

When Anti-Politics Becomes Political: What can the Italian Five Star Movement Tell us about the Relationship Between Populism and Legalism

Lucia Corso*

Populist politicians have to deal with a foundational paradox, i.e. ruling without being contaminated by the corrupting influence of power - Strategies to shield populists' political actions from the accusations that populist parties have flung against pre-existing elites - The Italian Five Star Movement as a populist political discourse resorting to legalist strategies - Legalism as a way of introducing political reforms as mandatory actions, required by some sort of exclusionary, pre-existing legal rule rather than the product of ideological confrontation and political compromise - Populism as an anti-political response to factionalism - Lottery system, absolute neutrality and the end of politics

INTRODUCTION

Current analyses of populist politics focus mainly on the reforms proposed by populist politicians to preserve their power. Indeed, the strategy of defining the populist ideology in terms of the populist ruling parties' performance and their proposed reforms, including constitutional reform, has led commentators to identify populism as an extreme form of majoritarianism, commonly promoting strong cabinets and threatening judicial independence and minority rights. Nadia Urbinati¹ puts emphasis on the tendency of populists in power to propose a concentration of public roles, which erodes the impartiality of the law. Jan Werner Müller² explains that populist-led governments tend to colonise or 'occupy' the state and that they undertake such colonisation openly and with

*Professor of Philosophy of Law, University of Enna 'Kore', Sicily.

¹N. Urbinati, 'Populism and the Principle of Majority', in C. Rovira Kaltwasser et al. (eds.), *The Oxford Handbook of Populism* (Oxford University Press 2017) p. 571 at p. 582.

²J.-W. Müller, *What is Populism?* (University of Pennsylvania Press 2016).

the moral backing of their constituencies. Luigi Ferrajoli identifies populism as 'plebiscitarian' democracy, in which appeals to the monolithic will of the people are used to back any political decision.³

Although this approach has the merit of alerting us to populism's illiberal tendencies, it may lead us to overlook the oppositional aspect of populism and its anti-elitist stance, which persists even when populists take power. The result is that the effects of the de-institutionalising ambitions of populism and its moralistic stances, which often target the very essence of politics, can be overshadowed and neglected when populist politics is characterised solely on the basis of populist politicians' craving for staying in power.

The aim of this article is to discuss the political discourse of the Italian populist Five Star Movement (hereinafter 'M5S', the Italian *Movimento Cinque Stelle*), which, despite being part of the Italian cabinet in coalition with the League since May 2018, has not forsaken its oppositional character, frequently resorting to various strategies to dispel any suspicion of the factionalism and corruption usually associated by populists with politics. M5S does not seem to display the features often ascribed to populist politics like decisiveness, disregard of formal law and a drive for a strong cabinet, thus threatening judicial independence. On the contrary, M5S has often relied on the power of the judiciary to carry out its moral battle against allegedly corrupt political power. Nonetheless, it does undeniably display several typical populist elements: a vehement anti-establishment attitude, a self-proclaimed post-ideological nature, and an insistent appeal to a form of direct democracy by means of digital platforms.⁴ Most importantly, M5S's long-time strategy of supporting social protest and siding with protesters, no matter what they might proclaim,⁵ is in keeping with the populist push to delegitimise existing elites.

The League, led by Matteo Salvini, although it displays strong populist traits,⁶ will not be discussed in this article, mostly because its politics have been adequately depicted in analyses which aim to characterise populism, and

³L. Ferrajoli, 'Rappresentanza politica e organicismo parademocratico', 3 *Democrazia e diritto*, special issue on populism and democracy (2003) p. 57.

⁴Among others, P. Corbetta and E. Gualmini, *Il Partito Di Grillo* (Il Mulino 2013); P. Corbetta, and R. Vignati, 'Direct democracy and scapegoats: The Five Star Movement and Europe', 49(1) *The International Spectator: Italian Journal of International Affairs* (2014) p. 53.

⁵L. Mosca, 'The Five Star Movement and social conflicts: Between symbiosis and co-optation' in F. Tronconi (eds.), *Beppe Grillo's Five Star Movement: Organisation, Communication and Ideology* (Ashgate Publishing 2015) p. 171; see also 'The Five Star Movement: Exception or Vanguard in Europe?', 49(1) *The International Spectator* (2014) p. 36.

⁶On the variety of Italian populism, see M. Tarchi, 'Italy: A Country of Many Populisms', in D. Albertazzi and D. McDonnell (eds.), *Twenty-First Century Populism. The Spectre of Modern European Democracy* (Palgrave 2008) p. 84.

constitutional populism, in terms of its exclusionary attitude, whereby ‘the populist stands for the unity of the people and those who are “outside” (the others or “them”) do not count’⁷ and where that division is often made on the grounds of an enemy/friend dichotomy.

The choice for M5S can be summed up in three reasons. First, M5S cannot be strongly characterised as being ‘of the people’. Nationalism, traditional values, and communitarian identity are marginal to its political discourse. The people to whom M5S’s representatives seem to refer are similar to the participants in a *class action* against the previous ruling elites; their main bond is a claim for damages against past governments. Second, it endorses some kind of technological utopianism, whereby digital platforms are envisaged as gradually replacing political action. Third, M5S has maintained a strong anti-corruption posture which is grounded in its suspicion of the very essence of political power, no matter which political group is in charge of ruling the country.

These three features serve to explain why M5S’s political discourse is heavily oriented towards dispelling any risk of factionalism, to remain faithful to the ambition of radically purging public choices subject to any private (elitist) influence. Its representatives not only make a point of concealing any hint of ideological content in their political judgments, they even envisage the rise of an interconnected digital community which finds solutions to common issues by means of perfectly anonymous and neutral procedures. While populist politics is commonly seen as mocking legal rules, M5S often resorts to legalist strategies as a way of dealing with public issues. Political actions are thus presented as obligatory solutions mandated by some sort of exclusionary, second-order legal reasoning, rather than the product of ideological choices or political compromise.

The argument I wish to make here is that the legal arsenal provides populist politicians with useful tools to avoid confrontation and dissent and thus to escape the foundational paradox of ruling without being contaminated by the corrupting influence of political power. This is especially true when the re-institutionalising ambitions of populists are not grounded on a thick concept of ‘the people’, and where the anti-elitist rhetoric remains strong even when populists are in power. The consequence is that the relationship between populism and legalism might be more than simply contingent, possibly transcending the Italian case.

The article can be conceptually divided in three parts. The first, and briefest, is a sketch of populism’s main traits with special regard to its oppositional nature. It argues that populism cannot be understood aside of its anti-establishment and anti-elitist stances. The second contains a discussion of M5S’s political discourse and addresses its core ideology, its performance in power and its political reforms,

⁷A. Sajò and R. Ruitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) p. 53.

including constitutional proposed reforms. It argues that legalism is a strategy often resorted to in carrying out M5S political action. The third part makes a preliminary attempt to propose that the relationship between populism and legalism might be more than simply contingent. It follows that the sketch of M5S's performance in power is not meant solely to confirm the 'variety of populist experience' thesis,⁸ but also to shed light on a neglected aspect of populist politics, i.e. the recourse to tactics aimed at relieving populist politicians of the burden of explaining the *merits* of their actions and ultimately at shielding them from the moral cost of their political judgements.

A BRIEF SKETCH OF POPULISM AND ITS OPPOSITIONAL NATURE

A common way to characterise populism is to define it as a thinly-centred ideology that considers society to be ultimately separated into two uniform and antagonistic camps, i.e. 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonté générale* (general will) of the people.⁹ By this view, there are two core features of populism. The first is anti-elitism and the second is a thick concept of the people, described as a homogenous single-voiced entity whose claims are often identified with a charismatic leader.

