

# **Popular facets of constitution-making and constitution-amendment powers\***

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## **1. By way of introduction: people as constitutional authority – a never-ending saga.**

In democratic theory, concepts such as *people*, *constitution*, and *constituent power* have been considered and reconsidered. They are notions of modern constitutionalism *par excellence* considering the renewed interest in the issue of constitution-making.<sup>1</sup>

I would start from the premise that constitution-making is a process compelled by the constitution-making power,<sup>2</sup> that is, the *constituent power* – an extraordinary power to form a *constitution* entrenched in the *people*.

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\* Scritto sottoposto a *referee*.

<sup>1</sup> See Edward McWhinney, *Constitution-making: Principles, Process, Practice* (University of Toronto Press, Toronto, 1981), 27-38; Laurence H. Tribe and Thomas K. Landry, "Reflection on Constitution-Making", 8 *Am. U.J. Int'l L. & Pol'y* (1993), 627-646; Jon Elster, "Forces and Mechanisms in the Constitution-Making Process", 45 *Duke L.J.* (1995), 364-396; Kostas Chryssogonos, "Popular Involvement in Constitution-Making", 20(4) *Revue Européenne de Droit Public* (2008), 1299-1316; Tom Ginsburg, Zachary Elkins, and Justin Blount, "Does the process of constitution-making matter?" 5(1) *Ann. Rev. L.&Soc. Sci.* (2009), 201-223; now in Tom Ginsburg, (Ed.) *Comparative Constitutional Design* (Cambridge University Press, New York, 2012), 31-68; Laurel E. Miller, "Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future", in Laurel E. Miller (ed.), *Framing The State in Times of Transition: Case Studies in Constitution Making* (US Institute of Peace Press, Washington, 2010), 601-666; Cheryl Saunders, "Constitution-making in the 21st century", 4 *Int'l Rev. L.* (2012) 1-10; David Landau, "The Importance of Constitution-Making", 89 *Denv. U. L. Rev.* (2012), 611-633; William Parlett, "The Dangers of Popular Constitution-Making", 38 *Brook. J. Int'l L.* (2012), 193-238; Claude Klein and András Sajó, "Constitution-Making: Process and Substance", in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012), 419; Fernando Mendez and Jonathan Wheatley, "Patterns of Constitution-Making Over Time and Space", in Jonathan Wheatley and Fernando Mendez (eds.), *Patterns of Constitutional Design – The Role of Citizens and Elites in Constitution-Making* (Ashgate, Farnham, 2013), 21; Mark Tushnet, "Constitution-Making: An Introduction", 91 *Tex. L. Rev.* (2013), 1983-2013; Jennifer Widner and Xenophon Contiades, "Constitution-writing Process", in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law* (Routledge, New York, 2013), 57; Joel I. Colón-Ríos, "Notes on Democracy and Constitution-Making", 3(5) *Victoria University of Wellington Legal Research Papers* 21 (2013), 21; Tom Ginsburg, "How To Study Constitution-Making: Hirsch, Elster, And The Seventh Inning Problem", 96 *Boston Univ. L.* (2016), 1347-1358.

Despite a revival of attention to these concepts and a puzzling interpretation, it is impossible not to return to the origins and find ties between the past and present constitutionalism. First of all, constituent power was given its most significant early formulation in the eighteenth century revolutions and rested on two conditions: the recognition of the ultimate source of political authority which derives from “the people” and the acceptance of a constitution as a juridical instrument created by them.<sup>3</sup>

Theoretical roots of the constituent power date back to the writings of Emanuel Sieyès. His reasoning is eloquent when he famously stated that «the constituent power can do everything in relationship with the constitutional making. It is not subordinated to a previous constitution. The nation that exercises the greatest, the most important of its power, must be, while carrying this function, free from all constraints, from any from, except the one that it deems better to adopt.»<sup>4</sup> In Sieyès’s famous pamphlet ‘*What is the Third Estate?*’, the *nation* is described as a collective will of the people, is the source of origin of all powers and authority, and its constituent power rests completely unbounded by any legal proceduralism being able to “create” a new regime through the exercises of its will.<sup>5</sup> The exercise of constituent power must be consistent with the idea of “the people giving itself a constitution.”<sup>6</sup>

The modern follower of Sieyès, Carl Schmitt, agrees that in genuine moments of “constitutional creation” the constituent power is “an absolute beginning” – a beginning understood as principle (*αρχή*),<sup>7</sup> and continues alongside a positive constitution.<sup>8</sup> Moreover, for Schmitt, «prior to the establishment of any norm, there is a fundamental political decision by the bearer of the constitution-making power. In a democracy, more specifically, this is a decision by the people.»<sup>9</sup>

It was Sieyès and Schmitt who claimed that the original site of the sovereign power is a normless state of nature and not an intermediate original community. The constituent power is a political will «[sprang] out of a normative nothingness and from

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<sup>2</sup> Jeffrey Seitzer’s translation of Carl Schmitt’s *verfassunggebende Gewalt*. See Carl Schmitt, *Constitutional Theory* (tr. J. Seitzer) (Duke University Press, Durham&London, 2008).

<sup>3</sup> Martin Loughlin, “The Concept of Constituent Power”, 13(2) *Eur. J. Pol. Theory* (2014), 218-237, at 219.

<sup>4</sup> Emmanuel Joseph Sieyes, “Reconnaissance et exposition raisonnée des droits de l’homme et du citoyen”, in François Furet and Ran Halévi (eds.), *Orateurs de la Révolution française. Les Constituants*, vol. I, (Pléiade, Paris, 1989), 1013.

<sup>5</sup> Emmanuel Joseph Sieyès, ‘*What is the Third Estate?*’ [1789], *Political Writings* (Hackett Publishing Company, Inc, 2003), 126.

<sup>6</sup> Joel I Colón-Ríos and Allan C. Hutchinson, “Democracy and Revolution: An Enduring Relationship?”, 89(3) *Denv. U. L. Rev.* (2012), 593-610, at 608.

<sup>7</sup> Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Duncker und Humblot, Berlin, 1993), 21, 23-24.

<sup>8</sup> Duncan Kelly, “Carl Schmitt’s Political Theory of Representation”, 65(1) *Journal of the History of Ideas* (2004), 113-134., at 126.

<sup>9</sup> Carl Schmitt, *op.cit.*, note 2, 140.

a concrete disorder,»<sup>10</sup> thus, cannot be justified by abstract normative arguments.<sup>11</sup> There are three moments of the manifestation of constituent power in relation to the constitution: first, the constituent power is exercised prior to or in the moment of constitutional creation forming the grounds of a constitution; second, once a constitution was created, constituent power persists during its “living” through the elected representatives who act on behalf of the people; third, it exists alongside the constitution as a continuous presence which can be reactivate in any moment through the popular mobilization, which as a revolutionary power, remains inalienable and unlimited.

On contrary, scholars of liberal constitutionalism consider that the constituent power disappears and is exhausted in a new constitutional regime. The procedures that governs the exercise of people’s power are set out in the constitution that only in certain ways can be altered.<sup>12</sup> For liberal thinkers, the “constituent power of the people sets up a framework to regulate ordinary power, and it comes into play only when the existing regime has been dissolved.”<sup>13</sup> According to Georges Burdeau, «the constituent power is not a mechanism of peaceful times but an actor of critical periods.»<sup>14</sup> This dialectic between *creation* and *revolution* has been carefully examined by Negri, who argues, «that the act of suspending far from being defined in negative terms, founds and inheres to the possibility of positivity. The more the first decision shows itself to be negative, the more radically it opens a number of grounding, innovative, linguistic, and constitutional possibilities. With this the constitutive act opens positively.»<sup>15</sup>

*Constituent power* is the certainty of modern *democracy*. These concepts are co-original and coeval,<sup>16</sup> and gave birth to the modern doctrine of *popular sovereignty*. Hence, formulating popular sovereignty as constituent power is to affirm the basic democratic value of self-government, i.e., collective acts of self-legislation and public events of self-alteration.

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<sup>10</sup> Carl Schmitt, *op.cit.*, note 7, 26.

<sup>11</sup> James Muldoon, “Arendt's Revolutionary Constitutionalism: Between Constituent Power and Constitutional Form”, 23(4), *Constellations* (2016), 596-607, at 597.

<sup>12</sup> Marcel David, *La souveraineté du peuple* (PUF, Paris, 1996), 8-12.

<sup>13</sup> John Rawls, “The Idea of Public Reason”, in Id., *Political Liberalism* (Columbia University Press, New York, 1993), 231.

<sup>14</sup> Georges Burdeau, ”Traité de science politique: le statut du pouvoir dans l’état, vol. IV (Librairie générale de droit et de jurisprudence, Paris, 1983), 177.

<sup>15</sup> Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, Minneapolis, 1999), 20.

<sup>16</sup> Ernst-Wolfgang Böckenforde, “Die Verfassungsggebende Gewalt des Volkes-Ein Grenzbegriff des Verfassungsrechts,” *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Frankfurt-am-Main: Suhrkamp, 1991), 11-12; Andrew Arato, “Forms of Constitution Making and Theories of Democracy”, 17 *Cardozo Law Review* (1995), 202-254; Antonio Negri, *op.cit.*, note 15, 1; Martin Loughlin, “Constituent Power,”, in Id., *The Idea of Public Law* (Oxford University Press, Oxford, 2004), 100; Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford University Press, Oxford, 2007), 6.

Today it is generally accepted that the constituent power lies with *the people*. Olivier Beaud asserted clearly: «constituent sovereignty signifies that, in contemporary states, the Sovereign is he who makes the constitution.»<sup>17</sup> This is not the place for discussion on sovereignty understood as “the highest power of command,”<sup>18</sup> but it is important to stress that “the sovereignty”, as constituent power, was systematically overshadowed by the competing doctrine of state sovereignty and only with the rise of democratic regimes, the sovereignty was understood as the power to found, to posit, to constitute, that is, as a constituting power that belongs to the people. The popular constituent power legitimates, from normative point of view, a constitution. Antonio Negri defines the constituent power as «the source of production of constitutional norms – that is, the power to make a constitution and therefore to dictate the fundamental norms that organize the powers of the state. In other words, it is the power to establish a new juridical arrangement, to regulate juridical relationships within a new community.»<sup>19</sup>

The theory of the constituent power denotes an ideal of democratic constitutional making in which the legitimacy of existing practices of constitutional founding is evoked in relation to people's participatory and inclusive method. For instance, the identity of the people as constituent subject turn into the major standard of the assessments of the validity of democratic constitutions and institutional arrangements. According to Schmitt, «it belongs to the essence of democracy that every and all decisions which are taken, are only valid for those who themselves decide.»<sup>20</sup> This theory of democratic legitimacy is correlated to that of democracy deeming a regime in which «the people is the subject of the constituent power and gives to itself its own constitution.»<sup>21</sup> However, “to constitute” identifies the *founding* of a constitutional order and its *constitution* that grants validity on condition of full involvement of its potential addressees. In other words, the addressees of the law become its authors.

The normative content of the constituent sovereign is one of participation and the binding higher law is valid only if the act created complies with the principle of participation and reflects the ‘superhuman general will’ of the ‘supernatural body’.<sup>22</sup> This normative dimension of the constituent power was captured by the liberal constitutional thinker, Carl Friedrich, who though avoided any direct reference to Schmitt, recognized, in a reluctant tone, the intimate link between a theory of democratic legitimization and the notion of the constituent power.<sup>23</sup>

At the center of the modern constitutionalism arose a debate related to the people as ultimate source of legitimate power and the formalized institutions and procedures

<sup>17</sup> Olivier Beaud, *La puissance de l'état* (PUF, Paris, 1994), 208.

