Essays

Questioning Representative Sovereignty: The Italian Head of State in 'Post-State' Constitutional Law

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Abstract

The Italian constitutional order is undergoing a slight but salient shift as regards the role of the Head of State, who is called on to take delicate political positions while acting as a liaison between the national and supranational stages.

This work aims to investigate this shift and its consequences to analyse how a State's constitutional structure evolves as confronted with the post-State reality. Starting with an account of 'representative sovereignty' to locate Heads of State in contemporary parliamentary governments, it takes as reference a speech delivered by the President in 2018 and examines in this light the constitutional practices of the last ten years as well as some of the most recent activities involving the President. The picture the work aims to paint exposes the ties between the national and supranational levels.

Whether this picture coheres with the overall national constitutional architecture is doubtful; however, the fundamentals of 'representative sovereignty' as accounted for in the introductory part no longer work well together, and this challenges some of the cornerstones of contemporary constitutionalism.

I. Introduction. 'Representative Sovereignty': Domestic Rigidity and Supranational Openness

In one of his least famous works, a maverick of the early 1900's Italian legal philosophy, Giuseppe Capograssi, pointed to the breakdown of a key constitutional concept that he called 'representative sovereignty' to account for the decline of the liberal State.[1] In 1922 he argued that the mounting crisis of the State's constitutional arrangements lay in a relatively 'new' phenomenon: as social pluralism rose to an unprecedented magnitude, national institutions were facing growing difficulty in accommodating diverging interests by means of legislation – which, as a consequence, decreased their authority and

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[1] G. Capograssi, 'La nuova democrazia diretta', in Id, *Opere*, (Milano: Giuffrè, 1959), I, 475, 485-486.

effectiveness.[2] This failure to link the institutions engaged in law-making with a fast-changing society undermined the foundational legitimacy of national sovereignty by weakening its representative support.[3]

The proper remedy to the 1920's crisis, in Capograssi's view, was the construction of more inclusive architectures to channel the rising pluralism into mediation paths directed by representative institutions. Otherwise, he foresaw, executives would seek more direct, possibly non-parliamentary ties to communicate with society and to respond to its needs, with two consequences, seemingly at odds with each other, yet in fact concurrent.[4] First: the government and the Prime Minister would come to occupy the centre of domestic constitutional orders. Second: the role of the Head of State 'may be reconsidered, perhaps re-construed' in a denser political fashion.[5] In fact, he argued, the new social forces would look at the Head of State as their best-suited institutional interlocutor;[6] consequently, under the mounting pressure of the most powerful among such forces, she would be prompted to marginalise the Parliament and secure a new social pact in what would look like a renewed, authoritarian version of constitutional monarchies.[7]

Therefore, he held, Heads of State would claim a legitimacy of their own – in the mode of Constant's '*pouvoir neutre*' –[8] pursuant to which they would make political choices aiming at either inclusion or exclusion of legitimate interests. Yet, the latter option would add to the State's crisis:[9] absent sufficiently solid representative ties, the claims of the excluded would turn into a powerful element of destabilisation for the State itself, both in the international arena and at home.[10]

It is understood that, in comparison with his contemporaries, Capograssi pioneered an innovative approach to political representation;[11] his focus fostered a shift from the state-centred 'institutional' paradigm to address 'the people' in its multifaceted composition, and dared to look beyond the dominant

[2] For a comparison, see L. Duguit, *Traité de droit constitutionnel* (1912; Paris: Ancienne Librairie Fontemoing &Co., 3rd ed., 1921), I, 606-609.

[3] C. Vasale, *Società e Stato nel pensiero di Giuseppe Capograssi* (Roma: Edizioni di storia e letteratura, 1972), 121.

[4] G. Capograssi, n 1 above, 558.

[5] ibid, 559-560.

[6] ibid, 566. See comments in C. Vasale, n 3 above, 120.

[7] F.J. Díaz Revorio, 'La monarquía parlamentaria, entre la historia y la Constitución' 20 *Pensamiento Constitucional*, 65-106 (2015).

[8] B. Constant, *Réflexions sur les constitutions, la distribution des pouvoirs et les garanties dans une monarchie constitutionnelle* (Paris: Nicolle, 1814), 3.

[9] G. Capograssi, n 1 above, 570. See V.E. Orlando, 'La decadenza del governo parlamentare' 2 *Rassegna di scienze sociali e politiche*, 1, 589-600, 598 (1884).

[10] See C. Vasale, n 3 above, 133.

[11] *See H. Hofmann*, *Repräsentation. Studien zur Wort-und Begriffsgeschichte von der Antike bis ins 19. Jahrundert* (1974), translated by C. Tommasi, *Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento* (Milano: Giuffrè, 2003), 415.

organicist conceptions of the State.[12] Yet, he wrote in an age of diffuse tensions within and among States, which resulted in the Second World War. Contrary to his hopes, the constitutional structures of liberal States did not make room for inclusive claims to representative sovereignty; rather the opposite, they mostly collapsed and paved the way to authoritarianism.[13] Domestically, constitutional flexibility could not counter the rise of autocratic governments that restricted, instead of broadening, social participation in the deliberation of the State's will.[14] Internationally, autarchic conceptions of sovereignty maintained by aggressive elites hardly tolerated any limitations to the States' power to defend their interests against one another.[15]

Consequently, representative sovereignty led to restricted participative spaces for law-making, whereas Heads of State went on to play an exclusive, rather than inclusive, role in refurbishing the ties between the State's power and a fast-changing society.[16] Far from protecting pluralism, the *Hüter der Verfassung* came to resemble the intimidating figure of Schmitt's *decider of last resort*, preserving national unity notwithstanding the interests of the excluded – even if their exclusion might lead to the infringement of established rights.[17]

After the war and with the awareness of the massive violations of human rights that had occurred worldwide, national flexibility and international autarchy were purposely abandoned. To counter the rise of autocratic and aggressive nationalistic governments, representative sovereignty was reformulated in a pluralistic fashion that may be described as a link between domestic rigidity and supranational openness. This link builds up a mutually positive relationship, where the former is instrumental to the latter and the

[12] *'Institutional representation' as a concept attached to the State's organs regardless of their actual ties to society is well-rooted in continental scholarship: see* V.E. Orlando, 'Du fondement juridique de la representation politique', 2(2) *Revue du droit public et de la science politique en France et à l'étranger*, 1-39 (1895) and V. Gueli, 'Il concetto giuridico della rappresentanza politica e la rappresentatività degli organi di governo' III-IV *Rivista italiana per le scienze giuridiche*, 239-256 (1942). This concept served as a ground for national representation in Fascist Italy: see O. Ranelletti, 'La rappresentanza nel nuovo ordinamento politico e giuridico italiano' 1(21) *Rivista di diritto pubblico e della pubblica amministrazione in Italia*, 199-206 (1929) and L. Paladin, 'Il problema della rappresentanza nello stato fascista' 1-2 *Jus*, 69-87 (1968). For comparison, see M. Stolleis, *A History of Public Law in Germany (1914-1945)* (Oxford: Oxford University Press, 2014), 17-20, 64.

[13] K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944; Boston: Beacon Press, 2nd ed, 2001), 237-242.

[14] H. Heller 'Politische Demokratie und Soziale Homogenität', in H. Heller ed, *Probleme der Demokratie*, vol. I (Berlin: Walter Rothschild, 1928), 35-47, English ed: A. Jacobson and B. Schlink eds,*Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 256-258.

[15] B. Mirkine-Gützevich, *Droit constitutionnel international* (Paris: Sirey, 1933), chapter II.

[16] J.A. Sánchez Moreno, 'El Parlamento en su encrucijada: Schmitt *versus* Kelsen, o la reivindicación del valor de la democracia', 162 *Revista de Estudios Políticos*, 113-148 (2013).

[17] C. Schmitt, 'Der Hüter der Verfassung', 55(2) *Archiv des öffentlichen Rechts*, 161-237 (1929).

latter enhances the former:[18] as a result, a virtuous circle protects the self-determination of the human *person* as a supreme expression of her dignity[19] by allowing her a central position in the overall constitutional architecture.[20] In this framework, political and substantive rights stay in a mutually positive relation: the material content of substantive rights is a consequence of the exercise of political rights and of the constitutional structure that unfolds accordingly.

The functioning of this link can be roughly presented as follows. Domestically, rigid constitutions protect individual rights through a separation of powers:[21] the State's institutions accommodate plural interests via rational discourse according to the constitution, as the legislator's will is balanced by constitutional courts' substantive review.[22] At the supranational level, openness replaces autarchy:[23] bi-and multilateral agreements expand the scope of international law,[24] and human rights are protected against States' sovereign will.[25] Furthermore, on the European stage, the principles of primacy and direct effect lead to an increasing legal integration[26] – whereas, politically, the Union strives to encompass formerly rival States into a single order shaped by law rather than by pure power.[27]

[18] M. Luciani, 'La "Costituzione dei diritti" e la "Costituzione dei poteri". Noterelle brevi su un modello interpretativo ricorrente', in *Scritti in onore di Vezio Crisafulli* (Padova: Cedam, 1985), II, 497.

[19] See J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' 41:4 *Metaphilosophy*, 464-480 (2010) and P. Häberle, *Die Wesensgehaltsgarantie des Art. 19 Abs. 2 Grundgesetz* (Stuttgart: C.F. Müller Verlag, 1983), 179.

[20] The centrality of the person in the Constitution's order gave rise to what has been called the 'Constitution's sovereignty' doctrine: see L. Lacché, 'The Sovereignty of the Constitution: A Historical Debate in a European Perspective' 34 *Journal of Constitutional History*, 83-102 (2017), and G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (Torino: Einaudi, 1992), 9-10.

[21] See Art 16 of the *Déclaration des droits de l'homme et du citoyen* (1789). On constitutional rigidity, A. Pace, 'La causa della rigidità costituzionale', in Id, *Potere costituente, rigidità costituzionale, autovincoli legislativi* (Padova: Cedam, 2002), 3-97; J.L. Requejo, 'El poder constituyente constituido. La limitación del soberano' 1 *Fundamentos*, 361-380 (1998). More recently, J. García Roca, 'De la revisión de las constituciones: constituciones nuevas y viejas' 40*Teoría y Realidad Constitucional*, 181-222 (2017) and Y. Roznai, 'Rigid (Entrenched) / Flexible Constitutions', *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2018), 1-17.

