sure that the anti-European character of his party will remain relevant. The picture, in short, has not changed that much.

While, according to the polls, Conte is still very popular among Italians, his way of dealing with the COVID-19 crisis has generated harsh criticism. His approach relied on a constant reference to the precautionary principle and prioritisation of the right to health over other rights (for instance the right to economic activity) as well as an interesting use of social media (in particular Facebook) to announce the contents of his decrees of the president of the Council of Ministers.

Indeed, the coronavirus crisis gave new blood to the leadership of Giuseppe Conte, who decided to manage the crisis directly by communicating with Italians through Facebook instead of using traditional media.

This situation increased the protagonism and visibility of Conte and at the same time caused uncertainty, since sometimes the measures announced by the Italian premier were just part of not-yet approved drafts. The emergency has contributed to the marginalisation of the parliament.

This lack of centrality of the parliament was partly remedied later on. To a certain extent, this situation is due to the way in which the government wanted to handle the pandemic and other reasons, in primis the ambivalence of the opposition. On the one hand, the right-wing opposition (namely Lega and Fratelli d’Italia) avoided the parliamentary debate, leaving the Chamber of Deputies when Conte went to report back to the parliament about the measures adopted in June 2020. On the other hand, Lega and Fratelli d’Italia have sometimes strategically rediscovered the importance of the parliament and have occupied the chambers to protest against the lockdown.

Moreover, Conte decided to announce his government’s new measures to boost economic activity in an alternative forum and format bombastically called États généraux instead of discussing them with members of the parliament.


In Italian, decreti del Presidente del Consiglio dei ministri (DPCM).


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So again, on both sides, we had a clear tendency to deprive the parliament of its role. It is difficult to imagine that parliament will play a greater role during the Draghi government, due to the (quasi) technical nature of the government, although, all the most important political parties have supported the birth of the new executive.

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From these pages one may think that this is a parochial analysis of recent developments in Italy, but this volume aspires to do much more. Italy is a prime example of post–World War II (WWII) constitutionalism, the product of a series of fundamental choices made at the end of the awful experience of Nazi-fascism, which has inevitably reshaped the original features of constitutionalism as both a philosophical movement and set of instruments to tame political power. At the same time, the Italian experience is different from the German one (the other great example of post–WWII constitutionalism) because, among other things, it does not present itself as a militant democracy. This is an important difference because it makes the Italian case both unique (in theory at least) and very relevant to study the relationship between constitutionalism, inclusiveness, and populism. Post–WWII constitutionalism has increased the dose of counter-majoritarianism inherently present in the concept of constitutionalism and its normative dimension. It is true that even authoritarian regimes may be equipped with documents called constitutions,¹⁴ but in these cases there will be constitutions without constitutionalism and these fundamental laws will be instruments of government only. While constitutions forged by constitutionalism are much more than this, as they tend to protect not only the power of the contingent majority to rule but also the preservation of minorities. This is after all the essence of democracy.¹⁵

The intimate connection between pluralism and constitutionalism offers a powerful argument against those scholars who have depicted constitutionalism as holism,¹⁶ neglecting the importance that the preservation of pluralism has in the mission of constitutionalism. Portraying constitutionalism as holism or arguing that the constitution emanates directly from a sort of a priori existing monolithic entity called ‘the people’ means neglecting the lesson of political history. In this sense, it is frequently the case that constitutions do not really reflect unity, they do not presume the identity of the constitutional subject; rather they are part of the process of the construction of this subject. In order to guarantee its legitimacy and effectiveness in the long run, constitutions have to create bridges connecting former enemies and contributing to the creation of a common platform of values. ‘In the real world, the law cannot be

represented by a single figure’,17 that is why constitutions need fictions to remedy this. Fictions, and silence, are two of the greatest instruments employed by a constitution to favour integration. Constitutional silence on some sensitive issues (‘elements of dormant suspension’)18 can avoid the emergence of conflicts and against this background, ‘abeyances are valuable, therefore, not in spite of their obscurity, but because of it’.19