<sup>18</sup> Jean Bodin, *On Sovereignty* (tr. Julian Franklin) (Cambridge University Press, Cambridge, 1992), 1

<sup>19</sup> Antonio Negri, *op.cit*, note 15, 2.

<sup>20</sup> Carl Schmitt, *The Crisis of Parliamentary Democracy* (tr. Ellen Kennedy) (MIT Press, Cambridge, 1988), 24

<sup>21</sup> Carl Schmitt, *Verfassungslehre* (Duncker & Humblot, Berlin, 1989), 224.

<sup>22</sup> Hannah Arendt, *On Revolution* (Penguin, London & New York, 1963), 60.

<sup>23</sup> Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Ginn and Company, Boston & New York, 1950), 128.

through which this power should be mediated and exercised.<sup>24</sup> The crucial question regards the nature of the authority those who make a constitution: is the constituent power exhausted in a single constitutive act or remains inexhaustible in some form within the constituted government they institute? There is an ultimate source of legitimate power or an alternative source of authority or a dormant potentiality to invoke in moment of crisis? Obviously, these dilemmas involve scholars all over the world without find a pure answer as long as one could choose pros or cons answers to all these questions due to the timelessness of constitution-making.

Firstly, as the constituent power creates a constitution as an expression of national unity, “the power of the people” remains the ultimate source of state power. The idea of constituent power «suggests a collective subject – be it a Nation, demos, public or people – which has some originary power to give birth to the constitutional settlement and which stands transcendental and normatively pre-eminent over it.»<sup>25</sup> However, on the other side, constitutions created for unifying a heterogeneous collectivity – i.e., a nation – might be understood as tools for the foundation of a *demos*.<sup>26</sup>

As Mark Tushnet observed, «the constituent power sometimes is called into being by the very process of constitution-making that presupposes the existence of the constituent power, [...] a *demos* – a people – for whom the constitution is to be a constitution.»<sup>27</sup> For some, the supreme power was vested in the constitution, for others the absolute power remains in the people. Revising the current constitution or drafting another one establishing a new legal order is not subject to any restrictions or constraints of a prior or current fundamental law.

As «constitutions are superior to legislatures, so the people are superior to the constitutions. [...] The consequence is [that] the people may change constitution whenever and however they please. This is a right of which no positive institution can ever deprive them.»<sup>28</sup> It is true that the constituent power was originally conceived as unbounded by previous constitutional rules and procedures<sup>29</sup> but never as absolute,<sup>30</sup> and nowadays, is intrinsically and substantively limited by norms of

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<sup>24</sup> See Martin Loughlin and Neil Walker (eds.), *op.cit.*, note 16.

<sup>25</sup> Damian Chalmers, “Constituent Power and the Pluralist Ethic”, in Martin Loughlin and Neil Walker (eds.), *op.cit.*, note 16, 293-298.

<sup>26</sup> As Duncan Ivison wrote: “Constitution constitutes the People who in turn constitute it”. See Duncan Ivison, “Pluralism and the Hobbesian Logic of Negative Constitutionalism”, 47(1) Pol. Stud. (1999), 83-99, at 84.

<sup>27</sup> Mark Tushnet, *op.cit.*, note 1, 1986.

<sup>28</sup> James Wilson, quoted in James McClellan and M.E. Bradford, *Jonathan Elliot's Debates in the Several State Conventions on the Adoption of the Federal Constitution, II* (James River Press, Richmond, 1989), 432.

<sup>29</sup> Claude Klein, ‘After the Mizrahi Bank Case – The Constituent Power as Seen by the Supreme Court’, 28 Mishpatim (1997), 341, 356; Luigi Corrias, ‘The Legal Theory of the Juridical Coup: Constituent Power Now’, 12(8) German Law Journal (2011), 1553-1572, at 1558-1559; Martin Loughlin and Neil Walker, ‘Introduction’, in Martin Loughlin and Neil Walker (eds.), *op.cit.*, note 16, 1-2.

<sup>30</sup> Yaniv Roznai, “Amendment Power, Constituent Power and Popular Sovereignty: Linking Unamendability and Amendment Procedures”, in Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds.), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, Oxford, 2017), 23-50, at 33-37.

international law, *super-constitutional* principles, and values of modern constitutionalism.<sup>31</sup>

Secondly, constitution-making can occur in nations with established constitutions as well. Every action taken within the institutionalized constitutional framework is an exercise of *constituted power*. In this sense, constituent power is established and manifested by means of elective representatives. In time of ordinary legislation, of ordinary constitutional amendments, and even of constitutional replacements made according to the provisions of the constitution, the constituted government act on behalf of the people. Rarely the people themselves call a constitutional change through a popular initiative. In any case, the constituent power always retains the power to reconstitute the constitution on its own terms set at any time by the constituent power as sovereign. Even if the power to amend the constitution is given to the people, they do not act as sovereign but perform like any other state's body. The people act as sovereign only when they abolish a constitution and only in this context, they return into the "state of nature" where no legitimate authority exists and where constituent power of the people mirrors their natural right.

In the wake of traditional distinction among *original* and *derived* constituent power, Yaniv Roznai distinguishes between *primary* and *secondary* constituent powers,<sup>32</sup> which correspond to *framing* power and *amending* power,<sup>33</sup> that is, the power to establish a constitution and the power to amend it. The people has the *right* to establish a new legal order but has the *authority* to revise what they constitute.<sup>34</sup> Both constitution-making and constitution-amendment powers are *constitutive* because a constituent feature exists in both processes as long as they constitute (institute) new constitutional rules. There is always a relational account among past and present, nothing starts *ex novo*, thus, constitution-making takes many forms. Contrasting Ramaswamy Iyer, even if a constitution is silent, the amendment power is not merely granted to Parliament.<sup>35</sup> Under the existing constitution, even the people may amend it and do only what the constitution permits. This suggests that

<sup>31</sup> Otto Bachof, *Verfassungswidrige Verfassungsnormen?* (Tübingen, Mohr, 1951) nella traduzione di Leonardo Álvarez Álvarez, *¿Normas constitucionales inconstitucionales?* (Editorial Palestra. Lima, 2008), 29-32; Lech Garlicki, Zofia A. Garlicka, "External Review of Constitutional Amendments? International Law as a Norm of Reference", 44(3) *Isr. L. Rev.* (2011), 343-368, at 355; Yaniv Roznai, "The Theory and Practice of 'Supra-constitutional' Limits on Constitutional Amendments", 62(3) *Int'l & Comp. L. Q.* (2013), 557-597; Thomas Franck and Arun K. Thiruvengadam, "International Law and Constitution-Making", 2(2) *Chinese J. Int'l. L.* (2003), 467-518; Markku Suksi, *Bringing in the People: a Comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff, Dordrecht-Boston-London, 1993), 25-26; Mark Tushnet, *op.cit.*, note 1, 1983, 1988.

<sup>32</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendment. The Limits of Constitutional Powers* (Oxford University Press, Oxford, 2017), 120-123.

<sup>33</sup> Claude Klein and András Sajó, *op.cit.*, note 1, 414.

<sup>34</sup> Following Cicero's approach (*De Legibus* 3, 12, 38), Hannah Arendt made the distinction between constitution-making power possessed by the people and thus, "the power resides in the people" and constitution-amendment power as an authority vested in a constitutional organ, which "rests with the Senate". See Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (Penguin Classic, New York, 2006), 91.

<sup>35</sup> Ramaswamy R. Iyer, "Some Constitutional Dilemmas", 41(21) *Economic and Political Weekly* (2006), 2064-2071, at 2065.

the amendment power should be regarded as an intermediate power between the constituent power and the legislative power.

Thirdly, it occurs to distinguish between amendment and replacement power of the people.<sup>36</sup> A conceptual distinction between ‘amendment’ and ‘revision’ pursuant to which different procedures are applied to amend or revise the constitutional text, allow assessing the classical distinction between total and partial revision. Different degrees of rigidity allow to differentiate between formal amendment, as ‘normal revision’ which aims to modify or integrate parts or single provisions of the constitutions, and constitutional revision, as ‘qualified revision’ implemented in order to totally change the constitutional text.<sup>37</sup> The later relates to a total revision through a constitutional pre-ordained procedure that can only take place in the presence of a revolution.<sup>38</sup>

The constitutions can be a consequence of an evolutionary path (*rectius*, a revolution), of a decision of non-revolutionary government, or a product of deliberative decision of the people. Through these three models of revolutionary conception of constitution-making, Hannah Arendt has highlighted the importance of the democratic nature of political processes that precede a constitution’s enactment. She considers that many contemporary constitutions are “imposed” from above and not a result of successful revolution by the people, the limitless power of ‘the people’ to break any constitutional bounds at any time is open to abuse from experts and elites.<sup>39</sup> In time of crisis, or extraordinary moments of a foundation of a new legal order, a “multitude without order” is held together by constituent institutions and thus, the constituent power is articulated through their political acts. Nevertheless, as Antonio Negri has claimed, revolutionary power of the multitude can disrupt constituted boundaries.<sup>40</sup>

These assessments reflects some controversy aspects of constituent power; as sovereign or not, external or internal to a legal order, limited or unlimited power, etc. What is sure is that constituent power is exercised in a legal vacuum.<sup>41</sup>

<sup>36</sup> For a distinction between amendment and replacement power see Mark Tushnet, *op.cit.*, note 1, 2006. See also Richard Albert, “The Structure of Constitutional Amendment Rules”, 49 *Wake Forest L. Rev.* (2014), who distinguishes between amendment and revision.

<sup>37</sup> See Maria P. Viviani Schlein, *Rigidità e flessibilità costituzionale*, in *Studi in onore di Paolo Biscaretti di Ruffia* (Milano: Giuffrè, 1987), Vol. 2, 1361- 1397, at 1376; Salvatore Bonfiglio, “Sulla rigidità delle Costituzioni. Il dibattito italiano e la prospettiva comparata”, 1 *Dir. pubb.* (2015), 105-126, at 109.

<sup>38</sup> See C. Mortati, “Concetto, limiti e procedimento della revisione costituzionale”, 58 *Riv. trim. dir. pubb.* (1952), 29-65; P. Barile, “La revisione della Costituzione”, in Piero Calamandrei and Alessandro Levi (dir.), *Commentario sistematico alla Costituzione italiana*, vol. 2, (Barbera, Firenze, 1950), 465-496, at 472. See also John Locke, *Second Treatise of Government* (Hackett, Indianapolis, 1980), section 226-227.

<sup>39</sup> Hannah Arendt, *On Revolution* (Penguin Classics, 2006), 135-136; Yaniv Rozani, “‘We the People’, ‘Qui, the People’ and the Collective Body: Perceptions of Constituent Power”, in Gary J. Jacobsohn and Miguel Schor (eds.), *Comparative Constitutional Theory* (Edward Elgar, Cheltenham-Northampton, 2018), 295-316, at 299.

<sup>40</sup> Antonio Negri, *op.cit.*, note 15, 333. See also Miguel Vatter, “Legality and Resistance: Arendt and Negri on Constituent Power”, in Timothy S. Murphy and Abdul and Karim Mustapha (eds.), *The Philosophy of Antonio Negri – Revolution in Theory*, Vol.2, (Pluto Press, London, 2007) , 66 – 67.

<sup>41</sup> Paolo Carozza, “Constitutionalism’s Post-Modern Opening”, in Martin Loughlin and Neil Walker (eds.), *op.cit.*, note 1, 69-188, 174.

Popular inclusiveness is «the contemporary mechanism for ensuring that a constitution actually is an exercise of the constituent power,»<sup>42</sup> thus, citizens' participation during moments of *constitution-making* is always legitimated and always reflects the Constitution's democratic legitimacy.<sup>43</sup> Thus, the locus of ultimate source of legitimacy is bottom-up, originating in “the people”<sup>44</sup> and the constitution is an expression of constituent power of the people to make and remake the institutional arrangements through which they are governed.<sup>45</sup> Following Duverger's approach, «[i]t is the constitution that derives its authority from the constituent power and not the constituent power that derives its authority from the constitution.»<sup>46</sup> A nation's constitution receives its normative status from the political will of “the people” to act as a constitutional authority whenever they wish.