[22] See P. Ridola, 'Libertà e diritti nello sviluppo storico del costituzionalismo', in P. Ridola and R. Nania eds, *I diritti fondamentali* (Torino: Giappichelli, 2001), I, 3-68, 35.

[23] C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law', 281(10) *Recueil des Cours – L'Aje*, 306 (1999).

[24] R. Lesaffer, 'Peace Treaties and the Formation of International law', in B. Fassbender and A. Pieters eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 71-94.

[25] D. Shelton ed, *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), 163.

[26] J.H.H. Weiler, 'The Transformation of Europe' 100(8) *Yale Law Journal*, 2403-2483, 2450 (1991).

[27] See J.-P. Jacqué, *Droit institutionnel de l'Union Européenne* (Paris, Dalloz, 5th ed, 2009),

In this framework, sovereignty is no longer thought of as a monolith in defence of State unity:[28] *multi-level* structures replace the state-centred model as the best-suited paradigm for pluralism to thrive at national and supranational levels.[29] Many scholars even argue that, given its ties to a State-centred conceptual background, sovereignty no longer suits the *post*-State scenario.[30]

Be that as it may, the constitutional arrangements that stem from the construction of multiple institutional channels between public powers and plural societies have found a better-defined role for Heads of State. Parliamentary governments[31] – the most diffuse constitutional structure within Europe's public space[32] – conceive of them as politically unaccountable counterweights acting as a last resort to resolve political conflicts beyond the majority's will.[33] In other words, Heads of State are called to play an *inclusive* role for the sake of national unity once no other political resource is available.[34] One might say that Capograssi's lesson has been embraced: the apex of institutional architectures is purposely designed to host socio-political pluralism in a peace-enhancing manner.

However, if one looks at the seething pluralism that ignites European societies from the viewpoint of today's Italian legal order, yet another of Capograssi's predictions seems to come true. Increasing social pluralism entails an increasingly political role for Heads of State, though designed as politically unaccountable; but, as he feared, this seems to come at the expense of inclusion, rather than fostering pluralism. Consequently, due to Heads of

87. Compare J.H.H. Weiler, 'The Community System: the Dual Character of Supranationalism' 1(1) *Yearbook of European Law* 267–306 (1981).

[28] J.H.H. Weiler, 'In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*', in J.H.H. Weiler and M. Wind eds, *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003), 7-24.

[29] I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making revisited?' 36(4) *Common Market Law Review*, 703-750 (1999).

[30] N. MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 123-136.

[31] In the European Union (the UK being no longer considered as a member) there are 21 parliamentary governments out of 27; Cyprus is the only presidential government, whereas France, Lithuania, Poland, Portugal and Romania are listed as semi-presidential.

[32] See P. Ridola, 'Prime osservazioni sullo "spazio pubblico" nelle democrazie pluralistiche', in Id, *Diritto comparato e diritto costituzionale europeo* (Torino: Giappichelli, 2009), 31-49 and A. von Bogdandy, 'European Law beyond 'Ever Closer Union': Repositioning the Concept, its Thrust and the ECJ's Comparative Methodology' 22(4) *European Law Journal*, 519-538 (2016).

[33] S. Milačić, 'Le contre-pouvoir, cet inconnu' in *Mélanges Lapoyade-Deschamps* (Bordeaux: Presses universitaires de Bordeaux, 2005), 681.

[34] There are notable substantive differences among parliamentary governments themselves; see G. de Vergottini, *Diritto costituzionale comparato*, (Padova: Cedam, 9th ed, 2014), I, 613-620; N. Parpworth, *Constitutional and Administrative Law* (Oxford: Oxford University Press, 9th ed, 2016), 53-59. On the evolution of the royal prerogatives under English constitutional law, see R. Blackburn, 'Monarchy and the personal prerogatives' 3 *Public Law*, 546-563 (2004) and R. Brazier, 'Monarchy and the personal prerogatives: A personal response to Prof. Blackburn' 1 *Public Law*, 45-47 (2005); on the Spanish King's powers, F.J. Díaz Revorio, n 7 above, 75 and I. Torres Muro, 'Refrendo y Monarquía' 29 *Revista Española de Derecho Constitucional*, 43-70 (2009).

States' apical position in the constitutional architecture, presidential claims hinge on the representation of national unity; thus, their opponents suffer an exclusion without remedy, as countermeasures are simply unconceivable – Heads of State are *themselves* the ultimate 'countermeasure' in their own political-constitutional orders.[35]

Three years ago, in a speech whose influence in defining Italy's constitutional structure is still underrated, the Italian Head of State raised a *sovereignty* claim in alleged defence of national unity.[36] Today, the dust of a politically heated issue has blown over and two new parliamentary majorities have relegated that Cabinet in the 'history' section;[37] yet there are still crucial reasons to analyze that claim, as it questions the role of the Italian Head of State in fully-fledged *post*-national contexts.[38] Pressures coming from a space that is external to and independent from the range of a State prove to exercise a slight, but remarkable influence on that State's constitutional setting.[39] Therefore, this is not only an Italian concern, but one that is tied to a broader, 'post-State' scenario.[40]

Pursuant to a summary of those events, this work investigates the substance of the claim the President raised in light of its manifold implications for contemporary constitutionalism.[41] The points that will be discussed are

[35] T. Martines, *Governo parlamentare e ordinamento democratico* (Milano: Giuffrè, 1967), 152.

[36] 'Sovereign' as it pretends to define the sovereign interest of the State: N. Walker, 'Sovereignty Frames and Sovereignty Claims' 14 *University of Edinburgh Research Paper*, 1-26 (2013).

[37] In August 2019, the then Ministry for Home Affairs Matteo Salvini (Lega) ceased to support the Conte Cabinet in the hope of turning his party's increasing growth in the polls into an actual parliamentary majority; however, other major parties (*MoVimento Cinque Stelle* and the Democrats) though rivals in the 2018 campaign, agreed to form a new Cabinet, with Giuseppe Conte as Prime Minister and Democrats in crucial Ministries and an enhanced 'pro-Europe' attitude. See 'Governo, Conte annuncia i ministri', *La Repubblica*, 4 September 2019; 'With New Cabinet, Italy's Political Turmoil Ends, For Now, *The New York Times*, 4 September 2019. Eventually, the new 'crisis' triggered by *Italia Viva* and by its leader Matteo Renzi has led to the formation of a new, fully 'Europeanist' Cabinet led by Mario Draghi and supported by virtually all the political forces (with the exception of *Fratelli d'Italia*). See 'A Giant of Europe Prepares to Head Italy's New Unity Government', *The New York Times*, 12 February 2021.

[38] More in G. Vosa, 'La pretesa "responsabilità istituzionale" del Presidente della Repubblica: un'accorata denuncia dei mutamenti profondi che solcano il diritto dell'Europa' 4 *Rivista AIC*, 186-210 (2019).

[39] G. Scaccia, 'Espansione di ruolo del Presidente della Repubblica e funzione di rappresentanza dell'unità nazionale' 3 *Lo Stato*, 101, 110 (2014) and M. Luciani, 'Il Presidente della Repubblica: oltre la funzione di garanzia della Costituzione', in M. Luciani and M. Volpi eds, *Il Presidente della Repubblica* (Bologna: Il Mulino, 1997), 11.

[40] 'Post-State' being understood as a historical moment in which States have lost the monopoly of lawmaking due to the exclusivity principle's demise. The concept does not imply the irrelevance of States in the international scenario; compare M. Loughlin, 'Constitutional Pluralism: An Oxymoron?' 3-1 *Global Constitutionalism*, 9-30 (2014) and S. Cassese, 'The Rise and Decline of the Notion of State' 7(2) *International Political Science Review*, 120-130 (1986) though it alludes to the fading of formal equality among sovereign States in the shift from 'international law' to 'international relations' (M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law (1870-1960)* (Oxford: Oxford University Press, 2002) 127, 440, 465).

[41] Compare A. Somek, *The Cosmopolitan Constitution* (Oxford: Oxford University Press,

anticipated hereinafter.

First: the President claims an 'institutional responsibility'. Yet, in the constitutional text, the only accountability to which he is subject arises in cases of betrayal and supreme violation of the Constitution, for which he would face impeachment. Accordingly, he has a correspondent duty to act only if, and when, the Constitution is at risk of supreme violation: his responsibility descends from the top of the institutional architecture and amounts to a substantive veto on the attributions of other constitutional organs.

Second: his claim refers to an alleged exercise of 'concrete sovereignty', the relevant arguments being *emotional,* rather than rational, in nature. The whole reasoning rests on a partial, politically controversial narrative of events from which the President strives to derive constitutional arguments.

Third: although the wording of the Constitution seems to preclude the development of such a claim, constitutional antecedents may be sought in the practice as evolved since 2011. In those circumstances, President Giorgio Napolitano shepherded fragile coalition governments to ensure compliance with the duties imposed by the European institutions to face the economic crisis. Yet, the stark opposition he had to confront – including with regard to troublesome, controversial political events that tarnished his mandate – would recommend the highest prudence in the evaluation of any arguments for a constitutional mutation that may stem from such practices.

Fourth: further confirmation of this claim has come from the response to another crisis, ie the CoVid-19 pandemic that has been shocking the world since early 2020, and in the aftermaths of the 2021 political turmoil that has led to the appointment of Draghi's Cabinet. President Mattarella has found occasions to strengthen his direct representational claim *vis-à-vis* the citizenry and to stress his role as a liaison between national and supranational orders.

As a result, in light of both recent and less recent circumstances, this slight *modification* of the presidential role seems to reveal an ongoing constitutional shift, which challenges the relation between constitutional rigidity and supranational openness at the roots of national orders. Thus, post-national constitutional arrangements maycontemplate a departure from what has been hitherto regarded as the cornerstone of contemporary constitutionalism.

II. The President's Powers and the Italian 2018 Elections: Innovative Practices in the Appointment of a Cabinet

The Italian President plays a crucial role in the appointment of the Cabinet.[42] It seems opportune to briefly recall the norms defining her *status*

2014), 176, and N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-national Law* (Oxford: Oxford University Press, 2010), 38.

[42] In the Italian literature, the span of presidential powers has been compared to the functioning

and attributions.