The two prongs of populist ideology cannot be interpreted as independent from one another. The ambition of a political ideology that reflects the will of the people cannot be filtered through the lens of political romanticism and should not be confused with any form of political decisionism. Populism cannot be understood in isolation from its oppositional nature¹⁰ and is strictly dependent on the delegitimisation of existing elites. Popular sovereignty and self-rule are not moral or political goals that need to be achieved to overcome heteronomy. They are instead presented as instruments to avoid exploitation and deceit.

The French historian Pierre Rosanvallon has explained the oppositional aspect of populism by arguing that populism is a perversion of counter-democratic powers.¹¹ Rosanvallon grounds his analysis on the idea that democracy cannot be reduced to mere electoral processes and that at least some anti-elitist

⁸P. Blokker, 'Varieties of populist constitutionalism: The transnational dimension', 20(3) *German Law Journal* (2019) p. 332–350.

⁹C. Mudde, 'Populism: an Ideational Approach', in Rovira Kaltwasser et al, *supra* n. 1, p. 4 at p. 6.

¹⁰E. Laclau, *On Populist Reason* (London: Verso 2005); contra B. Arditì, 'Populism is Hegemony is Politics? On Ernesto Laclau's On Populist Reason' 17(3) *Constellations* (2010) p. 488–497.

¹¹P. Rosanvallon, *Counterdemocracy. Politics in an Age of Distrust* (Cambridge University Press 2008).

counter-powers must be accounted for to provide a proper description of constitutional systems.¹² Democracy thus continually searches for counter-powers, i.e. bottom-up social mechanisms which exert control over the elected bodies between electoral processes. Counter-democracy, the historian argues, has three dimensions. The first is the power of oversight over government action, mostly through a free press and an alert citizenry, in general. The second is the capacity to prevent certain policies from being implemented by means of civil disobedience, circumvention of rules, and street demonstrations – in other words, a negative counter-power.¹³ The third counter-democratic power is that of the citizen judge. The ample US literature on jury trials offers a clear example of the capacity of common people to perform institutional tasks and even nullify laws contrary to public sentiment, by the practice which goes under the name of jury nullification. This third dimension also extends to cover the broader phenomenon of the judicialisation of politics.

Rosanvallon argues that populism arises whenever counter-democratic powers become pathological. This occurs when citizen surveillance morphs into a compulsive and permanent stigmatisation of the ruling authorities, when veto powers become a form of permanent interdiction of politics in any form, and when citizen-judges start acting like the sycophants in Athens and rely heavily on the judiciary to deal with public issues.

For the populist ‘thin’ ideology to persist upon achieving power, populism needs to re-institutionalise¹⁴ and overcome its foundational paradox of ruling without being contaminated by the corrupting influence of power. An initial strategy is to present political reform as a remedy against the failures of self-perpetuating political institutions. Drastic salary cuts for elected politicians, imperative mandates for members of parliament, term limits, the recall of unfaithful representatives, and the frequent use of referenda are usually explained by the need to cure political institutions of some sort of degenerative disease. The Italian cabinet, for example, has established a Ministry for Parliamentary Relations and Direct Democracy, prompting ironic comments from a few constitutional scholars describing a ‘Ministry that opposes itself’.¹⁵

A second strategy is to resort to legalist arguments as a way of concealing political behaviour.

¹²Ibid., p. 12.

¹³Ibid., p. 121 and p. 180.

¹⁴M. Krygier, ‘Institutionalization and its trials. (Anti-) Constitutional Populism in Post-Communist Europe’, 15(3) *EuConst* (2019) p. 544.

¹⁵M. Ainis, ‘Il Ministero che si oppone a sé stesso’, *La Repubblica*, 18 June 2018, p. 40, in which the author defines the Ministry for Parliamentary Relations and Direct Democracy as an oxymoron; the new Ministry has the double task of maintaining relations with Parliament while replacing Parliament with some kind of binding referendum.

The thesis I wish to argue here is that M5S has taken both these strategies to the extreme. It is therefore high time to discuss this brand of populism, which although it seems not to have renounced its strong ties with counter-democratic forces, has been in government for more than a year.

POPULISM ITALIAN STYLE¹⁶

After the Italian Parliamentary elections held in March 2018, M5S ended up being the prime political force with more than 32% of the votes; it then formed a cabinet coalition with the League, which had obtained 17% of the votes. Since then, the balance of power between the two political forces has changed; in the European elections held in May 2019, the League obtained 34% of the votes, with M5S dropping to 17%. As I write, the cabinet is still in power although the relationship between the two main leaders, Mr Di Maio of M5S and Mr Salvini of the League, has become tenser.

For more than a decade, M5S's main declared intent was to overcome representative democracy by promoting the direct involvement of citizens via digital platforms. This involvement has received a boost through the use of specific online platforms such as 'Rousseau', in which people are able to propose, discuss and poll initiatives that M5S representatives are then meant to introduce into political institutions. Founded in 2009 as an Internet-based movement, M5S was incorporated as a private association. Its two co-founders, Beppe Grillo, a stand-up comedian, and Gianroberto Casaleggio, an internet guru, have adamantly maintained that they were taking part in a battle between the old world and the new. According to this vision, the old world symbolises party democracy, partisan politics and political representation, whereas the new world is exemplified by citizens connected horizontally through the internet, without intermediary organisations.¹⁷

M5S insists that it is post-ideological. Its platform has hosted a variety of themes which range from new forms of environmentalism, fights against major construction projects (a bridge over the Strait of Messina, a high-speed railway corridor in the Val di Susa, oil drilling wells, gas pipelines and more recently ILVA steelworks) and hostility against trade unions.¹⁸ The moralisation of politics

¹⁶M. Tarchi, 'Populism Italian Style', in Y. Mény and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave 2002).

¹⁷N. Urbinati, 'The Italian Five Stars Movement for Foreigners', *Il Mulino*, March 2018, at <www.rivistailmulino.it/news/newsitem/index/Item/News:NEWS_ITEM:4272>, visited 12 August 2019.

¹⁸L. Manucci and L. Amsler, 'Where the wind blows: Five Star Movement's populism, direct democracy and ideological flexibility', 48(1) *Italian Political Science Review* (2018) p. 109;

has been a persistent feature, with calls for a 'clean parliament'. Grillo has claimed outright that 'political parties are evil', adding that corruption is 'a cancer that is eating up our country and making the lives of honest people impossible'.¹⁹

Although lacking a coherent political vision, M5S does express certain utopian views. Casaleggio was known for his strong belief in the power of digital communication and for being a follower of the Gaia project.²⁰ This school of thought asserts that 'collective knowledge is the new politics'.

One of the core ideas of the Gaia project²¹ is the inherent immorality of any power, whether economic (financial above all else), ideological, religious or political. The website of Casaleggio e Associati, the company which plays an important role in the infrastructural support of the movement, displays a video depicting a new world order. Its narrative recalls those of millenarians: after a catastrophic war, in 2054 a new society arises where digital identities replace the physical and human spheres, and people are constantly connected via the web. The prophecy outlines the onset of Gaia, a worldwide transparent government system where secret societies are banned, and any citizen is able to become president. In Gaia, political parties, religions, ideologies disappear so that man may truly become the master of his own destiny. Gaia offers a solution to two fundamental questions in politics: the incompetence of citizens and the problems that arise out of collective decision-making. Collective knowledge rests on the assumption that collective intelligence aggregates the knowledge of many to form an unbiased and, in many cases, accurate opinion. Collective decisions are deemed by definition superior to individual ones.²²

Another video, entitled Prometheus,²³ discusses the implications of collective knowledge theory on politics. Prometheus tells the story of a world where old media such as TV, newspapers, and radio are banished, and copyright laws

see also F. Tronconi (eds.), *Beppe Grillo's Five Star Movement: Organisation, Communication and Ideology* (Ashgate Publishing 2015) p. 9; *see also* D. Woods and L. Lanzone, 'Riding the populist web: contextualizing the Five Star Movement (M5S) in Italy', 3(2) *Politics and Governance* (2015) p. 54.

