DEMOCRATIC CONSTITUTIONALISM'S AUTOPHAGIC ALLUREMENT OF POPULISM: A COMMENT ON "FILTERING POPULIST CLAIMS TO FIGHT POPULISM: THE ITALIAN CASE IN A COMPARATIVE PERSPECTIVE" BY GIUSEPPE MARTINICO

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An institution, and its adherents abiding by God and faith, eats God and drinks his blood to maintain its secular-political hold over society, *Corpus Christi* to *Corpus Mysticum* to *Corpus Juridicum*, losing both God and its adherents to *Aufklärung*, enlightenment along the way. Much as the allurement of populism in democratic constitutionalism eats it up, ends it. Its autophagic moment. It can be either God/faith or institution, it can either be 'democratic constitutionalism' or 'populist authoritarianism'. But this double bind, this dual-coupling, is more real, more tenacious than can be undone so easily. Two sides of the same coin, *der doppelgänger*, 'Dr. Jekyll and Mr. Hyde', 'the heart of a dog'. To protect it from itself, democratic constitutionalism puts limits through entrenched constitutional principles, procedures, checks and balances, judicial oversight on the 'democratic' system, to protect it from 'system' destruction. Giuseppe Martinico stresses and makes an impassioned appeal, basing it on a reasoned argument for the *status activus processualis*,[1] providing institutional-processual measures in place, procedural participation, procedural protection, and procedural law reservation of law for fundamental rights protection in addition to the liberal idea of *status negativus* and the democratic idea of *status activus* as the safety valve in the structure of liberal democratic constitutionalism post-World War II ('WW-II') Western Europe in general and Italy in particular. The constituent democratic principles are constituted in the constitutional system structured primarily through a written constitution — England being an exception — in an autopoietic-systemic structure to protect it from system destruction due to the environment in the form of populism.[2]

"Populism" as a term evokes strong responses and consternation from a constitutionalist, and more often than not, it is in the "negative". It leads us to the obvious question: Does "democracy" have populist claims in its functioning? The answer is a resounding yes. The following question would be: Can populism, if gone unchecked, lead to majoritarian autocracies? Quite likely yes. How can it then be addressed? Martinico develops the idea of how the constitutionalist must intervene here by channelising some of the populist claims and filtering them through constitutional principles in a constitutional language and by implementing those through democratic institutions to entrench them in the functioning of State

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[1] Robert Alexy, THEORY OF CONSTITUTIONAL RIGHTS, 163 (Oxford University Press, 2010); Peter Häberle, *Second Co-report of Professor Dr. Peter Häberle, Marburg on Lahn* in PETER HÄBERLE ON CONSTITUTIONAL THEORY: CONSTITUTION AS CULTURE AND THE OPEN SOCIETY OF CONSTITUTIONAL INTERPRETERS, 60 (Markus Kotzur ed., Nomos, 2018).

[2] Gunther Teubner, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION, (Oxford University Press, 2012) ('Gunther'); Gunther Teubner, LAW AS AN AUTOPOIETIC SYSTEM, (Blackwell, 1993) ('Teubner').

constitutionalism. In this manner, the gear of how populists manipulate categories of constitutional theory and instruments of constitutional law for their politics would be reversed. It would rather be the constitutional State, as a system, which would assume the role of translating the language of different populist claims as the environment of law through the binary codes of the language of law and the constitution, and give it constitutional validity but through the constitutional democratic process including safeguards to the inviolable, 'universally' applicable and non-exclusive constitutional principles enshrined in post-WW-II constitutions and constitutional systems. However, he admits how populism in its bare, extreme, and crudest self, on the one hand, and post-war representative democratic constitutionalism dependent on the party system, on the other, are incompatible with each other. Martinico's preferred geographical location of comparison is Western Europe, centred on a very comprehensive constitutional history of Italy. It is a very European work in this respect, though not Eurocentric.

Once the constitutional principles of the rule of law and protection of democratic polity are framed within the confines of the edifice of the constitution in a liberal constitutional State, it is symbolic and effective, what Max Weber referred to as formal and material in his assessment of law[3], is established in the conception and functioning of the system of the State 'for itself' and 'through itself' for the protection of the rights regime, which by its very nature is counter-majoritarian, maintaining the rule of law for an effective and vibrant democratic polity. Keeping this objective of post-war constitutionalism of Western Europe in mind, Martinico prescribes how constitutional silences on some sensitive issues, *i.e.*, "elements of dormant suspension", made sense because the particulars, procedures and processes keeping in mind the constitutional framework, could be legislatively filled with the emerging needs of the time and/or interpreted by the constitutional court keeping the principled ends in sight.[4] Such a constitutional framework provided a structure and practice in place which could offer a solid bulwark against what Umberto Eco called "eternal fascism".[5]

In the first chapter Martinico addresses the general "populist challenge" to constitutionalism and then in the next five chapters goes on to explain the Italian example with some other European and sometimes American comparisons but the deepest comparisons was with Germany along the way in terms of both identifying the challenges and finally offering his solution to the problem in his seventh chapter which has comparative relevance in all liberal constitutional democracies, not just in Continental Europe but also in what is referred to as the Global South. The challenges, both structural and procedural-processual challenges, faced by constitutionalism from populist and even openly racist-far right political parties and regimes within, at least till now, notionally "liberal constitutional democracies" of the classically western world with implications for the rest of world — incurring the risk of the cardinal sin of "universalism", a perpetual concern of post-colonialism, — is a very serious challenge today and the certainties attached with such systemic structures since the early 1990s are no longer given. In such a 'worst of the times' scenario, this work is a pioneering and lasting contribution to the ongoing debate.

I.

The work is not delving into the genesis of populism in Italy as it becomes a subject matter of another research work, but what it certainly does is explore the challenges which two central elements of populism, the "concept of the people" and "anti-elitism" poses

[3] *Id*.,Teubner, 64–99.
[4] Giuseppe Martinico, FILTERING POPULIST CLAIMS TO FIGHT POPULISM: THE ITALIAN CASE IN A COMPARATIVE PERSPECTIVE, 5 (Cambridge University Press, 2022) ('Martinico').
[5] *Id*.

towards democratic constitutionalism.[6] This is the originary "paradox of law"[7] in its double binding with the formation of a "democratic constitutional" State as it is also based on the constitutional fiction of its appeal to the "concept of the people" as exemplified in perambulatory assertions of modern State constitutions, beginning with the American one "We the People". Martinico writes, "Populism is also described as a thin-centred ideology which can be easily combined with very different (thin and full) other ideologies, including communism, ecologism, nationalism or socialism".[8] (emphasis added)

This is an assessment of populism which brings it dangerously close to how Mussolini defined his party ideology of fascism:

> "Fascism is a great mobilisation of material and moral forces. What does it propose? We say without false modesty: to govern the nation […] We do not believe in dogmatic programs […] We will permit ourselves the luxury of being aristocrats and democrats, conservatives and progressives, reactionaries and revolutionaries, legalists and illegalists, according to time, place, and circumstances".[9]

It means how the fiction of the "concept of the people" can be harnessed for democratic constitutionalism, or it could be harnessed for fascist dictatorships. As facts of history would materialise, it doesn't come as a surprise how the Five Star Movement was linked with the online platform called the Rousseau Platform, with the French philosopher's hypnotic appeal to the "concept of the people" on which Peter Häberle writes:

> "As a constituted factor, a people operate universally, on many planes, on a multitude of occasions and in many forms, not least through the everyday application of fundamental rights. One ought not forget: a people is primarily a coalition of citizens. Democracy is "rule of the citizens", not of a people in a Rousseauian sense. There is no way back to Rousseau. The citizens' democracy is more realistic than the people's democracy. A citizen's democracy is closer to a concept that views democracy from the perspective of fundamental rights than to those in which the people have merely replaced the monarch as sovereign. This view is a consequence of the qualification of the populist term people, a term all too easily misunderstood. Fundamental freedoms (pluralism), not "the people", thereby become the point of reference for a democratic constitution. This *capitis diminutio* of the crypto-monarchical conception of a people is characterised by citizens' freedoms and pluralism".[10]

Much like the felicity and ease with how "populism" can be coupled with the "concept of the people" for any ideological programme, including fascism, so does "anti-elitism" becomes a rhetoric for political control by a syndicate in the name of the "people" because after all "some animals are and will always remain more equal than others".[11] Elite, as

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[6] *Id*., 11–13.

[7] Gunther Teubner, *Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter* in CRITICAL THEORY AND LEGAL AUTOPOIESIS: THE CASE FOR SOCIETAL CONSTITUTIONALISM, 59–83 (Diana Göbel ed., Manchester University Press, 2019).

[8] Martinico, *supra* note 4, 13.

[9] Norberto Bobbio, IDEOLOGICAL PROFILE OF TWENTIETH-CENTURY ITALY, Chapter 10, 122 (*translated by* Lydia G. Cochrane, Princeton University Press, 1960).

[10] Peter Häberle, *The Open Society of Constitutional Interpreters — A Contribution to a Pluralistic and "Procedural" Constitutional Interpretation* in PETER HÄBERLE ON CONSTITUTIONAL THEORY: CONSTITUTION AS CULTURE AND THE OPEN SOCIETY OF CONSTITUTIONAL INTERPRETERS, 147, 148 (*translated by* Stefan Theil, Markus Kotzur ed., Nomos, 2018) ('Häberle').

