THE ITALIAN WAY TO MIGRATION: WAS IT "TRUE" POPULISM? POPULIST POLICIES AS CONSTITUTIONAL ANTIGENS

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"In extreme conditions such as those that the applicants in the main proceedings have endured, their option to choose is as limited as the option of the Member States of the Mediterranean Basin to turn themselves into landlocked countries"
Advocate General Mengozzi, General Opinion, case C-638/16 PPU, X, X v. État belge, 7 February 2017, § 174

THE MIGRATION-POPULIST "CONNECTION": ALWAYS INCOMPATIBLE WITH CONSTITUTIONALISM?

Migration as a global, European and national phenomenon undoubtedly represents a privileged context where populism may find expression. The management of migration flows involves legal concepts which are traditionally related to populist trends: national security, border defence, national identity. By referring to the need to "protect" national values, migration policies may be oriented towards securitarian approaches which must be assessed in the light of their consistency with constitutional principles and rights at stake.

The analysis will be driven along two axes – populism and migration – which will be interconnected through the reference to the constitutional dimension: assessment of the "constitutional sustainability" of populist policies implemented in the context of migration within the Italian legal system shall be performed.

While it is not possible to analyse the vast literature on populism in depth, it is nonetheless necessary to clarify two preliminary assumptions which will drive the present analysis: on the one hand, populism in its "pure" expression is incompatible with constitutionalism (Blokker 2017; Tushnet 2019); on the other hand, migration does not constitute the reason for the rise of populism within the European context, but more precisely plays the role of "carrier" for populist policies. With regard to the former statement, within the comparison of different theories and doctrines related to the compatibility between populism and constitutionalism (Doyle, Longo Pin 2019), the incompatibility of the two seems to be the more satisfactory approach, as «Values such as political pluralism, transnational solidarity and protection of minorities renders constitutional democracy incompatible with populism» (Fournier 2018:23). Reference is made to a "pure" version of populism, meaning a political and legal will which is «inherently hostile to mechanisms and, ultimately, values, commonly associated with constitutionalism: constraints on the will of the majority, checks and balances, protections for minorities, or, for that matter, fundamental rights as such» (Mueller 2017: 590).

Therefore, if populist constitutionalism must be considered as an intrinsic oxymoron (Halmai, 2018), a different stance can be adopted with regard to popular constitutionalism (Kaidatzis, 2018; Alterio 2019)). On the one hand, the former expresses a populist rhetoric which is outside and against the narrative traditionally linked to constitutionalism as a doctrine, essentially based on pluralism, protection of minorities and limitation of powers (thus also of the concrete exercise of popular sovereignty): the "Us-Others" and "In-Out" mechanisms (Blokker 2019), which are typical of "pure"

(Bugaric 2019: 11) populism, are inherently incompatible with the genetics of constitutionalism, of which the inclusion of social conflict into the institutional and legal structure (principle of pluralism) and the primacy of the individual over the State (principle of personalism) are constituent elements (Bin 2007). On the other hand, popular constitutionalism is placed inside the constitutional(ist) discourse: its ambition is not to gradually modify the ecosystem of constitutional democracy (Fournier 2018: 10), but rather to achieve – by activating proper constitutional tools – an alternative balancing between powers, functions and interests to the one achieved by "liberal constitutionalism" (Blokker; Bugaric, Halmai 2019).

Thus, some degree of populism can be assimilated by constitutionalism, as long as the former adheres to the fundamentals of the latter and takes part fairly in the social, political and legal competition for concrete implementation of the constitutional project. Consistently, a populist attitude can also be considered as legitimate expression of constitutional pluralism, at least until it alters the foundations of constitutionalism. Thus, the populism-constitutionalism combination may alternatively produce an oxymoron or a paradox: depending on the degree, aims and "quality" of the populist agenda, its association with constitutionalism can be qualified alternatively in terms of unsurmountable incompatibility or sustainable coexistence, insofar as the former is an expression of the struggle for inclusion which is typical of constitutionalism and does not aim to block what has been called «chain of claim-making for inclusion» (Mueller 2017: 601).