Fictions are also essential for the success of governments:

The success of government thus requires the acceptance of fictions, requires the willing suspension of disbelief, requires us to believe that the emperor is clothed even though we can see that he is not […] Government requires make-believe. Make believe that the king is divine, make believe that he can do no wrong or make believe that the voice of the people is the voice of God. Make believe that the people have a voice or make believe that the representatives of the people are the people. Make believe that governors are the servants of the people. Make believe that all men are equal or make believe that they are not.20

Popular sovereignty is also fiction, since ‘a sovereign people is the figurative ventriloquist of our aspirations, a security blanket for our anxieties, and a projectile that we launch against those who stand between us and the horizon of our aspirations’.21

If constitutionalism is also about the need to protect and enhance pluralism, democracy is much more than the mere rule of the majority. In enhancing democracy and the rule of law, constitutionalism inevitably clashes with the majoritarian approach to the constitution. Exploring Italy as an example of post–WWII constitutionalism, this book aims to study the tension existing between populism and constitutionalism. In particular, I shall investigate how populists in power borrow, use and manipulate categories of constitutional theory and instruments of constitutional law.22 In so doing, my reflections will be comparative in nature and will be based on both diachronic and synchronic comparison. The importance of historical comparison is crucial to study the roots of the current new wave of populism in Italy and elsewhere. My argument is that this new round of populism has emerged because of what Umberto Eco called ‘eternal fascism’.23

19 Foley, The Silence, 10.
21 Z. Oklopcic, Beyond the People Social Imaginary and Constituent Imagination, Oxford University Press, 2018, 43.
22 For a political science analysis of the populists in power, see: D. Albertazzi, D. Mcdonnell, Populists in Power, Routledge, Abingdon, 2015.
Indeed, Italy has never dealt with its own past and has treated fascism as a mere parenthesis, as an incident which will not happen again. This has created a cultural and political breeding ground that has favoured this new round of right-wing populism.

As for the structure, this book is divided into seven Chapters.

Chapter 1 will explore the relationship between constitutionalism and populism in theoretical terms. It will be maintained that this relationship should not be understood as if constitutionalism and populism were in perfect opposition. Populism often relies on an instrumental use of constitutional law and offers what I will call a constitutional counter-narrative. Chapter 1 will also recall the complex debate on the notion and nature of populism, but for the purpose of this volume, instead of proceeding by definitions, I will progress by identification. In other words, I shall read the latest wave of Italian populism by focusing on three emanations: politics of identity, politics of immediacy and extreme majoritarianism.

Chapter 2 will explain why the Italian system is so important in examining the relationship between constitutionalism and populism. Italian history helps to explain the variety of populisms that have emerged in the country. Elements of populism can even be noted in the Italian constituent process, as we will see when recalling the experience of the Fronte dell’Uomo Qualunque ("The Common Man’s Front"), which had thirty members at the Italian Constituent Assembly.

In Chapter 3, the concept of sovereignism (‘sovranismo’) will be explored to investigate ‘identity politics’. Sovereignism in Italy tends to be coupled with anti-Europeanism and represents an ideal bridge connecting Lega and Movimento 5 Stelle. Indeed populists tend to manipulate the Italian Constitution in order to portray it as if it were a sovereignist charter opposed to the EU treaties. This kind of reading neglects and denies the principle of openness, which represents a building block of post–WWII constitutionalism, including its Italian version.

Chapter 4 deals with another emanation of populism, namely the politics of immediacy. In so doing it focuses on the use of the referendum. The referendum is frequently approached by constitutional law scholars with suspicion, and they usually stress both the advantages and disadvantages of its use in the context of representative democracy. Populists traditionally understand the referendum as a mantra to be used against the corruption of institutions, and this can be very dangerous, as we will see.