## 2. The founding of the *Bel Paese* and the *Italian People*

### 2.1. Tridimensional legitimacy of the Italian republic

The democracy should be understood as *of* the people, *by* the people, *for* the people. In this sense, three dimensions of legitimacy are met within a new constitutional order: legal, referring to the constituent power of the people; republican, related to the popular sovereignty; and democratic, in regards to the popular consent. This section aims at identifying in the Italian legal order three frames, interconnected and inter-reliant, in which this constitutional power is entrenched, and which corresponds at legal, republican, and democratic dimensions.

#### 2.1.1. Legal perspective

The extraordinary power to form a *constitution* is rooted in the *people*. From a legal point of view, a constitution is legitimated if it is the result of popular will, and in their constituent position, the people *themselves* become the author of constitutional rules, institutions, and procedures.

The formal fundamental law is the highest source of authority created by a constituent power, that is, a *people*. Thus, the foundations of the highest law lies outside of it, in an external authority. The constitution emanates «solely from the *nation's will*» – stated Sieyès. For him, “the nation” is a «body of associates [...]】

<sup>42</sup> Mark Tushnet, Advanced Introduction to Comparative Constitutional Law (Edward Elgar, Cheltenham-Northampton, 2014), 24.

<sup>43</sup> See Joel I. Colón-Ríos, “The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform”, 48(2) *Osgoode Hall L.J.* (2010), 199-245, at 213.

<sup>44</sup> Ulrich K. Preuss, “The Exercise of Constituent Power in Central and Eastern Europe”, in Martin Loughlin and Neil Walker (eds.), *op.cit.*, note 24, 211-222, at 211.

<sup>45</sup> Murray Forsyth, “Thomas Hobbes and the Constituent Power of the People”, 29(2) *Pol. Stud.* (1981), 191-203, at 191; Luc J. Wintgens, “Sovereignty and Representation”, 14(3) *Ratio Juris* (2001), 272-280, at 274.

<sup>46</sup> Maurice Duverger, “Contribution à l'étude de la légitimité des gouvernements de fait (à propos du Gouvernement provisoire de la République)”, *Revue de droit public et de la science politique en France et à l'étranger* (1945), 73-100, at 78.

represented by the same *legislature*.»<sup>47</sup> Because of the size of that body of associates, the people exercise their constituent power through their representatives; a representation of popular will which should be kept away from the representation in the ordinary legislation (the *constituted power*), and which should keep the same *extraordinary* characteristics of the *nation* – its independence, sovereignty and boundlessness.

In the wake of this approach, in Italian legal system, the constituent power was delegated to an assembly, which has started the constitution-making process that led to a new constitutional order. The Constituent Assembly, legitimized by the people by means of the so-called “institutional referendum” or “supra-constitutional referendum,”<sup>48</sup> was empowered to draft and adopt a new democratic constitution. On the legal level, the referendum has a fundamental value in the form of the State being the first action of constituent power in the advent of the Italian legal order. Turning the people into the main actor of the constituent proceeding, the referendum represented «the intangible sign of the restoration of the constitutional legality and the beginning of the constituent power’s exercise.»<sup>49</sup>

The new modern constitutions are a circumstantial product of a particular historical context, a result of a specific political decision of the general will that is given jural form as the constituent power.<sup>50</sup> On the one hand, the constituent power’s decision in a certain historical moment over the types and forms of (future) political existence poured into the nature of institutional arrangements of the new state. The constituent power is prior in authority. It is the continuing existence of a political unity that bolsters the authority of the constitution.<sup>51</sup> On the other, the constituent power of the people is prior in time and external to the existing constitutional order. In a democracy, a new constitution is the product of popular will seen as a living force, unlimited by the existing constitution, translated in the Locke’s *right to revolution*.<sup>52</sup>

The historical “rupture from past” that has marked Italy 70 years ago is not the first event, proof of popular sovereignty and republican democracy: yet, in the mid-nineteenth century, following the Mazzini’s political action,<sup>53</sup> the people exercise its authority by means a Constituent Assembly that drafted and adopted a Constitution - the Constitution of Roman Republic. Similar to the current Art. 1 of the Italian Constitution, the Roman sovereignty is an eternal right that resides in the people who are constituted in a democratic republic.<sup>54</sup> The people understood as social, cultural, political, and juridical entity delegated its constituent power to representative

<sup>47</sup> Emmanuel Joseph Sieyès, *op.cit.*, note 5, 97, 134.

<sup>48</sup> Karl Lowenstein, *Political Power and the Governmental Process* (Chicago University Press, Chicago, 1957), 263.

<sup>49</sup> Antonio Baldassare, “Il referendum costituzionale”, 14(2) *Quad. cost.* (1994), 235-260, at 249-250.

<sup>50</sup> Martin Loughlin, *op.cit.*, note 3, 226.

<sup>51</sup> Carl Schmitt, *op.cit.*, note 2, 125.

<sup>52</sup> See Joel I. Colón-Ríos and Allan C. Hutchinson, *op.cit.*, note 6, 599; Gabriel Negretto, “Replacing and Amendment Constitutions: The Logic of Constitutional Change in Latin America”, 46(4) *Law&Soc.y Rev.* (2012), 749-779, at 751.

<sup>53</sup> See Giuseppe Mazzini, *Opere II*, ed. Luigi Salvatorelli, 3a ed. (Rizzoli, Milano, 1967)

by means of a popular consultation. Even if this constitution never entered into force, it is the proof that the constituent power and popular sovereignty as generators of a republican action.<sup>55</sup> Indeed, to proclaim the Republic it takes the vote of the sovereign people - and therefore by direct universal suffrage - that legitimizes a constituent assembly, which is given the mandate to draft and adopt a Constitution that is republican. Such constitutional event would be repeated, certainly with some distinctions, exactly a century later, this time, in a united and lay Italy. This is the pure evidence that democracy degenerates but this does not exclude that it cannot be revived. The forms of democracy change according to historical phases and according to the people involvement in the political life.

The very democratic Italian Constitution as an agreement between citizens, as an association between social forces, as the first true and authentic proof of democracy, was born on June 2, 1946. Without even being able to make use of historical precedents nor of comparative experiences to be emulated, without knowing how to articulate the constitutional order within which to decline rights and freedoms, powers and guarantees, but with the only legal constraint requirement to provide for a President of the Republic in place of a Monarch, the new Constituent Assembly defended itself under the "veil of ignorance."<sup>56</sup> In recalling "the confidence in a future" declared by the Mazzini's action, Mortati highlighted the spiritual value of the constituent awareness of the people, which became constitutional.<sup>57</sup> The constitutional awareness assumes a toolkit of values, principles and norms established in a constitution<sup>58</sup> founded on the citizens' political obligation, which implies the idea of the moral duty of obedience to the state, and the idea of the state aiming at the "common good" of the people, as a principle of freedom. In other words, the constituent powers' will sorts values and relationships balancing command and obedience.<sup>59</sup>

The Mortati's concepts of people and nation are undifferentiated, based on force relationships. In his view, the will of constituent subject must be embodied in a juridical order and must be objectified in a formal constitution as a factual affirmation of the force overturned in a legal power that gives unity to different social

<sup>54</sup> See the text of the Constitution of 1849 in Guglielmo. Negri e Silvano Simoni (eds.), *Le Costituzioni inattuate* (Colombo, Roma, 1990).

<sup>55</sup> Mauro Ferri, "Costituente e Costituzione nella Repubblica romana del 1849", 1 *Diritto e Società* (1989), 1-52.

<sup>56</sup> Tommaso E. Frosini, "Potere costituente e sovranità popolare", Convegno "Costantino Mortati: Potere costituente e limiti alla revisione costituzionale" (Roma, 14 December 2015). On the competences of the Constituent Assembly, see Lucifredi Roberto, *L'Assemblea costituente. Che cosa è. Che cosa dovrà fare* (Giuffrè, Milano, 1945); Giulio Pierangeli, "Il problema centrale della Costituente", 7(5) *La critica politica* (1945), 135-141; Antonio Baldassare, "Sul processo costituente", 35(3-4) *Democrazia e diritto* (1995), 501-589.

<sup>57</sup> See Costantino Mortati, *La costituente. La teoria. La storia. Il problema italiano* (Darsena, Roma, 1945), in AA.VV., *Raccolta di scritti, vol. I: Studi sul potere costituente e sulla riforma costituzionale dello Stato*, (Giuffrè, Milano, 1972), 3-343.

<sup>58</sup> Ernst-Wolfgang Böckenförde, "Il potere costituente del popolo", in Id. (ed. it. Michele Nicoletti e Omar Brino), *Stato, costituzione, democrazia. Studi di teoria della costituzione e di diritto costituzionale* (Giuffrè, Milano, 2006), 114.

<sup>59</sup> Costantino Mortati, *op.cit.*, note 57, 12.

relationships subjected to shared norms. If for some thinkers the *will* aims at the unity of the subject that holds the constituent power, for Mortati, it has a conflictual nature creating political tension in the process of constitutionalisation.<sup>60</sup> The constituent power is a conflictual power that precedes, drives and exceeds constituted power.

Antonio Negri overshadowed the conflictual nature of “the multitude” assessing the absolute impermeability of the constituent and constituted power. He sets the absolute force of constituent power deprived of any legal relationship to any constituted legal form. The reiterative dimension of the ‘event’ – and not in the institutionalized dimension of the ‘form’ – can justify the constituent power deemed as political freedom.<sup>61</sup>

Adopting a relational approach, the paradox of constituent power *vis-à-vis* of the constituted one can be overcome. It is not necessary to assume the constituent power in terms of unity or inclusion of the people preceding a formal constitution or any other institutionalized form; the constituent power is a dialectic tie between the nation self-constituted and the constitutional form through which the people exercise its sovereign authority. The Italian people existed before but they became a nation as a political unity only by means of the institutional referendum. It was the first time when *all* the people were called to elect their constituent representatives and acted as a constituent power to establish the form of the political union recognized as such. In fact, on 2 June 1946, citizens – in their pure capacity by universal suffrage – take responsibility for a dual choice, decisive for the future of the Constitution: they decide the form of the state, and they elect who to entrust with the writing and approval of the new Constitution. Beyond the foundation as a pure act of representation in which the constituent power results entirely absorbed by a constituted power, there was the first contemporary and convergent exercise of direct democracy and representative democracy, which maximizes the principle of popular sovereignty.<sup>62</sup> In this sense, we can grasp constitutional awareness as the exercise of popular sovereignty within the boundaries of a new political regime and constitution; but there is no popular sovereignty without a Republic and there is no Republic without popular sovereignty. Hence, the next section treats the facets of a republic.

### 2.1.2. Republican perspective

From a republican point of view, constituent power underpins of a new state, is the source, origin, and foundation of a new political regime that takes life. It is the constituent power located on the boundaries of legal thoughts that helps to embed the nature of the constitutional form assumed by the political regime. In Italy, subsequently, from the setting of a clear regulation concerning the task entrusted to a representative assembly to perform an institutional choice, it is passed to a *coup d'Etat*<sup>63</sup> and the electoral body was called to choose between Republic and Monarchy.

<sup>60</sup> Filippo del Lucchese, “Machiavelli and constituent power: The revolutionary foundation of modern political thoughts”, 16(1) *Eur. J. Pol. Theory* (2017), 3-23, at 15.

<sup>61</sup> Antonio Negri, *op. cit.*, note 15, 333.