[11] This is a slight 'interpolation' of the classic ending chapter from Orwell's Animal Farm, "All animals are equal, but some animals are more equal than others". *C.f.* George Orwell, ANIMAL FARM (Vintage, 2021).

a concept, is very pleonastic, because after all, a poor Mozart is also a cultural elite and is endeared and highlighted by a cultural elite. It is much like a proverbial "poor" Brahmin of yesteryears, who was highly regarded for his scholarship, discipline, and abstemiousness, and constituted the most well-defined and enigmatic concept of a cultural-intellectual elite in human history. Since the human settlement of eight to ten thousand years, there has been an "elite" for physical-biological reasons and then increasingly for cultural-intellectual-religious-political-economic and the like reasons to provide guidance and leadership in respective localised societal communities. With the formation and expansion of the notion of the State, the "elites" have been comfortably saddled in the driver's seat of humanity. Even when there is a "circulation of elites", the differentiated and hierarchical position of elite and elitism remains firmly in its place which is perhaps why equity ensuring access to "elite platforms" is a more desirable and realisable ideal than equality and it can be in harmony with the other enlightenment ideal of liberty and "individual" drive for excellence and acknowledgement which has reached new mythical proportions in our current "late" modernity.[12]

The rise of the populist leadership in the United States of America ('US') in 2017 was seen as an aberration, but now, in hindsight, the regime from 2021 to 2025 was perhaps the ebbing of the old constitutional order, 'tragically' making the populist regime the mainstay. In much the same vein, Martinico correctly characterised the Mario Draghi government as rather an aberration because after all, even the relatively centrist Giuseppe Conte flaunted as being populist, not to mention the 'sudden' and meteoric rise of Fratelli d'Italia led by Giorgia Meloni since October, 2022 sort of mainstreaming populism, a period not covered by this book but as a forerunner almost prophesying its arrival.[13] As would appear, despite or rather due to his allegiance to populism, Giuseppe Conte was a popular prime minister during his term, even though he undermined parliamentary procedure during the COVID-19 crisis, quite dramatically and extra-constitutionally used social media to announce decrees, not just prioritising but dangerously scuttling every other constitutionally guaranteed right over the right to health, where the dangers of populist authoritarianism were entering through the backdoor of the fact and symbol of the pandemic in all liberal constitutional democracies and not just in Italy.[14] In a dystopian manner, the lack of constitutional propriety and disregard for parliamentary procedure during the COVID-19 crisis laid the foundations of the oxymoronic and un-hyphenable "populist constitutionalism". One of the first victims of populism in a democratic polity is the parliament and the parliamentary procedure, which distils public political discourse through the communicative rationality of legislative procedures and mitigates the extremities through the final legislation, keeping aloft democratic principles and the capillaries of democratic procedures and processes intact.[15] As things would materialise, today the Five Star Movement, for all practical purposes passes off as a left-of-centre 'political party' and not a 'movement' despite its fervent insistence on being considered a movement rather than a party; and, Lega and Salvini's electorate, through its more 'clear' and certain policy programmes, has been usurped by Fratelli d'Italia reducing it into a minor force today. This dramatic change in the Italian political-constitutional landscape today demands a companion volume from Professor Martinico.

[12] Andreas Reckwitz, THE SOCIETY OF SINGULARITIES (Polity, 2020).
[13] Martinico, *supra* note 4, 2.
[14] *Id*., 3; Pratyush Kumar & Emeric Prévost, *Global constitutionalism and fundamental rights at risk of the Covid pandemic: some thoughts for further reflections*, Chrono. 43, REVUE DES DROITS ET LIBERTES FONDAMENTAUX, 15 (2022) available at https://revuedlf.com/droit-constitutionnel/article-global-constitutionalism-and-fundamental-rights-at-risk-of-the-covid-pandemic-some-thoughts-for-further-reflections/ (Last visited on May 6, 2025).
[15] Gunther, *supra* note 2; Jūrgen Habermas, A NEW STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE AND DELIBERATIVE POLITIC (*translated by* Ciaran Cronin, Polity, 2023).

Getting back to the period until 2022, which Martinico covers, despite Euro-scepticism from the Five Star Movement and the League, and despite the lingering paradox of "sovereignism", on the one hand, and the necessity and availability of European funds through the European Stability Mechanism, on the other, for an ailing Italian economy, which by some accounts has not fully recovered from the economic crisis of 2008, they supported the government led by a quintessential European statesman Mario Draghi.[16] Among the two prime examples of post-WW-II constitutions, are Italy and Germany, but unlike Germany, Italy did not proclaim militant democracy and in many respects did not have a sharp break from past — more in part II below — albeit it moderately tried to balance the pulls of populism, which is as old as the republic itself, on the one hand, and democratic constitutionalism with inclusiveness, rule of law, protection of minorities, pluralism and judicial review, on the other.[17] It is precisely for this reason that the plot thickens, and makes the study of Italian constitutionalism all the more important, giving clues to not just Italian constitutionalists but others around the globe on how to tread the democratic constitutional path, on what to behold and what to eschew and how to eschew it, on how to snap the perpetual allurement of "eternal fascism", to help Faust not have a pact with the 'devil'. In Martinico's words, among the primary objectives of his work are,

> "If constitutionalism is also about the need to protect and enhance pluralism, democracy is much more than the mere rule of the majority. In enhancing democracy and the rule of law, constitutionalism inevitably clashes with the majoritarian approach to the constitution. Exploring Italy as an example of post-WWII constitutionalism, this book aims to study the tension existing between populism and constitutionalism. In particular, I shall investigate how populists in power borrow, use, and manipulate categories of constitutional theory and instruments of constitutional law. In so doing, my reflections will be comparative in nature and will be based on both diachronic and synchronic comparison. The importance of historical comparison is crucial to study the roots of the current new wave of populism in Italy and elsewhere. My argument is that this new round of populism has emerged because of what Umberto Eco called eternal fascism". (emphasis added)[18]

II.

Chapter 2 of Martinico's work is in many respects the heart and main pillar of the work where he provides a concrete historical-factual background of post Second World War constitutionalism and makes substantial and concrete comparisons with Germany, the other 'twin' which underwent Nazi-fascistic period in its history in the corresponding period — Italian fascism preceded it by more than a decade — and were allies in the war besides sharing the same 'genus' of totalitarian dictatorship. The *genus proximum* was totalitarian dictatorship and the *differentia specifica* was Fascism for Italy and Nazism for Germany.

The first reason for interest in Italian constitutionalism, as culled out by Martinico, is in the details of a longstanding anti-parliamentarism in Italy, something which happened soon after the war in 1945 and survived the constitution-making process and the birth of the republic in 1948 with enshrined rights in its first twelve articles.[19] A third reason is the populist volte-face for the European Union ('EU') even though Italy is a founding member of the European Communities which then metamorphosed into the EU, again for which it has been

[16] Martinico, *supra* note 4, 2, 3.
[17] *Id*., 4.
[18] *Id*., 5.
[19] *Id*., 29.

a prominent stakeholder much unlike UK which never really joined the EU like other prominent members and never became part of the Eurozone, a marriage which never got "consummated" and thus was a ground for "divorce", read Brexit.[20] Italy's marriage to the European Union is like Catherine of Aragon's to Henry VIII, unless the Catholic Church itself is destroyed, read unless the EU itself is destroyed, the marriage cannot be dissolved. Italixit would mean the unravelling of the EU. The second reason Italy was the first populist government in 2018, led by two diverse coalition partners, would be a bit more contentious.[21] Maybe for the reason of coalition alone, it could have this distinction, although Hungary by far remains an undisputed and brazenly populist anti-democratic regime within the EU since 2010. Until the previous government, i.e. till 2023, even Poland was in the fray for "populist" distinction.

Emotions did play an important role in the rupture from the past in post-WW-II constitutions, more particularly Italy and Germany,[22] much as it played a role in Indian constitution making, during and after the colonially orchestrated partition of India and a convenient shying of responsibility by the retreating British for maintaining law and order and communal harmony.[23] The 'eternity clause' in the German Basic Law/German Constitution and the 'republican form' clause in the Italian Constitution are the direct results of preceding historical experience and conveyed the emotional state of constitution makers while providing ultimate barriers to permanent constituent power,[24] where never again the 'exception' could overtake the rule.[25] Anti-totalitarian ethos is identified in three important features of post-WW-II constitutionalism.

> "Post-WW-II constitutions confirm this; it suffices to think of three fundamental devices that have been incorporated into almost all post-WW-II constitutions: constitutional rigidity requiring a supermajority to amend constitutional provisions; judicial review of legislation frequently entrusted to centralised bodies, normally called constitutional courts; and unamendability clauses. All these instruments have increased the counter-majoritarian flavour of constitutionalism".[26]

Although what the author means by the reversal of the premises of authoritarianism ideology-polity "without returning to the old *Rechtsstaat*" is not amply clear.[27]

Accordingly to Martinico, and with good reasons, the two principal pillars of post-WW-II German constitutionalism are "militant democracy" and "principle of human dignity".[28] The adherence to "militant democracy" is portrayed by Article 21 of the German

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[20] *Id*.
[21] *Id*.
[22] *Id*., 31, 32.
[23] There is now a massive body of literature on this subject, of which some representative ones are: Leonard Mosley, THE LAST DAYS OF THE BRITISH RAJ (Harcourt, 1961); Gail Minault, The KHILAFAT MOVEMENT (Columbia University Press, 1982); Bimal Prasad, PATHWAY TO INDIA'S PARTITION, Vol. I (Manohar, 2001); Bimal Prasad, PATHWAY TO INDIA'S PARTITION, Vol. II (Manohar, 2009); Bimal Prasad, PATHWAY TO INDIA'S PARTITION, Vol. III (Manohar, 2009); Venkat Dhulipala, CREATING A NEW MEDINA: STATE POWER, ISLAM, AND THE QUEST FOR PAKISTAN IN LATE COLONIAL NORTH INDIA (Cambridge University Press, 2015); Ishtiaq Ahmed, JINNAH: HIS SUCCESSES, FAILURES AND ROLE IN HISTORY (Penguin, 2020).
[24] Martinico, *supra* note 4, 31, 32.
[25] These are the famous opening lines in Carl Schmitt's work, "Political Theology", on which he gave a detailed constitutional treatment in his work "Constitutional Theory". *See* Carl Schmitt, POLITICAL THEOLOGY (*translated by* George Schwab, University of Chicago Press, 2006); Carl Schmitt, CONSTITUTIONAL THEORY (*translated by* Jeffrey Seitzer, Jeffrey Seitzer ed., Duke University Press, 2007).
[26] Martinico, *supra* note 4, 33.
[27] *Id*., 31.
[28] *Id*., 33.