The duality of the populism-constitutionalism connection also applies to the context of migration, where there is neither "one right answer" nor "one constitutionally compatible approach": the individuation of the concrete balancing between effective rights' protection and efficient management of migratory fluxes is reserved mainly to the political margin of appreciation of democratically legitimated bodies; in this context, counter-majoritarian bodies – such as constitutional and supranational courts (Baer 2018: 358 ff.) – enjoy a reduced margin of appreciation for assessing political choices. Accordingly, parliamentary acts, which are referable to a populist attitude from a cultural and political perspective, may be declared legitimate from a constitutional one: in cases like these, the populist origin of the act is traced back to the 'open-texture' of constitution by linking it to the legitimate aim of guaranteeing constitutionally relevant public interests, such as national security or public order. Still, how do we determine the sustainable level of populist policies within a constitutional legal order?

The triangle is complete: migration represents a paradigmatic context in which the relationship between populism and constitutionalism achieves the highest level of complexity and relevance. As anticipated, migration must be considered a preferential "carrier" of expression rather than a constituent factor for populism (Taggart 2017). The (mis)use of migration as a context of expression and strengthening for populism is favoured by the convergence between features traditionally associated with populism, on the one hand, and migration management, on the other.

The foundations of populism perfectly fit some of the characters of current trends in migration management. The polarization between "Us" and the "Others", which can also find an explicit constitutionalisation, as occurred in Hungary (Halmai 2018); a theory of Nation based on the paradigm of "ethnos" – the building and protection of «one ethnically defined nation» (Blokker 2019: 340; Stoyanova 2018;) – instead of "demos"; generally speaking, the dominance of an exclusivist paradigm instead of an inclusive one, when there is the need to frame the conceptual and constitutional meaning of "The People" (for the immigration issues, the emphasis is on «the people as a homogeneous entity» Taggart 2018: 250), thus explicitly (Hungary) or implicitly (Italy) orienting the approach to migrants in the direction of a contraposition between "Us" and "The Others". Once we have metabolised this inner association, the path towards securitisation of migratory policies is open and direct: it can be further strengthened when combined with a logic of "perpetual state of emergency", able to justify and even compel exceptional legislative or administrative means, and an

intense and systematic use of criminal law, which inevitably leads to "crimmigration" (Strumps 2006[1]).

Once we have detected the "irresistible" fascination linking populist fundamentals and migration management, it is worth disentangling three different dimensions in which this attraction may materialise.

POPULISM AND MIGRATION: THREE DEGREES OF ATTRACTION. CULTURAL RHETORIC, POLITICAL NARRATIVE AND LEGAL ACTION

Firstly, it can occur at a social and cultural level, thus in a pre-juridical phase of the construction of the rhetoric on migration, or rather, against migrants. At this level, social and political communication becomes essential in order to orient society towards a pre-determined perception of the migratory phenomenon and – more importantly – of the detrimental impact that migrants – especially those seeking international protection and coming to the national borders – have on the cultural, economic and even ethnic condition of citizens. At this stage, the People, to whom sovereignty belongs, slowly becomes – or is pictured as – a monolith in social, religious, cultural and ethnic terms: the narrative of migrants as "invaders" illegitimately coming to national soil, even when they belong to the most vulnerable groups of people, such as asylum seekers or victims of trafficking, is functional to progressively provoking the feeling of needing to resist against a undetermined group of "enemies". This feeling can eventually lead to the logic of the existence of a People which legitimately expresses national sovereignty through the democratic and representative circuit, in opposition to a mass of individuals – "the Others" – who must be kept "outside".

In this mindset, which becomes the cultural prerequisite for a populist utilization of power, migrants become "symbolic figurants" of the main target of populist rhetoric: the elite. Migrants' flow is thus imagined as part of a cultural and political project of the "corrupt elite", where core constitutional principles such as pluralism, solidarity and fundamental rights' protection are re-designed by a populist rhetoric, becoming negative factors which are instrumental to the realization of the elite's cultural and political programmes, such as the building of a multicultural society and, ultimately, the disintegration of the "pure people" (Mudde 2017).