Chapter 5 explores the impact of populism on Italian representative democracy. I shall first illustrate how Casaleggio and the Five Star Movement (before the recent

break-up) understand democracy, and then analyse the impact of the Conte governments on the legislative and non-legislative functions of the Italian parliament. As we will see, there is continuity between the pre-Conte situation and the current legislature in terms of the functioning of the institution despite the abrupt proclamations of populists. Chapter 6 analyses the impact of populism on the prohibition of the imperative mandate, a crucial component of political modernity and an element of the untouchable core of the Italian Constitution. In this analysis, I shall explore the organisation of the Five Star Movement and their internal rules, as well as the relevant case law of Italian judges. As we will see, again, despite its proclamations, the structure of the Five Star Movement resembles that of a typical political party, and all the announced transparency and horizontality do not correspond to its real course of action. In Chapter 7, building once again on the distinction between populism and populist claims, I selected some points from the populist agenda and tried to work through them. My intent was to extract and filter some normative arguments that could be reconciled with the untouchable core of post–WWII constitutionalism. The case of authoritarian populisms suggests that courts, especially constitutional courts – when present in the relevant jurisdiction – are frequently targets of populist attacks. Not by coincidence, authoritarian populists try to put pressure on courts by jeopardising their independence and reshaping them (court-packing, court-curbing). Fortunately, the Italian case does not show such worrying signals although judges have frequently been attacked by Berlusconi and Salvini for instance, as we will see in the first chapters of this volume. This is also partly explicable in light of the importance that law, and in particular criminal law, has in the Five Star Movement’s rhetoric and toolbox. This phenomenon can be traced back to the legacy of Tangentopoli, as we will see in Chapter 2. This consideration also explains why I have decided to focus on the populist impact on political actors, and in particular on the role of the parliament. This book reflects the events that took place up to 10 February 2021, with the exception of a few updates to reflect more recent developments. Renzi announced the withdrawal of the two Italia Viva ministers from the second Conte government in January 2021. In the eyes of many, this government crisis appeared incomprehensible. Renzi justified his choice in light of the disagreement between Italia Viva and the other majority forces on the Italian Recovery Plan and the Five Star Movement’s refusal to use the European Stability Mechanism. On 18 and 19 January 2021, Conte went to the Houses of Parliament to see if he still had a parliamentary majority, relying on the votes of what have been called ‘responsible’ members of the parliament. It is worth noting that in his speech in the Chamber of Deputies on 18 January 2021 Conte described himself as anti-populist and anti-sovereignist. These are words that are difficult to reconcile

26 Recently, D. Kosaf, K. Sipulova, ‘How to Fight Court-Packing?’, Constitutional Studies, No. 1, 2020, 133.
with what Conte himself had advocated in 2018 and early 2019. In this sense, Giuseppe Conte has proved himself to be a true chameleon of politics.

Conte won the confidence vote in both chambers. In the Senate, however, he survived without an absolute majority of votes and thanks to the abstention of Italia Viva, Renzi’s new party. Formally he was not required to resign, but it was clearly a difficult situation. He tried to find new votes before giving in to pressure to resign. Similar to the case of Renzi’s new political force, Conte’s supporters (called ‘responsible’ or ‘Europeanists’) set up a movement called Italia23 and even managed to create a new parliamentary group called Europeisti Maie Centro democratico (Europeanists MAIE Democratic Centre). However, these efforts were not sufficient and therefore Conte went to the president of the Republic and resigned on 26 January. Once the consultations began, it was clear that the fracture between Italia Viva and the rest of the majority could not be mended and Mattarella decided to give the former European Central Bank (ECB) chief, Mario Draghi, the mandate to form a new government. The Draghi government is supported by all major political forces with the exception of Fratelli d’Italia.