Basic Law ('German Constitution'), allowing for the banning of political parties, which reflects the conflict between two competing constitutional rights:

> "Militant democracy seems to look at problematic conflicts between the protection of two constitutional goods (freedom of speech or political association versus democracy), embodying a real constitutional dilemma, that is, a choice between two separate goods (or evils) protected by fundamental rights; a fundamental loss of a good protected by a fundamental right no matter what the decision involves". (emphasis added)[29]

It is much like striking a balance between the two legacies of enlightenment, liberty and equality, where neither of the two cherished principles can be allowed to outstrip the other, which requires a very fine balancing. Besides, an open society with democracy are so politically structured that the same democratic rights built on an open society can be effectively used to sabotage and destroy its foundations slipping soon from a populist majoritarianism, to authoritarism to even absolutism or despotism requiring careful underpinning of democratic propriety and openness along the way in all the capillaries of the polity to ensure that an open, free and liberal democratic forms and practice emerge from its structure.[30] Article 21 has been applied two and a half times so far: Sozialistische Reichspartei was held unconstitutional in 1954, Kommunistische Partei Deutschlands was held unconstitutional in 1956, and the Nationaldemokratische Partei Deutschlands ('NPD') was held to be anti-constitutional (*verfassungsfeindlich*) in 2017, but because it was so insignificant and thus not a threat to German democracy, it was held to be not unconstitutional (*verfassungswidrig*).[31] This issue brings us to the immediate present of the question of "unconstitutionality" or just "anti-constitutionality" of AfD ('Alternative for Germany') party which is reported to have a section of prominent cadre and leaders dangerously close to the Nazi party ideology, employing the same rhetoric and propaganda including deporting German citizens of foreign descent out of Germany as a "final solution" to the migration crisis with a significant following ranging to one-fifth (some recent estimates even suggest one-fourth) of the electorate in the whole country and single-handedly in a position to form government in some East-German States. Under such circumstances, Article 21 has achieved a new prominence where AfD is not just "anti-constitutional" in some respects, but unconstitutional, for example, for not respecting the dignity of equal citizenship rights of German citizens of foreign descent, which to my mind meets the strict proportionality requirement under German constitutional law principles and practice and should be held to be violative of Article 1 of German Constitution/German Basic Law, among other violations, and should be held to be "unconstitutional" by the Constitutional Court of Germany (my assessment gets vindicated when in early May, 2025, Germany's domestic intelligence agency classified AfD as an 'extremist organization' and a 'threat to democracy' with a political agenda violative of the constitutionally protected 'right of human dignity').[32] An open, free, liberal, pluralistic,

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[29] *Id*., 34.

[30] *See* Markus Kotzur, PETER HÄBERLE ON CONSTITUTIONAL THEORY: CONSTITUTION AS CULTURE AND THE OPEN SOCIETY OF CONSTITUTIONAL INTERPRETERS, 17–128 (Nomos, 2018); Pratyush Kumar, *A Book on the Cultural Context of European Constitutional and Public Law: Too Far From India?* in VERFASSUNG, GEMEINWOHL UND FRIEDEN — NACHGEDACHT AUS ANLASS DES 85. GEBURTSTAGES VON PETER HÄBERLE, 75–108 (Bernhard Ehrenzeller and Markus Kotzur eds., Nomos, 2020).

[31] Martinico, *supra* note 4, 35, 36.

[32] *C.f.* DW News, *Germany/s Domestic Intelligence Agency Classifies AfD as 'Extremist Organization'*, YOUTUBE, May 3, 2025, available at https://www.youtube.com/watch?v=VZEJ0h_64d8 (Last visited on May 15, 2025); DW News, *Germany's Domestic Intelligence Agency Finds Strong Evidence for AfD's Threat to Democracy*, YOUTUBE, May 4, 2025, available at https://www.youtube.com/watch?v=K9ZGhEw-6ZA (Last visited on May 15, 2025); DW News, *Decision could Pave the Way for AfD Party Ban*, YOUTUBE, May 3, 2025, available at https://www.youtube.com/watch?v=GxIIM63zThM (Last visited on May 15, 2025).

principled democratic society cannot be sustained by parties, policies, programmes, and leaders who want to use the openness of the open system in order to shut it out completely,[33] it would be system destruction.[34] Article 20(4) codifying the "right to resist" totalitarian regimes after 1968 and similar provisions finding their way in Eastern Europe after the fall of the Soviet Union was enacted due to the specific historical circumstance of a totalitarian Soviet Army entering Czechoslovakia in order to crush democratic opposition in 1968.[35] The "right to resist" under the German Constitution lies in the face of authoritarian oppression rather than as a licence to violate established constitutional principles and to upturn its democratic, open, plural, counter-majoritarian and protective features.

Unlike the sharp break which post-WW-II Germany had with its legal past, Italy's legacy has been mixed. Much of the fascist system remained, including the Italian Civil and Criminal Code.[36] The German idea in the symbols of the State and cultural institutions and the political discourse is far more open in their predominant discourse, at least until now, to keep reminding the German public of never repeating the horrors of the past. Maybe Germany is unique, along with perhaps the US, which addresses, again, at least largely to date, the issue of slavery quite frankly and with an acute sense of wrongdoing. Such a continued and persistent public treatment of the issue of fascism has never happened in Italy. And Martinico has been able to hit the nail on the head by pointing out the most important reason being the absence of anything like the Nuremberg trials to try fascist leaders and collaborators top-down in Italy in order for it to really have an epistemic break with the past and get rid of the looming "urfascism".[37] The way Martinico puts it, it appears that most fascist leaders and collaborators just got accommodated in post-war Italy or went back to their societies and communes silently harbouring their ideology and prejudices, which erupted every once in a while, with its full-scale eruption happening soon after the publication of this work in 2022. Fascistic ideology was put under the rug and with Fratelli d'Italia coming to political power, Lega and MoVimento 5 Stelle appear moderate today (although, everything said and done, these 'parties' were not fascists), and the ghosts of the past have come back to haunt Italy, if not in full measure but very substantially. In terms of exact provisions, the Italian constitution lacks something like Article 21 of the German Constitution, which is the reason for the emergence of the openly fascist parties and organisations like CasaPound Italia ('CPI') and Forza Nuova, including the brazen symbolism of commemorating Mussollini at his tomb, when the place where Hitler died is a parking lot in Germany, or the leader of Lega, Salvini not attending Italy's Liberation Day on April 25, is one stark difference in how the political process has dealt with its past in the two countries.[38] Despite this, and as Martinico correctly points out, the Italian Constitution making process through the remarkable constituent assembly and its leading members coming out with the very text of a remarkable Constitution was an act of resistance which "is a sort of umbrella concept employed to refer to a heterogeneous and temporary coalition of networks and individuals that fought against the German and Fascist troops between September 1943 and April 1945". (emphasis added)[39]

The historical account, leading members, and the three major sub-committees are as follows:

> "the Legislative Decree of the Lieutenant of the Realm no. 99 of 16 March 1946 proclaimed that both the referendum and the elections of the Constituent

[33] Karl Popper, THE OPEN SOCIETY AND ITS ENEMIES, Vols. I, II (Routledge, 2002).
[34] Teubner, *supra* note 2; Niklas Luhmann, LAW AS A SOCIAL SYSTEM, (Oxford University Press, 2008).
[35] Martinico, *supra* note 4, 37.
[36] *Id*., 38.
[37] *Id*., 43, 44.
[38] *Id*., 44.
[39] *Id*., 40.

> Assembly would take place on 2 June 1946. The Italian People opted for the Republic and elected the Constituent Assembly, which was composed of 556 members. A committee of 75 deputies (chosen among the members of the Constituent Assembly and chaired by Meuccio Ruini) had a primary role in preparing and writing the constitutional text. The Committee was divided into three sub-committees: the first was chaired by Umberto Tupini and worked on the 'rights and duties of the citizens'; the second was chaired by Umberto Terracini and worked on the constitutional organization of the State; and, the third was chaired by Gustavo Ghidini and worked on economic and social relationships. Another committee ('Committee of 18') drafted the constitution in accordance with the activity of these three sub-committees. The Italian Constitution came into force on 1 January 1948. The members of the Constituent Assembly were outstanding: some of them were lawyers (Piero Calamandrei, Costantino Mortati), some were politicians (e.g., Palmiro Togliatti, Sandro Pertini), and some of them had a mixed background (Vittorio Emanuele Orlando, the father of Italian studies in public law, and former prime minister and important statesman). These figures, with such different cultural and political backgrounds, gathered together around the memory of the past […] The Italian Constitution belongs to the group that Mortati called constitutions born from the Resistance, as they were forged with the clear intent of denying and overcoming the entirety of values (or anti-values) that had characterised the fascist era". (emphasis added)[40]

Although the symbolism of 'resistance' attached to the constitutional moment in Italy was a belated recognition, most likely since the 1960s, for which Martinico relies heavily on Claudio Pavone's pioneering work 'Civil War: A History of the Italian Resistance' on resistance,

> "In this book, Pavone distinguished among three dimensions of the Resistance, which was simultaneously a patriotic war of national liberation against German occupation, a class war fought mainly by communists, and a civil war between partisans ('*partigiani'*) and fascists […] He also made another fundamental distinction, between the military resistance of the few partisans, and a wider resistance of hearts and minds, which involved all those who supported anti-fascism and looked forward to a democratic Italy. For them, the Resistance was a great moral quest, a way of redeeming Italy from the stigma of having allowed the establishment of fascism". (emphasis added)[41]

It is this pioneering symbolism of resistance which is evoked every now and then with the resistance song of revolt "Bella ciao" against Nazi-fascist rule. If there is "urfascism", there is also "ur-resistance" and "urfreedom" and "ur-democratic constitutionalism" of Italian constitution-making and the very text of the constitution and those who owe allegiance to it and the principles it upholds in letter and spirit, like Martinico himself.