Functional to the above is a political discourse – and this is the second level of relevance, the political level – which is focused on the reinforcement of a twisted perception of migration as a concrete phenomenon in terms of both numbers and effective impact on the economic and social condition of citizens. Italy paradigmatically expresses this trend, in that an increasing detachment between social perception and the real dimension of the phenomenon has become a constant feature of the political discourse. It must be acknowledged that objective elements have decisively contributed to this. Trends of migrants coming to the Italian borders, especially in the period between 2014 and 2016, objectively constituted an unexpected and unusual – even exceptional – phenomenon, when compared to the traditional migratory fluxes which characterise Italy in ordinary times. Limiting the analysis to arrivals by sea in the last five years, official statistics[2] (Ministry of the Interior) documented a peak of arrivals in the aforesaid period (2014-2016), which was followed by a slow but constant decrease in the last three years. With regard to Italy, it is possible to enucleate at least two "seasons" of sea arrivals in the last five years. The events that occurred in the Southern part of the Mediterranean Sea

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[1] Within this trend, it is necessary to recall the role played, according to the populist rhetoric, by the systematic call to the connection between uncontrolled immigration and risks for European societies linked to the terrorist threat. This link is often used in order to justify, and in a certain way impose, very restrictive migration policies based on dissuasion, control and eventually real contrast of the phenomenon as a whole. In this sense, the confusion between supposed different "types" of migrations (see further below) favours the gradual but inexorable transition from the fight against terrorism also in the context of migration, to the struggle to irregular immigration up to the fight against immigration *tout court* (Gattinara 2017; Armillei 2017: 154).

[2] Ministry of Interior, Cruscotto statistico giornaliero (URL: http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/statistica/cruscotto-statistico-giornaliero. Last accessed: 13 October 2019).

and in Syria can undoubtedly be seen as the historical trigger for the "migration crisis"; at the same time, these events are also strictly linked with the political and the legislative reaction of the Italian governments in power during this period, which was characterised – as we shall see later – by a systematic implementation of emergency measures (legislative decree; administrative act) and by a process of "externalization" of national borders by concluding operational Memoranda with transit countries for migrants, such as Libya (Savino 2018; Moreno-Lax and Lemberg-Pedersen 2019). The first season started in 2014, when 170,100 arrivals took place, and ended in 2017, when Italy experienced a decrease of 34.24% in arrivals compared with those of 2016 (181,436 arrivals). The second season is characterised by a significant decrease of arrivals by sea, which brought arrivals to the figure of 7,521 in 2019 (data referring to the end of September): this trend means an astonishing 92.87% reduction compared to 2017 and 64.23% compared to 2018. Therefore, if it is indubitable that the 2014-2016 season experienced a massive and in some way – at least initially – exceptional and unexpected escalation of sea arrivals (Campesi 2017), the 2017-2019 season was characterised by an opposite trend, which has indisputably normalised the phenomenon of arrivals by sea.

At this stage, we limit the analysis to "mere" statistics, with the aim of objectively describing the events and highlighting the split between empirical data and social perception of migration. We shall only mention that while the first season found its trigger in contextual and historical reasons outside Italy – contingent factors – the second season derives from political and normative dynamics – structural factors – which find legitimisation directly in a narrative of migration flows based on obsessive reference to polarizing concepts such as emergency crisis, national security, public order, citizens' welfare. Narratives on migration conveyed by both politics and the media, combined with the – temporally defined – mass arrivals of migrants in the 2014-2016 seasons, have been driven by a systematic use of the keywords previously evoked. This contributed to consolidating within society a twisted perception of the phenomenon, which represents the cultural cornerstone on which securitisation of migration policies has recently been built.

