

RISE OF POPULISM AND THE FIVE STAR MOVEMENT MODEL: AN ITALIAN CASE STUDY

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Abstract

The spread of fake news on the Internet, the educational divide, the adverse effects of the economic crisis and the emergence of international terrorism are often ranked among the factors that led to the rise of populism. However, quite rarely it is called into question whether (and how) the distrust of mainstream political parties had an impact on the rise of populism across the Western democracies. Adopting a constitutional law perspective requires looking at the rise of populism through the lenses of the crisis of democratic representation. The paper aims at exploring the Italian scenario, where the anti-establishment Five Star Movement has grown up as leading populist force fostering a direct political participation of voters through the use of the Internet that is supposed to bring, in the long run, to political disintermediation. In this respect, the goal of the paper is to explore from a constitutional law perspective the grounds on which the rise of this anti-establishment movement has relied and the constraints that the Constitution may place on the populist surge.

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1. Introduction

It is well known among scholars that working out a widely accepted definition of populism is very difficult and, in any way, problematic. This holds especially true in the field of legal research, where the concept of populism seems to be borrowed from the language of political science¹.

However, there are countless examples and forms of populism in the American and European political experiences².

For the purposes of this paper, I will particularly focus on those populist expressions that call into question the well-established, constitutional law category of representative democracy and accordingly, the role and responsibilities of traditional political parties³. There is, in fact, a natural tension between constitutionalism and the emergence of populist movements⁴, which challenges the foundations of representative

¹ For instance J.W. Müller, *What is populism?* (2016), at 2-3, argues that for political actors to qualify as populist to be critical of elites is a necessary but not sufficient condition; also, populists are always antipluralist, as they claim to be the sole actors to represent the people; finally, they have a moral (and not merely empirical) claim of representation. However, from a legal standpoint, these features may be relevant to a limited extent only. See also M. Canovan, *Trust the People! Populism and the Two Faces of Democracy*, 47 *Pol. Stud.* 2-16 (1999).

² For an overview, see J.B. Judis, *The Populist Explosion* (2016). However, Judis points out that trying to define populism, as if it were a scientific term, is a mistake, as 'there is no set of features that exclusively defines movements, parties, and people that are called populist.' See among others D. Albertazzi, D. McDonnell (eds.), *Twenty-First Century Populism. The Spectre of Western European Democracy* (2008). See in particular L. Corso, *What does Populism have to do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions*, 3 *Riv. fil. dir.* 443-470 (2014).

³ See C. Pinelli, *The Populist Challenge to Constitutional Democracy*, 7 *Eur. Const. L. Rev.* 5-16 (2011).

⁴ For an overview on the current debate regarding populist constitutionalism, and generally populism and public law see, among others, P. Blokker, *Populist Constitutionalism*, *VerfBlog*, 2017/5/04, at: <http://verfassungsblog.de/populist-constitutionalism/>; K.L. Scheppele, *Autocratic legalism*, 16 November 2017, at <https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-6-kim-lane-scheppele-autocratic-legalism/>; J.W. Müller, *Populist Constitutionalism: A Contradiction in Terms?*, unpublished paper, at http://www.law.nyu.edu/sites/default/files/upload_documents/JWMueller%20-NYULaw-Populist%20Constitutionalism.pdf.

democracies. As noted by some authors⁵, such an approach would dispute the very aim of constitutionalism, i.e. to protect individuals from abuses of power. But at the same time, populism can be the last resort when the functioning of representative democracy disregards people's will or even contradicts the interests of the people⁶.

In this essay, I will focus, in particular, on movements and parties that stand out among anti-party or so-called anti-establishment parties. In this respect, the advent of new political actors has been fostered – according to a pretty rhetorical utterance – by a desire to disrupt long-standing dominant élites and let people's voices be heard⁷. I will argue that the spread of populist movements constitutes a reaction to the decline of traditional parties and the crisis of representative democracy. This paper will particularly explore the rise of the Five Star Movement⁸ in Italy and will focus on the challenges that it poses from the perspective of constitutional law.

I will move from the constitutional background, exploring the status of political parties as well as anti-party and anti-establishment parties. Then, I will discuss the most relevant legal factors that led to the rise of the Five Star Movement and to its recent electoral successes⁹. I will then highlight some critical

⁵ See (in Italian) G. Grasso, *Le «Mouvement 5 étoiles» et les défis de la démocratie représentative: à la recherche d'une notion constitutionnelle de populisme?*, 1 Perc. Cost. 209-210 (2017).

⁶ *Ibidem*.

⁷ According to Y. Mény, Y. Surel, *The constitutive ambiguity of populism*, in Id. (eds), *Democracy and the populist challenges* (2002), the relevant 'calling people' may correspond to three different notions: when the calling people refers to the 'sovereign people,' the target of populists are the political parties, meant to be the traditional institutions of representative democracy; when it refers to the 'class people,' populist claims are directed toward certain parts of the population; eventually, if calling people refers to the 'nation people,' populist attacks affect those who do not fall within the relevant collective identity. See M.E. Lanzone, *The "Post-Modern" Populism in Italy: The Case of the Five Stars Movement*, in D. Woods, B. Wejnert (eds), *The Many Faces of Populism: Current Perspectives* (2014).

⁸ In Italian, 'Movimento Cinque Stelle.'

⁹ For a general introduction on the rise of the Five Star Movement, see I. Diamanti, *The Five-star Movement: A new political actor on the web, in the streets and on stage*, 6(1) *Contemp. Italian Pol. J.* 4-15 (2014); F. Tronconi (ed), *Beppe*

points of the Movement model and speculate on its compatibility with the Italian Constitution in the *pars destruens*. Finally, in the *pars construens*, I will explore which measures may be taken to respond to the populist surge by revitalizing representative democracy. I will conclude that given the tolerant attitude of the Italian Constitution vis-à-vis anti-establishment and anti-party parties, this phenomenon can be marginalized, but is unlikely to be defeated.

The reason why this paper focuses on the Five Star Movement instead of other populist movements that arose in Italy at different times (like the *Lega Nord*)¹⁰ lies with the unprecedented constitutional challenges that this organization has brought about in the realm of political representation¹¹.

2. Political parties in the Italian Constitution

Before introducing the recent developments in Italy regarding the rise of populist movements, it is of utmost importance to explore the constitutional framework concerning political parties¹². A full understanding of the most critical challenges posed by the rise of new anti-party and anti-

Grillo's Five Star Movement: Organisation, Communication and Ideology (2015); and (in Italian) P. Corbetta, E. Gualmini, *Il partito di Grillo* (2013) and M. Tarchi, *Italia populista. Dal qualunquismo a Beppe Grillo* (2015). See also T. Mueller, *Beppe's Inferno*, *The New Yorker*, 4 February 2008.

¹⁰ In Italian, 'Lega Nord,' an anti-party party founded in 1991, at the sunset of the First Republic, advocating the secession of the North ('Padania') and inspired by the huge protest against traditional parties after the 'Tangentopoli' scandal. See, amongst others, M. Bull, M. Rhodes, *Crisis and Transition in Italian Politics* (1997).

¹¹ Marco Revelli, in a recent book (M. Revelli, *Populismo 2.0* (2017)), described three examples of populism that grew up in Italy: Silvio Berlusconi's 'videopopulism,' Beppe Grillo's 'cyberpopulism' and Matteo Renzi's populism 'from the top.' For an overview of the current and emerging challenges for the concept of political representation see (in Italian) S. Staiano, *La rappresentanza*, 3 Riv. AIC (2017) and N. Zanon, F. Biondi (eds), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica* (2001).

¹² See generally, among others (in Italian), in this regard, P. Ridola, *Partiti politici*, Enc. dir., XXXII, 66-126; A. Predieri, *I partiti politici*, in P. Calamandrei, A. Levi (eds), *Commentario sistematico alla Costituzione italiana*, vol. I (1950); G. Ferri, *Studi sui partiti politici* (1950).

establishment parties, in fact, requires taking into account the relevant constitutional paradigm and the way political parties affect the Italian form of government¹³.

Article 49 of the Italian Constitution reads as follows: ‘Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes.’

While granting citizens the right to assembly for political purposes, this provision does actually refer to a particular dimension of the freedom of association, which is protected, in general and broader terms, by Article 18, irrespective of the underlying purposes.