Even though there is no provision of the Italian constitution which is as emphatic as Article 21 of the German Constitution, there is provision XII of the "transitional and final provision" of which Martinico provides the information that the first part which is still in force is as follows: "It shall be forbidden to reorganize, under any form whatsoever, the dissolved Fascist party".[42] Although the second part, which was the temporary part, was a temporary

[40] *Id*., 39, 40.
[41] *Id*., 41.
[42] *Id*., 45.

restriction on members and collaborators of the fascist party to be restricted from voting or taking part in elections. Martinico does not provide the statistics of how many electorates and leaders were restricted under this temporary provision of five years. Again, the difference from the German position is very clear where Nazi offenders, collaborators and senior officials were tried and criminally punished, including with execution; in Italy they were just restricted to vote or run for office for five years, and the number of those who were actually restricted to vote or run for office is wanting. On the issue of the surviving first part of the Italian Constitution restricting the "reorganization of the fascist party", Martinico provides us with the reasoning offered by the Constitutional Court in one of its decisions:

> "In judgment 1/1957, the *Corte costituzionale* clarified that apology of fascism, in order to be considered a crime, "must consist not in a laudatory defence, but in an exaltation that could lead to the reorganisation of the fascist party. This means that it must be considered not in itself, but in relation to that reorganisation, which is prohibited by the 12th provision". This interpretation is confirmed, from a systematic point of view, by the fact that Article 1 of Legge Scelba defines what is understood as "reorganization of the Fascist party" for the purpose of the law".[43]

It would have been better if he had also provided us with the translation and constitutional discussion on Article 1 of Legge Scelba.

The very last Article 139 of the Italian Constitution, which constitutionally secures the "republican form", is the clearest provision structurally outlining the break from Italy's totalitarian past. Much like the Supreme Court of India ('SCI') developing a "basic structure doctrine" for the Indian Constitution, Article 139 of the Italian Constitution securing its "republican form" has been given a very concrete, expansive and desirable meaning by the Italian Constitutional Court in its judgment 1146/1988,

> "The Italian Constitution contains some supreme principles that cannot be subverted or modified in their essential content, either by laws amending the Constitution, or by other constitutional laws. These include both principles that are expressly considered absolute limits on the power to amend the Constitution, such as the republican form of State (Article 139) as well as those principles that even though not expressly mentioned among those principles not subject to the procedure of constitutional amendment, belong to the essence of the supreme values upon which the Italian Constitution is founded".[44]

Preservation of democracy, rule of law, counter-majoritarian principles, and protection of pluralism could all fall under the expanded meaning of Article 139 of the Italian Constitution.

With this constitutional discussion, Martinico provides us a brief and dense trajectory of Italian populism from post-WW-II until 2022. Even though the signs of populism was visible in anti-fascist leaders Nenni (Italian Socialist Party) and Togliatti (Italian Communist Party), the specific form of anti-partyism led by Guglielmo Giannini and his Common Man's Front with as many as thirty members in the Constituent Assembly, had the germs of populism which is bearing fruit today.[45] M. Tarchi, a pre-eminent scholar of Italian populism very succinctly sums it up:

[43] *Id*., 45.
[44] *Id*., 48.
[45] *Id*., 49, 50.

> "Qualunquismo presented itself as the voice of ordinary people, those excluded from the division of power, fed up with greedy and corrupt politicians, indifferent to ideologies they saw as a mere cover for elite ambitions for domination, sceptical of any programme and mistrustful of electoral promises they expected to be systematically broken by those elected. Declaring its aversion to both fascism and anti-fascism, to the monarchist, clerical or conservative Right and to the Republican, Socialist or Communist Left, the UQ [Uomo Qualunque; Common Man's Front] focused on the unbridgeable gap between the people on the one hand – united in their desire to be left in peace, and to get on with life in the wake of the bloody passions that had for years divided the peninsula – and the professional politicians on the other [...] Giannini's rhetoric counterposed the idea of a government made up of technicians and neutral administrators competent in public affairs to that of the hegemony of the parasites and their natural allies, the plutocrats. It is this extreme simplification of politics and the offer of easy, ready-made solutions, identified 50 years later by analysts as pivots of the argumentative structure, that allows us to place Le Pen and Tapie, Bossi and Berlusconi, Haider, Blocher, De Winters, Glistrups and the leader of the Rumanian Populists, Tudor, in the same family. It is precisely this simplification which was used as an effective instrument to gain consensus by the UQ in 1945".[46]

Tagentopoli, a scandal investigated by judges in the early-1990s brought to light a deep-seated corruption in the Italian political-economic-social system, but again had the unintended consequence of lack of trust in the established political parties and political leaders and the discursive political processes and led to the meteoric political rise of Berlusconi, then Lega Nord (metamorphosing into Lega), Movimento-5 Stelle (Five Star Movement), and now Fratelli d'Italia .[47]

III. CENTRIPETAL AND CENTRIFUGAL FORCES OF THE EUROPEAN UNION AND THE CASE OF THE REFERENDUM

All knowledge, including this linguistic representation of Martinico's work, is, after all, a mimetic function, as Benjamin says,

> "From time immemorial the mimetic faculty has been conceded some influence on language. Yet this was done without foundation: without consideration of a further meaning, still less a history, of the mimetic faculty. But above all, such notions remained closely tied to the commonplace, sensuous area of similarity. All the same, imitative behavior in language formation was acknowledged under the name of onomatopoeia […] "Every word—and the whole of language," it has been asserted, "is onomatopoeic." […] "To read what was never written." Such reading is the most ancient: reading before all languages, from the entrails, the stars, or dances. Later the mediating link of a new kind of reading, of runes and hieroglyphs, came into use. It seems fair to suppose that these were the stages by which the mimetic gift, which was once the foundation of occult practices, gained admittance to writing and language. In this way language may be seen as the highest level of mimetic behavior and the most complete archive of nonsensuous similarity: a medium into which the earlier powers of mimetic

[46] *Id*., 50, 51.
[47] *Id*., 51–62.

> production and comprehension have passed without residue, to the point where they have liquidated those of magic".[48]

Therefore, when in Chapters 3 and 4, Professor Martinico has used "mimetism" and "parasitism" in the title, "Mimetism and Parasitism in Action: Sovereignism and Identity Politics versus Post-World War II Constitutional Openness" and "Mimetism and Parasitism in Action: Politics of Immediacy and the Case of the Referendum", their meaning, definition, and their exact implication for what he is wanting to say is not sufficiently clear. Is 'mimetism', "sovereignism and identity politics" and the "politics of immediacy" in his understanding? Conversely, is 'parasitism' "Post-World War II Constitutional Openness" and "the case of the referendum" respectively? It is not at all clear in the way in which these ideas have worked out in Chapters 3 and 4. Although he does provide his intended meaning of "mimetism" and "parasitism" in the last and concluding Chapter 7, when he writes,

> "The former refers to the way in which populists try to conceal their majoritarian claims behind the words of the constitution; the latter to the actual plan to alter the equilibrium between the majoritarian and counter-majoritarian parts of the constitution, to change the axiological hierarchies on which the constitution is based".[49]

It appears inadequate, and even in its present form, it should have been put in the third chapter itself. When "Mimetism and Parasitism in Action" is dropped as a prefix, the meaning and the content of these chapters are very clear. Otherwise, one is left searching for the implications of "mimetism" and "parasitism" in these chapters, and a lingering question remains of its implications for the rest of the work. Because after all, liberal constitutional principles, practice and even the very text in the system of constitutional law have a mimetic function of their own, and correctly so. The system of knowledge builds upon its own self-references, something which for Western literature has been done very comprehensively by Auerbach.[50] Law and constitutional law are 'also literature', and at any rate, 'they have their own literature', which has worked on the mimetic function throughout their existence. Similarly, "parasitism" of an idea or its practice can be replicated both for the prefix as well as the suffix of the chapter, which leaves one guessing on its necessity in the title. The chapters on their own, without the use of these two terminologies in their prefixes, are comprehensive on the subject they are speaking about.

When "Europe" finally and very concretely materialised with the formation of the EU, the populist parties across the EU, including Italy (Lega and MoVimento 5 Stelle are discussed by Martinico, to which can be added Fratelli d'Italia), are deeply anti-Europeanist. Old nationalistic ideas have resurfaced and have been repurposed as "sovereignism/sovereign

[48] Walter Benjamin, *On the Mimetic Faculty* in REFLECTIONS, 334–336 (Schocken, 1978).
[49] Martinico, *supra* note 4,171.
[50] Erich Auerbach, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE, (Princeton University Press, 1953).

democracy" by Russian thinkers like Vladislav Yuryevich Surkov[51] and Aleksandr Dugin,[52] which have had implications in Hungary as Christian democracy and filtered their way into Italy as well through the works of Paolo Becchi, Luciano Bara Caracciolo, and Giuseppe Valditara.[53] Victor Orbán has used the European platform to very nearly sabotage the European project and portrays liberalism as an enemy of traditional, read Christian values and is thus anti-Hungary, which "must preserve its special nature and culture; in other words, its identity".[54] Much like the US Supreme Court today, Hungary has been a pioneer in compromising the independence of the judiciary with appointees who toe the government's line and read Articles 2 and 4 of the Treaty of the EU ('TEU'), to suit its 'sovereignist', verging on xenophobic, populist anti-democratic agenda, when it held, "therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points. Thus, their control should be performed with due regard to each other in specific cases".[55] Martinico comments on this:

> "Here, the Hungarian Constitutional Court *first* started with Article 4.2 TEU, which employs the concept of national identity. *Second*, it used the concept of constitutional identity, coupling it with the preservation of sovereignty, a term which is not used in Article 4.2 TEU. *Third*, it read the concept of constitutional identity in light of Article R.3, thus offering an alternative reading of the same concept […] After the judgment, the notion of constitutional identity was codified in the Hungarian Constitution in 2018 with the approval of the seventh amendment. Now Article R.4 reads: "The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State". The latest developments and the reaction to the spread of the COVID-19 virus have reinforced the authoritarian nature of the Hungarian system, making the picture even more complex".[56]

"Defence of the country" has been read by the populists as "protecting the motherland" under Article 52 of the Italian Constitution, where economic woes transpose themselves onto the enemy other, "the immigrants", in sheer disregard of Italian obligations under international law.[57] Without offering an alternative to the European project, including concrete economic (and now geopolitical) policies, critics of the EU, like Paolo Becchi in his

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[51] "The idea of sovereign democracy in Russia is consistent with the provisions of the Constitution, according to which: first, 'the bearer of sovereignty and the sole source of power in the Russian Federation shall be its multiethnic people'; second, 'no one may usurp power in the Russian Federation'. […] People cite the European Union as an example of giving up sovereignty for the great virtues. They forget the hitch about the European Constitution (which assumedly can be overcome). They also overlook that what is involved is either the establishment of a stable association of sovereign states or (in the boldest dreams) the synthesis of a multiethnic European nation and its, so to say, all-union sovereignty, by whichever politically correct euphemisms it may be designated". *C.f.* Martinico, *supra* note 4, 64, 65.
A clear antidote is provided conceptually and produrally-processually by Teubner in his pluralistic theory of law and societal constitutionalism, where there is no world or European state constitutionalism which would or could govern Europe, the capillaries of constitutionalism in its plural societal formulations providing a hope for collective solidarity, democracy and protection of cherished fundamental human rights. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society* in CRITICAL THEORY AND LEGAL AUTOPOIESIS: THE CASE FOR SOCIETAL CONSTITUTIONALISM, 213–236 (Manchester University Press, 2019); Gunther Teubner, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION, (Oxford University Press, 2012).

[52] 'Social justice, national sovereignty and traditional values are the three main principles of the Fourth Political Theory'. Martinico, *supra* note 4, 65.

[53] *Id*., 69.

[54] *Id*., 67.

[55] *Id*., 68.

[56] *Id*., 68, 69.

[57] *Id*., 69.

Manifesto Sovranista ('Sovereignist Manifesto'), erroneously argue that Italian membership of the EU was based on a manipulation of Article 11 of the Italian Constitution.[58] Martinico vehemently counters Becchi's claim by providing the "constitutional" history of the European Community from the European Coal and Steel Community ('ECSC') to the constitutional amendments in Germany and Italy, with specific reference to the European Communities and how

> "in both countries, the local constitutional courts accepted the structural principles of Community law much earlier by reading their constitutional clauses devoted to the international community broadly (in Germany Article 24, in Italy Article 11). This happened because of the simple fact that the entry into force of the European Treaties happened later than the entry into force of these two national constitutions".[59]

The second point of criticism provided by Martinico is how the wording of Article 11 is broad enough to include European Communities (Union) today even though Becchi's cherry-picking provides some correspondence of earlier lawmakers in the early years of the republic expressing the imagining of constitutionalisation of a European federation or confederation as a distant possibility.[60] Then there are critics of the Euro like Giuseppe Guarino, who, on very technical grounds, question the Regulation 1466/1997, which brought the Euro into force in Italy on the supposed grounds of conflict with Article 104C of the TEU.[61] And the same rationale has been employed to critique the 'Fiscal Compact' developed by the EU to counter the 2008–2009 economic crisis, with austerity measures in place.[62] For the populists, all this invariably boils down to the issue of economic sovereignty and 'stolen democracy', even though all future economic hopes of the EU member countries, including Italy, lie with European unity.[63] Although the highly technical nature of the EU regulations and the bureaucratic functioning of the European Commission do not help its case. The primacy of EU law is secured under the Italian constitutional rubric, which cannot have a United Kingdom ('UK') style Brexit, according to Martinico:

> "*First* of all, the Italian Constitutional Court itself has accepted the principle of primacy of EU law, making it conditional upon the respect of the supreme principles, called counter-limits (*controlimiti*). *Second*, it could be replicated for all the other Member States that did not have a constitutional basis when the Court of Justice delivered Costa/Enel. *Third*, it is questionable whether certain aspects of the principle of primacy are also recognised by Article 117 of the Italian Constitution after the 2001 constitutional reform. [...] they (sovereignists) tend to invoke only the sentence stating that Sovereignty belongs to the people, always omitting the part in which Article 1 of the Constitution reads that sovereignty is exercised by the people in the forms and within the limits of the Constitution". (emphasis added)[64]

Martinico identifies "openness" as one of the features of post-WW-II Italian constitutionalism, which is exemplified by Article 11 of the Italian Constitution:

> "the main example of Italian constitutional openness is given by Article 11, which is devoted to the rejection of war as an instrument of aggression against

[58] *Id*., 70.
[59] *Id*., 71.
[60] *Id*., 71.
[61] *Id*., 71, 72.
[62] *Id*., 72–75.
[63] *Id*., 75.
[64] *Id*., 75–77.

> the freedom of other peoples and as a means for the settlement of international disputes. Article 11 also agrees on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations". (emphasis added)[65]

The other relevant provisions relating to international law and domestic law in the Italian Constitution are Articles 10, 80, 87, and 117.[66] Due to the dualist tradition, international law principles like the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') and EU law are considered primary sources of the Italian legal system, and Martinico identifies three reasons for the codification of pacifist principles in the Italian Constitution:

> "The first is connected to political realism: Italy could not be considered a military power, so the constitutionalisation of an imperialistic foreign policy was not an option. The second reason was, in a manner of speaking, ethical, and finds expression in the words used, among others, by Don Luigi Sturzo, who defined war as immoral, illegitimate and prohibited. But the main reason for it was the intent to transfer, onto the international level, those principles of freedom, equality and substantive respect for the human person that were to be affirmed and implemented in the domestic order". (emphasis added)[67]

Although since the constitutional reform of 2001 amending Article 117 and the judgement of the Italian Constitutional Court in 2007 (Decisions 348 and 349/2007) ECHR was held to be "a super-legislative source that could occasionally be used to review the constitutionality of domestic legislation even though it cannot be traced back to the realm of constitutional sources".[68]

As far as the dynamic between international law (European law) and domestic law, three conclusive points are reached by Martinico,

> " (1) the Italian Constitution understands the role of the Italian Republic in the international and European arena, noting particularly the difficulties encountered by the Italian Constitutional Court in concretising the difficult balance struck by the Constituent Assembly, where sovereignty (not sovereignism) should be read in light of the new constitutional values stemming from post-WW-II constitutionalism. (2) Against this background, in order to guarantee some higher goals, the national legal system benefits from coordination with international public and EU laws. (3) In spite of what sovereignists argue, the Italian Constitutional Court has not given up sovereignty, constitutional identity and national democracy as if it were an accessory to the alleged European and global *coup d'état*. On the contrary, the Italian Constitutional Court has frequently threatened to use the counter-limits doctrine, not only with regard to the Court of Justice of the EU but also against the International Court of Justice. Similar dynamics of resistance occurred with regard to the case law of the Strasbourg Court. These episodical disagreements show that the Italian Constitution is acquainted with some limits to this constitutional openness when fundamental principles are at stake, and is a

[65] *Id*., 78.
[66] *Id*., 77, 78.
[67] *Id*., 78, 79.
[68] *Id*., 80.

> confirmation of the difficult equilibrium reached by the Constituent Assembly".[69]

Later he explains what he means by openness,

> "By openness, I mean the constitutionally established friendliness ('Freundlichkeit') towards legal sources that are, from a formal point of view, external to those governed by the national system, or, in other words, that are not produced by national actors (and, as such, are not traceable to the general will of the people) in charge of the law-making functions according to the constitution".[70]

There are similarities in the identification and reading of guiding constitutional principles for Italy (*forma repubblicana* — republican form, Article 139, Italian Constitution) or Germany ['*Ewigkeitsklausel* '— eternity clause, Article 79(3) of the Basic Law (Grundgesetz-GG) for the Federal Republic of Germany] or the development of the "basic structure doctrine" by the SCI.[71] Much like the expansive meanings which Article 21 of the Constitution of India has been given by the SCI, Article 2 of the Italian Constitution as a template of open norm has been held by the Italian Constitutional Court to validate "so-called new rights (the right to knowledge, the right to privacy, environmental rights) and to keep the constitution up-to-date with respect to the need to protect the 'person' (*principio personalista*)".[72] These principles even when in singular represents a bundle of principles in its constitutional meaning (Kantian categorical imperative/Nietzschean transvaluation of all values/Lyotard's *meta recit*) but one also needs to be careful on such extension of values as "THE VALUES" because they are not epistemologically and ontologically free of their historical and genealogical weight thickening the plot for post-colonial constitutional systems like India.