¹⁹C.J. Bickerton and C. Invernizzi Accetti, 'Techno-populism as a new party family: the case of the Five Star Movement and Podemos', 10(2) *Contemporary Italian Politics* (2018) p. 132 at p. 136.

²⁰Tronconi, *supra* n. 18, p. 19.

²¹Casaleggio and Associati, 'Gaia and the new global order', (www.youtube.com/watch?v=HMBO0rLuMEU), visited 12 August 2019.

²²Theorists of collective knowledge often quote Wikipedia as evidence of the power of the collective mind and the success of crowdsourcing. Other oft-quoted noteworthy examples are websites such as IMDb.com to decide which movie to watch or Yelp.com to pick a restaurant at which to spend the evening, *see* A.W. Woolley et al., 'Evidence for a collective intelligence factor in the performance of human groups', 330 *Science* (2010) p. 686.

²³Casaleggio and Associati, 'Prometheus. The Future of Media', (www.youtube.com/watch?v=HsJLRX-nK4w), visited 22 August 2019.

repealed. Individuals are expected to share private experiences through technologies to enhance human communicability. Unfiltered communication, free flows of information and enhanced accessibility will result in augmented collective knowledge. Web citizens will get things right.

Much like science fiction, virtual utopia does not rely on thick ideals. In fact, the loss of symbolism begets a rise in materialism. Public issues are reduced to the most material of goods (food, health, safety, clean air and water), whereas religion, ideology, and conflicts of any kind are quashed. It is no coincidence that in Prometheus we are told that *experience is the new reality*.

M5S: POPULISM AS OBJECTOCRACY

Using Paul Ricoeur's phraseology, M5S's core ideas are ingrained in the hermeneutics of suspicion²⁴ and yet the ultimate aim is that of a political system based on truth, where the truth is achieved through horizontal communication unfiltered by intermediaries. To describe M5S's ambitions, political philosopher Nadia Urbinati has coined the expression of 'objectocracy'.²⁵

Objectocracy can also be observed in the way M5S's representatives deal with public issues. In a study carried out by Bickerton and Invernizzi Accetti, the authors argue that by construing themselves as the finders of ad hoc solutions to specific problems, M5S representatives undercut the very possibility of an ideological confrontation between competing visions of society. Rather than referring to a series of coherent values or normative principles that one could legitimately disagree with, M5S focuses on issues that are remarkable for their technical and, in this sense, apolitical nature: water, the environment, transport, connectivity and development.²⁶

Grillo has emphatically refused to talk about politics, a term that in his vocabulary is systematically associated with ideas of corruption and vain ideological contention.²⁷ Instead, Grillo has made a point of reconstructing cases of public interest by presenting facts and claiming to illustrate scientific theories.²⁸ The idea that political decision-making should become similar to the problem-solving methods employed in corporations offers further evidence of M5S's willingness to trump political views in favour of skill.²⁹

²⁴P. Ricoeur, *De l'interprétation. Essai sur Freud* (Seuil 1965).

²⁵Urbinati, *supra* n. 1.

²⁶Bickerton and Invernizzi Accetti, *supra* n. 19, p. 136-137.

²⁷*Ibid.*, p. 137.

²⁸G. Casaleggio and B. Grillo, *Siamo in guerra. Per una nuova politica* (Brossura 2011).

²⁹L. Caruso, 'Digital Capitalism and the End of Politics: The Case of the Italian Five Star Movement', 45(4) *Politics and Society* (2017) p. 585 at p. 589.

The relationship between technocracy and populism has attracted scholarly attention.³⁰ Müller has acknowledged that populism and technocracy are ‘mirror images of each other’. ‘Technocracy’, he writes, ‘holds that there is only one correct policy solution’; ‘populism’, on the other hand, ‘claims that there is only one authentic will of the people aiming at the common good’. As a result, ‘[o]ne might pave the way for the other, because it legitimises the belief that there is no real room for debate and disagreement: after all, there is only one correct policy solution, just as there is only one authentic popular will’.³¹

Objectocracy must not be confused with the dominion of experts. It rather results from collective knowledge. It does not predicate the prominence of will over reason and feeds on the delusion of perfect reason. Such a truth is procedural rather than substantive. It is tied to the idea that the decisions and assessments made by a large, generally heterogeneous group of people achieve results that compare with those of experts. Government is thus no longer dependent on competency. Decisions will henceforth be outsourced to crowdsourcing platforms.³² The Weberian concept of a politics that requires commitment and vocation is adroitly subverted.

LOTTERY TO REMEDY THE FAILINGS OF REPRESENTATIVE DEMOCRACY

M5S shares with other populist movements a strong critique of representative democracy and yet it advances a peculiar solution, even envisaging the possibility of replacing elections with a lottery system to form parliaments and other public institutions.

Indeed, the critique of representative democracy can be carried out on two opposite grounds: on the one hand, the accoutrements of representative politics, including parties and parliaments, can be blamed for creating distractions and unnecessary complications. For example, Schmitt has dismissed the empty and trivial formality of legislative debate. Presidentialism, strong majoritarianism or even authoritarianism are the proposed remedies. A politics of prompt action is contrasted with the paralysis caused by an excess of representation and the

³⁰D. Caramani, ‘Will vs. Reason: The Populist and Technocratic Forms of Political Representation and Their Critique to Party Government’, 111(1) *American Political Science Review* (2017) p. 54; C. Bickerton and C. Invernizzi Accetti, ‘Populism and Technocracy’, in Rovira Kaltwasser et al, *supra* n. 1, p. 326.

³¹Müller, *supra* n. 2, p. 490.

³²Digital democracy seems to subvert the ideal of deliberative democracy, see S. Suteu, ‘The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy (Part of) the Solution?’, 15(3) *EuConst* (2019) p. 488.

principle of separation of powers is opposed both on ideological and practical grounds.³³

On the other hand, representative democracy can be accused of the opposite: being in hock to organised interests and disregarding popular will. Recall of elected representatives, imperative political mandates or forms of technological monitoring of political performances are usually instruments to bridge the distance between representatives and the represented. Social phenomena of citizens' surveillance or advocacy democracy are seen as entailing the participation of citizens and public interest groups in political and administrative decision-making.³⁴ Frequent referenda are called to replace political judgement. M5S shares this second approach.

These two opposite ways of attacking representative democracy lead to two distinct ideas of politics and two different forms of populism.³⁵ On the one hand, we find the view that a strong cabinet headed by a strong leader who speaks in the name of his entire constituency is the best institutional setting for allowing the authentic will of the people to be implemented. Nadia Urbinati has characterised this phenomenon as the shift from representation to delegation.³⁶

On the other hand, criticism of representative democracy can be more radical. Here institutions are reduced to neutral transmission channels vested with the task of carrying the voice of social protesters without interference. Parliaments are required to vote mostly on Bills proposed by citizens, referenda become more frequent, deputies cannot shift from one political group to another. Given the required neutrality of representatives and the irrelevance of their political ideas, elected bodies may even seem to be the result of a lottery. As Brett Henning, author of *The End of Politicians: Time for a Real Democracy*, argues, real democracy does not require politicians.³⁷ Beppe Grillo has taken up his call.³⁸

³³D. Kosař et al., 'The Twin Challenge to Separation of Powers in Central Europe: Technocratic Governance and Populism', 15(3) *EuConst* (2019) p. 427.

³⁴The literature on the topic is vast. See for example, R.J. Dalton, 'Citizenship Norms and the Expansion of Political Participation', 56 *Political Studies* (2008) p. 76. For a critical approach, G. Jordan and W.A. Maloney, *Democracy and Interest Groups: Enhancing Participation?* (Palgrave 2007).

³⁵P. Taggart, 'Populism and representative politics in contemporary Europe', 9(3) *Journal of Political Ideologies* (2004) p. 269.