Under Art 87 (1) of the Constitution, the President is 'Head of State' and 'represents national unity'.[43] As Head of State, she acts as the linchpin of the national institutional machinery: she has to ensure compliance with constitutional law and practice at the institutional level. As representing national unity, she activates a direct link with the whole Italian society that she is to interpret according to criteria of sound 'humanitarian reasons'.[44]

These two provisions refer to two different channels fuelling the legitimacy of the presidential actions. The first channel has to do with her function as supreme 'constitutional magistrate' that is undergirded by a systematic reading of rules conferring constitutional attributions to the State's organs. The second is embedded in her institutional prerogative and stems from her apical position in the constitutional architecture. Whereas the former relates to interpretation and must be backed by reasonable legal arguments, the latter hinges on the personal qualities of the President herself: it virtually rests solely on her wisdom and sense of justice.[45]

For presidential powers to be prudently used in view of preserving the unity of the Italian State, a sound balance must be struck between these two channels.[46] Considering both a systematic and a strictly textual argument, the constitutional magistracy is mentioned first in the Constitution's wording and has logical and juridical priority over the national unity representation, which should be confined to mostly *symbolic* functions.[47] Hence, should the President violate the constitutional attributions of other organs on the basis of her link with the Italian society, she would probably trespass the boundaries of her legitimacy and steer Italy toward a *quasi*-presidential, monarchy-like government, which would most probably be in breach of the Constitution.[48]

As for the appointment of a Cabinet, it is accepted that the President has incisive powers – since abundant constitutional practices enriched the laconic provision laid down in Art 92(2).[49] In fact, the President's role has come to be

of a squeezebox (Giuliano Amato; see G. Pasquino, 'La fisarmonica del Presidente' 3 *La rivista dei libri*, 8 (1992)).

43 M. Luciani, 'Un giroscopio costituzionale: il Presidente della Repubblica dal mito alla realtà (passando per il testo della Costituzione)' 2 *Rivista AIC*, 18 (2017).

44 G. Scaccia, n 39 above, 101-115; M. Luciani, 'La gabbia del Presidente' 2 *Rivista AIC*, 1-10 (10 May 2013).

45 A. Sperti, *Responsabilità presidenziale e ruolo costituzionale del Capo dello Stato* (Torino: Giappichelli, 2012), 30-33.

46 L. Paladin, 'La funzione presidenziale di controllo' 2 *Quaderni costituzionali*, 309-327 (1982).

47 A. Sperti, n 45 above, 5-17.

48 In case of political stalemate, the President may use its attributions to force a way-out from the *impasse*; a renowned, although controversial theory attaches to his figure a power of *constitutional* direction, symmetric to – but, significantly, separate from – the Government's *political* direction. See P. Barile, 'I poteri del Presidente della Repubblica' 1 *Rivista trimestrale di diritto pubblico*, 295 (1958).

49 Accordingly, '(t)he President of the Republic appoints the President of the Council of Ministers

crucial:[50] it has been recognised that, in some circumstances, she might appoint a Cabinet even with no support in either chamber, something that has occurred a few times.[51]

As a general rule, the President regularly consults with parliamentary forces and may commission explorative mandates to political figures (*mandati esplorativi*) to seek a parliamentary majority; she may confer a pre-appointment (*pre-incarico*) on the person who could most likely receive parliamentary support as Prime Minister (*Presidente del Consiglio dei Ministri*). The candidate may accept (often with reserve) the pre-appointment, then seeks parliamentary consensus and may present within days a list of candidate Ministers whose appointment is discussed with the President.[52]

It is understood that, generally, the President proceeds to the appointment according to the wishes of the candidate President of the Council of Ministers that she had appointed. In fact, the latter acts as a spokesperson of a potential parliamentary majority and expresses the wishes of the respective MPs – the vote of confidence concerned (*voto di fiducia*) taking place in each chamber within ten days of the Cabinet's appointment, as laid down in Art 94 (3) of the Constitution.

In the case under discussion, however, things went differently. Due to the new electoral system, largely proportional, and to the rise of new forces in the face of the decline of the traditional centre-right/centre-left parties, the 2018 general elections in Italy left most analysts bemused because of the changeable political scenario. Multiple negotiation rounds occurred during several weeks and the whole process of appointment of the Cabinet acquired unprecedented visibility.[53] The Euro-critical focus taken during the campaign by some of the parties receiving the most votes raised some international concerns.[54] Eventually, *MoVimento Cinque Stelle* (Five Star Movement) and *Lega* came to an agreement

and, on his proposal, the Ministers'. See S. Galeotti, *La posizione costituzionale del Presidente della Repubblica* (Milano: Pubblicazioni Università S. Cuore, 1949), 10; G. Guarino, 'Il Presidente della Repubblica italiana. Note preliminari' 3 *Rivista trimestrale di diritto pubblico*, 3 b (1951).

[50] M. Carducci, 'Art. 94', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* (Torino: Utet, 2006), II, 1810; A. Baldassarre, 'Il Capo dello Stato', in G. Amato and A. Barbera eds, *Manuale di diritto pubblico* (Bologna: Il Mulino, 1991), 461; F. Sacco, *La responsabilità politico-costituzionale del Presidente della Repubblica* (Roma: Aracne, 2012), 77.

[51] R. Ibrido, 'La nascita del Governo Fanfani VI ed i problemi costituzionali del governo privo della fiducia iniziale' *federalismi.it*, 1-18 (26 May 2013).

[52] A. Baldassarre and C. Mezzanotte, 'Presidente della Repubblica e maggioranza di governo', in G. Silvestri ed, *La figura e il ruolo del Presidente della Repubblica nel sistema costituzionale italiano* (Milano: Giuffrè, 1985), 92.

[53] C. Pinelli, 'Appunti sulla formazione del Governo Conte e sulla fine della riservatezza' 2 *Osservatorio costituzionale*, 1-10 (2018); M. Fichera, 'Formazione, funzionamento e struttura del Governo Conte: luci e ombre sugli sviluppi della forma di governo italiana', 3 *costituzionalismo.it*, *1-27* (2018).

[54] L. Fontana, ' Le responsabilità di chi ha vinto le elezioni' *Il Corriere della Sera*, 5 March 2018.

on a programme ratified by a written covenant,[55] the whole process being regarded as deeply innovative for Italian constitutional practices.[56]

The crucial events began on 23 May, as President Sergio Mattarella pre-appointed Giuseppe Conte (backed by *MoVimento Cinque Stelle* and *Lega*) who accepted with reserve. For some days, rumours mounted in the press about alleged disagreements on the candidate Ministers.[57] Eventually, on the afternoon of 27 May, Conte confirmed that he 'renounced' the appointment due to 'lack of an agreement' on the Ministers with the President.[58]

On that evening, President Mattarella took the initiative to present himself before the media in the most solemn form to deliver worldwide a speech of remarkable momentum.[59]

The peculiarities of that speech – leaving aside the circumstances leading to its delivery – can be summarized in two points. First, the conscious, evident attempt to sketch out a factual background in support of a specific narrative of the events related to the national and international scenarios. Second: such background – while resting on mostly emotional, rather than reason-based, arguments – was meant to support a clear-cut constitutional interpretation of the presidential powers that is designed to live beyond the specific circumstances and considerably expands the role of the President to the detriment of other organs. In other words: by an apparently unnecessary overexposure – perhaps even politically detrimental to his figure in the short term – President Mattarella gives reasons for the unprecedented role he is to play and strives to translate such reasons into stable constitutional foundations for presidential action.[60]

The *exordium* of the speech briefly recalls the events. The President reveals himself to 'have eased' political forces in the negotiations after the polls and provides accurate details of his actions, which nonetheless seems beyond constitutional practices.[61] He virtually directed two explorative mandataries in

[55] R. Bin, 'Il "contratto di governo" e il rischio di una grave crisi costituzionale' www.lacostituzione.info, 16 May 2018; G. Zagrebelsky, 'Contratto di governo? È patto per il potere' *Il Fatto Quotidiano*, 21 May 2019.

[56] M. Esposito, 'Spunti per un'analisi delle variazioni costituzionali percepibili nel procedimento di formazione del Governo Conte' 2 *Osservatorio Costituzionale*, 1-21 (2018).

[57] M. Damilano, 'La notte più buia della Repubblica e quei serpenti sulla Costituzione' *Editoriale L'Espresso*, 28 May 2018.

[58] T. Ciriaco and A. Cuzzocrea, 'Governo, il giorno della rinuncia di Conte. Ecco come è fallita la trattativa su Savona' *La Repubblica*, 28 May 2018.

[59] Vista – *Agenzia Televisiva Nazionale*, available at https://tinyurl.com/cxx29u7 (last visited 30 June 2021).

[60] As noticed (M. Dani and A. J. Menéndez, 'The "Savona Affaire": Overconstitutionalisation in Action?', available at www.verfassungsblog.de, 31 May 2018) he could have appointed Savona and reminded the public of his guarantee role as regards the State's compliance with international obligations; or else, he could have simply refused to appoint Savona without going public. However, he expressly chose to do otherwise.

[61] M. Esposito, n 56 above, 5.

seeking parliamentary majority, as well as the candidate Prime Minister.[62] In a more conventional reading of the Constitution, he may well exercise his 'influence' on the choices of political parties[63] – through *moral suasion*, or otherwise defined[64]– but may not interfere with their constitutionally provided tasks, ie seeking parliamentary consensus to build up the relation of confidence.[65]

The President underlines that he warned political forces – 'receiving no objection' – of the 'particularly high attention' he was 'to pay' to the choices of 'some Ministries'. Pursuant to this – he declares – he 'accepted all names' proposed, except the candidate Minister of Economy' (Paolo Savona, an internationally recognised economist with a prestigious *curriculum*, born 1936) 'in spite of the consideration' of his personal and professional profile. Yet, whether he has this power is questionable. There are precedents of the President exercising substantive scrutiny of specific candidate Ministers, but they are not comparable to this case.[66] First, because the reasons for such substantive scrutiny referred to moral or functional motives attaching to the person concerned, which in the case at debate the President has explicitly excluded. Second, because the relevant details were never aired to the public, rejection being the result of a cautious, discreet exercise of the President's influence – again: unlike what occurred in this case.[67] No rejection has been recorded that was explicitly grounded on the candidate's political ideas in relation to the relevant post; in a conventional understanding of the presidential figure, this would most probably amount to a political act interfering with the powers of political leaders in the formation of the Cabinet. Nevertheless, the President openly maintains the opposite view: he claims he has a 'guarantor-like role that has never, and could never, tolerate restrictions'.