In the fourth chapter, "Mimetism and Parasitism in Action: Politics of Immediacy and the Case of the Referendum", Martinico gives a detailed treatment of the political appeal of referendums and the right of recall through an imperative mandate as constant dark clouds hovering over the democratic constitutional sky of Italy. Bringing out the excerpts of two of the most remarkable Italian philosophers of law and constitution, Norberto Bobbio 'nothing threatens to kill democracy more than excess of democracy'; and Gustavo Zagrebelsky 'the time that gives us detachment from problems and their solutions', Martinico highlights the importance of deliberative democracy mediated through the political process initiated by political parties.[73] In this, Martinico also has a significant message for India where "one nation, one election" format proposed by the current government would make democratic deliberative process suffer as the time providing for such detachment from diverse problems and their diverse and plural solutions in a "continental" country like India demands different electoral time for different provinces. It is also a bulwark against any populist authoritarianism emerging at any point of time, besides never repeating the "internal emergency" of twenty-one months issued by Indira Gandhi and dismissing provincial governments not belonging to her party, making it effectively a one-party rule over the entire country, including the union government and the State governments respectively.[74]

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[69] *Id*., 83, 84.
[70] *Id*., 91.
[71] *Id*., 92.
[72] *Id*., 93.
[73] *Id*., 99.
[74] In giving an example of the excesses of emergency, daughter of leading freedom fighter and socialist leader Basawon Singh and socialist leader Kamala Sinha *née* Mukherjee, historian-journalist Gayatree Sharma writes, "Basawon Singh played a significant role in the 1974 'Total Revolution' movement. As a front-ranking leader of

On the issue of plebiscite, Martinico correctly quotes Hayward, "plebiscite is a populist device through which the people are treated by a government as a manipulable mass rather than a reasoning public".[75] And on the problems of referendum and plebiscite, he has excerpted none other than Max Weber himself:

> "The referendum does not know the compromise, upon which the majority of all laws is based in every mass State with strong regional, social, religious and other cleavages [...] Moreover, the plebiscitary principles weaken the autonomous role of the party leader and the responsibility of the civil servants. A disavowal of the leading officials through a plebiscite which rejects their proposals does not and cannot enforce their resignation, as does a vote of no-confidence in parliamentary States, for the negative vote does not identify its reasons and does not oblige the negatively voting mass, as it does a parliamentary majority voting against a government, to replace the disavowed officials with its own responsible leaders".[76]

'The assembled people' can soon slip into majority/minority, or as Schmitt would have us believe, the enemy/friend distinction, then it is no longer people mediated through public discourse as citizens, but a 'mob' — the tyranny of masses which works on the excitement of the moment.[77] Referendums have been seen as a 'counter-power' or a manifestation of the 'right of resistance' when mediated through civil society, albeit much would depend on how we define a civil society and identify the various components of its functioning.[78] It is local representative democracy rather than a volatile direct referendum democracy, which leads to an intensification of democracy in the long run through processual safeguards of fundamental rights effectiveness.[79] The political party keeps a check on charismatic leaders with authoritarian tendencies. A political party works as a check on charismatic leaders, with authoritarian tendencies, using popular appeal on the public outside, to exercise domination on the party on the inside, which does not go unchallenged where there is a vibrant and discursive inner-party democracy. On the other hand, to use the mechanism of the political party to amplify the individual personal appeal of a political leader leads to a

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the revolutionary movement in pre-independent India, he was called upon by Jayaprakash Narayan to once again lead, along with him, the second war of independence, this time albeit in a free and democratic country, with his knowledge and expertise of organizing and running a movement from the underground, a kind of guerilla warfare, to overthrow the dictatorial and authoritarian regime of Prime Minister Indira Gandhi. He went underground as soon as the Internal Emergency was promulgated on June 25, 1975, and stayed underground till the Emergency was imposed on the country, i.e., for the whole of 20 months, unlike many of the other leaders who were arrested during this period under the Maintenance of Internal Security Act (MISA). His wife, Kamala Sinha, along with many others, was arrested within a week of the promulgation of Internal Emergency under MISA and stayed in Bankipore Central Jail for the entire period of the Emergency leaving their three young daughters Gita, Gayatree and Rita to face the trials and tribulations of the time alone. This was not the plight of Singh's family alone. Hundreds of non-Congress leaders, chief among them being the Socialists of yore and of the Bharatiya Jan Sangh, eminent media personnel including many editors, in fact anyone and everyone who dared to challenge the diktat of Mrs. Indira Gandhi and her younger son, Sanjay Gandhi, had to undergo the same plight. […] Kamala Sinha was detained under several sections of the Cr.P.C. and the IPC shortly after the promulgation of emergency and a bail bond of rupees three lakhs was demanded for her release when the lower court was moved. Despite the Patna High Court ordering for her release, she was kept in illegal confinement for three more days after which a fresh order of detention was served in her prison cell under the MISA". Gayatree Sharma, *Basawon Singh: A Revolutionary Patriot* in BASAWON SINGH: A REVOLUTIONARY PATRIOT (COMMEMORATIVE VOLUME), 35, 40, 41 (Gayatree Sharma ed., Anamika Publishers, 2022).

[75] Martinico, *supra* note 4, 102.

[76] *Id*., 102, 103.

[77] *Id*., 103–106.

[78] *Id*., 106.

[79] *Id*., 106–110.

populist authoritarian drift in the party and then in the public, which is not a desirable outcome for a healthy democracy, leading to the destruction of its system.[80]

Referendums are employed to increase governmental power and used as a clever device to dupe citizens into making an immediate choice, without the mediatory and deliberative processes through political parties and the parliament, but through a supposedly direct and almost mythical contact between the charismatic leader and the people/masses.[81] The French example of calling for referendum to amend the Constitution to restore superiority of national law over international obligations by Marine Le Pen during the presidential election campaign of 2017 and Victor Orbán's referendum validating opposition on a racist and anti-refugee plank in Hungary of the so-called EU migrant quotas on October 2, 2016, are relevant examples at hand.[82] Constantino Mortati, an eminent Italian constitutional lawyer and later Justice of the Italian Constitutional Court, during his discussion at the Constituent Assembly, tried to reconcile direct and representative democracy by:

> "proposing constitutionalising different types of referendums (advisory, binding, deliberative) to be triggered by different institutional actors and by the people. In his view, the referendum was a stimulus to keep institutions in touch with their citizens. However, there were three elements to be carefully considered: 1) the turnout; 2) the deliberative quorum; and 3) the number of proponents necessary to trigger the procedure. Finally, Mortati also warned of the necessity to inform the people in order to foster awareness and ensure they were sufficiently educated on the issue to make a decision. This proposal was only partly accepted by the rest of the Constituent Assembly".[83]

The Italian Constitution, through Articles 75 (Quorum), 123 (Regional Referendums), 132 (Merger/Creation of New Regions), 138 (Constitutional Amendment), provides for referendums both at the national and regional levels and abrogative referendums are described as *unicum* in comparative law.[84] The Italian Constitutional Court does not just verify compliance with legislative requirements while conducting referendums, but is also in a position to reject the permissibility of conducting referendums in instances of unconstitutionality based on its satisfaction.[85]

IV. REPRESENTATIVE DEMOCRACY

In Chapter 5, Martinico discussed in detail the assault on representative democracy through the example of the political party which does not like to define itself as a party but as a movement called Five Star Movement (Movimento-5 Stelle), even though it formed governments in coalitions with other political parties and held crucial ministerial positions. It is a 'political party' (functional even if not conceptual) which took technology, internet, and digital platforms as the new locations of democracy, where answers could be reduced to a 'yes' and 'no', eliminating democratic deliberations and reasoned arguments, *void ab initio*. Political parties, representative democracy, and parliament were all an anathema to this "movement" to the extent where it could be held to be a "digital party".[86] Davide Casaleggio and his online Rousseau platform, as the only platform for the Five Star Movement, had concerns of violation of privacy and data protection issues, which have strong safeguards under

[80] *Id*., 109, 110.
[81] *Id*., 110, 111.
[82] *Id*., 111, 112.
[83] *Id*., 112, 113.
[84] *Id*., 113–115.
[85] *Id*., 115, 116.
[86] *Id*., 124–128.

EU regulations, which might be an additional reason for anti-Europeanist anti-EU positioning of all populist parties, including the Five Star Movement.[87] Some crucial features of Casaleggio and his Gaia techno-utopian project identified by Martinico are:[88] (1) Reverse the traditional relationship between electors and their representatives that we have come to know over the history of democracy. For him, direct democracy would mean every decision of the government should be put to a vote through technological means, in his case, through his personal private Rousseau platform. (2) Technology as an answer to all problems related to representative democracy, ending all reasoned deliberations and mediated distance before finally voting (for electors) or taking legislative decisions through the parliament (for legislators). (3) 'Anti-party-ism' as an endemic structural component of Italian democracy. (4) A related position of the 'paradox of the mute decision maker', which, in his view, can be mitigated by technology without accounting for the risks of information disorder. (5) Anti-intelligentsia and anti-science, where any expert or expert advice to decision makers should be dispensed with. We can only imagine its disastrous consequences for the economy, for example. (6) Every electorate has to participate in every decision-making process. (7) Dissolution of government and voting at will (indefinite plebiscitary condition) claimed under Article 1 ('sovereignty belongs to the people') of Italian Constitution without mentioning the other provisions (Articles 88, 92, 94 of the Italian Constitution) which tempers it and gives it its concrete functional implementation process within a representative democratic framework.

The Five Star Movement did not let the parliament function properly, and it would take every decision to its voters, delaying decision-making in the process. Thus, even though it became part of the legislative mechanism and had representatives in it, it used the same legislative device through a private online platform to both short-circuit the legislative process and to simultaneously discredit it further, which suited their political agenda.[89] The waste of legislative time and indecisiveness became an example of a self-justifying prophecy of populism and populist parties, i.e., parliamentarianism and party politics are an impediment to "direct democracy" and "problem solving".[90] Martinico, as the most suitable scholar, should give the same detailed treatment to Lega, and now Fratelli d'Italia and Forza Italia earlier, in the English language for an international audience, in order to familiarise them further with the chequered and eventful Italian constitutional journey, with lessons for liberal constitutional democracies elsewhere.

V. IMPERATIVE MANDATE: ARTICLE 67 OF THE ITALIAN CONSTITUTION

Much like the Christian fathers claim an inherently and morally superior tone; without any transparency, accountability, and oppose any other balancing institutional oversight on their claims, practices and functioning; the "unlearned" "unreflective" and "un-self-critical" populist "political leaders" (which is what they essentially are) speak with a pontificatory, morally superior tone on messy politics and political parties, and offer simpleton solutions without questioning "in the name and manner of questioning". Encapsulating this "politics" in the Italian context, Martinico writes:

> "Politics, for Grillo, is essentially vain ideological contention and, as seen in the previous chapter, in the new world order called Gaia, Gianroberto Casaleggio imagined a world without political parties. This is consistent with objectocracy. If it is possible to find and apply an objective truth, why should we waste time

[87] *Id*., 124–128.
[88] *Id*., 129–138.
[89] *Id*., 138–146.
[90] *Id*., 138–146.