³⁶N. Urbinati, *Democrazia figurata: il popolo tra opinione e verità* (Università Bocconi editore 2014); N. Urbinati, 'Democracy and populism', 5(1) *Constellations* (1998) p. 110.

³⁷B. Henning, *The End of Politicians. Time for Real Democracy* (Unbound 2017).

³⁸B. Grillo, 'Il Senato dei cittadini', 27 June 2018, (www.beppegrillo.it/il-piu-grande-inganno-della-politica-e-farci-credere-che-servano-politici/), visited 12 August 2019.

M5S: LEGALISM AS A STRATEGY FOR AVOIDING POLITICAL CONFRONTATION

Prima facie, M5S does not seem to fit in with most common analyses of populist politics, which tend to focus on decisiveness and taking vengeance on the political. On the contrary, formal law appears to have replaced politics as a means of fulfilling the promises of the objectocracy. I will mention a few examples which I believe support this thesis.

The contract for the government of change

To remedy the stalemate resulting from the 2018 political elections, M5S agreed to form a cabinet with the League, overcoming its longstanding refusal to negotiate with other political parties. To dispel suspicion of political compromise, the two parties adopted a strategy of entering into a legal contract that outlined the premise of their arrangement. The document was emphatically named ‘contract for the government of change’ (*contratto per il governo del cambiamento*, hereinafter ‘the contract’).

The very idea of signing a contract rather than providing a rough sketch of the political plans of the coalition indicates a conciliatory strategy to progressively narrow and eventually close the gap of politics and reconcile the competitors. The agreement even provides a remedy in case of ‘breach’ by either party and establishes a conciliation committee to settle any quarrels. A good faith clause is included, probably to emphasise the analogy with a contract governed by private law.³⁹

The general impression that arises from reading the agreement is not one of a coherent project. In fact, the contract merges two opposite and costly economic reforms (a flat tax proposed by the League and a universal citizen’s basic income proposed by M5S), which, in the nearly unanimous view of economists, are extremely difficult to reconcile. However, it is clear that the primary intent of the two parties is to conceal any hint of political demeanour. Whereas politics is by definition shrouded in suspicion, a legal agreement is a reliable tool to ensure impartiality and objectivity. It should be said that whereas the League has often acknowledged the possibility of revising the contract, thus betraying its instrumental or even opportunist attitude towards the counterparty, the M5S has shown stronger loyalty to this founding agreement, resorting to its written provisions as the main justification of its political action or inaction. The contract is even used to relieve each party of taking responsibility for the actions promoted by the other

³⁹C. Pinelli, ‘Uno strano contratto’, *Il Mulino* (2018), <www.rivistailmulino.it/news/newsitem/index/Item/News:NEWS_ITEM:4367>, visited 12 August 2019.

party. In this vein, M5S has avoided bearing the moral costs of the strict anti-immigration policies⁴⁰ carried out by the cabinet, on the ground that the policies had been requested by the League.

Prime Minister as the executor of the contract

Article 95 of the Italian Constitution provides that the President of the Council of Ministers (i.e. the Prime Minister) directs the policy of the government and is responsible for the actions of the cabinet. This provision is usually interpreted as the core of the Prime Minister's political accountability. However, the Italian Prime Minister, Giuseppe Conte, has more than once asserted that he is a mere executor of the contract signed by the two leaders of the coalition. Although Law 400/1988 assigns to the Prime Minister the task of mediating and overcoming conflicts between the Ministries of the cabinet, Professor Conte has often abstained from interfering in these frequent quarrels.

Even the choice of Prime Minister came as a surprise. Professor Giuseppe Conte, a respected law professor and attorney at law, is not exactly the common man who M5S claims to stand for. Despite M5S's past antipathy towards unelected politicians, Professor Conte was chosen by the party leaders. He has never run for an election and as an outsider to the political arena, he fits in quite well with the populist outlook. And yet, as an academic, a lawyer, and an institutional figure, he might have raised some concerns from a populist point of view. But since M5S's main concern is partisanship, it does not demand charismatic leadership. The Prime Minister has dispelled all possible suspicion by committing to perform his task more like an executor than a leader, at least until the results of the European elections in May 2019 became known.

Legal advisers to replace elected politicians

One of the biggest challenges that M5S faces is to turn its protester attitude into actual industrial politics. Although Movement activists have fiercely contested most Italian industrial plans currently in place, Mr Di Maio, the Ministry of Economic Development and Labour, has avoided backing off from already approved projects and has taken up a strategy of delay, which has included a shift of political responsibility to legal counsels. An identical tactic has been used for both the ILVA steel plant and the trans-Atlantic pipeline. In both cases, after entrusting the state advocacy office with the task of issuing a legal opinion for each project, the Ministry has justified its decisions to continue both plans solely

⁴⁰The so-called *Decreto Sicurezza* and *Decreto Sicurezza bis*, see also Law n. 132, 1 December 2018.

by making reference to the legal arguments contained in those opinions.⁴¹ A similar procedure has been put in place for the High-Speed project (the so-called TAV) in Val di Susa by the Ministry of Infrastructure. Once again, the burden of political responsibility has been shifted onto legal experts or, as in the case of TAV, onto engineers.

Public tenders, concessions and ritualistic politics

Analyses of public procurements under populism can provide useful information on the ambivalent relationship between populism and legal rules. One of the populists' most common complaints is that public contracts are awarded to curry favour with certain private parties. On his blog, Beppe Grillo has often launched campaigns against 'industrialists who support the establishment and exchange favours (or guarantee votes) in return for access to public contracts or concessions' and against 'politicians, who are worth less than prostitutes'.⁴² However, the remedy needed to counter the risk of favouritism is not clear. Although legal instrumentalism and a new form of favouritism might be one possibility, another could be to elevate the ambition of a perfectly neutral tender procedure to the extreme. This second solution implies, among other things, pandering to, rather than contrasting with, the trend of rule proliferation. Anticorruption mechanisms, preliminary controls, extensive audits, second opinions by external committees are all tools aimed at achieving the highest level of impartiality.

In stark contrast to previous governments which strove to show decisiveness and prompt action, M5S administrations, from the municipal level upwards, have, at least initially, adopted exactly the ritualistic attitude described above.⁴³ In order to avoid any suspicion of corruption or partisanship, extensive audits have been planned, often delaying the results for months. The paralysis of the municipality of Rome, led by Five Star Mayor Virginia Raggi, is an example of this state of affairs. Since public action can potentially give rise to corruption, inaction seems to be the political course of action most respectful of populist wishes.

More recently, M5S's representatives have grounded their decision not to renew the contract with Radio Radicale to cover parliamentary discussions and

⁴¹To read the dialogue between the Ministry and the State Advocacy, see www.sviluppoeconomico.gov.it/images/stories/documenti/parere-avvocatura-ilva-compressed-web.pdf, visited 12 August 2019.

⁴²B. Grillo, 'Processi popolari in rete', 21 May 2014, www.beppegrillo.it/processi-popolari-in-rete/, visited 12 August 2019.

⁴³Although there are several reasons for the substantial slow-down of public procurements in cities throughout Italy, the situation of the Municipality of Rome, which is governed by a Five Star Mayor, has become particularly serious.

other political stories, with the failure of the contractor to comply with tender procedure rules. The decision has prompted strong protests because of its allegedly illiberal intentions. Radio Radicale is well known for its pluralistic attitude, free spirit and the high quality of its commentators. Media Undersecretary Mr Vito Crimi explained the government's choice to cut funding with the argument that the celebrated broadcaster had provided service for 25 years without having to go through any public tender procedures. The decision not to renew the contract might reveal that legalism is also an instrument that can be wielded to silence dissent.⁴⁴ Martin Krygier, in this issue, urges those who seek to oppose populist intemperance to do more than merely object to (il)legal tactics and manoeuvres and to 'infuse' the rule of law 'with value beyond the technical requirements of the task at hand'.⁴⁵ His warning seems quite apt in this situation.