<sup>62</sup> See Tommaso E. Frosini, *Sovranità popolare e costituzionalismo* (Giuffrè, Milano, 1997).

As is known, the referendum of 1946 established the Republic by means of the vote expressed by the people, but the decision to entrust the form of the state to the people was not immediate due to the particular nature of the 'event' that would confirm the supremacy of the people as the foundation of the new democratic order. It was necessary to appeal to the participation of the people at the political choices in a new democratic era advocated in the Old Continent,<sup>64</sup> and to find a real "political alibi"<sup>65</sup> for the effective relationship between the 'real State' and the 'legal State'.<sup>66</sup>

Appealing to a tool of direct democracy in the choice of the form of state – the referendum has conditioned the framers of the Constitution: they had to take into consideration the people as an institutional body and assign them, in the context of a representative system, powers and enclose mechanisms allowing the participation in the future life of the Republic.<sup>67</sup>

"Long live the Republic! Long live Italia!" With these ovations began the first meeting of the Constituent Assembly on 25 June 1946. A formidable task of reconstruction *ab imis* entrusted to the Assembly at a time when the people seek an *ubi consistam* between the fading of parliamentary government and the emergence of a new order in which not only they had found a legal dimension but also the political forces would take shape of constitutional juridical figures.

The republican regime was born because the people desired it and so decided. Given its origin, "it is evident that [the republican form] has been consolidated [and] could not be changed except by a direct consultation achieved in the same manner through which it has arisen."<sup>68</sup> Thus, a limit was created: expressly produced by the institutional referendum<sup>69</sup> and then entrenched into the constitution tracing the boundaries between any constitutional change and constitutional revision. The immutability of the republican form<sup>70</sup>, pursuant to Article 131 of the Draft Constitution,

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<sup>63</sup> Piero Calamandrei, "Sul referendum istituzionale", in Norberto Bobbio, *Scritti e discorsi politici* (La Nuova Italia, Firenze, 1966), 4.

<sup>64</sup> See Carlo Ghisalberti, *Storia costituzionale d'Italia 1849-1948* (Laterza, Roma-Bari, 1974); Silvio Lanaro, *Storia dell'Italia repubblicana* (Marsilio, Venezia, 1992).

<sup>65</sup> Pietro Scoppola, *La Repubblica dei partiti* (Il Mulino, Bologna, 1991), 174.

<sup>66</sup> Tommaso E. Frosini, *op.cit.*, note 62, 118.

<sup>67</sup> *Infra* 2.1.3.

<sup>68</sup> Giovanni Gronchi, *Acts Const. Ass.*, 3 December 1947, V, Plenary Ass., 2781. In the voting of the Article 131 of the Draft Constitution, Togliatti proposed to amend the Article 1 of the Constitution as follows: «The Italian state is a democratic republic», and adding, «the republican form of the state can not be scrutinized either in front of the people nor in front of the legislative assemblies». On the immutability of republican form, see Palmiro Togliatti, *Acts Const. Ass.*, 29 November 1946, VI, I Subcommission, 738.

<sup>69</sup> Roberto Bin and Giovanni Pitruzzella, *Diritto pubblico* (Giappichelli, Torino, 2017), 317.

<sup>70</sup> Guido Lucatello, "Sull'immutabilità della forma repubblicana", 5 *Rivista trimestrale di diritto pubblico* (1955), 745-773; Gian Piero Orsello, "Revisione costituzionale e mutamento istituzionale", 42 *Riv. dir. pubb. e pubb. amm. in Italia* (1950), 124-148; Marino Bon Valsassina, "Referendum abrogativo, revisione costituzionale, mutabilità della forma di governo", 41(I) *Riv. dir. pubb. La giustizia amministrativa* (1949), 81-101.

has meant to convert it the permanent form of the Italian State<sup>71</sup> and to shape its abrogation more difficult within the complex constitutional process<sup>72</sup>. Given the merely declarative value of Article 139 of the Constitution,<sup>73</sup> the limit referred to can only be overcome by the same procedure followed at the time of the foundation of the State. The republican form cannot be revised through the revision procedure referred to in Article 138 of the Constitution,<sup>74</sup> since it did not arise and does not exist by virtue of the Constitution, but results from the decision taken by the people in the institutional referendum<sup>75</sup>. Therefore, the republican form established with a referendum can only be changed through another "exceptional referendum provided for by a special law"<sup>76</sup> which should re-propose the same circumstances that had given rise to the institutional choice. In any case, foreseeing the absoluteness of a limit and excluding any possibility of changing of the form of state would mean restraining the popular will and therefore violating the democratic principle provided for by Article 1 of the Constitution,<sup>77</sup> because it is not the popular sovereignty limited by the constraint provided for in Article 139; it is the limited sovereignty of the people established in the Constitution by means of the provision of Article 139 the indispensable cornerstone of the Constitution.<sup>78</sup>

Obviously that in a Republic, the holders of the authority will change as well as a new the constitution will enter in force. The framers of the Constitution draft a

<sup>71</sup> See Giuseppe Grassi, *Acts Const. Ass.*, 28 November 1946, VI, I Subcommission, 734; Roberto Lucifero d'Aprigliano, *Acts Const. Ass.*, 29 November 1946, VI, I Subcommission, 738; Umberto Nobile, *Acts Const. Ass.*, V, Plenary Ass., 3 December 1947, 4338: «If with [the “republic is the final form of Italy”] it was intended to express the historical certainty that no change will take place, the legislator will assume a part of a prophet, that someone would not fail to find ridiculous. If, on the other hand, one simply wanted to express that the republican form is definitive for our Constitution, it would be completely superfluous, because this concept is clearly expressed in the second proposition whereby “shall not be a matter for constitutional amendment”»]. All translation of the Italian Constitution refer to “constitutional amendment” and not “constitutional revision” even if the *mot à mot* translation of Italian word would refer to “revision”.

<sup>72</sup> Ferruccio Pergolesi (*Diritto costituzionale*, vol. I (Cedam, Padova, 1962), 187-188) hold that the Article 139 could be abrogated by a constitutional law or by a popular referendum, the latter «not [...] legally necessary, not being envisaged by the constitution; but [...] politically inevitable in accordance to the institutional referendum that established the republican form.»

<sup>73</sup> Article 139, Italian Constitution: «The form of Republic shall not be a matter for constitutional amendment.»

<sup>74</sup> *Infra* 2.2.1.

<sup>75</sup> The institutional matter was take out from the competences of the framers, legitimated to define the political system according to a decision already assumed through the referendum. See Carlo Esposito, *Commento all'art. 1 della Costituzione [1948]*, in Id., *La Costituzione italiana. Saggi* (Cedam, Padova, 1954), 5; Carlo Cereti, *Diritto costituzionale italiano* (Utet, Torino, 1963), 634 ss.; Pietro Virga, “La revisione costituzionale” 19 *Il circolo giuridico “L. Sampolo”* (1948), 93-126.

<sup>76</sup> Carlo Esposito, *op. cit.*, note 75, 7.

<sup>77</sup> According to Antonio Reposo (*La forma repubblicana secondo l'art. 139 della Costituzione* (Cedam, Padova, 1972), 83 ss), ascribing to the people the decision of the institutional form and removing all responsibilities on the matter from the Constituent Assembly led to the belief that among the coexisting elements of the Republic there was also the principle of popular sovereignty.

<sup>78</sup> Fabio Ferrari, “Potere costituente e limiti (logici) alla revisione costituzionale nell’ordinamento italiano: considerazioni introduttive”, 6 *Giurisprudenza costituzionale* (2014), 4901-4931, at 4031.

«parliament system that must recognized the principle that in the Italian Republic – unitary, indivisible, democratic – , the sovereignty lies exclusively in the people, from which all power emanates. The State [was] organized in such a way that sovereignty [would be] exercised by means of legislative, executive and judicial powers, which, coming from the same unique source, are not separate and even less opposed, but rationally distributed among the bodies called to implement the popular will, the only source of sovereignty and power.»<sup>79</sup> The new State is sovereign to the extent that it is based on the legal system established by the Constitution and the other laws deriving from it, while the powers, which are concretely the way in which the sovereignty of the State is implemented, «emanate from the people» who exercise them directly or through its representatives.

But what could it mean «emanate from the people»? If the concept only highlights the pure origin of the sovereignty, then where resides? Could this reside in the political parties? Undoubtedly, the framers assign the sovereignty to the people as an organic unity that exercised it by means of its representatives (included political parties) – and this was the reason for which the preference was given to «belongs to the people». Thus, who actually exercises the constituent power? Answering this question require to look beyond the representation in an exceptional event like that of foundation of the Republic, that is, to consider the representation for all future political actions and decisions. In this sense, the assertion of normative theory finds validity: if the foundation of the state is treated as an act of representation, the constituent power would be absorbed into the constituted power. This does not mean that the constituted power – the *creature* – abolishes, overcomes and nullify the constituent power – the *creator*.

The construction of the modern state around the two aspects – the legal and technical one inherent to the sovereign state that replaces the sovereign person, and the political one substantialized in the "advent of the sovereign nation" – led the first interpretations of the Constitution by scholarship and jurisprudence.<sup>80</sup> In the "dual" conceptual building of the State is embedded not only the sovereignty of the people inserted, but also the *tout court* sovereignty: Article 1(2) states the sovereignty of the people; Article 7(1) provides the sovereignty of the State; Article 11, establishes the limitations on national sovereignty to grant it, if necessary, "to a [supranational] order that ensures peace and justice among nations". The principle of sovereignty constitutes the object of various constitutional provisions which, directly or indirectly, are linked to it: for example, Article 10(1), which assumes on the basis of a precise set of relationships between the Italian legal system and the international one,<sup>81</sup> and Article 117(1), which, stressing the legislative power's division between the State and

<sup>79</sup> Vincenzo La Rocca, *Acts Const. Ass.*, 25 June 1946.

<sup>80</sup> See e.g. Vezio Crisafulli, "La sovranità popolare nella Costituzione italiana (Note preliminari)", *Rassegna Giuliana di diritto e giurisprudenza* (1954), now in Id., *Stato Popolo Governo – Illusioni e delusioni costituzionali* (Giuffrè, Milano, 1985), 91-146; Carlo Esposito, *op. cit.*; Edigio Tosato, "Sovranità del popolo e sovranità dello Stato", *Riv. trim. dir. pubb.* (1957), now in Id., *Persona, società intermedie e Stato* (Giuffrè, Milano, 1989), 27-82; G. Amato, La sovranità popolare nell'ordinamento italiano, 1 *Riv. trim. dir. pubb.* (1962), 74-103; Gianni Ferrara, "Alcune osservazioni su popolo, Stato e sovranità nella Costituzione italiana", 2 *Rass.dir. pubb.* (1965), 269-294; Lorenza Carlassare, "Sovranità popolare e Stato di diritto", in Silvano Labriola (ed.), *Valori e principi del regime repubblicano I.II. Sovranità e Democrazia* (Laterza, Roma-Bari, 2006), 163-214; Costantino Mortati, *Istituzioni di diritto pubblico*, vol. I, X ed., (Cedam, Padova, 1991). See Constitutional Court decisions 19/1962; 106/2002; 365/2007.

the Regions, binds the exercise of it to the respect of the Constitution but also to the obligations deriving from European or international law. While the Article 1(2) of the Constitution clearly refers to the sovereignty *in the State*, that is, within the total public space in which the people are included and not "absorbed", according to the postulates of monistic theories, the Articles 7(1), 10(1), 11, and 117(1) refer to the sovereignty *of the State*, that is, outside the overall legal system, in its relationship with other legal systems<sup>82</sup>.