The Italian Constitution does not treat political parties as institutions or – better said – as parts of the frame of government. Rather, they are considered as bodies through which the several interests of political nature are represented¹⁴. As noted by prominent scholars¹⁵, the option to frame the constitutional coverage for political parties in terms of freedom of political assembly was very ambiguous and discussed at the origins. Article 49, in fact, compromised two different dimensions: on one hand, this provision is included in the section concerning political rights (Title IV) and not in the part of the Constitution regarding the organization of the Republic; on the other hand, however, this provision emphasizes the role of political parties as institutional intermediaries between the State and society.

In the light of this inherent connection with the freedom of association¹⁶, political parties are immune from the State’s

¹³ In this respect see (in Italian), S. Staiano (ed), *Nella rete dei partiti. Trasformazione politica, forma di governo, network analysis* (2014); Id., *Trasformazioni dei partiti e forma di governo*, Federalismi.it, 7 October 2015; F. Giuffrè, *Crisi dei partiti, trasformazione della politica ed evoluzione della forma di governo*, Federalismi.it, 30 November 2016; S. Prisco, *Elogio della mediazione. Statuti dei gruppi parlamentari e libertà di mandato politico nelle democrazie rappresentative. Brevi annotazioni*, Federalismi.it, 13 June 2018.

¹⁴ See Italian Constitutional Court, order no. 79/2006.

¹⁵ See P. Ridola, *Partiti politici*, cit. at 12, 72.

¹⁶ Despite this framing, the provision does not contain any specific reference to the democratic nature of parties. As noted by Ridola, some members to the Constituent Assembly made a proposal (the so called amendment ‘Mortati-Ruggiero’) to require that political parties could ensure the democratic organization of the State. This amendment, that was later withdrawn, had been supported for various reasons: the need to guarantee, by the participation of

ideological influence. Freedom to assembly for political purposes is thus subject to the same limitations imposed by the Constitution to the freedom of assembly as such. Accordingly, even anti-party and anti-establishment movements enjoy full constitutional protection¹⁷. This is witnessed by the fact that even members of monarchist parties (pursuing the restoration of the Monarchy, in spite of Article 139 of the Constitution)¹⁸ sat in the Parliament in the aftermath of establishing the Republic. The Twelfth Transitional and Final Provision places a specific limit on political parties, by prohibiting reorganization ‘*under any form whatsoever, [of] the dissolved Fascist party.*’ The existence of this restriction does not *per se* deprive the Italian Constitution of its tolerant nature nor includes the Italian constitutional order within the scope of

different political views in the public opinion in the political arena, the correct functioning of the representative bodies; the safeguarding of the individual freedom to assembly vis-à-vis political parties to protect those who voluntarily waived this right. See P. Ridola, *Partiti politici*, cit. at 12, 73.

Also, some scholars, following the entry into force of the Constitution, directed some criticism towards the option of regulating political parties. They argued, as noted by P. Ridola, *Partiti politici*, cit. at 12, 78, that the democratic nature of political parties was better protected by the absence of legislation implementing Article 49 of the Constitution. Only a decade later, however, the degree of influence of political parties on the actual functioning of the form of government became material, and the polemic against the way parties were *de facto* replacing constitutional bodies and depriving voters of any real impact and choice (‘particracy’) emerged. See also (in Italian) G. Maranini, *Governo parlamentare e partitocrazia*, in Id. (ed), *Miti e realtà della democrazia* (1958).

¹⁷ For a specific focus on the attitude of the Italian Constitution toward anti-establishment parties, see (in Italian) I. Nicotra, *Democrazia “convenzionale” e partiti antisistema* (2008). Generally, on political parties in the Italian Constitution see (in Italian) S. Gambino, *Partiti politici e forma di governo* (1977); V. Crisafulli, *Partiti, parlamento, governo*, in P.L. Zampetti (ed), *La funzionalità dei partiti nello stato democratico* 93-119 (1967); C. Esposito, *I partiti nella Costituzione italiana*, in Id., *La Costituzione italiana* 215-243 (1954); and, *passim*, T. Martines, *Contributo ad una teoria giuridica delle forze politiche* (1957). Among the most recent works, see E. Gianfrancesco, *I partiti politici e l’art. 49 della Costituzione*, *Forum di Quaderni Costituzionali*, 30 October 2017; P. Marsocci, *Sulla funzione costituzionale dei partiti e delle altre formazioni politiche* (2012).

¹⁸ Article 139 of the Constitution reads as follows: ‘*The Republican form of government shall not be a matter for constitutional amendment.*’ This is the only explicit limit to constitutional amendment. However, this clause has been interpreted extensively by constitutional scholars as referring to all the distinguishing features of the Italian Republican form.

‘protected democracies’¹⁹. The Italian Constitutional Court, in fact, held that the pursuit of radical changes of the constitutional order is compatible with the Constitution as long as it is realized through a democratic process and without using violence²⁰. The prohibition entrenched in the Twelfth Transitional and Final Provision, thus, is far from constituting an ‘abuse clause’ to exclude anti-establishment forces from the enjoyment of the right to political assembly. Rather, this provision clarifies the essence of the founding covenant of the Republic, i.e. rejection of the Fascist regime, which would be *a priori* incompatible with the Constitution. This is the only exception to the pluralistic principle regarding political parties, in addition to the limits generally placed by Article 18 on the freedom of association²¹. As pointed out by Paolo Ridola, Article 49 of the Constitution is then derogated from the Twelfth Transitional and Final Provision, and the origins of this compromise dates back to the founding covenant of the Constitution in 1947. On one hand, the goal of the latter provision was to avoid that the new constitutional order

¹⁹ Other constitutions, such as the German Basic Law and the Spanish Constitution, provide more specific limits and fall within the category of ‘protected democracies.’ Article 21 of the German Basic law establishes that the internal organization of political parties must conform to democratic principles and stipulates that parties that, by reason of their aims or the behavior of their adherents, seek to undermine or to abolish the free democratic basis order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Tribunal is competent to rule on the relevant questions of unconstitutionality. Moreover, Article 6 of the Spanish Constitution provides that the creation and exercise of the activities of political parties are free, in so far as they respect the Constitution and the law. Additionally, their internal structure and functioning must be democratic. See (in Italian) S. Bonfiglio, *I partiti e la democrazia. Per una rilettura dell’art. 49 della Costituzione* (2013).

²⁰ See Italian Constitutional Court, order no. 114/1967.

²¹ As noted by P. Ridola, *Partiti politici*, cit. at 12, 113, the significance of this provision has been widely debated. On one hand, commentators saw in this restriction a necessary consequence of the democratic principle based on the natural coexistence of majority and minority groups, binding on any party proclaiming itself as totalitarian and aiming at establishing a totalitarian regime; on the other hand, commentators noted that the purpose of this clause, on the basis of the debates carried out in the Constituent Assembly, was to specifically ban the Fascist Party as such, and not any movement or party resembling the latter or reflecting the Fascist ideology.

could be indifferent to the variety of possible political actors: this way, the Twelfth Transitional and Final Provision encapsulates a specific evaluation made *a priori* by the Constituent Fathers to reject, by discriminating it in the political arena, the Fascist Party. On the other hand, the Twelfth Transitional and Final Provision aims at avoiding the re-establishment of the Fascist Party based on the overall consideration of its ideology rather than because of the threat that it represents for the democratic attitude of the State.

Against this background, another crucial provision, namely Article 67 of the Italian Constitution, prohibits subjecting Members of the Parliament (hereafter, MPs) to a binding mandate²². Even though the Constitution does not draw any qualified connection between political parties and MPs, it goes without saying that the constitutional framework relating to political parties is intertwined with this cornerstone of representative democracy.

By requiring the MPs to be free from any binding mandate, the Constitution has taken the option to protect their freedom of action vis-à-vis both their voters and the relevant political parties, with a view to sheltering them from the liability caused by any decision diverging from the original political address. In the words of the Italian Constitutional Court, every MP is free to vote in accordance with their political view and the party's address to which he/she belongs and also, not to adhere to the same²³. This way, the Constitution shields the MPs from any legislative or

²² More in detail on this see (in Italian) N. Zanon, *Il libero mandato parlamentare*, 288-289 (1992). See also F. Azzariti, *Cittadini, partiti e gruppi parlamentari: esiste ancora il divieto di mandato imperativo?*, 3 *Costituzionalismo.it* (2018) E. Rinaldi, *Divieto di mandato imperativo e disciplina dei gruppi parlamentari*, 2 *Costituzionalismo.it* 133-186 (2017).