After the results of the European elections of 2019, the League has pushed for a reform of public procurements to allow more flexibility in the choice of contractors and in tender procedures.⁴⁶ Although M5S was forced to accept several of the proposals, mainly for pragmatic reasons, it has not abandoned its central anti-corruption posture.

Criminal law and tort law to replace politics

Populism is often defined as the politics of blaming. Blaming, however, is essentially anti-political. Its legal counterpart is assessing responsibility in criminal or civil cases. It looks backwards. Politics, on the contrary, is forward-looking.⁴⁷ It is primarily interested in finding general solutions, rather than judging past behaviour. The ample literature on penal populism confirms the attitude of most populists towards criminal law and harsh punishments.

M5S's discourse is strongly focused on assessing liabilities. Criminal law is often invoked as the primary remedy against systemic problems such as corruption, tax evasion and abuse of power, whereas legal actions under the laws of torts are highly endorsed as a means of dealing with a variety of issues ranging from bank crises to political accountability.

For example, Law no. 3 of January 9th 2019, which is emphatically referred to as *Spazzacorrotti* ('Sweep away the corruption'), was enacted on a Bill proposed by

⁴⁴On the concept of autocratic or discriminatory legalism, see K.L. Scheppele, 'Autocratic Legalism', 85 *University of Chicago Law Review* (2018) p. 545-84.

⁴⁵Krygier, *supra* n. 14; see also M. Krygier, 'The Rule of Law: Legality, Teleology, Sociology', in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart Publishing, 2009) p. 45.

⁴⁶See (www.senato.it/2987), visited 12 August 2019.

⁴⁷On the difference between forward looking and backward looking populism, see P. Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism', 15(3) *EuConst* (2019) p. 519.

M5S and has been described by most M5S representatives as the first (!) anti-corruption law since the time of *Clean Hands* (Mani Pulite),⁴⁸ and therefore as directly tied to the judicial scandals that hit Italian political parties in the early 1990s (the so-called *Tangentopoli*). Law no. 3, among other things, increases penalties for crimes related to corruption, allows undercover officers to be deployed and perpetual bans from public contracts to be imposed on convicted contractors, and widens the possibility of using wiretaps and eavesdropping. The Law further provides strict transparency rules for the funding of political parties, which according to some commentators could pose a fundamental threat to the freedom of association. This reform has been presented as being at the core of the government action and as evidence of the cabinet's revolutionary character,⁴⁹ which entails siding with honest citizens against the 'monster devouring Italy' or the 'metastasis [corruption] that attacks virtually all sectors of public life: public works, procurement, healthcare, universities, politics and institutions'.⁵⁰ Although actions against corruption are obviously something to be welcomed, some of the provisions included in Law no. 3 raise concerns from a constitutional point of view with reference to the principle of proportionality as it applies to crime and punishment and the prohibition against retroactive legislation,⁵¹ thus confirming the illiberal tendencies of a politics conceived mostly as a tool for redeeming honest people from a corrupted elite.

M5S'S CONSTITUTIONAL REFORM

Constitutional change under populism has been described as carrying out three core functions: deconstructing the existing political regime, serving as an ideological critique that promises to overcome flaws in the prior constitutional order, and consolidating power in the hands of the populist leadership.⁵² According to this view, populist projects of constitutional change tend to consolidate the power of incumbents, erode the separation of powers, and weaken protections for minority and opposition groups. New constitutions and constitutional amendments proposed by populists often tend to concentrate power in the executive branch

⁴⁸See for instance, (m5s.international/spazzacorrotti-first-anti-corruption-law-times-clean-hands), visited 12 August 2019.

⁴⁹Ibid.

⁵⁰Ibid.

⁵¹See, for instance, V. Manes, 'L'estensione dell'art. 4 bis ord. pen. ai delitti contro la P.A. profili di illegittimità costituzionale', 2 *Diritto Penale Contemporaneo* (2019) p. 105.

⁵²D. Landau, 'Populist Constitutions', 85 *University of Chicago Law Review* (2018) p. 521–522; P. Blokker, *Populist Constitutionalism* (Preußischer Kulturbesitz 2017); see also L. Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular and Constitutional Identity', 12 *EuConst* (2016) p. 6.

and lengthen the time that incumbents can stay in power.⁵³ Populist constitutionalism is associated with legal resentment and a critique of liberal constitutionalism.⁵⁴

The Italian case seems different. Until only a few years ago, Italian populist parties strenuously defended the Constitution against even the slightest change. This was especially clear in 2016 during the political campaign for a referendum to approve a constitutional reform that had been proposed by the previous parliament, which was dominated by the left. M5S sided with well-known constitutional scholars, some of whom served on the Constitutional Court, in strongly opposing majoritarianism, which the constitutional reform was intended to promote. And yet the proposed reform would have been in line with certain populist ideals; it aimed to modify institutional structures to increase decisiveness, decrease the use of veto powers, allow Bills to be passed by one House only and, most of all, to reduce the number of members of Parliament.

More recently, the Italian populist cabinet has proposed a constitutional reform which seems to reflect M5S's ambitions to remedy the vices of representative politics by injecting elements of direct democracy. While the constitutional amendment proposals cannot be discussed in depth here, a brief sketch is befitting.

The first section of the package of constitutional reforms provides, among other things, for a reduction in the number of members of Parliament (amendments to Articles 56 and 57 of the Constitution) and lowering the voting age for electing Senators.⁵⁵ M5S's insistence was in vain: the initial idea of adding provisions to the Constitution that would reduce the salaries of parliamentarians has been abandoned at the behest of the League.

The core of the reform, however, is aimed at strengthening the popular legislative initiative and direct democracy⁵⁶ by amending Article 71 and by lowering the quorum for abrogative referendum required under Article 75. The current version of Article 71 states that citizens can propose legislative Bills to the parliament, provided that the Bill is supported by at least 500,000 eligible voters and is drafted in articles. No duty to vote on the Bill is set forth, however.⁵⁷ It is this gap

⁵³Landau, *supra* n. 52, p. 532; Müller, *supra* n. 2, p. 62.

⁵⁴Blokker, *supra* n. 52.

⁵⁵A.C. n. 1585, (www.senato.it/leg/18/BGT/Schede/Ddliter/49285.htm), visited 12 August 2019.

⁵⁶A.C. n. 1173, 19 September 2018 and the accompany report by Minister Fraccaro. *See also* G. Grasso, 'Le «Mouvement 5 Étoiles» et les défis de la démocratie représentative: à la recherche d'une notion constitutionnelle de populisme?', *Percorsi costituzionali* (2017) p. 207 ff; P. Bilancia, 'Crisi nella democrazia rappresentativa e aperture a nuove istanze di partecipazione democratica', 1 *Federalismi.it* - Focus Democrazia diretta vs democrazia rappresentativa (2017) p. 2 ff.

⁵⁷The internal regulations of each House of the Parliament currently provide that any Bill presented pursuant to Art. 71 must be taken into consideration. The Senate regulation even prescribes a timeline, *see* Reg. Camera, Art. 104, co. 4; Reg. Senato, Art. 74, co. 2 e 3.

that the constitutional reform proposal wishes to fill by compelling parliament not only to vote on the Bill but to *approve* it within 18 months of receipt. If 18 months pass without approval being given, or approval with substantial variations, a mandatory referendum is called, provided that the promoters of the Bill persist in their approval request and that the Constitutional Court declares the referendum admissible. It is worth noting that the initial proposal of M5S amounted to the introduction of a propositional referendum (*referendum propositivo*) not subject to any parliamentary filter for evaluating the popular initiative.⁵⁸

According to the drafters, one of the goals of the reform is to ‘allow citizens to participate in the political choices of the country and to increase citizens’ power to exert control over the activities of their representatives’.⁵⁹ Direct democracy is presented by the promoters of the reform not solely as an instrument to propagate a sense of responsibility for public issues among common citizens,⁶⁰ but mostly as a device ‘to stem the degenerative aspects of representative democracy, [such as] the attitude of trading off political positions; the creation of privileges to favour those in power; the expansion of bureaucratic privilege and dependency on pressure groups’.⁶¹

These proposals have not been received favourably by constitutional scholars.⁶² While this essay is perhaps not the most appropriate place to summarise such an interesting debate, it is, however, worth mentioning the most commonly deployed arguments against the idea that certain forms of direct democracy might provide a remedy to the crisis of representation in Italian political institutions. First, it has been argued that excessive catering to counter-democratic powers does not have the effect of fortifying political institutions. Attempts to overcome increased hostility on the part of citizens against their representative institutions by means of more frequent recourse to the popular vote or by widening the scope of the popular legislative initiative could ultimately activate a vicious circle in which institutions, and parliament above all, are more and more vilified.⁶³ Second, the introduction of certain elements of direct democracy could pave the way for some form of plebiscitary democracy, which would put minority rights at risk.⁶⁴ Third,

⁵⁸A.C. n. 3124.