The core of the constitutional organization lies in Parliament, which is not sovereign of itself but is the organ of immediate source of the people's sovereignty, which must adopt laws in accordance with international standards. The constituted power is not only limited by the constitutional constraints determined by the constituent power, but also by the international norms. Consequently, the constituent power is not limited only by the precepts imposed to itself according to its will, but also by international principles of constitutionalism.

The founding of the Italian State it was the revolutionary process embedded in the change of the political regime that has continue through the framers giving the people confidence, first of all, in the democratic state: the State - which had always appeared as an enemy - was configured as one in which citizens could democratically make accomplish their aspirations, one that safeguards their "common good" in order to avoid serious social crises, or even overthrow the regime by another revolution.

The old regime was the problem that Constituent Assembly is called to resolve. In order to avoid any return to the old regime, the framers provide for a head of state, not elected by the people, who represents the nation's unity and guarantees the respect of the Constitution. Denying the amendment of the republican form does not impose only a limit to any change to the form of Italian State, but also a constraint in relation to the selection of its President.<sup>83</sup> Consequently, any constitutional change, therefore, alters the form of government that, shifting the balance between the constitutional organs and reinstating the centres of authority, modifies the influence of the people over political decisions and, thus, the form of state.<sup>84</sup> The founded parliamentary government, in which prevail human rights, the rule of law and democratic values, is a consequence of this choice.

### 2.1.3. *Democratic perspective*

<sup>81</sup> Tomaso Perassi, *La Costituzione italiana e l'ordinamento internazionale* (Giuffrè, Milano, 1952), 23: «The wording of the Article 10 of the Italian Constitution was inspired by the conception according to which the internal legal order of each State is original, distinct and independent from the international legal system».

<sup>82</sup> See Costantino Mortati, *op.cit.*, note 79.

<sup>83</sup> See Daniele Chini, "Sulla revisione costituzionale delle disposizioni relative al Presidente della Repubblica", 4 *Rivista AIC* (2016); Giancarlo Rolla, "L'utilizzo dei poteri presidenziali tra emergenza e revisione tacita della costituzione", 4 *Rivista AIC* (2016).

<sup>84</sup> Sergio Bartole, "Democrazia maggioritaria", in AA.VV., *Enc. Dir. Agg.*, vol. V (Giuffrè, Milano, 2001), 349 ss; Maurizio Fioravanti, *La scienza del diritto pubblico. Dottrine dello Stato e della Costituzione tra Otto e Novecento*, vol. I (Giuffré, Milano, 2001), 350; Vittorio Emanuele Orlando, "Studio intorno alla forma di governo vigente in Italia secondo la Costituzione del 1948", I *Riv. trim. dir. pubbl.* (1951), in Id., *Studi giuridici vari* (Giuffrè, Milano, 1955), 3 ss; Filippo Pizzolato, "Orlando all'Assemblea Costituente", 3 *Rivista AIC* (2016).

The 1948 Italian Constitution is a product of a representative process. As Kostas Chryssogonos explains: «[a] Constitution may be characterized as democratic, from the point of view of the holder of constituent power, when it has been elaborated and voted by a collective representative body (constituent assembly, national assembly, etc.), elected through universal, equal and secret suffrage by the people, occasionally with some form of direct participation of the latter.» Even though there was not founded the Republic yet, the popular sovereignty was already taken into consideration allowing, for the first time, the 'whole' citizenry to directly elect its representatives and thus, participate at (and in future) political decisions. The choice in favor of the Republic,<sup>85</sup> a new form of state, seems to be taken for granted<sup>86</sup> even if it does not need to be established only a Republic for a state to be democratic.<sup>87</sup> From then on, it would be the task of the Constituent Assembly to establish a system that would balance the representation and direct democracy at its best.

The modern theories are built around the concept of popular sovereignty, according to which the will of the people and the will of the politicians are opposed, and around the idea of an 'evolutionary democracy', in which the people not only transfer (or delegate) the general will to the representatives, but adjust their will over time through institutes that a modern system makes available.

Democracy is a system in which citizens participate not only in the control of the representatives through periodic elections, but also in the decision-making process giving inputs on political issues. Nowadays democracy is a "strong democracy": it is a system of citizens' self-government rather than a representative government in the name of the people.<sup>88</sup> Democratic rights are not limited to political decisions alone, but are extended to all social institutions.<sup>89</sup>

In the process of drawing up political decisions, the regulatory adjustment to popular will must be guaranteed.<sup>90</sup> Given the progressive broadening of the participatory element in the representative regime, the theory of political

<sup>85</sup> The results of the referendum had raised doubts about the majority principle applied; but regardless of the way in which it is calculate the majority, the choice was mainly in favor of the Republic. See John Paxton, "Italy", in Id., *The Statesman's Yearbook* (Palgrave Macmillan, London, 1981), 720-731. In the Lieutenant Decree Law of 14 March 1946, n.98 - *the second provisional Constitution of the State* -, Article 1 enshrined that «simultaneously with the elections of the Constituent Assembly, the people [were] called to decide by referendum on the institutional form of the State (Republic or Monarchy).» According to the interpretation of Article 2 of the decree the «majority of voters» means the majority of valid votes; and even if the majority of legal electors entitle to vote were considered, the same choice would have prevailed; see Manlio Mazziotti Di Celso, *Lezioni di diritto costituzionale*, (Giuffrè, Milano, 1993), 42.

<sup>86</sup> The *first provisional Constitution of the State* - the Lieutenant Decree Law of 25 June 1944, no. 151 - provided for in Article 1 that «the institutional forms will be chosen by the Italian people, who will elect, by direct and secret universal suffrage, a Constituent Assembly to deliberate a new State Constitution.»

<sup>87</sup> See Great Britain, Spain, Denmark, etc.

<sup>88</sup> Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, Berkeley, 1984), 145.

<sup>89</sup> *Ibidem*. See also Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press, Cambridge, 1970).

<sup>90</sup> Norberto Bobbio, *Il futuro della democrazia* (Einaudi, Torino, 2005), 23.

representation has been called into question in a severe way: it has imposed the need to integrate the founding of the will in the Assembly from different points of view and through different proposals.<sup>91</sup> Starting from this assumption, a representative system can be integrated and supplemented by participatory mechanisms.<sup>92</sup>

Participatory democracy is not an alternative; it is complementary to representative democracy,<sup>93</sup> endowing the people with greater protagonism within the process of forming the will of the state both as an organic unity through “the people-as-one” and through social groups.

In this sense, the framers of the Constitution provided for the principle of political participation through direct democracy's tools (Articles 71(2) and 75) as well as through political parties (Articles 18 and 49). In addition to the adjectives given to the Republic by Article 1, defining the Italian democracy as participatory, the fundamental law stressed the necessity of national politics and identified in political parties the permanent and principal instruments of democracy. This essential framework then found the basis of its effectiveness in ensuring that each part of the political system demanded and sought in the most reassuring form embedded in the Constitution. There was prescribed an external and independent safeguard by means of the President and Constitutional Court, and internal safeguard through mechanisms and forms of expression of the sovereignty, allowing «the correlation between the distinct and articulated plurality of the popular grounds to represent and the collegial composition of the representative organs at any level of the state system.»<sup>94</sup>

In ideological terms, the action of the framers has been developed in a predominantly democratic and nationalist environment. The concerns were not focused on the mere enunciation of the democratic republican character; on the contrary, the framers were more focused on innovative elements to be set up in Italian constitutional law, aiming at transposing the democratic expression into reality. In some way, it could be argued that the Constitution represents a model of configuration of the institutions of a rule of law, which, respecting the classic parliamentary regime, introduced the counterweights necessary for its full accomplishment.

Seven mechanisms of participation of the people were provided for in the Constitution. At national level, there are: constitutional referendum, (Article 138, in the context of constitutional reform); agenda initiative (Article 71(2)) and the abrogative referendum (Article 75) in the context of legislative process; and petition (article 50). The Italian fundamental law provides for other participatory tools at regional level: Article 123 concerning the referendum in case of approval of regional

<sup>91</sup> Manuel Garcia Pelayo, *Las transformaciones del Estado contemporaneo* (Alianza Editorial, Madrid, 1985), 121.

<sup>92</sup> On the distinction between direct democracy and semi-direct democracy, see Andreas Auer, Giorgio Malinverni, Michel Hottelier, *Droit constitutionnel suisse*, 3<sup>e</sup> éd., vol I, (Stämpfli, Berne, 2013), 69.

<sup>93</sup> Pier Luigi Zampetti, “Democrazia rappresentativa e democrazia partecipativa”, in Guido Gerin (ed.), *Quarant'anni dalla Costituzione: atti del IV convegno dell'Associazione italiana di dottrina dello stato* (Cedam, Padova, 1990), 11-23.

<sup>94</sup> Gianni Ferrara, “La sovranità popolare e le sue forme”, 1 *Costituzionalismo.it* (2006), 1-17, at 11, now in Silvano Labriola (ed.), *op.cit.*, note 79, 251-276.

statutes, Article 132 referring to the referendum in case of merger or creation of territorial entities, and Article 133 concerning the referendum held in the hypothesis of change in the provincial boundaries and the establishment of new Provinces within the regions. A wide recognition in terms of popular participation in the political life of the state.

The central reason for the input that has driven the framers was to establish a regime that had to strictly reflect the rupture from the old regime. In order to guarantee the legitimacy that inspires the Constitution, the consensus found in the Assembly would have to endure in the future. In this sense, the institutions of direct democracy were a complement to the principle of constitutional rigidity and the mechanisms of control of constitutionality of the laws.<sup>95</sup> A resolute and definitive value had found the referendum and a marginal one was conceived to the initiative of the people since the decisive will belongs to the parliamentary assemblies.

Although the referendum was considered the only instrument capable of adjusting the emptiness created between the people and the representatives, it was provided in two forms: constitutional – optional and prospective – and the abrogative referendum. Differently as regards the popular initiative as this tool does not respond «to a substantial democratic need»<sup>96</sup> because the parliamentary assemblies, already legitimized by the people, were fundamental and sufficient in the constitutional system for the purposes of the legislative procedure.<sup>97</sup> Mortati claimed the opportunity of the popular legislative initiative «in order to curb and limit the will of the majority,» which does not always correspond to the will of the people, so «it is useful and democratic to allow this possibility to control the degree of compliance between the politics of the government and the popular orientations.»<sup>98</sup>

According to the Italian Constitution, the people were given only the power of initiative the legislative process by proposing a bill drawn up in sections and signed by at least fifty-thousand voters. Another question arises: if the constitution is silent, who is entitled to decide those actions for which the constitution makes no provisions? In the presence of this lack and by the systematic and historical interpretation of Article 71, the popular initiative consists in empowering the people to initiate both the process of constitutional amendment and legislation.<sup>99</sup> Some scholars exclude that a total revision of the Constitution could be accomplished by means of constituent power.<sup>100</sup> In front of constitutional and amending laws referred

<sup>95</sup> Emilio Crosa, *Principes politiques de la nouvelle constitution*, in Id., *La Constitution italienne de 1948* (Presses de Sciences Po, Paris, 1950), 70.

<sup>96</sup> Emilio Lussu, *Acts Const. Ass.*, 24 October 1946, II Subcommission, 422.

<sup>97</sup> Tommaso E. Frosini, *Forme di governo e partecipazione popolare* (Giappichelli, Torino 2002), 99.

<sup>98</sup> M. Cristina Grisolia (ed.), *La Costituzione della Repubblica nei lavori preparatori della Assemblea Costituente*, VII, Camera dei deputati, Roma, 1970, 1240. See also Fausto Cuocolo, *Saggio sull'iniziativa legislativa*. (Giuffrè, Milano, 1971), 67. On the Mortati's thoughts, see Filco Lanchester (ed.), *Costantino Mortati costituzionalista calabrese* (Esi, Napoli, 1989); Mario Galizia and Paolo Grossi, *Il pensiero giuridico di Costantino Mortati* (Giuffrè, Milano, 1990).