National and European opinion polls starkly depict this trend (Chetail 2019: 2; Trimikliniotis 2019). According to the Special Eurobarometer on "Integration of immigrants in the European Union"[3], only 16% of Italian citizens believe that the percentage of immigrants staying legally in their country is higher than the percentage of those staying illegally, while 47% of those polled think that there are more immigrants staying illegally than there are immigrants staying legally and a further 25% believes that there is about the same number of the two categories of migrants. The data refer to surveys conducted during April 2017, when official statistics on sea arrivals started to decrease significantly; at the same time, the Report suggests that it is likely that this is influenced by the sharp increase since 2014 in the number of arrivals of people seeking protection in the EU, with Greece and Italy as the primary countries of entry. Further striking information is represented by the margin of error between the real number of foreign citizens living in Italy and the number effectively perceived by Italian society. According to the same Report, the percentage of immigrants in the total population perceived in Italy is 24.6%, when official data indicate 7% of the total population as the portion of non-citizens living in Italy: significantly, the error of perception – the misrepresentation of reality – by Italian citizens is the highest of all European Union countries (+17.4 percentage points[4]).

Even if it is not possible to infer from these data a direct connection between a populist trend characterising the Italian political environment and the cultural misrepresentation of the effective impact of migration on Italian society, the consolidation of a social perception which seems to recall some of the features of "pure" populism cannot be denied. This is not enough to qualify Italy as a populist environment when dealing with migration. Regardless of this, data from the polls contribute

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[3] European Commission, "Integration of immigrants in the European Union", Special Eurobarometer, 2018, no. 469.

[4] Istituto Cattaneo, Immigrazione in Italia: tra realtà e percezione, 2018 (URL: https://www.cattaneo.org/2018/08/27/immigrazione-in-italia-tra-realta-e-percezione/). It links this error of perception not only to lack of information but also to the existence of deep-rooted prejudices against immigrants, which could bias voters' perception.

to define a cultural environment which is ready to accept legislative and administrative reforms which can be defined – expressly or indirectly – as a manifestation of a populist trend at political level.

This leads to the third level of relevance, which follows the cultural and political construction of a narrative based essentially on a distorted social perception of both the dimension and characteristics of migratory flows, namely normative relevance. What is the reaction of representative bodies vested with legislative and regulatory powers when facing a declared "emergency" pertaining to migration? As stated above, if we look at the last decade, Italian legislation on migration is characterised by a number of connotative elements shared by parliamentary majorities and governments very different for political culture, ideology and party.

Limiting our analysis to the last two legislatures, if we apply the essential characteristics traditionally associated with a populist political experience to the coalitional governments which brought together left-wing and centre-right parties (Letta, Renzi and Gentiloni governments) and then the "yellow-green" coalition (Lega with Salvini and the Five Stars Movement), the "genetic" diversity between them appears to be self-evident.

In very broad terms, the "yellow-green" coalition, which entered into an irremediable crisis last August, brought together the two political movements that at European level represent the paradigm of populism "in power" and vividly expressed the complexity and multidimensionality of the populist phenomenon (Martinico 2018: 73; Mény and Surel 2002). On the contrary, previous coalition governments represented, when evaluated through populist lenses, the epiphenomenon of everything populist movements aim to defeat: the "corrupt elites", who constitute, in the populist rhetoric, the enemy of the "true people" (Mudde 2017: 32).

Even with this irreconcilable cultural and ideological background, the two coalitional experiences based their political agendas on partially common premises, which deal respectively with the nature of the phenomenon, the nature of the legal sources employed to regulate it and the legal status of people arriving at state borders.

The migratory phenomenon has been constantly qualified by rule-makers as an "endless emergency", thus requiring extraordinary measures to react efficiently and promptly. The mechanism is perfect in its simplicity: the 'emergency' narrative, progressively inoculated at social level, justifies and even requires extraordinary reactions at legislative level.