⁵⁹Report accompanying the reform, (documenti.camera.it/_dati/leg18/lavori/stampati/pdf/18PDL0028960.pdf), visited 12 August 2019.

⁶⁰Ibid.

⁶¹Ibid.

⁶²See (www.lacostituzione.info/index.php/2019/05/16/riforma-della-costituzione-lintroduzione-del-referendum-propositivo-invito-al-dibattito/), visited 12 August 2019.

⁶³M. Luciani, ‘Referendum e forma di governo’, in *Associazione per gli studi e le ricerche parlamentari*, Quaderno n. 7, Seminario 1996, Torino, Giappichelli, 1997, p. 97.

⁶⁴S. Rodriguez, ‘I limiti della democrazia diretta. L’iniziativa popolare nell’esperienza svizzera e statunitense, con uno sguardo all’Italia’, *Riv. trim. dir. pubbl.* (2017) p. 451.

a generalised recourse to the popular legislative initiative, although presented as a tool to strengthen the accountability of members of parliament *vis-à-vis* the people, could produce the opposite result: a democracy beholden to extra-parliamentary elites (i.e. those drafting the bills) who dictate the political agenda.⁶⁵ Fourth, the generalised recourse to referenda, both for introducing new laws or to repeal existing laws, by lowering the required quorum, could suppress the deliberative aspect of democracy by which opposing interests are balanced and compromise preserves pluralism. The binary (yes/no) vote requested of citizens voting in referenda not only threatens the discursive element of political decision-making but, in stark contrast to the reform promoters' declared intent, might even end up encouraging both citizens and elected officials to shirk responsibility for public issues.⁶⁶

Relying on the analysis of Rosanvallon, it could be conjectured that the main intention behind shifting political decision-making to counter-democratic powers is to shield political actions from being tried in the court of public opinion. Digital democracy has the same function as the legalist strategy. Following this line of reasoning, rather than being an instrument to increase politicians' accountability *vis-à-vis* the electorate, direct democracy is a way to trump counter-democratic powers and to shield politicians from the bitter destiny that could await them: an excess of stigmatisation and negative public opinion.

It is worth recalling that M5S has already used the strategy of delegating certain political decisions to online voters registered via the Rousseau platform. For example, when Parliament was asked to authorise criminal proceedings against the Minister of the Interior, Mr Salvini, for having prevented 177 immigrants stranded off the coast of Sicily from disembarking,⁶⁷ M5S's representatives were faced with a tragic political dilemma: if they authorised criminal proceedings against a Minister in their own cabinet (who was also a Vice Prime Minister), the government would have had to resign. Furthermore, M5S's electorate is generally in agreement with the views of the League on the topic of immigration. However, if M5S's representatives had decided to deny the authorisation, they would have been perceived as betraying their trademark intransigency against politicians accused of crimes and their unquestioning faith in criminal judges.

⁶⁵P. Pasquino, 'Popolo o élite? Il referendum propositivo e la retorica della democrazia diretta' in *La Costituzione.info*, 23 April 2019, <www.lacostituzione.info/index.php/2019/04/23/popolo-o-elite-il-referendum-propositivo-e-la-retorica-della-democrazia-diretta/>, visited 12 August 2019.

⁶⁶R. Bin, 'Riforma della Costituzione: l'introduzione del referendum propositivo', in *Itinerari Costituzionali*, at <www.lacostituzione.info/wp-content/uploads/2019/04/Incontro-cattolica-RB.mp3>, visited 22 August 2019.

⁶⁷I am referring to the so-called caso *Diciotti*, see <questionegiustizia.it/doc/trib_catania_decreto_salvini.pdf>, visited 12 August 2019.

The leaders of M5S decided to allow their constituency to make the decision, invoking direct democracy as a way out.

ANTIPOLITICS AND LEGALISM

Pierre Rosanvallon defines populism as the ‘pure politics of the unpolitical’ or the consummate antipolitics.⁶⁸ The antipolitical nature of populism is the consequence of its connections with counter-democratic social powers. In the ‘physiological’ life of a democracy, counter-democratic powers are not meant to produce politics. Their main task is to veto some of the policies carried out by institutional powers or to improve the political actions of the cabinet. Not so once populism rears its head. As its pathology is based on counter-democracy or even ‘absolute counter-democracy’,⁶⁹ populism, once in power, needs to find a way to overcome its foundational paradox. Populism has to rule without politics. Populist regimes are not equipped to do what any political authority must do to ground its legitimacy; they cannot justify their policies *on the merits*. This explains the massive use of specious arguments populist politicians have to resort to when introducing a new policy, such as the will of the people, the pride of the nation, the faults of past ruling élites, or, as we have seen with regard to the Italian cabinet, the contract of government between the two parties of the coalition.

My claim is that legalism is one of the strategies used by populist regimes to rule without politics. Whereas in the previous paragraphs I have tried to support this thesis with a bit of empirical evidence drawn from the Italian political experience, I would now like to propose that the relationship between populism and legalism might be more than simply contingent.

First, as a strategy for avoiding debate and disagreement, the law has a lot to offer. The mere idea of legal decisions as based mostly on second-order arguments, i.e. arguments which do not address the merits of the case but remain superficial, is generally accepted among legal theorists. Joseph Raz defines as second-order those ‘reasons to act on or refrain from acting on a reason’.⁷⁰ The most important category of second-order reasons recognised by Raz is that of exclusionary or peremptory reasons. These are reasons to refrain from acting on a reason. Exclusionary reason pre-empts first-order reason not by outweighing it; exclusionary reason just prevails by virtue of being of a higher order.⁷¹ The exclusionary reason excludes first-order reason from consideration. Legal rules, Raz contends,

⁶⁸Rosanvallon, *supra* n. 11, p. 268.

⁶⁹*Ibid.*, p. 273.

⁷⁰J. Raz, *Practical Reasons and Norms* (Oxford University Press 1976) p. 39; *see also* J. Raz, *The Authority of the Law* (Oxford University Press 1979) p. 17–19.

⁷¹Raz (1976), *supra* n. 70, p. 49.

work exactly as exclusionary reasons. They do not outweigh first-order reasons; they simply prevent first-order reasons from being taken into account. By contrast, politics cannot avoid first-order reasons for too long. Imagine some sort of new fiscal policy. A government might ground its policy on first-order reasons (increased growth, more equality, and so forth), or it might alternatively claim to be bound to its policy by rules of a higher order (European fiscal compact, constitutional provisions).

Exclusionary reasons ground legal authority (and authority in general) and at the same time shield authority from excessive demands of legitimacy. As an expression of absolute counter-democracy, populist actors rarely engage in first-order reasoning. First-order reasons, i.e. reasoning on the merits, could give rise to confrontation, dissent or even protest. Protest, however, is not lightly tolerated by a government which claims to identify with counter-democratic powers. A legalist strategy might offer a way out.