> in political discussions? It is no coincidence that for populists, political mediation appears as a source of inefficiency and corruption".[91]

And, of course, who has this special copyright over "objective truth" and "objectocracy"? Of course, the ones who are swearing in its name, much like the Christian moralizers in early antiquity who burnt down the library at Alexandria and persecuted "pagans" and killed the female philosopher and scientist Hypatia. In the process, democratic rights, minority rights, pluralism with "multiple Gods" and the vocation of politics itself are subverted and vilified:

> "if political mediation is inefficient and if political discussion is a waste of time, the conclusion is that political parties are just factors of political fragmentation and paralysis and that professional politicians are not needed, as per the logic 'everyone is worth one' (*uno vale uno*), meaning that every member of the political community has the same value".[92]

One of the direct outcomes of "swearing by direct democracy" and attack on political parties and parliament are the espousals spearheaded by the Five Star Movement in "the reduction in the number of members of parliament and the introduction of a legislative referendum (*referendum propositivo*)".[93] This rhetoric reduces politics and political processes to gambling and runs counter to Italian constitutional principles and structure, providing for "free parliamentary mandate" and protecting "the idea of representation".[94] The prohibition of the imperative mandate is entrenched in the history of post-WW-II European democratic constitutionalism through specific provisions in most of the Western European constitutions (which have also found their way into non-Western European constitutions under the EU framework).[95] The paradox of using the party apparatus and functioning to destroy party and parliamentarism by enforcing imperative mandate is in plain sight — autophagia — eating the party, parliamentarism, and then democracy itself. If representation is indeed "fiction", then every other idea developed by humankind, such as law, constitution, constituent assembly, religion, and Gods, are indeed "fictions" to order their life, family, society, and the State, where these latter terms are also fictions in their turn. Deliberative democracy mediated through political parties and those practising politics as a vocation has been the most successful and achievable format, which is closest to the aspired democratic ideal.

On the constitutional structure of imperative mandate under the Italian Constitution, Martinico writes:

> "Article 67 of the Italian Constitution was approved without overly extensive discussions in the Constituent Assembly. It is included in a series of provisions aimed at defining the status of the members of parliament. This confirms that the prohibition of the imperative mandate is not only functional to the defence of the institution, but also to the preservation of the necessary autonomy of the member of parliament in question, an autonomy which is crucial to facilitate decision-making on complex matters in a highly pluralistic society. [...] Article 67 should be read together with Article 49, which is devoted to political parties. Article 49 of the Italian Constitution reads: Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes. [...] Article 67 tries to protect both the parliament and its

[91] *Id*., 147.
[92] *Id*., 148.
[93] *Id*., 148.
[94] *Id*., 149.
[95] *Id*., 150–160.

> members from different possible sources of interference: territorial interests, lobbies and economic groups. At the same time, with the emergence of mass political parties, Article 67 needs to be framed in a triangular relationship: elected, electors and political parties. [...] Article 67 thus offers a shield. [...] What is not possible is recalling the elected member, or, in other words, imposing the automatic loss of their seat, because this would give political parties absolute power over the elected in their list". (emphasis added)[96]

Understandably so, Article 67 of the Italian Constitution is on the firing line of amendment by populist parties, which is why some scholars consider it to be the "unamendable part of the Constitution covered by the concept of republican form included in Article 139". (emphasis added)[97] At any rate, the freedom of the representatives and the right against recall are the "unamendable core" of Article 67, a principle upheld unequivocally by the Italian Constitutional Court in its judgments 14/1964 and 1/2014, for example.[98]

VI. JUDICIAL REVIEW: SOME COMPARATIVE REFLECTIONS

Martinico's defence of judicial review from populist attack is a timely intervention. The critique of judicial review as a "counter-majoritarian force" is actually its merit since it protects the minorities, vulnerable sections of society, the unrepresented, and the under-represented sections of society, and all those left out by the legislative and executive-administrative machinery from the 'tyranny of the majority'.[99] The experience of post-colonial societies with popular governments soon slipping into authoritarian regimes is a constant and lurking danger to be ignored. The comparative example from India is important and relevant here. India still has huge numbers (in absolute numbers) of poor and disadvantaged sections, who have 'strangely' been empowered by the judiciary through its act of review (both judicial as well as constitutional).

[96] *Id*., 160, 161.
[97] *Id*., 163.
[98] *Id*., 163.
[99] Isaiah Berlin, *The Hedgehog and the Fox* in THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS, 436–498 (Chatto & Windus, 1997).

India's human rights protection,[100] protection of indigenous communities,[101] and the protection of the environment,[102] including the right to be free from the adverse effects of climate change,[103] are instances of what is characterised as "judicial legislation" or its "complete justice", providing competence to the SCI under Article 142 of the Constitution of India. An unelected body is the umpire to keep democracy intact in the largest democracy in human history. But the 'weakest' institution/system of the three main branches in the classical "separation of powers" scheme, read the Judiciary, also has to precisely and specifically function within the limits of the Constitution, much as the judiciary sets limitations on the more powerful branches of the legislature and the executive to not trip the limitations of the Constitution and to put a brake on the amending powers to protect the "basic structure" of the Constitution, or to protect from the use of legislative amendment as a subterfuge to replace the existing Constitution. It is indeed a strange paradox, but it has served India well despite some populist and ideological critiques of the 'usurpation' of this competence by the SCI (and also the High Courts, which also can hear constitutional matters within their territorial jurisdiction, subject to an appeal to the SCI). This is a difference in the processes of functioning of democracy in the 'developing' post-colonial legal systems from those of democracy in former colonial powers and 'developed and advanced economies' (which also 'have' or 'should have' a developing legal system). No wonder India is a shining example of a vibrant democracy despite its numerous challenges since it achieved freedom from British colonial rule on August 15, 1947. Most other post-colonial societies of Asia, Africa, and Latin America have gone through bouts of authoritarian regimes in their history. A reassessment and a different conceptual theorisation are required in democratic and political theory, where the safety valves of democracy, of which the protection of minorities is one of the most essential prerequisites, are actually being fulfilled by a pejoratively called "juristocracy".[104] When majority citizens

[100] The protection of human dignity as part of human rights discourse and the expansive interpretation of the "right to life" under Article 21 as a justiciable inalienable constitutionally protected fundamental rights guaranteed under the Constitution of India is an entire jurisprudence developed by the SCI. It has been held to be the "basic structure" of the Constitution which cannot be amended or alienated even under constitutional emergency conditions. Yaniv Roznai, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS, 42–47 (Oxford University Press, 2017); Sudhir Krishnaswamy, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE, (Oxford University Press, 2010); Sanjay Jain, Sathya Narayan, BASIC STRUCTURE CONSTITUTIONALISM: REVISITING KESAVANANDA BHARATI, (Eastern Book Company, 2011); Pratyush Kumar, *Emeric Prévost, Global Constitutionalism and Fundamental Rights at Risk of the Covid Pandemic: Some Thoughts for Further Reflections*, Chron. 43, GRENOBLE: REVUE DES DROITS ET LIBERTES FONDAMENTAUX, 15 (2022) available at http://www.revuedlf.com/droit-constitutionnel/article-global-constitutionalism-and-fundamental-rights-at-risk-of-the-covid-pandemic-some-thoughts-for-further-reflections/ (Last visited on May 9, 2025).

[101] In Orissa Mining Corporation v. Ministry of Environment & Forest & Others, 2013 INSC 267, the SCI stayed the mining in Neyamgiri Hills of Odisha thus protecting the cultural, religious and spiritual rights of marginalised indigenous communities which holds the hills to be living and sacred. It is a tacit recognition of societal constitutionalism of the socio-religious system of a marginalised community where the Supreme Court of India itself has evolved as a social court. Radhika Borde & Bettina Bluemling, *Representing Indigenous Sacred Land: The Case of the Niyamgiri Movement in India*, Vol. 32(1), CAPITALISM NATURE SOCIALISM, 68–87 (2021); Stellina Jolly, *The Vedanta (Niyamgiri) Case: Promoting Environmental Justice and Sustainable Development* in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT, 289–302 (Cambridge University Press, 2021) ; Roland Hardenberg, CHILDREN OF THE EARTH GODDESS: SOCIETY, MARRIAGE, AND SACRIFICE IN THE HIGHLANDS OF ODISHA, (De Gruyter, 2019); Gunther, *supra* note 2.

[102] Pratyush Kumar, K.K. Ojha, Indian Environment: Effect of Global Warming and Climate Change and their Policy Responses, Korean Legal Research Institute (KLRI), South Korea (Global Legal Issues 2012-2013), Vol-III, 2012, pp. 353-389.

[103] M.K. Ranjitsinh & Ors. v. Union of India & Ors., 2024 INSC 280.