Three further questions arise. First: who is to benefit from the 'guarantee'

[62] Conte specified that he was 'to renounce the charge' rather than 'not to accept the appointment'. This formula echoes the *Statuto Albertino* provisions (Art 65) referring to the King in a constitutional monarchy: see M. Esposito, n 56 above; compare M. Belletti, *Forma di governo parlamentare e scioglimento delle Camere. Dallo Statuto albertino alla Costituzione repubblicana* (Padova: Cedam, 2008), 363.

[63] L. Elia, 'Appunti sulla formazione del Governo' 2 *Giurisprudenza costituzionale*, 1170 (1957).

[64] D. Galliani, *Il Capo dello Stato e le sue leggi* (Milano: Giuffrè, 2013), II, 513; V. Lippolis and G.M. Salerno, *La Repubblica del Presidente. Il settennato di Giorgio Napolitano* (Bologna: Il Mulino, 2013), 14.

[65] B. Caravita di Toritto, 'I poteri di nomina e scioglimento delle Camere', in A. Baldassarre and G. Scaccia eds, *Il Presidente della Repubblica nell'evoluzione della forma di governo* (Roma-Bari: Laterza, 2013), 104.

[66] See the different positions in www.lacostituzione.info and 2 *Osservatorio costituzionale* (2018); also, D. Tega and M. Massa, 'Why the Italian President's Decision was legitimate', available at www.verfassungsblog.de, 28 May 2019; M. Dani and A. J. Menéndez, n 60 above.

[67] One may say that no 'judicialization' of the relevant positions has ever taken place: A. Stone Sweet, 'Judicialization and the Construction of Governance' 32(2) *Comparative Political Studies* 147-184 (1999).

attached to his role? The President's 'guarantor-like' role relates to his function of *contre-pouvoir* aiming to include minorities beyond the majoritarian will; but it is doubtful whether a majority or minority can be said to exist before a cabinet is appointed, obtains parliamentary support and undertakes any action. Second: how the President chooses the ministries for which he exercises such a 'particular attention' resulting in a veto-like power, for this implies that some ministries are 'more important' than others – contrary to the collegiality principle ruling the Council of Ministers (Art 92). Third: in which sense such a power has 'never tolerated restrictions' since it has never been exercised in these terms?

However, in the follow-up of the speech, there seemed to be no room to respond to any of these questions.

III. An 'Institutional Responsibility' in the Appointment of Ministries: in Search of 'New' Constitutional Grounds

The President's position appears to descend from a systematic constitutional reading that is deliberately *new*. He seemingly claims the existence of a constitutional unwritten norm formed in an extremely short time and without relevant practice; that is, absent the typical constitutive elements of customary norms.[68] This claim, already audacious, becomes manifest when he argues that he bears an 'institutional responsibility' in the selection of candidate ministers 'as the Constitution provides' which impelled him to refuse the appointment of Paolo Savona.

This 'institutional responsibility' is the key of the whole presidential stance. The Constitution contains no such reference, nor does the *genus* 'institutional responsibility' feature anywhere in the text. As the Head of State of a parliamentary government, the President is politically unaccountable: the only check on his actions lies in the cases laid down in Art 90 (high treason and supreme violation of the Constitution) for which he would face impeachment.[69] So long as the Constitution is in force, no other responsibility could attach to his office.

Therefore, his claim arguably exposes an issue of the utmost gravity: the responsibility that the President feels on his shoulders rests nowhere less than at the highest level of the State. His reported duty to act prompts him even to counter majoritarian political forces, as, should he fail to do so, his behaviour would fall within the scope of Art 90. Briefly: President Mattarella is asserting

[68] C. Esposito, 'Consuetudine (*dir. cost.*)' *Enciclopedia del Diritto* (Milano: Giuffrè, 1961), IX, 460; for comparison, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, London: McMillan, 1915; repr: Indianapolis: Libertyfund.org, 1982), 277.

[69] L. Carlassare, 'Art. 90', in G. Branca ed, *Commentario della Costituzione* (Roma-Bologna: Foro Italiano-Zanichelli, 1983), II, 149-189.

on a prime-time broadcast speech that he is acting to prevent a supreme violation of the Constitution, which would arise from the mere appointment of Savona as Minister of Economy.

He deploys a lengthy description of the relevant factual background in support of this claim. The President reveals that for Minister of Economy he wished to appoint somebody who 'could not be seen as a supporter of the Italian exit from the Euro'. Then: *who* should not see Savona as a *No-Euro* supporter, and why would this bring such a menace to Italy? What obscure, yet threatening emergency is the President referring to, and – ultimately – what is the binding force that can be legitimately inferred from such an emergency?

The speech only contains generic explanations linked with a need to secure the 'trust of investors, Italians and non-Italians' and the rising spread rate. Yet, the menace is reported to have concrete implications: the losses on the stock markets are putting at risk the savings of Italian citizens and companies, the safeguard of which the President undertakes as a 'duty' of his own. Consequently, the binding force related to this menace is the highest.

Then, further argumentative support of the President's claim is provided, but mainly – if not wholly – in the form of overtly *emotional* grounds. Three issues are touched upon: indignation (occasioned by trivial comments in the German press);[70] Europeanism (endorsed by loud but vague proclamations of Italy being 'a founding member, and a protagonist' of the European Union); and personal feelings of the President himself ('I am not speaking with light heart').

In sum, the constitutional background that the Italian Head of State is offering to the citizens – and to the whole world – as a support for a sovereign claim in defense of Italy's national unity can be summarized as follows. Due to reasons linked with: 1) unspecified emergencies relating to the potential lack of trust from national and international investors; 2) generic duties to protect Italians' savings; and 3) vague pro-Europe sentiments, the appointment of a Minister of Economy with Euro-critical opinions, chosen by parliamentary actors, is deemed *per se*, and prior to any action (let alone, normative measure) taken by a Cabinet which is still to be appointed, a supreme violation of the Constitution that the President has the 'institutional responsibility' to prevent.

As a corollary, it must be acknowledged that in the President's view the political will of Parliament meets with *substantive* constraints, maybe equivalent to the 'forms and limits provided by the Constitution' to the people's sovereignty (Art 1 (2) of the Constitution) perhaps even to the 'Republican form' (Art 139) that cannot be modified without changing the Constitution.[71] Such

[70] On the numerous provocative headlines appeared in the German newspaper *Der Spiegel*, see 'Copertina con spaghetti a forma di cappio e la frase: "Ciao amore"' *Il Fatto Quotidiano*, 1 June 2018.

[71] In this regard, the President seems prudent: he specifies that 'leaving the Eurozone is a choice of fundamental importance' to be 'discussed openly and seriously, especially if it has not been

constraints, while endowed with nearly irresistible binding force, are vaguely enunciated; and reasons for their juridical nature look evanescent. In the relevant literature, two basic arguments have been formulated to strengthen their anchor in the current constitutional order: the first refers to the duty of protecting the 'savings' undertaken by the Italian Republic and the second to alleged EU/international constraints.

First: under Art 47 '(t)he Italian Republic encourages and safeguards savings in all forms. It regulates, co-ordinates and oversees the operation of credit'. This provision can be linked with the speech as the President mentioned the 'protection of savings' of the Italian citizens as a duty he has to comply with. However, at a closer look, this provision displays a loose relation to the case at hand. In particular, the second sentence shows that it applies to cases in which the savings' legal regulation falls within the State's competence. Yet, in this case, the connection between the protection of savings and the State's scope of action, including a refusal to appoint a candidate Minister, is far from evident. Is there any cause-effect relationship between the two? And, if so, does it bear constitutional relevance? Moreover, is it of such a magnitude to forbid a merely political act like the appointment of a candidate Minister? These questions remain unanswered.

Second: arguments referring to a duty to comply with European Union or international obligations are the most diffuse.[72] There are three arguably suitable constitutional bases. The first is Art 11, concerning the 'limitations of sovereignty' that Italy accepts as an EU member. Second comes Art 117 (1) providing that the legislative competence of the State and the Regions is bound by international and EU obligations. Third, Art 81 (as modified in 2012 pursuant to the 'Fiscal Compact' Treaty) contains the 'balanced budget' rule limiting resort to public debt financing.

The argument contends that these references provide a sufficiently solid constitutional support for the presidential refusal to appoint Savona; because, if read systematically, they prove the existence of legal constraints on the activity of Italian institutions stemming from Italy's membership in the EU and other international bodies.

Although carefully crafted, this line of reasoning is unpersuasive, for – unmistakably – the case at hand does not fall within the scope of any such provisions.

Art 81 is considered to lack actual binding value by most scholars, who wonder whether it may effectively serve its alleged purpose – ie working as a

on the table during the electoral campaign'. The door seems open for a future change; but this does not preclude that it may be considered a change *of* the Constitution rather than *in* the Constitution. See J. L. Requejo Pagés, *Las normas preconstitucionales y el mito del poder constituyente* (Madrid: CEPC-Estudios Constitucionales, 1998), 68.

[72] See S. Curreri, 'Le ragioni di Mattarella nel rifiutare quella nomina, ma lo ha fatto nella sede sbagliata' *www.lacostituzione.info*, 29 May 2018; D. Tega and M. Massa, n 66 above.

parameter to challenge legislation resulting in unbalanced budgets.[73] It has mostly worked as an additional parameter to support the constitutionality of austerity measures that cut off welfare expenditures.[74] In the current case, there is neither a piece of legislation nor a Cabinet calling for the Parliament to approve it, and no infringement of budgetary rules has occurred.

Art 11 reads as a basis to ensure the primacy of EU self-executing law;[75] but no such law is present or even cited in this case.

Art 117 (1) is more explicit: it binds 'State's and Regions' legislative competence' to compliance with EU/international law, and works as a parameter for constitutional adjudication in cases of incompatibility between non self-executing EU/international law and national law. Yet, again, no such law is anywhere at debate.[76]

Even if a systematic constitutional interpretation relying on all these articles is attempted to support a transfer of sovereignty to or a limitation of sovereignty in deference to EU/international institutions, there is still a significant distance between their range of application and the case at issue. The appointment of a Minister is by no means comparable to 'national law' for the purpose of the application of EU (let alone, international) treaties: it is a political act of a sovereign State. Therefore, if it can be constrained by virtue of Italian membership in the EU, or in other international legal orders, this means that the EU, or another international legal order, has authority to restrict the freedom of the Italian institutions to decide on their own composition. Such an authority does not rest on any EU legal basis; is hardly compatible with the purpose of any international treaty; finally, it cannot be justified in light of substantive harmonization of EU or international law, for the simple reason that it *does not harmonize law*, nor does even refer to it. It is a genuine takeover of national sovereignty on the *political* side; one which would certainly clash with Art 4 (2) of the Treaty on the European Union – pursuant to which '(t)he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' – and would most probably operate in breach of the conferral as laid down in Art 5 of the

[73] G. Scaccia, 'La giustiziabilità della regola di pareggio di bilancio' 3 *Rivista AIC*, 1-20 (2012).