The second way to establish a connection between populism and legalism involves the idea of neutrality espoused by certain strains of populist discourse, especially when technology plays a significant role. One of the primary functions of the rule of law is to remedy the arbitrariness of the power of the men. Legal rules, due to the generality and abstraction that liberates them from any specific context, are instruments against partisanship. Since one of populism's main enemies is factionalism, populists willingly accept any tool available to implement neutrality. This could explain not only the populist craving for rule proliferation as a means of narrowing the margins of any discretionary power but also their enthusiasm for the use of digital technologies to perform ordinary administrative tasks.⁷²

There is a third way to conceptualise the relationship between populism and a formalist conceptualisation of law. It is related to the ambivalent stance of populism *vis-à-vis* the phenomenon of the judicialisation of politics. This will be discussed in the following paragraph.

FROM THE POLITICS OF REDEMPTION TO A CLASS ACTION AGAINST THE PAST RULING ELITE

In sketching the populist zeitgeist, Cas Mudde makes the conjecture that the populist surge is an illiberal democratic response to decades of undemocratic liberal

⁷²Paul Blokker makes the opposite argument with regard to right-wing populist movements in Eastern-Central Europe. Blokker argues that populist engagement with the law in Eastern-Central Europe includes a reaction to what is portrayed as legal fundamentalism or an excessive juridification of society: Blokker, *supra* n. 47. I will take such a diversity of opinions to be evidence of the variety of populist movements' performance in power.

policies. To stem the populist tide, Mudde urges establishment politicians to bring back into the electoral realm the crucial issues of the twenty-first century, such as immigration, neoliberal economics, and European integration.⁷³

The identification between populism and the essence of politics has been made also at the theoretical level. Ernesto Laclau ties populism to a 'totalizing Hegelian metaphysics' and contrasts the populist logic of equivalence by which social demands are bundled into one single opposition between the people and the elite, to a depoliticised and technocratic logic of difference by which individual demands are treated on a case-by-case basis by the state.⁷⁴

Margaret Canovan goes even further by explaining the rise of populist parties in contemporary Europe as the desire to vindicate the loss of the redemptive aspect of democracy.⁷⁵ Following this line of reasoning, populist discourse can be associated with the call to the 'poor of spirit'⁷⁶ contained in the Gospels and the vehement protest against legalism by St. Paul or the first Reformers.⁷⁷ Drawing on the US literature on populist constitutionalism, I myself have espoused the view of populism as a reaction to an excess of judicialisation in constitutional law.⁷⁸

However, the relationship between the judicialisation of politics and populism is ambivalent at best. If, on the one hand, lawyers and jurists are perceived as part of an elite that should be opposed, populism, on the other, also has roots in the judicialisation of politics. Corrosively enlarging the idea of the citizen judge,⁷⁹ populism embraces the fantasy of replacing politics with law. Not only is the very essence of power ridiculed and criminalised so that all civic activity is reduced to mudslinging,⁸⁰ but criminal accountability replaces the political. Populists generally identify the state with its prosecutorial function. Two opposite consequences ensue. First, judges are vested with the task of exercising political power; second, politicians (populist politicians) are expected to exercise power as if they were acting in court.⁸¹

⁷³C. Mudde, 'The populist Zeitgeist', 39(4) *Government and Opposition* (2004) p. 542.

⁷⁴Bickerton and Invernizzi Accetti, *supra* n. 30, p. 329.

⁷⁵M. Canovan, 'Trust the People! Populism and the Two Faces of Democracy', 47(1) *Political Studies* (1999) p. 2 at p. 9.

⁷⁶Matthew 5:3.

⁷⁷For a discussion on this topic, see J. Ballestreros, 'Towards a Rebellion without Resentment: Against Obscene Inequality and Populism', 77 *Persona & Derecho* (2017) p. 59.

⁷⁸L. Corso, *I due volti del diritto. Élite e uomo comune nel costituzionalismo americano* (Giappichelli 2016); L. Corso, 'What does Populism have to do with Constitutional Law. Discussing Populist Constitutionalism and its Assumptions', III(2) *Rivista di Filosofia del diritto* (2014) p. 443.

⁷⁹Rosanvallon, *supra* n. 11, p. 270.

⁸⁰*Ibid.*, p. 270.

⁸¹The idea that judges could take part in the populist fight is not limited to the Italian case. See for example the case of Brazil, D. Werneck Arguelhes, *Judges Speaking for the People: Judicial Populism*

Appropriation of the legal discourse by politics does not simply concern public enforcement alone. Even economic policies are to be filtered through the same legal logic. Economic measures are primarily intended to work as a form of compensation to that section of the population, the *people*, which has allegedly been damaged by previous governments, the elite. Aristotle's distinction between distributive justice and corrective justice, which establishes the difference between politics and law, is rejected. All justice is corrective.

To get back to the M5S experience, it is no coincidence that Giuseppe Conte, immediately after being appointed Prime Minister, defined himself as the *attorney of the people*. Populists can be conceptualised as participants in a *class action* against the previous ruling elites. Even economic reform can be seen through this lens. As one constitutional scholar has recently argued, M5S's warhorse, the Basic Income, is intended as a form of reparation for the failure of past governments to fulfil the constitutional provision declaring the right to work;⁸² it is the just compensation that citizens of the South are due from the past ruling class in the North.

Populist policies look backwards, seeking punishment and compensation. While politics implies collective responsibility,⁸³ populist politicians (and voters) divide society into two antagonistic groups, much like in a courtroom. Hannah Arendt described the essence of politics in exactly opposite terms. It is worth recalling her words:

When Napoleon Bonaparte became the ruler of France, he said: I assume responsibility for everything France has done from the time of Charlemagne to the terror of Robespierre. In other words, he said, all this was done in my name [. . .]. In this sense, we are always held responsible for the sins of our fathers as we reap the rewards of their merits; but we are of course not guilty of their misdeeds, either morally or legally [. . .]. This vicarious responsibility for things we have not done, this taking upon ourselves the consequences for things we are entirely innocent of, is the price we pay for the fact that we live our lives not by ourselves but among our

beyond Judicial Decisions, *VerfBlog*, 4 May 2017, (verfassungsblog.de/judges-speaking-for-the-people-judicial-populism-beyond-judicial-decisions), visited 12 August 2019.

⁸²C. Tripodina, 'Reddito di cittadinanza come "risarcimento per mancato procurato lavoro". Il dovere della Repubblica di garantire il diritto al lavoro o assicurare altrimenti il diritto all'esistenza', *Costituzionalismo*, 1/2015, (www.costituzionalismo.it/download/Costituzionalismo_201501_497.pdf), visited 12 August 2019. Other scholars claim that Law n. 26 of 2019, introducing the Basic Income, can be read as a form of penal control over poor people due to the harsh sanctions imposed when its provisions – including the destination of the expenditures made with the Income – are violated, see R. Rivero, 'Reddito di cittadinanza: assistenza alla povertà o governo penale dei poveri?' *Questioni di Giustizia*, 2/2019, (www.questionegiustizia.it/articolo/reddito-di-cittadinanza-assistenza-alla-poverta-o-governo-penale-dei-poveri-06-06-2019.php), visited 12 August 2019.

⁸³H. Arendt, 'Collective Responsibility', in H. Arendt, *Responsibility and Judgment* (Random House 2005) p. 147-155.

fellow men, and that the faculty of action which, after all, is the political faculty par excellence, can be actualized only in one of the many and manifold forms of human community.⁸⁴

Legal responsibility is, on the contrary, individualised, context-related, backwards-looking. Legal reasoning rarely rests on consequential arguments. As any psychoanalyst might say, the emphasis of the Italian populists on the idea of *change* betrays, in fact, a fixation with the past. The restorative nature of their (a)political action explains populists' disregard for the impact their policies will have on future generations.