The emergency paradigm has led to the systematic activation of emergency *sources*, such as decree-laws, adopted without distinction by all the governments in power, thus limiting the role of Parliament even in the event of the approval of structural reforms related to asylum procedure and status[5]. It also allows a broad interpretation of legislative clauses, which provides for the activation of emergency organisational *solutions* in the context of the reception of asylum seekers. In this case, the ordinary reception system (SPRAR-Refugee and Asylum Seekers Protection System, see Section 14 of Legislative Decree no. 142/2015; Penasa and Pretto 2016) has been *de facto* replaced by the extraordinary reception system (CAS - Extraordinary Reception Centres, Section 10 of the same legislative decree): this inevitably leads to lower standards of protection for asylum seekers' fundamental rights and of integration into the host society. The emergency approach to migration is the reason also for the implementation of unconventional *methods* for the management of arrivals at the national borders: the 'hotspot' approach has been required of some Member States (among which, Italy) by the European authorities in order to efficiently and promptly react to massive arrivals of migrants, with the aim of guaranteeing "first reception" and the pre-qualification of migrants as asylum seekers or, alternatively, as irregular migrants (Casolari 2016; Savino 2016). By derogating from general rules (and guarantees) on reception and asylum procedures set forth at European and national level and performed in the absence of any formal legal ground (only soft law and non-binding acts have been introduced by the Italian government in order to regulate the concrete implementation of this procedure: see the Standard Operation Procedure), the pre-qualification of migrants decisively orients the attribution of the status and consequently the legal regime applicable to them (access to

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[5] See *infra*. In contradiction with the populist will to reaffirm the centrality of the popular will betrayed by liberal and technocratic elites.

the reception system and asylum procedure; administrative detention in *ad hoc* centres awaiting return to the country of origin; Campesi 2018).

This praxis contributes to increase the lack of legal certainty regarding the effective implementation of substantive and procedural guarantees linked with the specific status attributed to each migrant. If migrant's rights, which are functional to the effective access to the asylum procedure – such as the right to officially apply for asylum and to legal aid and linguistic and social support – are not effectively guaranteed at the time of the first contact with national authorities, migrants who would be entitled to be recognized as asylum seekers are instead considered to be "irregular". Here, a direct connection with the political intention to criminalize and deliberately muddle different legal regimes applicable to migrants is detectable: at rule-enforcing level, legal regimes whose–boundaries are clearly drawn in legislation are likely to be confused due to the inadequacy of the guarantees effectively enforced (Cortese 2017); at political level, the misperception of different categories of migrants is deliberately ridden in order to convey the idea of an unlawful exploitation of the refugee status by migrants as a mass of individuals and to consider asylum not as a legal status with solid constitutional and European grounds but instead as an *escamotage* employed by migrants to occupy the space belonging to citizens (Algostino 2018: 1175); at social level, this narrative contributes to strengthen the feeling of a "siege" from outside to end which extraordinary measures must be passed to protect the safety and well-being of "proper" citizens. The circle between social, political and legislative levels is ultimately closed.

THE ITALIAN WAY TO MIGRATION: WAS IT "TRUE" POPULISM?

The Italian way to migration management is characterised by a recurrent use of key concepts – emergency crisis, national security and public order, fight against irregular migration – which are deliberately channelled by political narratives in a two-fold direction: downward, the mantra of migration as national emergency contributes to artificially build a social environment which is inclined to metabolise policies which more or less explicitly contrast migration fluxes, when they are not explicitly against migrants; upward, by basing legislative choices – largely ratified through exceptional legal sources (decree laws, emergency ordinances) – on the need to react against unexpected and extraordinary events in order to guarantee public order and national security. Thus, this narrative seems to be win-win: nonetheless, is this enough to consider this approach as populist? Are we experiencing a *structural* populism, capable of rewriting constitutional fundamentals of the form of state? Or rather, can it be qualified as *contingent* populism, which connotes migration policies merely in a sporadic and limited way and which is instead the expression of a widespread approach of closure towards migrants within EU Member States?

In order to answer these questions, two issues will be tackled: the existence of a continuity between different governments; the reaction of counter-majoritarian bodies to hypothetical populist pushes, by analysing major trends detectable within the case-law of the Italian Constitutional Court.