[74] L. Carlassare, 'Diritti di prestazione e vincoli di bilancio' 3 *Costituzionalismo.it*, 136-154 (2015).

[75] As interpreted after the Italian Constitutional Court's Judgment 170/1984: see G. Zagrebelsky, *Il sistema costituzionale delle fonti del diritto* (Torino: EGES, 1984), 142; F. Sorrentino, *Le fonti del diritto* (Genova: ECIG, 1997), 28; A. Celotto, 'Coerenza dell'ordinamento e soluzione delle antinomie nell'applicazione giurisprudenziale', in F. Modugno ed, *Appunti per una teoria generale del diritto*, (Torino: Giappichelli, 3rd ed, 2000), 129-270; an analysis of the effects in D. Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali* (Milano: Giuffrè, 2018), 163.

[76] F. Sorrentino, 'Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario' 4 *Diritto pubblico comparato ed europeo*, 1355 (2003).

same Treaty.[77]

Briefly: none of these constitutional arguments seems to suit the case, which proves to be an unprecedented one in the seventy-year-long constitutional practice of the Italian Republic.

IV. 'Concrete Sovereignty': An Empirical Description, a Constitutional Argument?

The floor is open as to whether there is a constitutional argument that may support the presidential claim better than those discussed above. The remainder of the speech is of little help in this respect. The President only says that rejecting Savona's appointment is necessary to defend national unity and to protect 'concrete' national sovereignty.

However, 'concrete sovereignty' is not an identifiable concept; it would be misleading to associate it with an international treaty formally providing for the loss of a State party's sovereignty in case of non-compliance.[78] Thus, as no further legal ground is referred to, one is rather urged to look back at the factual substance of the President's claim, which is of the utmost gravity.

The President is openly saying that, while formally being a sovereign State, *concretely* Italy is, since an undetermined moment in time, no longer a sovereign State. To acknowledge that this loss of sovereignty occurred at some point in the past has three fundamental implications. First, a statement of facts: national political leaders have ignored or tacitly accepted both that loss and its consequences, and deliberately concealed this fact from the general public.[79] Second, a political point: representative coverage must be denied to those positions that, though fully lawful under the Italian constitutional order, simply cannot be upheld (anymore) because they clash with that very outer political source to which national sovereignty bows. Third, a legal aspect: the arguments to justify such an exclusion of political positions still in principle lawful cannot be formulated fully, because that exclusion depends on events ranging beyond the control of national institutions. Such events are to be taken as 'facts' that stand beyond the State's will and are not amenable to a 'public use of reason'.[80]

This is why it is up to the President to ensure respect of the duties

[77] K. Lenaerts and J.-A. Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles in EU Law' 47(5) *Common Market Law Review*, 1629 (2010).

[78] See A. Cassese, *Diritto internazionale* (Bologna: Il Mulino, 2003), 211 and G. Del Negro, 'The Validity of Treaties concluded under Coercion of the State: Sketching a TWAIL Critique' 10(1) *European Journal of Legal Studies*, 39 (2017).

[79] Compare D. Chalmers, 'The Reconstitution of European Public Spheres' 9:2 *European Law Journal*, 127-189 (2003) and A. Somek, 'Delegation and Authority: Authoritarian Liberalism Today' 21:3 *European Law Journal*, 340 (2015).

[80] J. Habermas, 'Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism' 92(3) *Journal of Philosophy*, 109-131 (1995).

stemming from this source: standing at the top of the national institutional structure, he can evaluate how to better comply with them on a case-by-case basis and, by virtue of his prerogative, he would have his 'sound advice' translated into *modified* constitutional law whenever he deems it opportune, so as to adjust the national constitutional setting accordingly.

The impact of this construction on contemporary constitutional arrangements can hardly be overestimated. The concept of representative sovereignty that lies at the foundation of contemporary constitutions was held to construe multiple ties between public powers and a plural society based on a link between domestic rigidity and supranational openness. Now, this link is confronted with a severe challenge. In fact, should one return to the foundations of representative sovereignty and match them with the narrative that the President constructed, she would face an inextricable dilemma.

The presidential argument would proceed as follows. The openness of State constitutions, while aiming to protect pluralism by interconnecting constitutions in a supranational legal order, forced States to enter the global arena without the protection of the exclusivity principle.[81] This was *irreversible*, and also *indispensable* to reject aggressive autocratic nationalism that could jeopardize human rights. Thus, it is both *irreversible* and *indispensable* to stay within the supranational order; all the more so in times of crisis. In fact, a collective breakdown may lead to the demise of that order as a whole; including the disintegration of Italy as a political and constitutional unit, 'lost in translation' from a nation-State to a simple tile in a crumbling supranational mosaic.[82]

Therefore, the supreme violation of the Constitution for which the President feels responsible does not refer to the Italian Constitution only, but to this supranational construction. Decisions on how to confront the challenges caused by the crisis have of course been taken; but by others, although with formal participation of Italian representatives at the time of the decision, and cannot be changed unless others, too, agree on such changes.[83] As a result, Italy could not exercise its own sovereignty without impairing the sovereignty of some other 'sovereigns'; thus, finding itself as 'a clay pot among iron pots'[84] it must

[81] Pursuant to which all legal sources are contained in the Constitution, and there is no other source of law than those recognised by the Constitution. See C. Pinelli, *Costituzione e principio di esclusività* (Milano: Giuffrè, 1990), 61.

[82] For a comparison, G. Piccirilli, 'Il ruolo europeo del Capo dello Stato', in R. Ibrido and N. Lupo eds, *Dinamiche della forma di governo tra Unione europea e Stati membri* (Bologna: Il Mulino, 2018), 392-393, wonders whether presidential power may be arising in parallel with the responsibilities that international actors seem to attach to her figure; M. Ferrara, *Capo dello Stato, vincoli europei e obblighi internazionali. Nuove mappe della garanzia presidenziale* (Napoli: Editoriale Scientifica, 2019), 47-48, argues that such a responsibility may stem from the '*interconstitutional* nature' of the European legal order.

[83] C. Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation' 16(5) *German Law Journal*, 985-1027 (2014).

[84] This is a quote from a famous Italian novel: A. Manzoni, *I Promessi Sposi* (1827; 2nd ed, 1842); in the English translation Id, *The Betrothed* (London: Richard Bentley, 1853), 12: the parish

relinquish its autonomy in favour of other, more powerful countries.[85]

This is the apocalypse-like scenario the President discloses as both a framework for institutional action and a constitutional justification for a slight but ineluctable *constitutional mutation* he is to drive by himself, according to the circumstances.[86] Some scholars argue that warning signs of this scenario popped up in the German Constitutional Court's *Maastricht* ruling[87] and turned obvious in further judgments on the Economic and Monetary Union issued in Karlsruhe[88] and elsewhere.[89] Be that as it may, as a common background to all such cases, a general assumption stays unquestioned, to the extent that it is implicitly presumed as a *fact*: [90] there is *no alternative* than to yield to such constraints.[91] President Mattarella acts within this framework: in his view, the appointment of a Minister of Economy who may generate distrust in the markets would certainly cause a threat to the integrity of the State that the State alone could neither prevent nor fix. Clearly, he assumes there is no alternative to the predicted scenario, and thus he must use his prerogative in light of the genuine threat to the integrity of the State that he is to prevent.[92]

Nevertheless, if one looks at the political spectrum resulting from the 2018

priest *Don Abbondio* '…had found himself…like an earthen vessel thrown amidst iron jars'.

[85] See M.A. Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union' 14(5) *German Law Journal*, 527-560, 542 (2013) and P. Craig, 'The Financial Crisis, the European Union Institutional Order and Constitutional Responsibility' 22(2) *Indiana Journal of Legal Studies*, 243-267, 256-257(2015).

[86] B. Ackerman, *We the People – II: Transformations* (Boston: Harvard University Press, 1998), Part II; compare F. Fernández Segado, 'Las mutaciones jurisprudenciales en la Constitución' 89 *Revista de las Cortes Generales*, 9-88 (2013); M. Luciani, 'Dottrina del moto delle costituzioni e vicende della Costituzione repubblicana' 1 *Rivista AIC*, 1-18 (2013) and M. Dogliani, 'Diritto costituzionale e scrittura', in Id ed, *La ricerca dell'ordine perduto. Scritti scelti* (Bologna: Il Mulino, 2015), 105-132.

[87] *BverfGe*, 2 BvR 2134/92 - 2159/9, 12 October 1993, *Brunner et alt.* v *European Union Treaty*. See C. Joerges, n 83 above, 1001, and C. Joerges and M. Everson, 'Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?' 63 *LSE 'Europe in Question' Discussion Paper Series*, 9 (2013).

[88] See F. Scharpf, 'The Asymmetry of European Integration: Or Why the EU Cannot be a Social Market Economy' 8 *Socio-Economic Review*, 211-250 (2019).

[89] See, in general, T. Beukers, B. de Witte and C. Kilpatrick eds, *Constitutional Change through Euro-Crisis Law* (Cambridge: Cambridge University Press, 2017), Section III, 241-326. A detailed account of the Estonian case in C. Ginter, 'Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty' 9 *European Constitutional Law Review*, 335-354 (2013); see also E. Chiti and P.G. Texeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' 50(3) *Common Market Law Review*, 683-708, 695 (2013) and S. de la Sierra Morón, 'Límites y utilidades del derecho comparado en el derecho público: en particular, el tratamiento jurídico de la crisis económico-financiera' 201 *Revista de Administración Pública*, 69-99, 95 (2016).

[90] See W. Streeck, 'The Rise of the European Consolidation State' 15(1) *MPIfG Discussion Paper*, 1-28, 14 (2014).