<sup>99</sup> Paolo Biscaretti di Ruffia, *Diritto costituzionale*, XV ed. (Jovene, Napoli, 1989), 446-466.

<sup>100</sup> Maria P. Viviani Schlein, *Rigidità costituzionale: Limiti e graduazioni* (Giappichelli, Torino 2000), 110 ss; Mario Dogliani, "Potere costituente e revisione costituzionale", 15(1) *Quad. cost.* (1995), 7-32, at 14-15..

to in Article 138 and the proper constitution, only the formers could be a result of a constitutional reform. Any other constitutional change concerning the entire text of the constitution re-emerges from the will of constituent power and with a fundamental political decision.<sup>101</sup> The constituted power upholds a constitutional change within the limits imposed by the constitution; a transformation that derives from a ‘constituent and constitutionalized’ review. But this does not preclude the subversive nature of the constituent power to reverse the constituted order while respecting the formal procedure.<sup>102</sup> By operating outside the rules and institutions of ordinary politics, the people will be able to act in their sovereign capacity as “constituent power.” In this constituent position, the people create constitutional rules, maximizing the democratic legitimacy. The next section assessed the people capacity to act inside or outside the constitutional rules, that is, the popular amending power.

## 2.2. The People in the Formal Constitutional Amendment Process

Constitutional change is a complex labyrinth of relationships and interactions between amendment procedures, political actors, and centres of authority, and these processes must be studied in depth and considered from an integrated perspective.

It is well known that a constitution is the political heart of a nation;<sup>103</sup> moreover, amendment rules are at the core of constitutionalism, defining the conditions under which all other constitutional norms may be legally displaced<sup>104</sup> and providing mechanisms for societies to refine their constitutional arrangements.<sup>105</sup> Formal constitutional amendment rules consider the overall framework of the political system to dictate how constitutional change should occur.<sup>106</sup> Exploring and modelling constitutional change connects actors and mechanisms within a given legal order, and this process inevitably touches all areas of constitutional law and the allocation of powers. As long as amendment procedures are designated as adaptive approaches to changing circumstances, formal changes provide a means for resolving conflicts between constitutional actors, especially with regard to the allocation of amendment powers.

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<sup>101</sup> Fabio Ferrari, *op.cit.*, note 78, 4002.

<sup>102</sup> Gustavo Zagrebelsky, *Manuale di diritto costituzionale*, vol. I (Utet, Torino, 1968), 100-101.

<sup>103</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, 2008), 12.

<sup>104</sup> Akil R. Amar, “The Consent of the Governed: Constitutional Amendment Outside Article V”, 94(2) *Columbia Law Review* (1994), 457-508, at 461; Xenofon Contiades and Alkemene Fotiadou, “Models of constitutional change”, in Xenofon Contiades and Alkemene Fotiadou, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, (Routledge, New York, 2013), 418.

<sup>105</sup> Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, Cambridge 2009), 81.

<sup>106</sup> Adrain Vermeule, “Constitutional Amendments and the Constitutional Common Law”, in Richard W. Bauman and Tsvi Kahana (eds.), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, Cambridge, 2006), 229.

### *2.2.1. Rules of change and their Interpretation in the Italian Legal Order*

In the modern world, constitutions can no longer be unalterable; they contain rules of change, mechanisms of balancing constitutional stability, and procedures of constitutional amendment. The formal constitutional amendment process drafted by the Constituent Assembly and translated in Article 138 of the Italian Constitution consists of such necessary procedures. The complex constitutional review procedure established by the abovementioned constitutional provision represents the conversion of the principle of constitutional rigidity within the framework of the sources of law, safeguarded by the constitutional judges. It is the republican Constitution that embodies the “break” from the past, and the supreme principles – among which the rigidity itself – are deemed as “logical” clauses to its ‘living’.<sup>107</sup>

The amending formula draws from the structure of ordinary legislative procedures, with necessary additional requirements to modify Italy’s fundamental law or to introduce a new constitutional bill. The steps that align with ordinary legal procedure involve having two readings by each Chamber with a mandatory interval of three months, and the required approval by at least an absolute majority in the second vote. However, the rigidity of the Italian amendment process extends beyond ordinary legal processes in a number of ways. First, Article 138 of the Constitution establishes that in order to pass any constitutional modification, each of the two Chambers of the Italian Parliament must vote in favor of and reach double conformity on the same text twice over a period of no less than three months; a reinforced majority is also required. According to the same article of the Constitution, the second vote is a mere approval, requiring at least an absolute majority (50 percent of the members of each Chamber plus one, regardless of the number of those taking part in the vote). In case of a two-thirds majority, the approved constitutional amendment can then be promulgated and published, and enter into force.<sup>108</sup> Second, whenever a two-thirds majority is not reached in one (or both) of the two Chambers, but only the (necessary) absolute majority, within three months of the second vote, one fifth of the members of each Chamber, 500,000 voters, or at least five regional legislative assemblies can request a referendum on the text voted by Parliament,<sup>109</sup> The draft constitutional amendment is deemed passed if a voting majority approve it. However, if the constitutional draft is approved in the second vote by a majority of two-thirds of the members of each House, no referendum can be requested. In this case, promulgation of the approved draft constitutional amendment will follow either with the expiration of the three-month term or, in the case of a referendum being requested, the positive vote expressed by the citizens in favor of the constitutional amendment.

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<sup>107</sup> Fabio Ferrari, *op.cit.*, note 78, 4030.

<sup>108</sup> Articles 73 and 74 of the Constitution.

<sup>109</sup> Further profiles of the referendum procedure are governed by Law no. 352/1970; up to that year, in the absence of rules regulating the practice of the constitutional referendum, all constitutional laws had to be approved by a necessary two-thirds majority, making the procedure even more rigid. See Tania Groppi, “Constitutional revision in Italy: A marginal instrument for constitutional change”, in Xenofon Contiades and Alkemene Fotiadou, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge, New York, 2013), 206.

The second process, in the event that proportional electoral representation is not established, consists of an optional referendum because a supermajority could not be reached. However, the people can be called to participate in the amendment process by either proposing amendments or, within the final phase, by eventually deliberating on the constitutional amendment voted by the Parliament.

Given the complexity of the procedure, several issues remain open, especially on the general role played by the constitutional referendum within the framework described in Article 138. This particular type of referendum has been variously defined as one of “guarantee” allowing minorities to verify the alignment between the will of the Parliament and that of the People: in an “opposing” referendum, it functions to halt the constitutional amendment endorsed by the Parliament’s majority; as a referendum of “control”, it prevents the possible malfunctioning of constitutional legislation; and as a “confirmative” or “validating” referendum, the process strengthens the legitimacy of the same majority that supported the reform.<sup>110</sup> Precisely because of the different qualification given to the constitutional referendum, the relationship between the Parliament and the people within the constitutional amendment process can fluctuate.

In this view, the Constitutional Court stated that «in [the Italian] system, fundamental choices concerning the national community and inherent in the ‘constitutional agreement’ are reserved to political representation, on whose decisions people cannot intervene unless pursuant to the procedure indicated in Article 138.» In the Court’s view, Article 138(2) of the Constitution not only provides a referendum on constitutional law simply as optional but, in preventing popular intervention that is disconnected from the parliamentary procedure, it circumscribes within strict time limits the people’s initiative power. The third paragraph of the same article entirely precludes the possibility of popular intervention when it determines that «the referendum does not take place when the law has been approved in the second vote by a two-thirds majority of its members,» thereby confirming that the power of constitutional revision belongs, first and foremost, to the Parliament.

There is no doubt that Article 138 of the Italian Constitution places the decision-making on constitutional amendments mainly in the hands of the parliamentary representatives. In fact, within the amending procedure, the people will act either only as a “check,” with conservatory and safeguarding functions, or as a confirmatory force, with regard to an already perfected parliamentary will that, in the absence of popular validation, is nonetheless able to consolidate its legal effects.<sup>111</sup>

## 2.2.2. People’s Amending Power: Theory and Practice

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<sup>110</sup> Giampietro Ferri, *Il referendum nella revisione costituzionale* (Cedam, Padova, 2001), 153. See also Gianpaolo Fontana, *Il referendum costituzionale nei processi di riforma della Repubblica* (ESI, Napoli, 2013); Id., “Il referendum costituzionale tra processi di legittimazione politica e sistema delle fonti”, *Federalismi.it* (2016); Roberto Romboli, “Il referendum costituzionale nell’esperienza repubblicana e nelle prospettive di riforma dell’art. 138 Cost.”, in Silvio Gambino and Guerino D’Ignazio (eds.), *La revisione costituzionale e i suoi limiti* (Giuffrè, Milano, 2007), 93 ss; Anna Alberti, “Note intorno alla fase referendaria costituzionale”, 4 *Rivista AIC* (2016); Alessandro Mangia, “Potere, procedimento e funzione nella revisione referendaria”, 3 *Rivista AIC* (2017).

<sup>111</sup> Constitutional Court decision 14 November 2000, n.496 (G. U., S.S., 22/11/2000, n.48).

Constitutional changes are very closely linked to the amendable nature of the provisions. Besides procedural prerequisites, amendment rules specify what is subject to or immune from formal amendment. However, a question arises vis-à-vis the limits of people's amending power as designated by the constitutions.

Since its entry in force, the Italian Constitution has been amended 14 times, and 32 out of 139 articles have been modified. Six draft constitutional amendments were repealed, and only three constitutional referendums have taken place.<sup>112</sup>

In theory, there is no reference in the Constitution regarding the initiating power of the people, and, as mentioned above, in practice, the people have never commenced a constitutional revision procedure. Even if the Italian Constitution does not provide a clear reference to the people's power to amend it, the doctrine upholds that the same institutions empowered to introduce ordinary legislation have the power to propose constitutional amendments – that is, the government, any Member of Parliament, the regions, and the people.<sup>113</sup> Despite the fact that the people have never proposed a constitutional amendment, if they were to do so, which are the limits imposed to this power?

The only explicit limit on constitutional revision is provided by Article 139, according to which «[t]he republican form of the state shall not be a matter for constitutional amendment.» This is the unique “eternity clause” provided by the Italian Constitution. However, the Italian doctrine has traditionally stressed the existence of many other implicit limits to the constitutional amendment, principles that cannot be changed through the procedure described in the Article 138. These principles represent the “core” of the Constitution and qualify the form of the state.<sup>114</sup> Thus, they fall within the purview of “constituent power” (i.e., constitution-making power), rather than as “constituted” (i.e., constitution-amending power). According to this assessment, a total revision of the Constitution is not allowed in the Italian legal system.<sup>115</sup>

Amending unamendable provisions in the Italian legal system is a question unlikely to get over. On one hand, scholars interpret the explicit limit to constitutional amendment provided by Article 139 in a systematic way, together with Article 1 of the Constitution: the concept of the “republican form of State” as excluded from revision would refer not only to the selection of the head of state, but also to the entire form of the state according to which «Italy is a democratic Republic [...].»<sup>116</sup> In

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<sup>112</sup> Carlo Fusaro, “Italy”, in Dawn Olivier and Carlo Fusaro (eds.), *How Constitutions Change: A Comparative Study* (Hart Publishing, Oxford, 2013), 218-220; Groppi, *op.cit.*, note 13, 213-217.

<sup>113</sup> Article 71: “Legislation may be introduced by the Government, by a Member of Parliament and by those entities and bodies so empowered by constitutional amendment law. The people may initiate legislation by proposing a bill drawn up in sections and signed by at least fifty thousand voters.”

<sup>114</sup> Maria P. Viviani Schlein, *op.cit.*, note 100, 1367-1368.