²³ See Italian Constitutional Court, judgment no. 14/1964. As pointed out by Zanon (N. Zanon, *Il libero mandato parlamentare*, cit. at 22), this judgment took the view that, despite the apparent contradiction between the principle underlying Articles 49 and 67, the latter placed a limit preventing too much extreme implications of the democratic principle enshrined to the former, such as recall or loss of the seat as a consequence of exclusion or resignation from a party. In the view of Zanon, this understanding of Article 67 seconded by the judgment at hand was a restrictive one, as the Italian Constitutional Court focused only on the 'negative' and 'residual' significance of this provision, i.e., that of depriving any agreement or instruction given from parties and voters of effectiveness and binding value.

statutory provisions that may impose legal consequence as a result of ‘disobedience’ to their respective parties and constituents. This prohibition, therefore, assumes that the functioning of the parliamentary mandate does not aim at representing sectorial interests, rather at compromising the various societal interests mirrored by political parties. Against this background, measures like the *recall* or dismissal of MPs would be contrary to Article 67. However, as noted by Justice Zanon, the relevant scholarly debate includes a variety of views on the theoretical and practical effects of this ban. First of all, the ban may merely exclude that a mandate, whether given from the voters or from a party, has any relevance and effect. According to this construction, agreements and instructions for MPs are still be possible but deprived of any legal guarantee: thus, they are not be enforceable and MPs can depart from the instructions received. From a different perspective, the ban enshrined to Article 67 may constitute an actual prohibition, forbidding in any case agreements and instructions aimed at conditioning MPs. However, the critical point of this option lies with determining the consequences of a possible mandate: instructions and agreements could be considered ‘void’ (and not merely unenforceable) but from a practical standpoint this would make only a little difference compared to the aforesaid alternative interpretation²⁴.

Regardless of the specific understanding and the consequences of the ban in question, the ultimate goal thereof is to avoid a degradation of political representation where instead of a

²⁴ As Zanon observed (N. Zanon, *Il libero mandato parlamentare*, cit. at 22, 291), these alternative options for interpreting Article 67 rely on different views on the concept of political representation and the legal status of MPs. The latter interpretation highlights the importance of the prohibition and the well-established understanding of political representation as free from any influence: the idea itself of a mandate between parties/voters and MPs is rejected. Behind this construction is the assumption that MPs are a state’s body which is separate from any other actor: the ban on binding mandate would aim at preserving specifically this separation. The former interpretation, instead, moves from an opposite view: it assumes that MPs are no longer as separate ‘body’ of the state, as they act as institutional connection between social stances and the state.

competition among ideas and political programs a compromise between sectoral interests would take place²⁵.

As I will specify more in detail below, this cornerstone, common to many constitutions, is confronted by the rise of parties, such as the Five Star Movement, that call for a return to direct democracy.

The prohibition of binding mandate embodied in the Italian Constitution is then a pivotal factor to bear in mind while considering the transformations in the recent political scenario, notably the rise of the Five Star Movement²⁶. The Italian Constitution adheres to a liberal view of representation, where although representatives are chosen by voters, they remain free to take any steps for the pursuit of general interest²⁷. On the contrary, according to the democratic theory of representation (inspired by Rosseau), representatives act in accordance with a specific mandate received from voters to bring into the parliamentary assembly the specific interests of the latter. As I will discuss more in detail, this is exactly the view of the Five Star Movement and its constituency.

²⁵ N. Zanon, *Il libero mandato parlamentare*, cit. at 22, 299.

²⁶ Article 67 has been interpreted not as a general and absolute prohibition for every member of the Parliament to receive any instructions, but as the freedom to act without being bound by the same, that can be either disregarded or taken into account. This construction of Article 67 of the Constitution is consistent with the concept of *responsiveness* developed by some US scholars. See H. Pitkin, *The Concept of Representation* (1967); see also L. Disch, *Democratic Representation and the Constituency Paradox*, 10(3) *Persp. Pol.* 599-616 (2012).

²⁷ See the famous *Speech to the electors of Bristol* by Edmund Burke given on 3 November 1774: 'Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*. If the local constituent should have an interest, or should form a hasty opinion, evidently opposite to the real good of the rest of the community, the member for that place ought to be as far, as any other, from any endeavor to give it effect.'

3. How the Five Star Movement entered the political arena

Probably, the most distinguishing and telling feature of the Five Star Movement is that it grew out of its founder's blog – the former comedian Mr. Beppe Grillo²⁸. Started in 2005, the blog quickly became a virtual agora, where the posts, reflecting Grillo's political opinion and ideology, generated thousands of interactions. Given the massive success, a mixture of contemporary outbreak of financial crisis and some controversies concerning traditional political parties made Mr. Grillo's blog the backbone of an organized structure with political purposes. This way, the Five Star Movement came into being in 2009 as a political actor and took part in the local and regional elections in 2010, 2011 and 2012. Eventually, the Movement was able to elect a couple of majors; in the 2013 general elections, it became the most-voted party, one of the 'big three minorities' that came up²⁹. In the 2016 municipal elections, Ms. Virginia Raggi from the Five Star Movement became Rome's new major. In the 2018 general elections the Five Star Movement was again the most-voted party, gaining 32% of the vote, while the right-wing coalition captured the largest share of the vote, i.e. 35%. Since no majority premium was provided under the election law, known as 'Rosatellum', neither the Five Star Movement nor the right-wing coalition obtained the absolute majority of seats, while the Democratic Party reached a historical low (18%). However, as very turning point of the elections, *Lega Nord* (or '*Lega*'), led by Matteo Salvini, became the first party in the right-wing coalition (17%), overtaking Berlusconi's Forward Italy (14%). This factor proved to be all but irrelevant in the aftermath of the election, since the League is used to convey a more radical-right message than Berlusconi's center-right one and is commonly recognized as a far-right party. It is not by coincidence that 88 days after the general election and the failure of the Senate and Lower House speakers (Casellati Alberti and Fico) to reach a compromise different political parties and coalitions in their 'exploratory mandate', the Five Star Movement

²⁸ See www.beppegrillo.it.

²⁹ See (in Italian) I. Diamanti, *Introduzione. 2013: il Paese delle minoranze in-comunicanti*, in I. Diamanti, F. Bordignon, L. Ceccarini (eds), *Un salto nel voto. Ritratto politico dell'Italia di oggi* (2013).

and League formed a new government headed by Giuseppe Conte (an independent supported by the Five Star Movement) where Matteo Salvini and Luigi Di Maio (the respective parties' leaders) serve as deputy prime ministers. The advent of the Conte Cabinet was possible because the two parties managed to reach an agreement on a government program³⁰. They symbolically entered into a contract³¹ and this way made the life of the Cabinet conditional upon the pursuit of the compromised program (including the most sensitive matters for the respective constituencies)³². Such outcome, as I will more in detail point out below, contradicts one of the main claims made against traditional political parties by the Five Star Movement, i.e. the establishment of cross-movement coalitions blurring the lines of boundaries and differences. However, such an outcome is not unprecedented, as the Letta, Renzi and Gentiloni Cabinets demonstrate.

Which factors permitted the Five Star Movement to become the most-voted party in 2013 and 2018 general election?

The use of Internet has allowed the Five Star Movement to obtain broad consensus (facilitating the spread of populist

³⁰ For a critical overview on the aftermath of the 2018 general election see G. Martinico, *I-CONnect Symposium-The Aftermath of the Italian General Election of March 4, 2018-Populism Versus Constitutionalism 101: What Can We Learn from the Italian Scenario?*, *Int'l J. Const. L. Blog*, 17 August 2018, at: <http://www.iconnectblog.com/2018/08/i-connect-symposium-the-aftermath-of-the-italian-general-election-of-march-4-2018-populism-versus-constitutionalism-101-what-can-we-learn-from-the-italian-scenario>. See also A. Torre, *I-CONnect Symposium-The Aftermath of the Italian General Election of March 4, 2018-Taming the Crisis*, *Int'l J. Const. L. Blog*, 16 August 2018, at: <http://www.iconnectblog.com/2018/08/i-connect-symposium-the-aftermath-of-the-italian-general-election-of-march-4-2018-taming-the-crisis>; and F. Clementi, *I-CONnect Symposium-The Aftermath of the Italian General Election of March 4, 2018-The Italian Political Elections: A Definitive Back to the Past?*, *Int'l J. Const. L. Blog*, 15 August 2018, at: <http://www.iconnectblog.com/2018/08/i-connect-symposium-the-aftermath-of-the-italian-general-election-of-march-4-2018-the-italian-political-elections-a-definitive-back-to-the-past>.