[104] One can draw parallels to judicial independence and accountability at the Council of Europe and European Court of Human Rights, Jörg Luther, *Judicial Independence and Accountability in the Council of Europe and the European Court of Human Rights* in EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW, Vol. I, 197–220 (2019). The entire first volume of the European Yearbook of Constitutional Law is useful in understanding judicial independence and accountability on the one hand and "democratic" legitimacy on the other in the European context.

disagree about any principle of rights and the procedure and processes of its implementation, it is the Supreme Court whose only allegiance is with the Constitution and the constitutional principles which it enshrines, ensures through proportionality principle, which is a more precise mechanism of evaluation than balancing, to uphold constitutional principles which are the real issues at stake and protects and preserves the autopoietic nature of the legal-constitutional system from being destroyed as a mere handmaiden of politics in its structural coupling with law. The legitimacy of the Supreme Court/Constitutional Court is constitutional and not political, and it serves the Constitution well, in not being politically legitimate. It also does not mean that the system of the constitutional Supreme Court system is not open to the environment of law, which does not just include politics but also society, economy, culture and so on, but this environment can enter the constitutional system only through the binary codes which transforms the nature of politics, economy, society, culture into legal-constitutional structures and processes of the legal system through the legal-constitutional language articulated by the Supreme Court.[105] In this lies the democratic legitimacy of the legal-constitutional system; otherwise, it would lead to system destruction at both levels, i.e., in politics as well as the constitution. The US example is glaringly evident, where the executive appointment of the Supreme Court judges is in the process of the destruction of the constitutional system by its interlinkages with politics and not in serving the constitutional system. By overturning *Roe* v. *Wade*,[106] but also in giving untrammelled powers to the elected President of the US, where every action, including inciting violence against the State, becomes protected as presidential immunity,[107] is certainly the destruction of the constitutional system, which in the process might destroy democracy itself. The "originary violence"[108] and "unelected" and thus "democratically illegitimate" Supreme Court/Constitutional Court system protects, preserves and perpetuates a "living constitution" which in turn feeds the capillaries of a vibrant democracy. It is a fundamental paradox of law/constitution with which we have to contend in order to avoid the system's destruction of a liberal constitutional order. Hart, Hook, Jefferson and Waldron, among others, are brilliant but wrong, where, despite their concerns for democracy are unable to assess the importance of "judicial review (and constitutional review as its sub-system)" in its service of the democratic system.[109] The UK is a small country with a permanent monarchy, and thus has been balanced with parliamentary supremacy. Big republican democracies with huge electorate or even small but diverse republican democracies like Italy can ill afford parliamentary supremacy as it could slip into majoritarian authoritarianism though multicultural-multi-community democracies like India is served well with first-past-the-post-system which is sometimes curiously mischaracterised as "electoral autocracy" by western interlocutors or "westernized natives" (how else is democratic process and structure framed otherwise, is not brought forth by the neologists who have come up with this curious terminology). The democratic ethos found expression and legitimacy through Public Interest

[105] Gunther Teubner, AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (De Gruyter, 1987); Teubner, *supra* note 2.

[106] In a clear back-sliding on human rights standards and reminding one of medieval dark ages in Europe, in Dobbs v. Jackson Women's Health Organization, the United States Supreme Court overturned a five-decade old Roe v. Wade judgment guaranteeing a woman the right of abortion. It is in sharp contrast with the largest democracy and a deeply religious society of India which guarantees woman the right of abortion. It is an object lesson from the Global South from which countries like United States can well learn from in order to improve its human rights record.

[107] Trump v. United States, 144 S.Ct. 2312 (2024) (United States Supreme Court).

[108] Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, Vol. 11(5–6), CARDOZO L. REV., 921–1045 (1990) ('Derrida').

[109] H.L.A. Hart, *American Jurisprudence through English Eyes* in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, 125 (Oxford University Press, 1983); Sidney Hook, THE PARADOXES OF FREEDOM, 95 (University of California Press, 1962); Thomas Jefferson, *Letter from Thomas Jefferson to William Jarvis* in THE WRITINGS OF THOMAS JEFFERSON, Vol. 15, 207 (A.A. Lipscomb and A.E. Bergh eds., Kessinger's Legacy Reprints, 2010); Jeremy Waldron, *The Core of the Case against Judicial Review*, Vol. 115, YALE LAW JOURNAL, 1346–1406 (2006).

Litigations ('PILs') at the SCI (also the High Courts), metamorphosing it into a "societal constitutional court"[110] resting on the "open society of constitutional interpreters".[111] Presidential pardons under Article 72 of the Constitution of India[112] or Gubernatorial pardons under Article 161 of the Constitution of India[113] are also subject to judicial review.

VII. CONCLUSION

Populists do not have a genuine commitment to the principles of democratic constitutionalism and merely make an instrumentalist (Blokker) use of constitutionalism to subvert intrinsic principles of democratic constitutionalism like the rule of law and protection of minorities.[114] Antidotes to this populist surge, as suggested by Martinico, include a harmonious reading of Article 11 of the Italian Constitution with the EU law, and through Article 1 of the Italian Constitution itself, developing the jurisprudence of judicial review of the legislation by the Constitutional Court to save counter-majoritarian safety valves.[115] Although much like the "originary paradox of law",[116] Martinico at one point admits paradoxically, "While I have maintained that with its extreme majoritarianism and its idea of instantaneous democracy populism represents a threat to the equilibria of constitutional democracy, this does not add up to the conclusion that all the claims advanced by populist movements cannot be filtered to make them compatible with the essence of Italian (and post-WW-II) constitutionalism".[117] With his sharp observation and precise diagnosis, he correctly sensed that the Draghi government was just an interregnum and a stop-gap arrangement which could not quell the upsurge of populism in Italy.[118] And it has exactly turned out as Martinico had diagnosed.

Things have taken a further southward turn on how Artificial Intelligence algorithms and online data could be viciously manipulated, besides, of course, rich, vested and xenophobic individuals owning social media platforms can manipulate and sway political opinion and are a current threat to deliberative democracy in "real time". This is an area which can be further explored by Martinico in the companion volume in addition to discussing the problems of "online voting", right to privacy, and data protection, and the strange format of executing online voting through a privately owned Rousseau platform by Davide Casaleggio which he already comprehensively covered in this work.[119] Casaleggio has nowhere near the influence, resources and heft which tech firms are enjoying in the US today, for example, besides the Five Star Movement distanced itself from Casaleggio and his Rousseau platform, diminishing his political reach significantly. Online platforms like Q-non have a contorted and phantasmagorical view of the world in their own online systemic bubble. It brings us to "real" and "concrete" human interactions in family, society, and community as the locus of sociology of law and legal theory in this late modernity with functional differentiations. But there is also a pushback or dysfunctional differentiations,[120] as they have emerged globally in constitutional systems this year, bringing us to the cusp of the crisis of theory and a crisis of the sociology of

[110] Gunther, *supra* note 2.
[111] Häberle, *supra* note 10, 129–165.
[112] Maru Ram v. Union of India, (1981) 1 SCC 107; Kehar Singh v. Union of India (1989) 1 SCC 204; Bikas Chatterjee v. Union of India, (2004) 7 SCC 634.
[113] Swaran Singh v. State of UP, (1998) 4 SCC 75.
[114] Martinico, *supra* note 4, 170, 171.
[115] *Id*., 171, 172.
[116] Derrida, *supra* note 109, 920–1045.
[117] Martinico, *supra* note 4, 172.
[118] *Id*., 173.
[119] *Id*., 173, 174.
[120] I would like to thank Prof. Klaus Günther to suggest this term on January 22, 2025, while discussing the current constitutional and political crisis in the US unfortunately having adverse global implications.

law we have to grapple with. Drawing a leaf from Norberto Bobbio, Martinico very rightfully outlines the importance of institutions which, by filtering through the deliberative processes of democracy bring out a well-reasoned judgment of not just the political leaders through political parties but also the citizens, immunizing them from the shocks of sudden and impulsive nature of "direct democracy".[121] One such important institution in democracy is the parliament, "the parliamentary free mandate is part of the untouchable core of the Italian Constitution and is thus covered by the 'republican form' concept under Article 139. In this sense, not even recall is possible".[122] The EU representing European unity not just for its geopolitical and economic weight, but in today's world of uncertainty, purportedly upholding democracy and democratic values (Articles 2 and 7, TEU — respect for dignity and human rights, democracy and the rule of law), offers an antidote to "populism"[123] within its geographical bounds, for example to amend provisions like Articles 57, 58, 71, and 83 of the Italian Constitution[124] to further populist agenda (inimical to Article 49 giving privileged role to political parties) and offers hope and solidarity in the rest of the world. This is a curious turn of events where Europe, through the EU, is given an opportunity for leadership of the democratic and free world in a way in which it can redeem itself from its colonial cruelty and violent past.

Martinico's focus remains the classic State constitutionalism which cannot cover all the system domains due to massive functional differentiations as a result of industrial modernity which took Italy also in its stride in the 1930s and the 1960s, at least in its northern region, leaving a gaping gap in its regional variations and the initial formation of Lega Nord (now Lega) as a regional *revanchist* party as Martinico and other Italian constitutionalists present it to be. And based on Lega's narrow political agenda and racist overtones, there is all the more reason to accept this rationale. With the 'sudden' rise of Meloni and her party in the corridors of power, Martinico's work has been turned into a work of 'recent constitutional history' and a prelude to what was about to come making it urgent for a companion volume to this work for observers of constitution to understand and assess what Italy in particular and Europe in general is undergoing. Euro-scepticism in the founding members of Italy, Germany, and France of the EU, and still among the largest economies enjoying political weight globally, is a very serious constitutional matter. At some point, the current author had written that the EU within the State constitutional framework is the closest to being a 'Gandhian moral exemplar', and the unravelling of the very idea of European integration does not just spell doom for Europe but for all such constructive solidarities among States elsewhere. Brexit should not have been taken so seriously within Europe. A marriage which is not consummated has all the grounds for divorce. The UK's marriage with Europe was never consummated and had all the grounds for divorce, and it ultimately happened to the peril of the UK. The continent should stand on its own principled ground, and Italy, being one of its most important stakeholders, makes its constitutional journey and its inner systemic challenges interesting and worthy of consideration.

[121] Giuseppe Martinico, *supra* note 4, 175.
[122] *Id*., 180.
[123] *Id*., 178.
[124] Art. 57 of the Italian Constitution deals with the territorial basis for the election of the Senate of the Republic. Art. 58 of the Italian Constitution deals with the voting age for the Senate. Art.71 of the Italian Constitution deals with the popular legislative initiative. Art. 83 of the Italian Constitution deals with the number of regional delegates for the election of the president of the Republic. *C.f.* Martinico, *supra* note 4, 182, 183.