During the above-mentioned two seasons of arrivals at the Italian borders, different coalitional governments in power made use of emergency measures in order to cope with mass migration. Both the "*larghe intese*" coalition government (we will focus on Gentiloni government) – expression of the elite according to the populist rhetoric – and the "yellow-green" one – where two different types of populism found representation (Newell 2018) – adopted decree-laws, respectively aimed at speeding up asylum procedures and fighting illegal immigration (Decree-Law no. 13/2017, converted into Law no. 46/2017, known as the "Minniti-Orlando Decree"), on the one hand, and at introducing urgent measures on international protection and security on the other hand (Decree-Law no. 113/2018, converted into Law no. 132/2018, known as the "Salvini decree") and on public order and security (Decree-Law no. 53/2019, converted into Law no. 77/2019, known as the "Salvini bis").

Although the decree-laws mentioned above were an expression of different – even dichotomous – political backgrounds, they have been traced back, by Italian legal scholarship, to a common

understanding of migration as an emergency event intrinsically linked to public security (Cavasino 2018: 14). Accordingly, the "Salvini decree" was placed in a seamless common path with previous measures adopted in the past years, which would identify as their "northern star" the combination between immigration and public security (Algostino 2018). So, how far does this political continuity go, when we consider that normative choices stem from different political cultures and refer to different "peoples"?

The hypothesis is that a cultural discontinuity coexisted with a normative continuity (Cetin 2015); and that, with regard to the latter, a change in the cultural matrix of migration policies caused them to be reduced merely to public security issues. Thus, if a continuity is detectable, as emerges from the substance of the decree-laws mentioned, it was subject of an "escalation" which took place while the "yellow-green" coalition was in power (Cavasino 2018: 15-16). The paradigm shift was formally ratified by the coalition "agreement" (*contratto*) between the two movements. The section dedicated to migratory policies was titled "repatriations and stop business" and expressed main issues that would fill the government's agenda: further criminalisation of asylum seekers (to provide new crimes that when committed by asylum seekers cause their immediate removal); delocalization of asylum procedures to countries of transit or origin; increase of the number of repatriation centres (CPR), the number of which had already been increased by the "Minniti-Orlando Decree"; the transfer of financial resources from the reception of asylum seekers to the repatriation of irregular migrants. The ideological nature of this approach to migration management is self-evident, if one considers the intentional utilisation of slogans ("stop business") in official documents, the simplification of the factual and normative complexity produced by mass migration, and the underestimation of the duties in terms of reception of asylum seekers and procedures deriving from European Union law (Bonetti 2018). Does this change in the cultural and political matrix find expression also in the substance of the acts adopted by the two (classes of) governments?

If we consider the political context from which firstly the "Minniti-Orlando" and then the "Salvini" decrees stem, it is possible to detect at least two areas of conjunct intervention, which are especially relevant as they express the "essentials" of Italy's way of dealing with migration: the systematic implementation of *de facto* administrative tools, which often lack legal grounds and are mainly based on un-formalised praxes, is proven by consolidation of the 'hotspot' approach; the implementation of the Memorandum of understanding signed by Italy with the government (or rather, one of the governments) of Libya, which is part of the process of externalization of national borders and thus of migration management to foreign authorities. With regard to the hotspot approach and the Memorandum with Libya, a political continuity is clearly detectable. Both were activated during the "*larghe intese*" governments and went on to become some of the key-tools for the tightening implemented by the "yellow-green" coalition. The Memorandum with Libya has been particularly functional in reducing until almost complete exhaustion arrivals by sea, in the light of a political plan formally in line with European standards – as it was aimed at fighting trafficking and irregular migration – but which effectively had the indirect (probably not unwitting) effect of also stopping the fluxes of asylum seekers and thus of significantly curtailing the number of asylum requests.

Therefore, the cultural matrix shift produced found pre-existent legal grounds, which were then implemented in conformity with a rhetoric that can be qualified as populist. Particularly emblematic is the case of the closure of ports by the former Minister of the Interior Salvini, who was formally able to exploit the conditions and implement the procedures set forth in the context of Themis, a Frontex Joint Maritime Operation (Carrera 2019): the provision of the criterion of the closest port to the rescue zone for identification of the place where migrants must be disembarked, a principle that is hardly compatible with the prohibition of refoulement and the criterion of "safe harbour"; the reduction of the patrolling and intervention marine area. This implementation undeniably took place in line with a very different cultural and political mindset compared to that of previous governments (see the humanitarian nature of *Mare Nostrum* Operation).