³¹ See (in Italian) F. Di Marzio, *La politica e il contratto* (2018). As to the constitutional law issues raised by the choice of a 'contract' to define the political agenda of the Conte Cabinet, see (in Italian) M. Carducci, *Le dimensioni di interferenza del "contratto" di governo e l'art. 67 Cost.*, *Federalismi.it*, 13 June 2018.

³² The 'contract' is available (in Italian) at this url: http://download.repubblica.it/pdf/2018/politica/contratto_governo.pdf.

counter-narratives) and supported the creation of an organization that is quite similar to political parties, notwithstanding Grillo's opposite claim³³.

Inspecting the content of its political claims, in the realm of anti-establishment and anti-party movements, the Five Star Movement is not alone. Taking the anti-euro sentiment as a common denominator, for example, the right-wing Lega Nord and Fratelli d'Italia³⁴ can also be considered on the same side.

However, the reasons to explore the rise of the Five Star Movement from the perspective of public law relate to the unprecedented constitutional issues and challenges that the advent of this new political actor has generated.

The most remarkable characteristic of the Five Star Movement is that while its political view reflects a distinctively anti-establishment attitude, it also emerges as an anti-party movement seeking emancipation from the model of traditional parties. Traditional parties are deemed as the enemy, the symbol of 'old politics' that led Italy to the brink of economic disaster. To highlight the distance marked from political parties, the Movement called itself a 'non-party' and its statute as 'non-statute.' Setting aside this rhetorical self-understanding that actually corresponds more to 'food for voters' than to a description of the movement, it is worth noting that the Five Star Movement model calls for a disintermediation of political representation from political parties³⁵. In Grillo's view, the use of Internet is supposed to allow voters to directly participate in the political process, according to the model of e-democracy, and thus increase transparency and political accountability. The MPs are considered to be mere spokesmen bound by the will of their constituents, as debated on Grillo's blog, open to all registered users of the same.

³³ See, more in detail, E. Falletti, *Direct democracy and the prohibition of the binding mandate: The Italian debate*, paper presented at the World Congress of Constitutional Law, Oslo, Norway, June 2014, 1-14; F. Bordignon, L. Ceccarini, *The Five-Star Movement: A catch-all anti-party party*, in A. De Petris, T. Poguntke, *Anti-party parties in Germany and Italy* 17-44 (2015).

³⁴ *Fratelli d'Italia* is a right-wing anti-establishment party founded in 2012 after a split from *Il Popolo della Libertà*, the party headed by Silvio Berlusconi.

³⁵ See N. Urbinati, *A Revolt against Intermediary Bodies*, 22(4) *Constellations* 477-485 (2015).

A recent comparative study on anti-party parties in Italy and Germany by Andrea De Petris and Thomas Poguntke³⁶ has focused on some distinguishing features of the Five Star Movement. De Petris, in particular³⁷, explored the following characteristics, that I find worth quoting:

a. The Five Star Movement is a personified party, as it has been 'built, developed and directed' by Beppe Grillo as a personal movement. Also, this characteristic depends on the strict relationship that the Movement's voters/supporters entered into with Grillo ('a link of mutual interdependence,' according to De Petris) mainly through his extremely popular blog.

b. The Five Star Movement is a 'non-association' with a 'non-statute': This character is an expression of 'a systematic refuse to adopt definitions and the lexicon in use by political parties.'

c. The mechanism for the creation of 'certified lists' and the selection procedures of candidates for national elections: The Five Star Movement has adopted a very detailed mechanism to allow citizens wishing to contest in the local elections to create their own lists of candidates. Once each list is created, it must undergo a certification process controlled by the Movement itself, and it must comply with a set of strict requirements. Likewise, the Movement has launched online primary elections for the selection of candidates at the general election held in 2013.

d. It is a political program 'under permanent construction' that is consistent with the understanding of the Five Star Movement as an open platform working according to a 'fluid' approach.

From a speculative point of view, one may wonder now whether this model is compatible with the Italian Constitution. As specified above, Article 49 does not place any limit to the freedom of association for political purposes, except for the dissolution of the Fascist party. Anti-establishment and anti-party parties are

³⁶ A. De Petris, T. Poguntke (eds), *Anti-party parties in Germany and Italy*, cit. at 33.

³⁷ See A. De Petris, *Programs, Strategies and Electoral Campaigns of the Five Stars Movement in Italy. A brand new Party Model or an "Anti-Party" State of Mind?*, in A. De Petris, T. Poguntke (eds), *Anti-party parties in Germany and Italy*, cit. at 33, 125-142.

therefore protected as such by the Constitution and entitled to take part in the democratic political activities. The very crucial point, however, does not relate to the qualification of the Five Star Movement as an anti-establishment and anti-party movement. It rather lies with the compatibility of the Movement's views with the Constitution, regarding direct and participatory democracy and the role of political parties³⁸.

4. Some key factors behind the rise of populism in Italy

Several factors have contributed to the rise and consolidation of populist parties and movements in Europe and other countries. Among others, the spread of fake news on the Internet, the educational divide, the adverse effects of financial crisis, and more recently, the emergence of international terrorism are often ranked among the causes for the populist surge. All these circumstances definitely had an impact. However, from the perspective of constitutional law, they fail to explain properly why Grillo's party has obtained such widespread support in Italy.

I will try to set aside the factors that may be relevant from the sole political-science perspective and pinpoint some elements related to the Italian form of government that, in my view, marked the transformation of the political scene.

The first point concerns the deep crisis of political parties and their ability to capture voters' attention and support. Like in other European countries, in Italy, the financial crisis that broke out in 2008 considerably impaired the relationship between people and political parties³⁹, and widened the gap between them. The financial crisis, indeed, served as an 'excuse' for populists to attack the political establishment, at both the national and European level.

However, in Italy, the relationship between voters and political parties had already been significantly weakened as a consequence of various scandals involving leading politicians and

³⁸ See (in Italian) G. Sartori, *Una violazione macroscopica*, in *Corriere della Sera*, 6 November 2013.

³⁹ P. Ignazi, *The Crisis of Parties and the Rise of New Political Parties*, 2(4) *Party Pol.* 549-566 (1996).

a predominantly self-referential view of politics by parties and their members.

Some commentators observe that the distrust of the mainstream political parties is also on account of the lack of a proper degree of internal democracy⁴⁰. This aspect reflects in the actions of those party leaders who led the traditional parties to become more and more focused on the leader⁴¹. This is the reason why the strong leadership of Renzi caused splits recently in the center-left *Partito Democratico*, similar to what had happened to the center-right before – *Il Popolo della Libertà* party, when Mr. Berlusconi was the Prime Minister. Pasquino has noticed that ‘there is now no Italian party that can reasonably claim to be anything but personalistic’⁴². This holds true even for the Five Star Movement⁴³. From the perspective of constitutional law, this

⁴⁰ See (in Italian) G. Brunelli, *Partiti politici e dimensione costituzionale della libertà associativa*, in F. Biondi, G. Brunelli, M. Revelli, *I partiti politici nella organizzazione costituzionale* 7-35 (2016); A. Lanzafame, *Sui livelli essenziali di democrazia nei partiti*, 1 *Rivista AIC* (2017).

⁴¹ G. Pasquino, *Italy: The Triumph of Personalist Parties*, 42(4) *Politics & Policy* 548-566 (2014); See also (in Italian) M. Calise, *Il partito personale. I due corpi del leader* (2010).

⁴² See also B. Manin, *The principles of representative government* (1997), at 219-220 who notes that ‘Voters tend increasingly to vote for a person and no longer for a party or a platform. This phenomenon marks a departure from what was considered normal voting behavior under representative democracy, creating the impression of a crisis in representation. [...] It is equally possible to regard the current transformation as a return to a feature of parliamentarianism: the personal nature of the representative relationship’. According to Manin, this situation may have two causes, namely the fact that ‘the channels of political communication affect the nature of the representative relationship: through radio and television, candidates can, once again, communicate directly with their constituents without the mediation of a party network’; secondly, ‘the growing role of personalities at the expense of platforms is a response to the new conditions under which elected officials exercise their power’. Also, Manin observed that ‘if a certain form of discretionary power is required by present circumstances, it is rational for candidates to put forth their personal qualities and aptitude for making good decisions rather than to tie their hands by specific promises. Voters too know that the government must deal with unpredictable events. From their point of view, then, the personal trust that the candidate inspires is a more adequate basis of selection than the evaluation of plans for future actions’.