[91] See C. Joerges and M. Weimar, 'A Crisis of Executive Managerialism in the EU: No Alternative?' in G. de Búrca, C. Kilpatrick and J. Scott eds, *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek* (Oxford: Hart, 2014), 295-321.

[92] See C. Joerges, n 83 above, 1012; D. Tega and M. Massa, n 66 above.

elections, it is necessary to reconsider this assumption, however familiar and well-founded it might be considered. In fact, as many members of the new elected Parliament (significantly, a potential majority of them) did not agree on the overall narrative above elucidated, President Mattarella came to present as an unquestioned *fact* what was really a *political* position.

To put it clearly: many – potentially, a parliamentary majority – believe that the narrative endorsed by the President is untrue, wholly or in part. In particular, it may be untrue that Italy must be part of the net of intertwining constitutions composing the supranational legal order[93] – adherence to which is both *indispensable* and *irreversible*.[94] It may also be untrue that staying within that order requires obedience to unspecified external constraints that are to be translated into *modified* constitutional law at the word of the President.

In other words, what was presented as a shared, *neutral* framework is now a *partial*, controversial one: a heated *political* issue, which the President nevertheless treated as a plain, unquestioned one. In this regard, it does not matter whether the positions of those who challenge that framework differ, even radically, and do not offer an alternative view; the simple fact that such a challenge is raised bears witness to the political sensitivity of the issues concerned. As a consequence, the President finds himself to: 1) claim authority as Head of State to impose his stance in an exclusive manner, even against a potential parliamentary majority, and to do so 2) in light of a given viewpoint (an understanding of the events and an interpretation of constitutional provisions) that is no longer shared by political forces.

At this point, the question becomes whether precedents can be found in the institutional practice that may back such a claim for a stronger presidential figure.

V. National Political Instability and Incumbent Supranational Duties: Constitutional Precedents of a *Modified*, 'Stronger' President

It is hard to deny that a slight modification of the Constitution as regards presidential powers has occurred in the recent decades.[95] It has been argued that the President would be allowed to resort 'to the (un)expressed potential' enshrined in the Constitution to 'dismantle' an exasperated political

[93] R. Colliat, 'A Critical Genealogy of European Macroeconomic Governance' 18(1) *European Law Journal*, 6 (2012).

[94] See M.A. Wilkinson, 'Constitutional Pluralism: Chronicles of a Death Foretold?' *ARENA WP-7*, 1-28, 20-24 (2017).

[95] Compare O. Chessa, *Il presidente della Repubblica parlamentare: un'interpretazione della forma di governo italiana* (Napoli: Jovene, 2010), 52; G. Scaccia, *Il re della Repubblica. Cronaca costituzionale della presidenza di Giorgio Napolitano* (Modena: Mucchi, 2015), 63; V. Lippolis and G.M. Salerno, *La presidenza più lunga. I poteri del Capo dello Stato e la Costituzione* (Bologna: Il Mulino, 2016), Section I.

fragmentation.[96] However, such modification has admittedly arisen in times of crisis, precisely as in Carl Schmitt's most eloquent predictions,[97] so that its potential to support a constitutional mutation must be carefully weighed.

It seems that a line of continuity in this respect has been drawn and is discreetly but relentlessly being pursued by both Presidents Giorgio Napolitano (who can be seen as the initiator) and Sergio Mattarella.

Notably, the debate ignited as former President Napolitano started to make extensive use of his powers when the 2008 economic crisis began to affect Italy. That period was characterized by high national political instability and emerging supranational duties. Under such 'extreme' circumstances, he emerged as a 'stronger' institutional figure.

Since 2011 approximately, President Napolitano acted as a *de facto* political leader at both national and supranational levels. Domestically, following Berlusconi's resignation[98] and in view of the (in)famous letter received from the European Central Bank[99] he supervised the governments backed by both Democrats and Berlusconi's supporters.[100] On the European and international scene, his energetic presence in foreign policy via the chairmanship of the hitherto marginal Council of Supreme Defense[101] and through the power to concede pardon,[102] as well as his support to government coalitions thoroughly committed to European loyalty, were deemed crucial to secureing Italy's compliance with the rules deliberated at a supranational level to tackle the crisis.[103]

[96] E. Furno, *Il Presidente della Repubblica al tempo delle crisi* (Napoli: Editoriale Scientifica, 2021) at 23.

[97] C. Schmitt, 'Diktatur und Belagerungszustand: Eine staatsrechtliche Studie' 38 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 138-161 (1916). See W.E. Scheuerman, *Carl Schmitt: The End of the Law* (New York: Roman & Littlefield, 1999), 33.

[98] See 'Silvio Berlusconi si è dimesso. La piazza in festa grida "Buffone"' *La Repubblica*, 12 November 2011.

[99] Signed by the then President J.-C. Trichet and by the future President M. Draghi. The full text was soon leaked to the press: see 'Il testo della lettera della BCE al Governo italiano' *Il Sole 24 Ore*, 29 September 2011, available at https://st.ilsole24ore.com/art/notizie/2011-09-29/testo-lettera-governo-italiano-091227.shtml?uuid=Aad8ZT8D (last visited 25 September 2020).

[100] Those forces amounted to what remained of the two coalitions that had been competing for power throughout the 90s and the first 2000s decade. Both were facing a serious hemorrhage of votes towards other political forces. An overview in P. Anderson, 'The Italian Disaster' 36(10) *London Review of Books*, 3-16 (22 May 2014).

[101] G. Scaccia, 'Il «settennato» Napolitano fra intermediazione e direzione politica attiva' 33(1) *Quaderni costituzionali*, 93-108, 101(2013).

[102] A. Pugiotto, 'Fuori dalla regola e dalla regolarità: la grazia del Quirinale al colonnello USA' 2 *Rivista AIC*, 1-6, 4 (2013); M. Luciani, 'La gabbia del Presidente' n 44 above.

[103] More recently, the topic of a supranational 'institutional' responsibility has opened the floor for a rich scientific debate: see G. Piccirilli, 'Il ruolo europeo del Capo dello Stato', and M. Ferrara, *Capo dello Stato, vincoli europei e obblighi internazionali*, both at n 82 above; see also M. Ferrara, 'La Presidenza Mattarella tra politica estera e garanzia interordinamentale' 2 *Quaderni costituzionali* 2020 388-391 and A. Spadaro, 'Dalla crisi istituzionale al Governo Conte: la saggezza del Capo dello Stato come freno al "populismo sovranista"', in A. Morelli ed, *Dal "contratto di*

Yet, acting as a patron of a fragile and heavily opposed coalition pact, his position was the most delicate; and it became all the more so when he requested the Italian Constitutional Court to deliver a harsh judgment proceeding from a controversial set of circumstances in order to back his 'style' in the exercise of presidential powers.[104]

That affair began with President Napolitano raising a *conflict of powers*[105] in July 2012 against the Prosecutor's Office based in Palermo, in a case of wiretapping in which the intercepted person was caught while speaking on the telephone with the President himself. This person – Nicola Mancino, who had formerly served as a Minister and as Head of the Judiciary Supreme Council, but was no longer in office at the time of the wiretapping – was reported to be troubled by the ongoing criminal investigations on the corruption scandals of 1992.[106]

Italian criminal procedural law states that the Prosecutor's Office must present all collected wiretapping records during an investigation (and previously authorized by a court) in a hearing in which all the parties are given the chance to listen to the whole set of wiretapped conversations. After that hearing, all the parties' allegations considered, the court admits or rejects each of the records in view of the actual trial.

In the case concerned, prior to such a hearing, information was leaked to the press regarding President Napolitano accidentally featuring in some records; Prosecutors were prompted to confirm these rumors and specified that in their view no penal relevance attached to those conversations. Nevertheless, they asserted that they were bound by a legislative duty to present all the records at the hearing and let the judge decide, before all the parties concerned.

Governo" alla formazione del Governo Conte (Napoli: Editoriale Scientifica, 2018), 19; as for the legislation on immigration (*Decreti Sicurezza*) and the President Mattarella's comments prior to the promulgation, see G. Azzariti, 'I problemi di costituzionalità dei decreti sicurezza e gli interventi del Presidente della Repubblica', 3 *Diritto pubblico*, 639-650, 646 (2019)

[104] Corte costituzionale 15 January 2013 no 1, *Cassazione penale*, 1319 (2013).

[105] 'Conflitto di attribuzioni tra poteri dello Stato' (Art 37, legge 11 March 1953 no 87).

[106] In February 1992 huge corruption scandals concerning politicians and members of the Italian financial elite arose all over Italy (famously dubbed *Tangentopoli*, the Town of Bribes); simultaneously, the conviction of Mafia bosses in the Maxi-Trial (30 January) and the utter political instability caused by the scandals triggered a gory reaction by the Mafia, which culminated in the murder of the two key Anti-Mafia Prosecutors (Giovanni Falcone and Paolo Borsellino, killed by explosives respectively on 23 May and 19 July). The current investigations in the framework of the 'State-Mafia Negotiations Trial' reveal that a pact among Mafia bosses and politicians was sealed in 1993 to halt these murders, and that this pact has oriented Italian politics from 1994 (I Berlusconi Cabinet) onward. In 1992 Nicola Mancino was Minister of Home Affairs; he was investigated and went acquitted in the First Instance Trial – unlike many others who were convicted, both politicians and Mafia bosses. Documents and reports in https://tinyurl.com/3f7jdndy (last visited 30 June 2021); comments on the judgment of First Instance (20 April 2018) in G. Amarelli, 'La sentenza sulla Trattativa Stato-Mafia: per il Tribunale di Palermo tutti i protagonisti sono responsabili del delitto di minaccia a un corpo politico dello Stato di cui all'art. 338 c.p.' *Diritto penale contemporaneo*, 7-8, *passim* (2018).