<sup>115</sup> Groppi, *op.cit.*, note 13, 210; Enrico Grossi and Valeria Marcenò, “Art. 139”, in Raffaele Bifulco, Alfonso Celotto and Marco Olivetti (eds.), *Commentario alla Costituzione, Volume 3* (Utet giuridica, Torino, 2006), 2731.

<sup>116</sup> Temistocle Martines, *Diritto costituzionale* (Giuffrè, Milano, 2011), 198.

other words, the explicit limit stated in the Article 139 is avowable of a limit imposed by the institutional referendum.<sup>117</sup>

On the other hand, the existence of a “core” of unamendable principles has been linked to the difference between the primary and secondary constituent power, or between the power to establish a new constitution and the power to amend it.<sup>118</sup> In this respect, the revision procedure can only be used to enact minor changes to the constitution that do not affect the fundamental features of the system, while any legal option to change the fundamental text in its entirety would be excluded.

Most of the unamendable content is located within the amendment provision, inferred from its declaration of the “eternity” of the system, but unamendability also appears in other parts of the Constitution, that is, in those provisions claiming the “supreme principles”. The Italian Constitutional Court explicitly<sup>119</sup> qualified such «supreme principles, that cannot be subverted or changed in their essential content neither by constitutional laws of revision nor by constitutional laws,» as implicit limits to constitutional amendments, and recognized its competence to review the constitutionality of constitutional laws. According to the Court’s interpretation, «these principles are explicitly provided by the Constitution as absolute limits to the power of constitutional revision, as the republican form of government stated by the Article 139 as well as the principles which, although not expressly mentioned among those not subject to the constitutional revision process, belong to the essence of the supreme values upon which the Italian Constitution is founded.»

The debate among scholars on the identification of these “supreme principles” is closely connected to the possibility of introducing a federal form of state, the direct election of the Republic’s president or the prime minister, and even the possibility of amending the 12 articles under the heading “Fundamental Principles,” followed by Part I of the Constitution, entitled “Rights and Duties of Citizens.” Part II of the Constitution, addressing the “Organization of the Republic,” and some provisional and transitional dispositions can also be deemed relevant to the debate on the identification of “supreme principles,” but, as demonstrated in practice, the second part of the Constitution has been changed to the extent that the amendments did not indirectly affect principles enshrined in Part I.

A further limit to any change derives from EU law, whereby the Constitution recognizes the «constitutional common traditions of the Member States.»<sup>120</sup> There is a substantive limit more than a formal one, insofar as Italy could leave the EU as consequence of popular will, and later change the Constitution, introducing provisions in contrast with those traditions.<sup>121</sup>

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<sup>117</sup> Roberto Bin and Giovanni Pitruzzella, *op.cit.*, note 69, 337.

<sup>118</sup> Yaniv Roznai, “Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea”, 61(3) *The American Journal of Comparative Law* (2013), 657-719, at 657; Yaniv Roznai and Serkan Yolcu, “An unconstitutional constitutional amendment—The Turkish perspective: A comment on the Turkish Constitutional Court’s headscarf decision”10(1) *International Journal of Constitutional Law* (2012), 175-207, 175.

<sup>119</sup> Constitutional Court decision 15 December 1988 n. 1146 (G.U. 11/01/1989, n. 2).

<sup>120</sup> Article 6(2) TEU.

<sup>121</sup> Carlo Fusaro, *op.cit.*, note 112, 215.

Finally, the possibility of modifying even the amending formula, as entrenched in Article 138, is subject to academic debate. According to the scholarship, the procedure regulated by Article 138 could be revised, with the only limit being a revision that would make the Constitution less rigid.<sup>122</sup>

Coming back to practice, most constitutional acts in the Italian legal order were passed by a large majority in Parliament. The people's involvement in the amendment process, specifically through a referendum on the constitutional amendments, has been expressed only three times: in 2001, related to the quasi-federal reform of Title V, Part II of the Constitution, with a turnout of 62 percent in favor; in 2006, regarding another attempt at a systematic revision of the Part II and strictly linked to the application of Article 138, but rejected; and in 2016, concerning «provisions for overcoming equal bicameralism, reducing the number of Members of Parliament, limiting the operating costs of the institutions, the suppression of the CNEL and the revision of Title V of Part II of the Constitution,» which also failed to garner public support.

Constitutional revision in Italy has been virtually exclusively in the hands of political parties, and the power to amend the Constitution likewise belongs to the Parliament. People's participation is only optional and is still considered controversial. The procedure established by Article 138 is closely linked to proportional representation. Any constitutional change passed by only a majority of members of Parliament should be regarded as substantively unconstitutional – this is the reason for the optional constitutional referendum at the public's request.

The difference with the ordinary revision mechanism is that people, instead of being required to give their "positive approval" to proposed amendments, can choose to express their dissent by vetoing a proposed amendment – which, from a constitutional design perspective, increases their authority in undertaking amendments, but it may also create barriers to constitutional change and produce an undemocratic amendment process.

### 2.2.3. (*Un*)Constitutionality and the Role of the Constitutional Court

Constitutions have certain entrenched constitutional provisions that are impervious to the amendment. These unamendable provisions are subject to amendment neither by the judiciary nor according to the constitutionally entrenched amendment procedure. To actually amend an unamendable provision requires much more than a discrete revision; it involves comprehensive renewal through a huge constitutional "revolution," and only in this case some could claim the unconstitutionality of the constitution. But a question is necessary to address: could it be a constituent power unconstitutional? Yes, because some constituent powers – even if never (or still) does happened in Italy – may be or not legitimate or constitutional.<sup>123</sup>

<sup>122</sup> Alessandro Pace, "L'incostituzionalità della costituzione di Berlusconi", Astrid (June 12, 2006), available at <[www.astrid-in.it/static/upload/protected/4-A\\_4-A\\_Pace-Europa-08\\_02\\_06.pdf](http://www.astrid-in.it/static/upload/protected/4-A_4-A_Pace-Europa-08_02_06.pdf)>; Groppi, *op.cit.*, note 13, 214.

<sup>123</sup> See Kim Lane Schepppele, "Unconstitutional Constituent Power", in Rogers Smith and Richard Beeman (eds.), *Constitution Making* (University of Pennsylvania Press, Philadelphia , 2015), available at <[www.sas.upenn.edu.dcc/files/uploads/Schepppele\\_unconstitutional%20constituent%20power.pdf](http://www.sas.upenn.edu/andrea-mitchell-center/sites/www.sas.upenn.edu.dcc/files/uploads/Schepppele_unconstitutional%20constituent%20power.pdf)>.

Many questions have arisen in the literature on (un)constitutional amendment processes. Who can declare an amendment unconstitutional? Who can determine the constitutionality of a proposed amendment? The obvious answer would be that a court should be authorized to do this.<sup>124</sup>

Decision-making bodies – such as legislators, a citizens’ assembly, or a national referendum process – could propose a constitutional amendment, and by changing the “spirit of the Constitution,” alter the legal system completely. From this perspective, we return to the debate on the simple power to amend the constitution or to establish a new one – the difference between *pouvoir constitué* and *pouvoir constituant*, between primary and secondary amendment power, and between total and partial constitutional revision, which involves participatory theory and people’s sovereignty.

In the Italian legal system, the 1948 Constitution ensures an original combination of representative and direct democracy, including grassroots-initiated referendums;<sup>125</sup> the “eternity clause” was introduced as a natural complement to the 1946 referendum, which had abolished the monarchy. It is a theoretical matter within the unconstitutional amendment debate, as long as the people could be recalled at any time to vote on any constitutional change that could alter the legal system, as happened in Hungary. In such cases, could the Court still declare those provisions unconstitutional if the people agree with that particular change?

In any case, there are constitutional principles or liberal democratic values that should be shielded from revision, even by the most compelling legislative or popular majorities. The scholarship is divided on this argument, though.<sup>126</sup> As Albert has maintained, there are various categories for assessing constitutional change, and unconstitutionality is only a form of nonconstitutionality. He has identified a textual model that authorizes constitutional amendment; a political model, which introduces extraconstitutional change; and a substantive model, which forbids unconstitutional amendments.<sup>127</sup> From this perspective, the Italian constitutional text enshrines the necessary and sufficient conditions for amending it and contains a clear provision regarding that procedure. Moreover, the Italian Constitution traces the political model insofar as amendments may spring from the expression of popular will, which manifests the dualism between the political branches and citizenry.

The debate concerning the limits to the constitutional amendment in the Italian system is a very political one. Sometimes scholars and politicians who do not agree on constitutional reform concentrate their debate on constitutional legitimacy and on the inconsistency of the amendments regarding the basic principles of the

<sup>124</sup> Tom Ginsburg and Gombosuren Ganzorig, “When Courts and Politics Collide: Mongolia’s Constitutional Crisis”, 14(2) *Columbia Journal of Asian Law* (2001), 309-325, 309

<sup>125</sup> Carlo Fusaro, *op.cit.*, note 112, 212; Paolo Galizzi, “Constitutional Revisions and Reforms: The Italian Experience”, in Mads Andenas (ed.), *The Creation and Amendment of Constitutional Norms* (British Institute of International and Comparative Law (BIICL), London, 2000), 235-241.

<sup>126</sup> Stephen Townley, “Perspective of Nation Building”, 30 *Yale Journal of International Law* (2005), 347-365, at 365; Elai Katz, “On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment”, 29 *Columbia Journal of Law & Social Problems* (1995), 251-292, 259.

<sup>127</sup> Richard Albert, “Nonconstitutional Amendments”, 22 *Canadian Journal of Law & Jurisprudence* (2009), 5-47, at 12.

Constitution. The political party, which sustains constitutional reform, can require a referendum in order to reach absolute approval from the governed body.<sup>128</sup> In this sense, the political model is linked to extraconstitutional change insofar as the constitutional change that occurs unbounded by the fundamental law.

Furthermore, the political model marries the written and unwritten constitutional requirements governing amendment.<sup>129</sup> Citizens themselves, as agents of constitutional change, generate unwritten constitutional amendments that do not require judicial involvement, only judicial acquiescence.<sup>130</sup> A public debate implies civic engagement in constitutional politics, where the representative bodies and their citizens are involved in a national dialogue regarding the future of the state. In such cases, there is no space for a judicial review of those amendments that transform the legal system. However, constitutions have overcome this issue by empowering the Courts to scrutinize the conformity of any constitutional change with the existing constitution, and this is the essence of what Albert calls the substantive model.

This is precisely the path that the Italian Constitutional Court has developed over the years. The Court has embraced its role and expanded the list of the unamendable provisions, assessing a broader theory of unconstitutionality. Regardless of the drivers of constitutional amendments, the theory of implied limits in the Italian legal system has been widely accepted by the Constitutional Court.

The Court played a significant role not only in implementing the Constitution,<sup>131</sup> but also in adapting the Constitution as Italian society has changed. In many circumstances, the Constitutional Court has legislated beyond the written constitution, but in some circumstances, it has also manifested a certain degree of self-restraint.<sup>132</sup> A constitutional amendment must be adopted without compromising the effectiveness of the written text, and the constitutional changes developed "outside" of constitutions should not alter the meaning of the provisions. However, according to the Court, an amendment is unconstitutional if it undermines Article 1, regarding the republican government. Based on Article 2 and interpreted as an open provision, the Court expanded the list of human rights that could be modified. Based on the Article 3, the Court has likewise addressed a range of disparate provisions that involve unequal treatment and held that an amendment stressing an "unreasonable discrimination" should be considered illegal. Furthermore, the two main parts of the Constitution are linked together, and any major change in Part II could infringe upon the implementation of Part I because values established in the

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<sup>128</sup> See the Constitutional Acts of 1993 and 1997, introducing an extraordinary procedure and transforming the referendum from optional to mandatory.

<sup>129</sup> Albert, *op.cit.*, note 29, 15.

<sup>130</sup> *Ibid.*, 19.