⁴³ See M.E. Lanzone, *The “Post-Modern” Populism in Italy: The Case of the Five Stars Movement*, cit. at 7, 58. With respect to the impact of media on the

background leads us to wonder whether the absence of a comprehensive legal framework applicable to political parties may have had an impact. Currently, only a limited set of obligations apply to political parties. One of the most important pieces of legislation relates to public financing and has been subject to controversial changes over the past years⁴⁴.

In addition to the above, party switching is a very common practice in Italy, facilitated by the attitude to compromise parties' political views. It is often associated with corruption, as some resounding scandals have proven⁴⁵. But generally, voters actually view this practice as a betrayal, reflecting the absence of responsibility of any MPs towards them. However, since MPs cannot be subject to a binding mandate pursuant to Article 67, any possible measure to prevent party switching would likely be unconstitutional.

As I will clarify below, the advent of Five Star Movement has further increased the distrust between voters and traditional parties. This newcomer, indeed, forced the moderate right-wing and left-wing parties (at least, some of them) to compromise their views and seek an agreement after the 2013 general election to form a coalition government that most likely both the left-wing and right-wing voters would not have supported *a priori*. It seems that Italy is back to the 'age of compromise,' a very distinguishing feature of the 'First Republic,' where the degree of fragmentation among parties was high (notwithstanding the dominant position of the *Democrazia Cristiana*) and a proportionate electoral system guaranteed fair representation in the Parliament for all the parties. Paradoxically enough, this 'new alliance' between the moderate left-wing and right-wing parties after the general election held in 2013 was facilitated by the success of the Five Star Movement and

relationship between voters and political leaders, see (in Italian) G. Sartori, *Homo videns* (2000).

⁴⁴ See A. De Petris, *Is it all about money? The Legal Framework of Party Competition in Italy*, in A. De Petris, T. Poguntke (eds), *Anti-party parties in Germany and Italy*, cit. at 33, 79–106.

⁴⁵ Among others, in 2013, Silvio Berlusconi was accused of having bribed Senator De Gregorio to change sides and support his government in 2006. In 2015, the Court of Naples sentenced Berlusconi for three years' imprisonment. In the appeal proceedings, Berlusconi was eventually acquitted since the charge was time-barred.

its refusal to enter into a coalition with the *Partito Democratico*. Furthermore, in the months preceding the 2018 general election the alliance in a post-election coalition of the left-wing and right-wing parties was silently, but widely endorsed as the most likely scenario to defeat the Five Star Movement. This factor has probably discouraged voters from supporting the parties that were likely to form such coalition, namely the Democratic Party and Berlusconi's Forward Italy. It is not by coincidence that, on one hand, the Democratic Party got only 18% of the vote and, on the other one, Forward Italy was unexpectedly surpassed by the League in the center-right coalition. Also, both parties approached the election with no clear leadership, in a 'low-profile' mode that raised some suspect on the actual plans for the post-election scenario.

Another important factor that broadened the gap between the people and parties and thus, indirectly supported the rise of the Five Star Movement is the electoral legislation.

In 2005, a very weak and controversial electoral law came into force in Italy.

Two aspects were very challenging in particular.

On the one hand, the winning coalition was given at least 55% of the seats in the Chamber of Deputies in accordance with the majority premium. However, the winning coalition was not required to reach any specific threshold of votes to become entitled to the majority premium.

On the other hand, while casting their vote, the voters were not given the opportunity to express their preference for a candidate. Unlike the former electoral legislation, the candidates were chosen internally by the parties and included in large and closed lists. This element was also said to pave the way to corruption, on the assumption that the most powerful politicians were facilitated to retain their seats. Regardless of this possible downside, depriving voters of their expectation to express preferences for candidates has further weakened the relationship between people and parties. This mechanism created a deep dissatisfaction amongst voters, even though the assumption that expressing preferences is the best mechanism to match voters' expectations probably needs to be revisited. This law was labeled as a loophole for politicians to escape from facing their responsibilities towards the voters.

At the beginning of 2014, the law was eventually found unconstitutional by the Italian Constitutional Court⁴⁶. Moreover, in the aftermath of this landmark decision, the legitimacy of the election of MPs was questioned, most notably by the Five Star Movement (at least, as far as the MPs who had been awarded a seat by virtue of the ‘majority premium’ being declared unconstitutional was concerned). Some politicians, with the support of certain constitutional law scholars, even called for the dissolution of the Parliament⁴⁷.

Finally, an element that may have influenced the growth of the Five Star Movement, which probably will strengthen its position as an anti-establishment party over the next few years, relates to the concrete functioning of the Italian form of government. The Italian Constitution does not provide for a direct election of the prime minister, nor does it the electoral law. As a matter of fact, in Italy, the President of the Republic normally appoints the leader of the winning coalition as the prime minister after the general election. In a system where political parties are organized according to a bipolar scheme, indeed, the prospective prime ministers are clear to the voters when elections take place, as they are reasonably confident that the leader of the winning coalition will be appointed. This is a distinguishing feature of the majoritarian parliamentary system that became the dominant scheme in Italy after the outbreak of the ‘Tangentopoli’ scandal and the end of the ‘First Republic’ at the beginning of 1990s. However, some circumstances radically changed this scenario. On 16 November 2011, the Monti Cabinet – an Experts’ Cabinet – was formed with the purpose of leading Italy out of the overwhelming economic crisis. The Cabinet was headed by Professor Mario Monti, whom the President of the Republic appointed lifetime senator only few days before⁴⁸, and replaced the Berlusconi IV Cabinet. The Monti Cabinet was supported by majority of the

⁴⁶ Italian Constitutional Court, judgment no. 1/2014. See E. Longo, A. Pin, *Judicial Review, Election Law, and Proportionality*, 6(1) *Notre Dame J. Int’l & Comp. L.* 101-118 (2016).

⁴⁷ See (in Italian) A. Pace, *I limiti di un Parlamento delegittimato*, Osservatorio costituzionale, March 2014.

⁴⁸ Please note that the Constitution does not require the prime minister being a member of the Parliament to be appointed.

political forces (including the *Partito Democratico* and *Il Popolo della Libertà*), while the sole Northern League withheld its support from Professor Monti. The adoption of a package of emergency austerity measures paved the way for Five Star Movement (not yet sitting in the Parliament) to strongly challenge the Monti Cabinet just a few months later, when the electoral campaign began. Then, after the 2013 elections, the *Partito Democratico* and *Il Popolo della Libertà* were forced to form a new 'grand coalition' to support a cabinet headed by Enrico Letta (*Partito Democratico*). This scenario was the consequence of the Five Star Movement's refusal to support Pierluigi Bersani, leader of the left-wing coalition that 'formally' won the elections but was unable to obtain majority of the seats in both the chambers. One year later, as a consequence of the *Partito Democratico*'s internal withdrawal of confidence, the Letta Cabinet was replaced with a cabinet headed by Mr. Matteo Renzi, who at the time was serving as mayor of Florence. Then, Renzi resigned on 4 December 2016, after the failure of the constitutional referendum⁴⁹ that his government had drafted firsthand and supported⁵⁰. Paolo Gentiloni, a former minister of the Renzi Cabinet, was eventually appointed prime minister.

⁴⁹ In more detail, see E. Stradella, *Italy after the Constitutional Referendum: Legal and Political Scenarios, from the Public Debate to the Electoral Question*, Italian L.J., Special Issue 61-84 (2017); P. Blokker, "Vote Yes for a Safe Italy" or "Vote No to Defend the Constitution": *Italian Constitutional Politics between Majoritarianism and Civil Resistance*, VerfBlog, 2016/7/27, at: <https://verfassungsblog.de/italy-constitution-referendum-renzi-blokker/>; C. Joerges, *After the Italian Referendum*, VerfBlog, 2016/12/09, at: <https://verfassungsblog.de/after-the-italian-referendum/>; F. Clementi, M. Steinbeis, *Italy before the Constitutional Referendum: "I do not see any Armageddon Scenario"*, VerfBlog, 2016/12/02, at: <https://verfassungsblog.de/italy-before-the-constitutional-referendum-i-do-not-see-any-armageddon-scenario/>; M. Goldoni, *Italian Constitutional Referendum: Voting for Structural Reform or Constitutional Transformation?*, VerfBlog, 2016/8/11, at: <https://verfassungsblog.de/italian-constitutional-referendum-voting-goldoni/>. See also O. Pollicino, M. Bassini, *Nothing left to do but vote – The (almost) untold story of the Italian constitutional reform and the aftermath of the referendum*, VerfBlog, 2016/12/15, at: <https://verfassungsblog.de/nothing-left-to-do-but-vote-the-almost-untold-story-of-the-italian-constitutional-reform-and-the-aftermath-of-the-referendum/>.