The President instead wanted those records destroyed beforehand and challenged the Prosecutors' action before the Court.[107]

Some commentators pointed out that the Constitutional Court was forced into an awkward position. Given both the importance of the case and the heated political context, to rule against the President would have urged him to resign, which was felt by majoritarian political forces to be nothing less than calamitous. Therefore, the President's institutional authority added to the ardent political support he enjoyed, which gave the Court no other choice than to endorse his position. President Napolitano knew he was making the Court an offer that could not be refused, and he did so – as a constitutional scholar commented – with the aim of sealing an institutional alliance that would have overwhelmed the Prosecutors, yet at the expense of the Court's credibility.[108]

The Court indeed engaged in an unprecedented, fully-fledged account of the presidential function. According to this decision, presidential powers are not exhaustively listed in the Constitution, but rest on a 'net of relationships' (*rete di raccordi*) that the President must be left free to entertain as she holds appropriate, in view of 'the unity of the legal order'. Thus, *as instrumental* to the free unfolding of such a net, all records in which the voice of the President is audible cannot be brought as 'evidence' before any court but must be destroyed prior to any adversary check; otherwise, her freedom to exercise her constitutional tasks would be undermined.[109]

In order to attain the desired outcome, the Court proceeded to an audacious 'constitutionally consistent' reading of criminal procedural rules meant to be derogatory in nature (thus, hardly interpretable extensively) and backed it by analogies with other norms limiting the judicial disclosure of records – namely, with the restrictions to disclosure applying to conversations between a doctor and his patient, a lawyer and his client, a Catholic confessor

[107] Opposite reactions from constitutional scholars featured in the press: G. Azzariti, 'Un conflitto senza regole' *Il Manifesto*, 17 July 2012; G. Zagrebelsky, 'Napolitano, la Consulta e quel silenzio sulla Costituzione' *La Repubblica*, 17 July 2012; M. Ainis, 'Le istituzioni e le persone' *Il Corriere della sera*, 17 July 2012; U. De Siervo, 'Ristabilire il senso del limite' *La Stampa*, 17 July 2012; F.P. Casavola, 'La tutela del Colle l'unico obiettivo' *Il Mattino*, 17 July 2012; A. Manzella, 'Conflitto di poteri: l'equilibrio smarrito' *La Repubblica*, 18 July 2012.

[108] See G. Zagrebelsky, n 106 above. Allegations were serious: the intercepted person had been implicated in the investigations on the negotiations allegedly entertained by Mafia members and State's officials after the bombs that devastated Italy in 1992-1993, and from the wiretappings he seemingly asked to speak with the President precisely about that issue. In addition, President Napolitano resorted to the Court few days before the 20th anniversary of the bombs killing the then Palermo Prosecutor Paolo Borsellino (19 July 1992) which obviously added to the momentum of the events and occasioned heated comments during the annual memorial: a banner was exhibited at the ceremony with the wording '*1992-2012: Romanzo Quirinale*' (*Romanzo criminale*, 'A Criminal Novel' is a popular movie and TV series based on an Italian criminal gang; the Roman hill '*Quirinale*' is the President's residence). See G. Pipitone, 'Mancino-Napolitano, un anno di *Romanzo Quirinale*: "Distruggere le intercettazioni"' *Il Fatto Quotidiano*, 18 April 2013.

[109] Corte costituzionale, n 103 above.

and the confessed person – which clearly aligned with the *charismatic*, far more than rational, legitimacy, that was being recognised as belonging to the President.

Many commentators warned that such arguments promised to go much further than that specific, yet highly controversial, case, for they could have been deployed in support of a new interpretation of the President's constitutional powers, which entailed two consequences. First, leaving the frontier of the President's mandate at her own disposal, as it was only defined in the teleological perspective of national unity. Second, disrupting the balance between the two channels supplying legitimacy to the President's action, above referred to as 'constitutional magistracy' and 'representative of national unity'.[110] Both consequences emphasized the emotional link between the President and the Italian people; and both resulted in increased presidential powers resting on a weakened reason-based argumentative support, to the detriment of other constitutional organs.[111]

Hence, material for constitutional arguments emerged from those troublesome days to endow the presidential figure with some 'stronger', politically relevant, traits. Another warning sign of an ongoing, yet controversial, mutation of the presidential role in the Italian constitutional architecture can be detected in the behaviour of President Mattarella during the current Covid-19 crisis. Although in a more discreet style than his predecessor's, President Mattarella has enhanced his emotional connection with the Italian people while making his voice clear and loud during the negotiations occurring at the EU level to decide on how to tackle such a crisis.

On 12 March 2020, in her monthly press conference, the President of the European Central Bank (ECB) Christine Lagarde answered a question on the ECB's role in the Covid-19 emergency by pointing out that 'the Bank is not to close spreads'.[112] Her declaration appeared to repudiate the ECB's robust stance as the bulwark against markets' speculations on the Euro's fall that former President Mario Draghi announced in his celebrated 'whatever it takes' speech.[113]

[110] See the relevant literature cited in G. Vosa, 'Percorsi di legittimazione del potere. La figura del Presidente della Repubblica nei primi mesi del bi-settennato di Napolitano, rileggendo C. cost., 1/2013' 1 *Rivista AIC*, 1-24 (2014).

[111] G. Scaccia, 'Il ruolo del Presidente della Repubblica dopo la sentenza della Corte costituzionale 1 del 2013', in L. Violini ed, *Il ruolo del Capo dello Stato nella giurisprudenza costituzionale*, 'Associazione Gruppo di Pisa' Annual Report (Napoli: Editoriale Scientifica, 2015), 39-71; M. Luciani, 'La gabbia del Presidente' n 44 above; A. Pace, 'Intercettazioni telefoniche fortuite e menomazione delle attribuzioni presidenziali' 6 *Giurisprudenza costituzionale*, 1267 (2013).

[112] Available at https://tinyurl.com/8vzwpxw5 (last visited 30 June 2021) the *verbatim* of the press conference. See comments: 'Italy furious at ECB's Lagarde 'not here to close spreads' comment', available at *Reuters.com*, 13 March 2020; 'ECB's plan to support eurozone banks is underwhelming' *The Guardian*, 13 March 2020.

[113] 'But there is another message I want to tell you. Within our mandate – within our mandate – the ECB is ready to do whatever it takes to preserve the Euro. And believe me, it will be enough'.

This caused turbulence to the stock market, to the detriment of the Italian financial position. Then, an official note from the *Quirinale* came rapidly on *Twitter* and soon became a trending topic: 'Italy is in a hard condition, while the Italian experience in fighting the virus will probably be of help for all countries. It is right to expect, in the common interest, that initiatives of solidarity be made, rather than moves that can hamper our action'.[114]

The quick reaction on social *media*, the peremptory expressions, the lack of formality and the sharp tones bordering on rudeness are highly exceptional to President Mattarella's usual style of communication. That message implicitly fostered an impression of political leadership vested in the Presidency as a representative of national unity. Indeed, that message aimed to defend the country as a whole in a skirmish of bargaining which will predictably be both difficult and delicate. Yet, what specific position Italy is to maintain is far from uncontroversial: political fractures are emerging as to what measures are to be taken and which of the recovery instruments discussed at the EU-Eurogroup[115] level is to be accepted or rejected.[116] Meanwhile, President Mattarella has gone silent; however, such an exposure of the President's role as a sort of gatekeeper between the domestic and the supranational plane[117] has 'fortuitously' aligned with a bizarre event resulting in an emotion-based boost of his personal figure. On 28 March, the President featured in a video to address the country during the emergency. The footage was broadcast in prime time, but unexpectedly looked unedited: it included failed attempts to record the speech where the President is mumbling, coughing, halting repeatedly, trying and stopping again, showing distress for the difficult circumstances, and joking with the cameraman: 'I do not go to the hairdresser either' (meaning: due to the lockdown) before delivering the message.[118]

Speech at the *Global Investment Conference*, London, 26 July 2012, available at https://tinyurl.com/hb3m4njx (last visited 30 June 2021).

[114] See the tweet at https://tinyurl.com/374eaepk (last visited 30 June 2021).

[115] On the relations between the 'Eurogroup' as a key institutional premise among the multiple intergovernmental articulations of the EU institutional architecture, P. Craig, 'The Eurogroup, power and accountability' 23(3-4) *European Law Journal*, 234-249 (2017).

[116] See the positions of the Italian MEPs at the European Parliament's Plenary Sitting (Brussels, 17 April 2020) in the vote on the Commission's proposal of a CoVid-19 Economic Package (2 April 2020, consisting of eleven different legislative proposals. The mutualization through common bonds (dubbed 'Coronabonds') of the debt for healthcare expenditures met with a 'no' from national opposition parties *Lega* and *Forza Italia* (Berlusconi's) while being the key negotiation target for the Italian Cabinet (as repeatedly pointed out by Prime Minister Giuseppe Conte). Within the majority's coalition, one party (*Movimento Cinque Stelle*) voted against the proposal referring to the use of ESM – European Stability Mechanism, perceived in their perspective as a 'Greece-like treatment' – and abstained on the overall package while the Democrats voted 'in favour of the ESM. All the documents are available at https://tinyurl.com/3ade4889 (last visited 30 June 2021).

[117] M. Ferrara, 'La Presidenza Mattarella tra politica estera e garanzia interordinamentale' at n 82 above, 390.

[118] See the video at https://tinyurl.com/h6kfyfn7 (last visited 30 June 2021).

This was claimed to be a mistake on the side of the operators, but it happened for the first time in the Italian Republic's history, and it was a mistake that admittedly contributed to strengthening an emotion-based channel for the President's direct communication with the Italian people.[119]

As a political crisis exploded in January 2021, President Mattarella went public twice. In the first occasion (29 January) he announced that 'a chance for a new Cabinet to be supported by the same political forces existed and was to be duly verified'; he conferred on the President of the Chamber of Deputies, Roberto Fico, an explorative mandate.[120] In the second occasion, speaking in a prime-time broadcast after a tense day, he confirmed that 'such a verification had delivered a negative result' and pointed to 'two possible solutions'. First: 'to immediately form a new Cabinet that is adequate to confront the serious ongoing emergencies. Second: 'elections'. The latter option 'must be carefully considered, as the polls are an exercise of democracy'; yet he declared he had a 'duty to highlight that they would coincide with a crucial time for Italy'. Then, he listed all the reasons why (he held) general elections were incompatible with 'a decisive development' of the vaccine campaign, as well as with a sound management of the EU pandemic funds amidst the mounting social emergencies, and so on. 'We cannot afford to waste this opportunity, for our future', he concluded. Finally, he addressed 'all the political forces' to support 'a high profile Cabinet' to confront these urgencies.