M5S, POPULISM AND THE RULE OF LAW

Populist uprisings in Western democracies usually follow years or decades of perceived political corruption and abuse of power. Counter-democracy has become more active. Internal rules of governance, ethics committees, supervisory bodies, more transparent administrative actions, independent authorities, and especially jailing politicians, bureaucrats and bankers are but a few of the methods which have been used to alleviate the sense of frustration felt by the population or perhaps simply to cater to public opinion. Legal actions have become the most effective form of counter-democracy.

Distrust in politics is not a recent phenomenon. The sense that nothing ever changes, no matter who is running the country, is a very common sentiment in Italy. In 2000, almost a decade before the outbreak of the economic crisis, only 11% of the population indicated that it at least partially trusted political parties.⁸⁵ In 2011, confidence had fallen to a mere 4% and the government had the trust of only 12% of Italians, which was, with the exception of Greece (8%), the lowest score in Europe.⁸⁶

The Italian populist experience cannot be understood independently of the reasons that led traditional parties to be swept out of power in the early 1990s – political corruption, above all else. In the Italian discourse, political corruption has always been much more than mere bribery. It has been synonymous with the abuse of power and bad politics, in general. The first wave of populism, personified by the tycoon political leader Silvio Berlusconi, was based on the idea of replacing traditional politics with business-oriented political action.

⁸⁴Ibid., p. 150.

⁸⁵G. Sandri and M. Telò, 'Political System, civil society and institutions in Italy: The quality of democracy', 11(3) *Comparative European Politics* (2013) p. 261 at p. 270.

⁸⁶Demos 2012, *Rapporto fra gli Italiani e lo Stato*, (www.demos.it/a00796.php), visited 12 August 2019.

When that approach lost its appeal to the electorate, a second and much more radical wave of populism arose, giving rise to two different kinds of populist discourse. On the one hand, the League has mainly used rhetoric attacking supra-national elites, such as EU technocrats and non-governmental organisations, and has exploited the parochialism and chauvinism which characterised the political discourse of its progenitor, the Northern League, by expanding it to include the entire country. On the other hand, M5S has tried to maintain a rigorous anti-elitist posture, attempting to preserve its strong ties with counter-democratic powers.

The argument can be made that M5S's political experience, and possibly the parable of its political decline, is evidence of populism's lack of a constitutive political element and hence of the doomed trajectory of populist movements which merely pretend to maintain a counter-democratic stance once in power.⁸⁷ Populists cannot avoid breaking what Ernesto Laclau has described as the *chain of equivalence* (i.e. the interchangeability of the varying and sometimes conflicting demands of their constituencies), which has allowed them to win over wide and varied electorates. This is why populists often end up displeasing some of their supporters after few months in government, unless they base their politics on a strong characterisation of the people and, to a certain extent, *distract* the electorate from their initial demands.

What happens, however, when populists' 'peoplehood' is not based on some kind of political naturalism, as in the case of M5S? M5S's core ideology, shared by both its founders Grillo and Casaleggio and still alive in many M5S representatives yet common to many populist movements in which an anti-elitist stance is strongly maintained, does not simply target the prospect of a virtuous public man, i.e. the political man celebrated by civic republicanism. It also targets the private man and the private interests that drive him for the contaminating influence it can have on political power. Its moralism finds a solution solely through some kind of technological utopianism. In the absence of any political naturalism, the concept of the people, which M5S often describes in terms of an online anonymous community of interconnected digital identities,⁸⁸ is even more artificial than the one assumed by the dominant view of constitutionalism and celebrated by the liberal tradition.⁸⁹

Populists have been described as impatient with procedures and institutions, and as ill-disposed to intermediary bodies, as they prefer unmediated relations between the populist ruler and the people. They have been seen to prefer direct,

⁸⁷US historian Hofstadter has claimed that populists are like bees: once they sting they die, see R. Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (Random House 1955).

⁸⁸See, for example, the debates on the concept of the people, which result from the conference called Sum, organised on a yearly basis by Casaleggio and Associati. For Sum#03, see www.gianrobertocasaleggio.com/sum-2019/, visited 12 August 2019.

⁸⁹H. Kelsen, *La democrazia* [1929] (Il Mulino 1981).

‘natural’ or ‘pure’ forms of politics, as opposed to indirect and artificial ones.⁹⁰ This picture needs to be readjusted to fit in with a populist discourse that rejects the natural dimension of politics and whose main intent is to carry the anti-elitist drive to the extreme. M5S’s excessive use of legal methods as a strategy for dealing with public issues can probably be explained as a fantasy of political action immune from all elitist influences. Legalism has the same function as digital democracy, i.e. concealing the inherent imperfection of politics.

Despite its provocative intent, Beppe Grillo’s proposal to replace elections with a lottery system is enlightening. Haunted by the paranoia that any human action is tainted by malice, luck may be the solution.

Populism is often accused of posing a threat to the rule of law with the argument that the rule of law is grounded in hostility to arbitrary power.⁹¹ When populism’s anti-elitist and moralistic ambitions are carried to the extreme, populism’s opposition to the rule of law requires, however, a different explanation.⁹²

The rule of law is built upon hostility to arbitrary power⁹³ and yet demands that some margin of discretionary power be preserved. It cannot supplant political values entirely, and can only survive grounded in some idea of politics. The rule of law cannot be identified with the law of rules⁹⁴ and requires, to a certain extent, that public power be trusted. When populism’s radical denial of the Weberian public ethos is combined, as in the case of M5S’s discourse, with a strong suspicion of private interest, the very essence of politics is struck at its core. As James Madison warned more than two hundred years ago, trying to overcome factionalism by purging private interests and private opinions is like deciding to annihilate ‘the air, which is essential to animal life, because it imparts to fire its destructive agency’.⁹⁵

⁹⁰Urbinati, *supra* n. 36.

⁹¹Krygier, *supra* n. 14.

⁹²The literature on the inner morality of law is ample. For formal morality, see L Fuller, *The Inner Morality of Law* (Yale University Press 1965); for the opinion that the rule of law incorporates thicker moral principles, see, for example, T. Bingham, *The Rule of Law* (Penguin Books 2011); see also the Rule of Law Checklists issued by the Venice Commission in March 2016, <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)>, visited 12 August 2019.

⁹³Krygier, *supra* n. 14; see also Krygier, *supra* n. 45.

⁹⁴A. Scalia, ‘The Rule of Law as a Law of Rules’, 56 *University of Chicago Law Review* (1986) p. 1175; J. Shklar, *Legalism. Law, Morals and Political Trials* (Harvard University Press 1986); F. Viola, *Il governo della legge ieri ed oggi* (Giappichelli 2011); M. Krygier, ‘Ethical Positivism and the Liberalism of Fear’, in T. Campbell and J. Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism* (Dartmouth, 1999) p. 59 at p. 64.

⁹⁵J. Madison, Federalist Papers, n. 10, <www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10>, visited 12 August 2019.

To contain the populist tide, an appeal to impartiality and neutrality as the core principles of the rule of law might not suffice and may even be misplaced. Populism can be overcome solely by rehabilitating the possibility of public virtue and thus strong political discretionary power, or perhaps even by renouncing the ambition of radical immunisation of politics from private interests.⁹⁶

While politics, since its origins, has been a human attempt to limit the lottery of nature and to form a world shaped in the image of man, the populist anti-political and moralistic impulse perhaps envisages the utopia of a (technological) rebirth, a sort of dystopic second nature, in which ideologies, religions and political opinions disappear, where digital neutrality plays a central role. Such a society characterised by the sharing of private experiences and built around the myths of collective knowledge and the eradication of all private interests spells, however, the end of the rule of law. Grounded in political values, liberty above all else, the rule of law implies human intentionality, human error, and a never-ending effort to adjust legal rules and institutions to an idealist view of the future.



⁹⁶On the emphasis to be given to private interest to preserve political liberalism, see S. Holmes, *Passions and Constraint: on the Theory of Liberal Democracy* (Chicago University Press 1997).