⁵⁰ On the merits of the failed 'Renzi-Boschi constitutional reform' see generally the Italian Law Journal Special Issue 2017, and in particular: G. Romeo, *The Italian Constitutional Reform of 2016: An 'Exercise' of Change at the Crossroad*

On the basis of this scenario, the Five Star Movement often claims that voters have been deprived of their say in respect of the choice of the prime minister (a quite bizarre claim, in light of the recent appointment of Giuseppe Conte, an independent that had not even run for election). From a constitutional point of view, this claim has no grounds, since the Constitution does not provide for the direct election of the prime minister. In fact, the choice of the government depends on the existence of an agreement among the different political forces. Yet, it is true that between 2011 and 2017, the lack of stability – a very distinguishing feature of the Italian form of government – led to the rapid succession of a number of cabinets headed by prime ministers who were not even leaders of the competing coalitions at the general election.

The Five Star Movement's claim that voters have no longer say in the choice of the government is radically groundless; indeed, they never had say, since the direct election of the prime minister had never existed in Italy. However, it is true that the gap between the government and voters is growing, and the inability of parties to support longstanding governments has further increased the distrust.

These and other factors allowed the Five Star Movement to capture the frustration that voters were feeling towards incumbent governments and parties. Notwithstanding their relevant political agenda lacking clarity – being driven mainly by Grillo's personal opinions – the Five Star Movement became an outlet for political discussion and expression of protest. The target of the protest conveyed by the Five Star Movement, among the others, was political establishment. The latter includes similar movements like the *Lega Nord* that were born in opposition to the old parties of the First Republic as anti-establishment entities. In order to mark their distance from the target of the protest, the Five

between Constitutional Maintenance and Innovation, Italian L.J, Special Issue 31-48 (2017); G. Delledonne, G. Martinico, *Yes or No? Mapping the Italian Academic Debate on the Constitutional Reform*, Italian L.J, Special Issue 49-60 (2017); B. Caravita di Toritto, *The Constitutional Reform, between a Lost Opportunity and a Negative Outlook*, Italian L.J, Special Issue 85-90 (2017). See generally P. Blokker, *The Grande Riforma of the Italian constitution: majoritarian versus participatory democracy?*, 9(2) *Contemp. Italian Pol.* 124-141 (2017); Id., *Constitutional Paradigms: The Italian 1948 Constitution between Conservation and Reform*, in Id. (ed), *Constitutional Acceleration within the European Union and Beyond* (2017).

Star Movement regards itself as a non-party and questions the foundations of representative democracy by promoting a direct and participatory democracy.

I will develop now a *pars destruens* and a *pars construens*. In the *pars destruens*, I will argue that the model of direct democracy of the Five Star Movement is hard to reconcile with the Constitution and would most likely fail. In the *pars construens*, in light of the aforementioned factors that led to the new populist surge in Italy, I will question whether some remedies can be taken with a view to marginalize the role of populist movements by revitalizing representative democracy and the traditional parties.

5. *Pars destruens* - Some critical remarks on the Five Star Movement

The model of political representation proposed by the Five Star Movement has been described as a hybrid between direct democracy and participatory democracy⁵¹.

Actually, different aspects in the structure and functioning of the Movement reflect these underlying principles - the possibility of a certain number of voters to require introducing a bill to the Parliament; the extensive use of online consultations both for the selection of candidates and for debating the approval or repeal of bills (or again, for deciding whether an MP must be excluded from the Movement); and the direct involvement of the constituents in a range of activities.

If one places these developments against the background of the decline of political parties, increasingly depicted as closed oligarchies, they look promising in respect of the reduction of the divide between citizens and political actors.

However, far from entering into the merits of the controversial results of the Five Star Movement from a political standpoint, the impact of these novelties needs to be revisited.

In particular, more than the specific forms of direct and participatory democracy, it is the general attitude of the Five Star

⁵¹ E. Falletti, *Direct democracy and the prohibition of the binding mandate: The Italian debate*, cit. at 33, 5.

Movement toward the representative system that appears unlikely to be reconciled with the constitutional framework.

In the view of the Movement, political parties would no longer act as the ‘center’ where different views are compromised, and the will of the people is ‘filtered.’ The exercise of representation is supposed to be emancipated from the intermediation of political parties, whose representative attitude is weakened because of the Internet’s potential. New media, in fact, allow citizens to ‘speak aloud,’ participating in the political process without any filter or intermediary⁵².

I feel that this construction of the relationship between the use of media and the lack of parties’ intermediation is too simplistic. When it comes to debating the state of health of political representation, a fully disenchanting view is indeed necessary.

Norberto Bobbio, one of the most enlightened authors, wrote in 1994 that the claim to realize a ‘computerocracy,’ allowing a direct democracy, was purely childish⁵³. This scenario would have brought an excess of democracy – an even more dangerous option.

The rationale behind the Five Star Movement is that MPs are merely spokesmen while the determination of political stances rests in the hands of voters, who have the power to bind the MPs’ actions in Parliament. As such, the MPs are subject to a binding mandate, in fair contrast with the Constitution. More recently, criticism has been expressed⁵⁴ with respect to the code of conduct adopted by the Five Star Movement that applies to the respective Members of the European Parliament (MEPs). The code expressly provides voters with the power to recall a member of the European Parliament if a ‘serious infringement’ occurs⁵⁵.

⁵² See, among others, M. Orofino, *The web 2.0 and its impact on relations between citizens and political representatives*, MediaLaws, 17 November 2017, at www.medialaws.eu.

⁵³ See (in Italian) N. Bobbio, *Il futuro della democrazia* (1984).

⁵⁴ See (in Italian) G. Grasso, *Mandato imperativo e mandato di partito: il caso del MoVimento 5 Stelle*, 2 Oss. cost. (2017).

⁵⁵ The recall of the MEP can be requested, in case of serious infringement, by at least 500 registered members of the Five Star Movement residing in the electoral district where the MEP was elected. Alternatively, a proposal of recall can, in

Furthermore, it establishes that a penalty of 250,000.00 Euros must be paid to the Five Star Movement in case the concerned member of the Parliament refuses to resign.

These internal rules are definitely incompatible with the prohibition of binding mandate. Apart from Article 67 of the Italian Constitution (that would not be enforceable in this specific case), both the Statute for Members of the European Parliament and the Rules of Procedure of the European Parliament do prohibit MEPs to receive a binding mandate or be bound by any instructions⁵⁶. Then, in case an MEP failed to resign after having committed a 'serious infringement' of the code of conduct, the obligation to pay a fine would be most likely unenforceable.

A very similar provision applies to the MPs who belong to the Five Star Movement Parliamentary Group in the Chamber of Deputies and Senate of the Republic. Article 21, para. 5, of the relevant statute approved on 27 March 2018, in fact, provides that 'Any MP who leaves the parliamentary group because of either his/her exclusion or voluntary withdrawal or resignation based on political disagreement shall pay a fine amounting to Euro 100,000.00 to the Five Star Movement by ten days'. Also the wording of the 'contract' between the Five Star Movement and the League encapsulates suggests a normative claim to make binding the political mandate on MPs with a view to contrasting party-switching⁵⁷. This claim was common to many documents with no legal effects, most notably codes of ethics and codes of conduct⁵⁸

any case, be approved with the vote of majority of the registered members of the Five Stars residing in the electoral college where the MEP was elected.

⁵⁶ Rule 2 reads as follows: '*Members of the European Parliament shall exercise their mandate independently. They shall not be bound by any instructions and shall not receive a binding mandate.*'

⁵⁷ See p. 35 of the 'contract' under para. 20.

⁵⁸ See (in Italian) F. Scuto, *I pericoli derivanti da uno svuotamento dell'art. 67 Cost. unito ad un "irrigidimento" dell'art. 49 Cost. Alcune considerazioni a partire dalla vicenda dello Statuto del Gruppo parlamentare "Movimento 5 Stelle"*, *Federalismi.it*, 13 June 2018, 3-5. The Author notes that codes of ethics and codes of conduct aim at ensuring the respect of Article 54 of the Constitution, requiring citizens to whom public functions are entrusted to fulfill the same with 'discipline and honor', in addition to a general duty of loyalty to the Republic. Then, the adoption of said codes is up to the parties in the exercise of the organizational autonomy that they enjoy pursuant to Article 18 and Article 49 of the Constitution. These rules of conduct may have the effect of preventing

applying to Five Star Movement candidates and activists; now, it is enshrined to the statute of the parliamentary group, which is supposed to have also legal effects⁵⁹.