Soon afterwards, the Quirinale's Clerk officially mentioned the name of Mario Draghi as a candidate President of the Council of Ministers in a press conference.[121]

Among the commentators, some have highlighted that Mattarella's choice has been indeed of high political significance.[122] Others, too, have pointed out that this 'supermajoritarian Cabinet' represents a kind of constitutional anomaly.[123] It may also be highlighted that – apart from the obviously remarkable pressure he put on all the political forces to accept Draghi as the leader of a new Cabinet, which they did – he has silently excluded the option of a centre-right Cabinet that would have brought into power Eurosceptic forces;[124] anyhow, he has

[119] See M.C. Antonucci, 'Il barbiere di Mattarella, ovvero l'errore che lega istituzioni e cittadini (W il Presidente!)' available at *Formiche.net*, 28 March 2020, and the newspapers of those days: 'Mattarella e il barbiere: la normalità che ci aiuta. Quando la prima carica del Paese ha i tuoi stessi problemi, la distanza si abbatte' *Corriere del Mezzogiorno*, 29 March 2020.

[120] See 'Mattarella dà un incarico esplorativo a Fico: "Verificare l'esistenza dell'attuale maggioranza di governo"' Il Fatto Quotidiano, 29 January 2021.

[121] See the video at https://tinyurl.com/6dj9svtc (last visited 30 June 2021).

[122] A. D'Andrea, 'Decisioni neutrali che neutrali non sono. L'investitura del nuovo Governo' *LaCostituzione.info*, 14 March 2021

[123] S. Curreri, ' "Super-maggioranze" e "super-opposizioni" ' *LaCostituzione.info*, 14 February 2021.

[124] He could have conferred an equally short explorative mandate to the President of the Senate (Maria Elisabetta Alberti Casellati, Forza Italia) but such a possibility has apparently been excluded since the first round of informal meetings with the political leaders.

(again) furthered a top-down model of legitimacy that has been accounted for as 'risky'.[125]

In sum, President Mattarella walks a path that was inaugurated a few years ago; yet, like his predecessor, he is well aware of the liaison role that he has inherited, and of the increasing difficulties that it entails.[126] His task is coming to be the most delicate, perhaps even more than his predecessor's, given the multiple ongoing crises and the incumbent economic downturn: should he find himself to act as a political leader,[127] he would deprive of representation certain political interests, lawful nevertheless, simply because they apparently run contrary to his (and/or his party's) political positions.[128] Whether this is consistent with the Constitution – so long as the current Constitution stays in force – is a question that could find several grounds for a negative answer.

VI. Conclusions. Domestic Rigidity and Supranational Openness: What Foundations for Representative Sovereignty?

In the aftermath of the Second World War, according to common wisdom, the sense of pain as a result of the catastrophes that perturbed the planet urged States to agree on new arrangements designed to avoid the dangers of a totalitarian regime supported by aggressive nationalist States.[129] The key was to repudiate nationalist autarchy and to endow sovereignty with solid representative support, based on the centrality of the human person. In this vein, respect for human dignity inspired separation of powers and protection of rights[130]– both instrumental to one another – in drafting rigid constitutions. Likewise, openness towards a supranational public space fostered globalisation and triggered European integration as instrumental to economic liberties; so that a multi-level field of overlapping legal orders was created as 'a space of

[125] See G. Zagrebelsky, 'Il governo Draghi e tutti i rischi di questa 'democrazia dall'alto' at https://tinyurl.com/et2ep7e3 (last visited 30 June 2021).

[126] See the speech delivered for the 40th anniversary of the death of Giovanni Gronchi (3rd President of the Italian Republic) 'Il Capo dello Stato è la voce della Costituzione contro ogni smarrimento verso i valori della Carta' *Il Fatto Quotidiano* (18 October 2018).

[127] Some of his actions might be interpreted in this manner since the beginning of his mandate: see the invitation for a private colloquium delivered to Roberto Battiston (physicist, removed a few days prior from the Chairmanship of the Italian Space Agency by the new Cabinet) to 'speak about the autonomy of science' as reported in *La Repubblica* (9 November 2018).

[128] Sergio Mattarella has served as a member of the Democrat Party. Yet in some media, perhaps in unrequested outbursts of complicity, there are frequent contributions construing his public profile as a political leader: see G. Genna, 'Sergio Mattarella, ritratto di un presidente *pop*' *L'Espresso* (1 November 2018).

[129] See C. Möllers, ' "We are (afraid of) the People": Constituent Power in German Constitutionalism', in M. Loughlin and N. Walker eds, *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007 – repr 2012), 87-105.

[130] J. Habermas, *The Concept* n 19 above.

liberty'.[131]

Contemporary constitutionalism has rested on the idea that the constitutional structures derived from the positive, circular relationship of these concepts would work well to accommodate social and political pluralism at both national and supranational levels. Whoever doubted the functioning of such structures found solace in the idea of a common cultural *humus* – or at least a common constitutional culture[132]– which provided solidarity among peoples, as well as cooperation among institutions, with a more tangible background in cases of urgency.

Faced with the tough reality of the economic-financial crisis and of the increasing differences flourishing in a multi-faceted society, these hopes have proved largely optimistic.[133] Diverging interests generate tensions from within and outside States that constitutional devices struggle to modulate. Exacerbated political conflicts have led the Italian Head of State to curtail some interests from the spectrum of the State's unity, leaving them with no representative coverage. However, noticeably, those excluded interests are not ruled out because of their illegality. They are perfectly legitimate, but simply 'cannot be afforded' by the Italian State, which exposes obvious, painful asymmetries in European membership, and presents a challenge to the veracity of the overall narrative that aimed to cement the foundations of post-World War II constitutionalism.[134]

In fact, the events recounted in this article display an emerging fracture between domestic rigidity and supranational openness in the protection of socio-political pluralism within the European common space.

There are two possible alternatives: either A) the Constitution forbids the modified interpretation the President pursues as regards his own constitutional role; or B) it does not.[135] A proper answer to the question would require an in-depth analysis of the limits to the constitutional mutations triggered by supranational openness that would exceed the bounds of this article.[136]

[131] F. Álvarez-Ossorio Micheo, 'Europa como espacio integrado de libertad' 3(5) *Araucaria – Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales*, 93-122 (2001).

[132] P. Häberle, *Verfassungslehre als Kulturwissenschaft* (Berlin: Duncker & Humblot, 1998), 320.

[133] See K. Jaklić, *Constitutional Pluralism in the EU* (Oxford: Oxford University Press, 2013), 102, 217; among others, G. della Cananea, 'Is Multilevel Constitutionalism really "Multilevel"?' 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 283-317 (2010).

[134] J. Shaw, "Shunning' and 'seeking' membership: Rethinking citizenship regimes in the European constitutional space' 8(3) *Global Constitutionalism*, 425-469 (2018); A.J. Menéndez and E.D.H. Olsen, *Challenging European Citizenship. Ideas and Realities in Context* (London: Palgrave-McMillan, 2020), 59.

[135] *Ex plurimis*, see B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Boston: Harvard University Press, 2019), 27 (on Italy: 131) and R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press, 2019), 18, 61.

[136] A. Morrone, 'I mutamenti costituzionali derivanti dall'integrazione europea' 20

However, it can be argued that domestic rigidity and supranational openness find themselves in conflict or lead, if taken together, to the suppression of political pluralism on either the national or the supranational plane – precisely that political pluralism that they aimed to protect.

If A) is correct, either constitutional rigidity is safe at the expense of supranational openness – because President Mattarella, in order not to violate the Constitution, must refrain from his position and repudiate the supranational ties that Italy has subscribed to – or, for the sake of supranational openness, the national constitution must become flexible, ie allowing for a presidential breach of the constitutional architecture. In the first case, political pluralism is preserved at the national level but repudiated on a supranational plane; in the second, it might well be preserved at the supranational level but at the expense of legitimate positions on the national level.

If B) is correct, the presidential action to prevent a supreme violation of the Constitution can be regarded as the optimal solution to reconcile domestic rigidity with supranational openness; but legitimate political interests are left with no representative coverage. Thus, the combination of the two leads to the suppression of political pluralism, rather than to the protection thereof.

The constitutional mutation that is being triggered seems to overturn the positive relation between political and substantive rights; political rights risk being denied in order for substantive ones to be granted.[137] In fact, President Mattarella links to 'concrete sovereignty' and to the 'protection of savings' his rejection of Savona's appointment as a Ministry of Economy. Hence, in a certain point of the European legal space, along the curvature of the Italian constitution, some rights do not find their source in the law-based functioning of representative institutions, but elsewhere. This new source has an eerie characteristic: it requires obedience to an inscrutable authority whose legitimacy is justified on emotional arguments rather than on rational discourse.[138] In this perspective, the departure from the moorings of contemporary constitutionalism, including self-determination as a supreme expression of human dignity, could hardly be more evident: [139] to put it bluntly, the source of authority is getting so far and unfathomable than it could well go transcendent without much difference.

As a consequence, substantive rights would not be *granted* – in the sense of being *recognised* as belonging to the citizenry as a community of human persons – but, rather, genuinely conceded, *octroyés*, *otorgados*, *elargiti* by a

Federalismi.it, 24 October 2018, 1-27.

[137] M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford: Oxford University Press, 2021), 95, 147.

[138] J. Habermas, *Die Einbeziehung des Anderen. Studien zur Politischen Theorie* (Frankfürt: Suhrkamp Verlag, 1996), 65.

[139] See M. Wilkinson, 'Authoritarian Liberalism: The Conjuncture behind the Crisis' *LSE-WP* 5/2018, 1-21.

virtually unquestionable, superior law-maker, in the like of pre-modern absolute monarchies[140] – or, else, in the XIX century's *Allgemeine Staatslehre* fashion.[141] This, to be sure, would tie the so-called *multilevel* protection of rights to certain political and constitutional theories whose commonality with the totalitarianisms of the *Short Twentieth Century*[142] has been well documented in a book published as recently as 2003.[143] In that book, the editors Christian Joerges and Navraj Singh Ghaleigh wonder whether Europe's constitutional legacy includes certain dark aspects that were going unnoticed. Around two decades later, this sounds like a warning that ought not be neglected.

[140] See M. Dawson and F. de Witte, 'Self-determination in the constitutional future of the EU' 21(3) *European Law Journal*, 371-383 (2015).

[141] For comparison, see C.F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (3rd ed, Leipzig: Tauchtnitz, 1880), 44-75, 190-243 and G. Jellinek, *System der subjektiven öffentlichen Rechte* (Tübingen: Mohr Siebeck, 1892), 39-50.

[142] The quote is from E. Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914–1991* (New York: Random House, 1994).

[143] C. Joerges and N. Singh Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Oxford: Hart, 2003).