* I had intended to present different parts of this book in several conferences in the United States when the world was suddenly caught up in a pandemic. As a consequence, and like everybody else on planet Earth, I had to rethink all my plans, and those conferences became webinars or virtual workshops. I would like to thank those friends who agreed to provide comments and ‘go online’ with me. I probably bored them to death, but they were really kind and helpful and offered plenty of comments. My gratitude to them goes beyond the power of speech. Thanks to Antonia Baraggia, Marco Bassini, Giuseppe Bianco, Francesca Biondi Dal Monte, Paul Blokker, Edoardo Bressanelli, Andrea Buratti, Carlo Maria Cantore, Giovanni De Gregorio, Giacomo Delledonne, Cristina Fasone, Silvia Filippi, Filippo Fontanelli, Luca Gori, András Jakab, Costanza Margiotta, Matteo Monti, Matteo Nicolini, Fabio Pacini, Leonardo Pierdominici, Oreste Pollicino, David Ragazzoni, Emanuele Rossi, Robert Schütze and Rolando Tarchi. I am hugely indebted to Tom Ginsburg for supporting this project. My gratitude also goes to Zachary Elkins and Ran Hirschl, the other co-editors of this prestigious CUP series. The publication of this book is a dream, which has become reality. This book is also the outcome of a long process of growth, and sadly there are people who will not be able to read it because they passed away too soon. Paolo Carrozza and Alessandro

27 Italia23 is a movement created by some of Conte’s supporters, namely by Raffaele Fantetti, a former Forza Italia senator. The website of Italia23 can be consulted at the following URL: https://italia23.it/. Here ‘23’ refers to 2023, when the current legislature is due to end (five years from the 2018 election).

28 Maie is the group of the Movimento Associativo Italiani all’Ester o (the Associative Movement of Italians Abroad). However, soon after the end of the second Conte government the parliamentary group, Pro-Europeans-MAIE-Democratic Centre, immediately dissolved: www.senato.it/4839.
Pizzorusso, my professors when I was a student at the University of Pisa and the Scuola Superiore Sant’Anna and my mentors during the first years of my academic career. I am a better person and scholar than I was when I started to teach and do research thanks to the advice I received from them, in particular about the importance of comparative law. I will be always grateful to them. This book is dedicated to my family, which is now spread between Sicily (my mum and little brother, Luca) and Tuscany (my fiancée, Lelia): I love you all. A special place in these acknowledgments is reserved for our cats: Maverick, Nino and Olmo. We fell in love with them even though they fell asleep every time I started to talk about the book. Love is asymmetrical, as are many other things in life.
1

Populist Constitutionalism: An Oxymoron?

1.1 THE MANY FACES OF THE POPULIST CHALLENGE: A CONCEPTUAL CLARIFICATION FOR THE PURPOSE OF THE BOOK

‘Constitutions belong to all but are not “empty” (politically neutral).’1 With these words an eminent constitutional lawyer reacted to a series of attacks launched on the Italian Constitution by some political parties at the beginning of the new millennium. Indeed, the irony in this is that the new wave of populisms has been obliging constitutional lawyers to deal with some long-standing issues, including that of the neutrality of constitutions. Instead of embarking on a large-scale comparison, which may risk missing the historic roots of these phenomena, in this volume the analysis will be carried out by focusing on some important instruments of constitutional democracy – referendums and the prohibition of the imperative mandate, among others – and this will ensure consistency and coherence with the comparative law analysis carried out throughout the book. In this sense, while the present book has a precise focus on the Italian case, this does not exclude the possibility of framing this national case in a comparative perspective, as it is an ideal case study of post–World War II (WWII) constitutionalism. Building on these considerations, this book tries to address the following research question: ‘How can constitutional democracies channel populist claims without jeopardising the legacy of post–WWII constitutionalism?’ When dealing with this question, I shall study the impact of populism on some instruments of constitutional democracy, endeavouring to explore their role as possible fora of populist claims and targets of populist attacks.2

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2 It has been suggested that: ‘Constitutionalists must ultimately accept that this tension cannot be resolved through legal means’ (J. Scholte, ‘The Complacency of Legality: Constitutional Vulnerabilities to Populist Constituent Power’, German Law Journal, special issue 3, 2019, 351, 360). This point might be misleading. The effort made in this book does not necessarily lead to concluding that these post–WWII constitutional law devices will alone resist populism, or that this issue can be solved in purely legalistic terms. Here my point is that constitutional lawyers must at least try to find