Notwithstanding the Five Star Movement calls for the repeal of Article 67 of the Constitution, the prohibition of binding mandate does make sense⁶⁰ still as a cornerstone⁶¹ of representative democracy⁶².

members of a given party to run for election or other party offices but cannot in any case determine restrictions that are unconstitutional because either they contrast with the prohibition on binding mandate pursuant to Article 67 of the Constitution or are not compatible with the democratic standard for internal organization required by Article 49 thereof.

⁵⁹ The insertion of this clause into the statute of the Five Star Movement parliamentary group has given rise to a broad debate among constitutional law scholars on the nature of the clause and the legal remedies to challenge the imposition of the fine. See in particular R. Di Maria, *Una "clausola vessatoria" in bilico fra la democrazia rappresentativa e la tutela giurisdizionale dei diritti*, *Federalismi.it*, 13 June 2018, 4-8; S. Curreri, *Costituzione, regolamenti parlamentari e statuti dei gruppi politici: un rapporto da ripensare*, *Federalismi.it*, 13 June 2018; A. Cerri, *Osservazioni sulla libertà del mandato parlamentare*, *Federalismi.it*, 13 June 2018; C. Martinelli, *Libero mandato e rappresentanza nazionale come fondamenti della modernità costituzionale*, *Federalismi.it*, 13 June 2018; see also P. Marsocci, *Lo status dei parlamentari osservato con la lente della disciplina interna dei gruppi. Gli argini (necessari) a difesa dell'art. 67*, *Federalismi.it*, 13 June 2018.

⁶⁰ According to a different interpretation (articulated by G. Grasso, *Qualche riflessione su statuti e regolamenti dei Gruppi parlamentari, tra articolo 49 e articolo 67 della Costituzione*, *Federalismi.it*, 13 June 2018), Article 67 of the Constitution does guarantee the free exercise of the mandate by MPs, but subject to the condition that such exercise is compatible with the Constitution, most notably with the duty of loyalty to the Constitution pursuant to Article 54. To a certain degree, in the view of Grasso, Article 21, para. 5, of the Statue of the Five Star Movement parliamentary group may play a role in securing MPs' accountability by ensuring that MPs act in accordance with a general political line (without prejudice to political dissent) and avoiding party-switching. Without prejudice to the above, the introduction of a penalty is considered in any case illegal.

⁶¹ See among others (in Italian) C. Pinelli, *Libertà di mandato dei parlamentari e rimedi contro il transfughismo*, *Federalismi.it*, 13 June 2018; G. Demuro, *Il diritto individuale al libero mandato parlamentare*, *Federalismi.it*, 13 June 2018; A. Ciancio, *Disciplina di gruppo e tutela del parlamentare dissenziente*, *Federalismi.it*, 13 June 2018.

⁶² Some authors, however, argue that introducing some elements of direct democracy could be the sound remedy to revitalize representative democracy: see (in Italian) M. Ainis, *Come salvare il Parlamento*, *Repubblica*, 28 April 2017.

The Italian experience, moreover, constitutes a litmus test of some difficulties that are related to the implementation of mechanisms of direct and participatory democracy⁶³.

First, these mechanisms have failed to convey a significant participation of voters in the political decision-making process. When the Five Star Movement launched (apparently) open consultations in order to give the floor to their constituents (e.g. on the selection of candidates or on the decision to exclude or not certain members from the Movement), just a very limited number of voters actually took part in the voting procedures. Were a political entity bound to bring to the Parliament the views that only a few voters had contributed to form, the content of the relevant political decision would be, by definition, non-democratic. In such a scenario, the promise of an actual representation of the will of people through disintermediation from political parties would be an empty one.

Additionally, since all the relevant decisions are taken on the basis of consultations held on a website, in order for such a model of direct and participatory democracy to work, access to the Internet platform should be universal (i.e. granted to the citizens of all generations and all areas of the country). The digital divide, however, is still a serious problem in Italy, like in Europe and in the US.

Finally, *quis custodiet ipsos custodes?* Examining the Five Star Movement, most of their relevant resolutions are not adopted by the voters, rather by a restricted group of individuals who determine the political line without any legitimacy. This leads to a general lack of transparency that affects the credibility of the Five Star Movement vis-à-vis the citizens. Furthermore, who guarantees that the outcome of the consultations carried out on the blog is correct and not subject to any alteration or manipulation?

The Five Star Movement, then, cannot escape reality and should confront the existing limits of the project of reaching a direct and participatory democracy through a 'non-party'.

⁶³ See also C. Sbailò, *Presidenzialismo contro populismo: col mandato imperativo si dissolve la democrazia costituzionale, ma non basta dire "no"*, *Federalismi.it*, 13 June 2018.

In this respect, some courts have handed down interesting judgments that have lend doubts about the compatibility of the Five Star Movement with the legal order of certain internal mechanisms. A first decision was handed down in July 2016 by the Court of Naples⁶⁴. The lawsuit originated from the exclusion of some members from the Movement. The plaintiffs were accused of having infringed the rules of the Movement (named '*non-statuto*,' 'non-statute,' with a view to emphasizing difference from the traditional parties) for having joined a Facebook secret group, facilitating the exchange of various political views. The exclusion from the Five Star Movement was communicated to the plaintiffs via email by an ill-defined 'Staff of Beppe Grillo,' a body that had no grounds in the (non)statute. As a consequence of the exclusion, the plaintiffs could not take part (in their capacity both as voters and as candidates) in the primaries launched on the website for the 2016 municipal elections. The Court of Naples suspended the exclusion and found that notwithstanding the choice of the name and organizational structure, the Five Star Movement does amount to a political party whose members enjoy freedom of political association. Accordingly, membership to the Five Star Movement is governed by the same rules provided by the Italian Civil Code for associations. Pursuant to the relevant provisions of the Civil Code, measures such as exclusion from an association may be taken upon a duly approved resolution of the assembly, unless otherwise provided by a statute of the association⁶⁵. The very interesting point in the decision of the Court lies with the acknowledgment that even the Five Star Movement falls within the category of political parties and is accordingly subject to the (few) relevant statutory provisions that are applicable to the same.

Another remarkable judgment was delivered in April 2017, prior to the municipal elections in Genoa⁶⁶. The local court

⁶⁴ Court of Naples, order of 14 July 2016, affirmed by Court of Naples, 18 April 2018, no. 3773.

⁶⁵ Precisely, the Five Star Movement argued that the power to exclude members from the association was stipulated in the Regulation published on the blog of Beppe Grillo. However, the Court of Naples noted that such a Regulation may not overrule the binding statutory provisions applying to private associations, unless a specific amendment to the statute of the association is approved to introduce such a power of exclusion.

⁶⁶ Court of Genoa, order of 10 April 2017.

suspended the resolution by which Beppe Grillo, in his capacity as 'guarantor' of the Movement, had invalidated the results of the primary elections held on the website, won by the list headed by Ms. Marika Cassimatis, in order to replace her with another candidate. The Court noted that the power to exclude some candidates granted to the guarantor was limited by the (non)statute to special circumstances and did not amount to a generic veto power (or the 'last say') by the leader of the Movement. Also in this case, the Court found that the adoption of this type of resolutions is regulated by the relevant provisions of the Civil Code, unless otherwise established by the (non)statute. Not even the 'ratification' of the exclusion of Ms. Cassimatis through an online vote among the members of the Movement was found to constitute a sound basis to remedy the infringement of the statute and keep the resolution immune from any possible claim.

6. *Pars construens* - Making political parties democratic again?

As the recent events show, populism has also flourished in Italy because of the deep crisis of the traditional political parties. Against this background, the Five Star Movement captured the sense of frustration felt by voters and channeled it into a critique of the model of representative democracy. I have outlined some factors that had an impact on the rise of the Movement from a constitutional-law standpoint. Some of these elements (e.g. the electoral system) directly relate to the form of government, whereas others (e.g. the advent of personalist parties) refer to how the form of government actually works. Both types of factors show that while anti-establishment and anti-party parties are not *per se* incompatible with the Constitution, there is nevertheless room to control the spread of populism by reinforcing representative democracy. Since the Constitution places no limits (except for reconstitution of the Fascist party) on the freedom of political association, some measures may be necessary, not to reject populism as such, but to strengthen the role of political parties and reduce the gap between them and the people. Evidently, the existing alternatives to representative democracy, such as the Five Star Movement model of direct and participatory

democracy, may prove unsatisfactory and even raise constitutional law issues.