<sup>131</sup> Informal changes have been determined by the lack of implementation of the Constitution. Many laws were necessary to establish the new guarantor bodies and to limit political majorities. See Groppi, *op.cit.*, note 13, 218.

<sup>132</sup> Constitutional Court decision 6 September 1995, n. 422 (G. U. 20/09/1995 n. 39) regarding the unconstitutionality of the reserved quota system in the electoral list, which was overcome by a subsequent constitutional amendment; Constitutional Court decision 14 April 2010 n.138 (G. U. 21/04/2010 n. 16) regarding same-sex marriage held that the intent of Italian constituents was to preclude an evolving interpretation of marriage.

former would strictly limit the possibility of amending provisions included in the first part.<sup>133</sup> In the same reasoning, Article 138 cannot be amended because of its link to proportional representation.

Although there is no provision regarding judicial review, the Italian Constitutional Court claims that it is its duty and right to check the constitutional legitimacy of laws revising the Constitution, no matter who has proposed the constitutional amendment.<sup>134</sup> However, in practice, the Court has never made a decision to annul a constitutional amendment.

### 3. Endeavors of popular constitutional review

Nothing could stop the people as a ‘whole’ to return to their natural status and destroy a constitution and, consequently, the democratic order. The constitutional awareness returns into constituent awareness but such a change would destroy the basic principles and values, which means to deny the democracy. A constituent power should not undermine the *raison d'être* of the democratic order. As Murphy claims, the constitutive power of the whole people should be limited.<sup>135</sup> “We, the people” cannot act as a whole in the reason of an opposing minority, which turns the constituent power in an illegitimate one. But always a constitution should provide for ‘means of egress’ for constituent power (that, is, deliberation, inclusiveness on constitutional matters),<sup>136</sup> obviously manifested within certain limits and, therefore, protected in order to be legitimated and which allow to re-emerge from time to time. The constituent power must maintain its capacity to rethink the constitutional order and reappear in the future when deemed appropriate. For Habermas, the popular constituent power may entail an organic, substantive, ethnic homogeneity to bind a community together and, as such, it can lean towards a “militant ethno-nationalism” and a voluntaristic and essentialist model of nationalist politics.<sup>137</sup> For this purpose it should act as a whole which will never abolish people’s rights and freedoms, their representation in assemblies or political rights, necessary to concretely “maintain” and “improve” the constitution.

Beyond the legal thoughts on constituent power, the Italian people are empowered – implicitly – to propose amendments to the constitution. Despite the little interest and insufficient success of this tool on the level of praxis, there are

<sup>133</sup> The parliamentary regime established by Articles 92-96 could not be amended to establish, for instance, a presidential regime.

<sup>134</sup> Kemal Gözler, *Judicial review of constitutional amendments: a comparative study* (Ekin, Bursa, 2008), 51-52.

<sup>135</sup> Walter F. Murphy, “Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity” in Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, Princeton 1995), 163-190, at 178; Id. *Constitutional Democracy – Creating and Maintaining a Just Political Order* (John Hopkins University Press, Baltimore, 2007), 507-517.

<sup>136</sup> Joel I. Colón-Ríos, *op.cit.*, note 43.

<sup>137</sup> Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo DeGreiff eds.) (MIT Press, Cambridge, 1998), 148; Id., *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (tr. William Rehg) (MIT Press, Cambridge, 1996), 462-490.

some popular initiatives aiming at amending the Constitution. In the last 20 years, only 6 amendment initiatives had popular origin: two were submitted to the Senate, other at the Chamber of Deputies, and during a whole parliamentary term – the XVth – no initiative was of constitutional nature.<sup>138</sup> The most interesting for the purpose of this analysis is the popular initiative “Quorum zero and more democracy” (A.C.5424) submitted to the Chamber of Deputies in 2012, assigned to the Constitutional Affairs Commission but the exam does not started yet. This initiative proposes amendments to several constitutional provisions relating to popular participation in the legislative and constitutional process: articles 50, 67, 69, 70, 71, 73, 74, 75, 118, 138. The main and innovative aspects to embody in the Constitution concern the minimum age of the voters which should be reduce to sixteen-year-old, the confirmative referendum for any constitutional revision within the terms established by law; electronic collection of the signatures, legal status to the popular committee proposing the amendment; and revision of constitutional amendment provision. According to the proposed wording, the amendment process stated in Article 138 should consist of two successive debates by each Chamber with at intervals of not less than three months and not more than six, and approval by an absolute majority of the members of each House in the second vote, followed by a mandatory popular referendum. The amendments or any other constitutional laws will not be promulgated unless they are approved by a majority of valid votes. For the first time it was proposed to draft an explicit provision as regards the exercise of popular amendment power: «the people exercise the initiative to amend the Constitution, through the proposal of a bill drawn up in sections that follows the procedure envisaged for the popular initiative, with the exception of the number of statements of support, which must be at least equal to 2 percent of the citizens entitled to vote for the Chamber of Deputies.» Unfortunately, as many other proposal of popular origin, these initiatives are not corroborated by elective representatives on the effectiveness level, and this behavior proves how the constituted power absorbs the constituent one and not adjust from time to time the popular will.

Despite some innovations on the level of the toolkit of people's engagement in the legislative procedure - above all as regards their effectiveness – even the last constitutional reform of 2016<sup>139</sup> would have been configured insufficient and incomplete in view of the explicit reference to the people as holder of amendment

<sup>138</sup> In chronological order:

2017 – "Rules for the implementation of the separation of the judging and inquiring careers of the judiciary" (A.C. 4723) concerns amendments to article 84, 104, 105, 106, 107, 110, 112 as well as Title IV Part II of the Constitution.

2012 – “Quorum zero and more democracy” (A.C.5424)

2011 – Amendments to Articles 114, 117, 118, 119, 120, 132 and 133 of the Constitution, as well as to the Special Statutes of the Regions of Sicily, Sardinia, and Friuli Venezia-Giulia, concerning the abolition of the provinces (A.C.4682)

2001 – “Amendments to Part II, Title V, of the Constitution concerning provincial and local autonomies. Assign provincial statute of autonomy to the province of Treviso (A.S.4) – already submitted in 2000 (A.S.4789); “Amendment to Title V of the Constitution on provincial and local autonomies. Assign provincial statute of autonomy to the province of Bergamo and other provinces (A.S.2) – already submitted in 1999 (A.S.3994); “Constitutional referendum for the institution of the Parliament of Padania ”(A.C.14) – already submitted in 2000 (A.C.6858).

<sup>139</sup> On a broad analysis of the participatory aspects in the Renzi-Boschi Decree, see Nelia Rodean, “Il mito di Sisifo. Iniziativa dei cittadini nell'ambito delle proposte di riforma costituzionale”, 4 *Forum Quad. cost.* (2015).

power. Beyond the hermeneutical interpretations related to the same quantity of voters empowered to propose a constitutional amendment (which never happened), the last constitutional reform did not consider a need to positivize the popular initiative. Taking cues from the various experiences, many scholarship debates concern the possibility to implement the constitutional initiative linked to a quorum of submissions set at one million entitled citizens. Furthermore, an admissibility pre-examination by the Constitutional Court would allow a certain number of voters (for example, fifty thousand) to check their constitutional amendment proposal even before the effective before collecting the statements of support. Bearing in mind the Swiss example, the Parliament could also present a counter-proposal to be submitted to popular vote, and realize in this way a more effective dialogue for the best solution among constituent and constituted power.

However, the proactive dimension in the constitutional review process remains anchored to the only possibility ex Article 139 of the Constitution vis-à-vis the request of referendum if «the law is approved in the second vote by each of the Chambers by a majority of two thirds of its members» and the request comes from five hundred thousand voters.

Like in a word game between English and French pronunciation: “we, the people” exist “*oui*, the people” – that is, *we*, all the people created the constitution and our “*oui*” during the referendum conserves the democratic constitution. And perhaps this is the reason that stake the “definitive virtue” of the democracy and elevated it to constitutional status of ‘eternal principle’.<sup>140</sup>

#### **4. By way of conclusion: constituent power within (un)constitutional conundrum**

The question of whether a constitution can be (un)constitutional is rooted in democratic foundations and may be answered only in reference to the people as the ultimate source of legitimacy. The people, through their direct and indirect consent, can validate or invalidate a constitutional amendment or a constitution. The people could defend constitutional principles through a “revolution,” a referendum, or through their representatives; under different forms of consent, people possess the extraordinary power to transform formally also an unconstitutional constitution into a legitimate one. But by whom and on which grounds a constitutional amendment or a constitution may be declared unconstitutional? The answer seems obvious: by constitutional courts, based on the textually entrenched procedural requirements or by an extensive interpretation of other constitutional provisions.

The global trend, especially after World War II, is toward acceptance of explicit and implicit limitations on constitutional amendment power, no matter who holds such power. Despite recent developments in Hungary where the Constitutional Court has also rejected the notion of implicit limits, claiming that amending power is unlimited in the absence of any explicit restrictions, there is now a general acknowledgment by constitution drafters and courts that certain “supraconstitutional” principles are unamendable (i.e., that certain amendments are prohibited, and that constitutional courts have the power to review these amendments and to annul those

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<sup>140</sup> William F. Harris II, *The Interpretable Constitution* (John Hopkins University Press, Baltimore, 1993), 203.

contradicting the “basic structure” or “constitutional core”). Any constitutional amendment that compromises those principles and values can be declared unconstitutional even if the people drive such constitutional change.<sup>141</sup>

Supreme principles are protected in various constitutions. They can be universal and common to all modern democratic societies (e.g., a state’s religion or official language; the separation or integration of church and state; the rule of law; multiparty systems, political pluralism, or other democratic characteristics; territorial integrity; judicial review; the separation of powers; sovereignty of the people; or even such general provisions as the spirit of the constitution), or reflect the specific ideals and values of a distinct political culture (e.g., the establishment of federalism). This trend is linked to the general rise of “world constitutionalism,” the global spread of “supranational constitutionalism,” and judicial review, which all serve to prevent the abuses of majority rule.<sup>142</sup>

People, as holders of constitutional amendment power, have to balance their power to initiate, approve or invalidate a constitutional amendment in light of all constitutional provisions and formal requirements. They can create a “constitutional” constitution as well as an unconstitutional one. They are a fundamental component of the constitutional change processes, but where this element is marginal despite the culture of popular sovereignty, the democracy’s facets change. In front of many popular trends, the very term ‘constituent power’ has almost entirely disappeared from even the most ‘populist’ approaches to constitutional change.<sup>143</sup>

The people may delegate their power to draft or approve a constitution to officials tasked with representing their interests, and they may validate a(n) (un)constitutional constitution a constitution directly by referendum. In particular, they can transform a formally (un)constitutional constitution into a (il)legitimate one anchored in democratic values.<sup>144</sup> The various ways that a constitution or a part of it can be unconstitutional in terms of constitutionality substance and participatory democracy, lead constitutional courts, as guardians of the democracy, to consider alternative grounds and rationales upon which to declare a constitutional amendment unconstitutional or to overturn (un)constitutional changes in name of the constitutional democracy.

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<sup>141</sup> Yaniv Roznai, *op.cit.*, note 31, 582.

<sup>142</sup> Gábor Halmai, “Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective”, XX *Wake Forest Law Review* (2016), 101-135, at 135.

<sup>143</sup> See for example Akhil Reed Amar, “The Consent of the Governed: Constitutional Amendment Outside Article V”, 94 *Columbia L. Rev.* 457 (1994); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong. (and How We the People Can Correct It)* (Oxford University Press, New York, 2006).

<sup>144</sup> Richard Albert, “Four Unconstitutional Constitutions and their Democratic Foundations”, 50 *Cornell Int.l L.J.* (2017), 169-198, at 198.