But how is it possible to reverse the trend of distrust of the mainstream political parties?

First and foremost, the approval of an electoral law to guarantee political stability was essential before the general election of 2018. After the Italian Constitutional Court struck down the electoral law in 2014, a new law named 'Italicum' was passed in 2015. However, on 9 February 2017, the Constitutional Court ruled that some crucial provisions of the Italicum Law were unconstitutional⁶⁷. But this decision turned out to be even more disruptive in light of the failure of the constitutional referendum held, meanwhile, in December 2016⁶⁸. In fact, the scope of the Italicum Law was limited to the election of members of the Chamber of Deputies, as the Senate of the Republic was supposed to be reformed and converted to an assembly composed of representatives of the Regions and Municipalities who were not elected by voters⁶⁹. Yet, the constitutional referendum failed and the election to the chambers of the Parliament was governed by two sets of completely different rules⁷⁰ - an almost insurmountable obstacle to political stability - until the approval,

⁶⁷ Italian Constitutional Court, judgment no. 35/2017. See C. Caruso, M. Goldoni, *Halving the "Italicum": The Italian Constitutional Court and the Reform of the Electoral System*, *VerfBlog*, 2017/2/28, at: <http://verfassungsblog.de/halving-the-italicum-the-italian-constitutional-court-and-the-reform-of-the-electoral-system>; G. Delledonne, G. Boggero, *The Italian Constitutional Court Rules on Electoral System*, *Int'l J. Const. L. Blog*, 8 February 2017, at: <http://www.iconnectblog.com/2017/02/the-italian-constitutional-court-rules-on-electoral-system>.

⁶⁸ D. Schefold, *Constitutional Reform and Constitutional Unity. Reflections on the Constitutional Referendum of 4 December 2016 and on the Judgment of the Constitutional Court no 35/2017*, *Italian L.J.*, Special Issue 147-156 (2017).

⁶⁹ The Five Star Movement campaigned against the reform focusing particularly on this profile, as the constitutional reform was supposed to deprive voters of the power to elect senators by replacing them with an assembly of 100 representatives of local authorities nominated by regional councils and municipalities.

⁷⁰ Namely, by the Italicum law as amended by the judgment of the Constitutional Court no. 35/2017 as to the Chamber of Deputies and by the so called 'Consultellum,' i.e. the electoral law of 2005 as amended by the judgment of the Constitutional Court no. 1/2014 as to the Senate of the Republic.

on 3 November 2017, of a new law named 'Rosatellum'. This law was estimated to make it difficult for Five Star Movement to win the general election of 2018, by allocating one third of the seats via a 'first-past-the-post' system based on single-member electoral districts and two third thereof proportionally without any chance for voters to pick their candidates. Contrary to all expectations, the Five Star Movement won most of the seats, especially in single-member electoral districts.

So, in the age of the crisis of representative democracy, giving voters the power to indicate their preference among candidates seems a sound way to reduce the gap between parties and citizens. Despite the existence of a pressing need to bridge this divide, the Parliament has taken another road.

A second proposal aims at introducing legislation regulating the sole aspect of functioning of political parties that reflect on their representative functions. The (limited) legal framework applying to political parties in Italy mainly concerns financing of the same⁷¹. Italian Parliament passed a few provisions first in 2012⁷² and then in 2014⁷³ with a view to ensuring 'transparency and democracy of political parties' in the context of the reform of party funding⁷⁴. These provisions turned out to have a limited impact⁷⁵ as they merely introduce formal requirements concerning the content of the statutes of political parties. Respect of these requirements is a prerequisite for parties to be eligible for

⁷¹ See (in Italian) F. Biondi, *Il finanziamento pubblico dei partiti politici. Profili costituzionali* (2012).

⁷² Law 6 July 2012, no. 96 ('Provisions governing the reduction of public financing of political parties and movements and measures to ensure transparency and accountability').

⁷³ See Law 21 February 2014, no. 13 ('Passing into law Law-Decree 28 December 2013, no. 149, repealing public financing of political parties, regulating parties' transparency and democracy and governing voluntary and indirect contribution to political parties').

⁷⁴ On the 'changing landscape of structure and financing' of political parties see M.R. Allegri, M. Diletti, P. Marsocci, *Political Parties and Political Foundations in Italy* (2018).

⁷⁵ See (in Italian) R. Calvano, *La democrazia interna, il libero mandato parlamentare e il dottor Stranamore*, *Federalismi.it*, 20 June 2018, 7-9; F. Scuto, *La democrazia interna dei partiti: profili costituzionali di una transizione* (2018); Id. *Democrazia rappresentativa e partiti politici: la rilevanza dell'organizzazione interna ed il suo impatto sulla rappresentanza politica*, *Federalismi.it*, 2 October 2017.

indirect public contribution. First, Article 5 of Law no. 96/2012 requires that the statutes of political parties must be compatible ‘with democratic principles in the internal organization, most notably with regard to the selection of candidates, the respect of internal minorities and the protection of the rights of party members’. Article 3 of Law no. 13/2014, in turn (included in a specific section on ‘Internal democracy, accountability and transparency’), provides a comprehensive description of the content of party statutes, including: rights and duties of party members; modalities of participation in the party’s political activities; criteria to ensure the representation of minorities in non-executive bodies; disciplinary measures applicable to party members; criteria for the selection of candidates running for European, general and local elections. In light of this limited legal background, the implementation of the democratic principle enshrined to Article 49 of the Constitution seems to be only on the paper. As noted by some scholars⁷⁶, the Five Star Movement could easily circumvent the application of these requirements, by simply avoiding applying for public indirect contribution.

In the age of the crisis of political parties, where there is an increasing use – amongst others – of primary elections, the relationship between citizens and parties could probably benefit from the approval of a specific (and long-awaited)⁷⁷ piece of legislation on political parties to ensure more directly and effectively the respect of the democratic principle⁷⁸. As suggested by some scholars, the content of a possible law regulating political parties should be as minimal as possible, in order not to undermine the freedom that is guaranteed by Article 49 of the Constitution. But the specific mission of these kinds of association

⁷⁶ See again R. Calvano, *La democrazia interna, il libero mandato parlamentare e il dottor Stranamore*, cit. at 75, 8-9.

⁷⁷ Time is probably ripe for a law on political parties, to answer the question posed by L. Elia, *A quanto una legge sui partiti?*, in S. Merlini (ed.), *La democrazia dei partiti e la democrazia nei partiti* 51-58 (2009) (in Italian).

⁷⁸ See G. Brunelli, *Partiti politici e dimensione costituzionale della libertà associativa*, cit. at 40; A. Lanzafame, *Sui livelli essenziali di democrazia nei partiti*, cit. at 40. See also (in Italian) G. Amato, *Nota su una legge sui partiti in attuazione dell’art. 49 della Costituzione*, *Rass. Parl.* 1-13 (2012). See also (in Italian) A. Barbera, *La democrazia “dei” e “nei” partiti, tra rappresentanza e governabilità*, in S. Merlini (ed.), *La democrazia dei partiti e la democrazia nei partiti*, cit. at 77, 231–252.

may justify (if not require) some form of regulation with a view to making political parties more democratic. If more internal-party democracy is secured, traditional political parties will be able to compete more with the only apparently democratic model of the new populist movements.

Now, a question that may lead to speculating on other possible remedies: Is there room for any form of accountability of the MPs that does not challenge the prohibition of binding mandate? Article 67 of the Italian Constitution is a cornerstone of representative democracy that should not be revisited at all. Yet, I am wondering whether, for instance, an extremely widespread practice of party switching – one of the most serious threats to the stability of governments in Italy – would actually be compatible with the Constitution from a perspective other than that of Article 67. But this is probably a very demanding question.

Finally, it would be wrong to ‘throw the baby out with the bathwater’ and consider the Five Star Movement model as the root of all evils. Indeed, some elements of this model may be implemented to bridge the gap between voters and parties, but only on the assumption that the relevant forms of direct and participatory democracy can complement, but never replace, representative democracy as such.