A similar process is detectable also with regard to communication methods and policy implementation tools. The semantics of the political discourse related to migration completely

changed during the time the "yellow-green" government was in power; they undoubtedly contributed to the process of separation between concrete and perceived reality of the phenomenon that affected Italian society (see data above). The reiterated reprise of expressions (slogans?) such as "sea-taxis", in reference to the NGO vessels operating in the Mediterranean with search and rescue functions; "cruise", in reference to the routes followed by migrants, which not only statistics but also common sense should consider in their dramatic force and complexity; "clandestine", used to indiscriminately label anyone who arrives on Italian coasts; "holiday", to qualify the national reception system for those applying for international protection, identified as "alleged refugees" on social media with the clear intention of suggesting a condition of illegality[6]); these are just some of the expressions that have been conveyed at political and institutional level in the public debate on migration (Dimitriadis 2019). They decisively contributed to the construction by the mass media of a perceived reality that does not correspond to the factual and legal situations, but that had the function of fostering social acceptability of highly restrictive policies, practices and regulations.

With regard to the methods of enactment of populist policies - and the cultural project of which they are expression – we experienced the exacerbation of a *modus operandi* typical of the Italian approach to migration management, which is directly connected to the binomial immigration-(in)security and to the emergency approach systematically adopted: the implementation of systemic reforms by means of administrative praxes, which are formalised at legislative level *ex post facto*. In order to highlight the chronological continuity of this approach, it is possible to refer once again to the implementation of the hotspot method, which symbolically expresses a gradual "administrativisation" of migratory policies and migrants' rights (Savino 2015). Also from this perspective, during the period in which the last Italian government was in power, there was an escalation, which is linked to populist dynamics and can be qualified as "announcement effect" or more generally as mediatisation of migration policies. In this case, however, the social impact of political declarations ends up subrogating the lack of a formal legal act able to legitimate the effects thus generated.

A paradigmatic case, which undoubtedly constitutes a further element of discontinuity (Villa 2018[7]), can be found in the practice of ordering the closure of ports to prevent the disembarkation of migrants rescued at sea, in particular by NGOs (Cusumano and Gombeer 2018). This was also to avoid the duties of rescue, reception and protection imposed by national and European law; the "announced" closure of ports, which had extraordinary media exposure (Sea Watch, Open Arms, Sea Eyes, Diciotti), was not preceded by the issue of formal acts by competent authorities (Carta 2018)[8].

In this case, the media power of the statements of the holders of top public functions ended up replacing the legal force of acts that should have formalized administrative measures concretely adopted. It is not arbitrary to identify in this strategy the expression of one of the characteristics of populist discourse, according to which populist leaders must do what the people want, even at the risk of setting aside «The formal structures of liberal democracy (...) if they are preventing the populist leader to fulfil his role» (Bugaric 2019: 393). The legal manifestation of this political and cultural strategy took place only *ex post facto*: the "Salvini bis" decree intervened to criminalise *de jure* those actions – connected with the search and rescue of migrants – previously stigmatised *de facto*, providing for a pecuniary sanction (with confiscation of the ship in case of reiteration) in case of non-compliance with limitations or bans on the subjects of order, public security and immigration (Article 2, Legislative Decree 53/2019, converted into Law no. 77/2019).

The semantic, ideological and methodological discontinuity becomes nuanced when interpreted on a strictly legal level, as it has been implemented through the "populist" employment of existing rules

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[6] Il Post, Gli immigrati e gli alberghi, 17 June 2015 (URL: https://www.ilpost.it/2015/06/17/immigrati-alberghi-di-lusso-salvini/).

[7] According to Villa 2018, « it is important to note that although the Gentiloni government had asked NGOs in the summer of 2017 to either sign a "code of conduct" or stop their SAR operations at sea, until May this year the Italian government had never openly and actively opposed search and rescue operations *per se*».

[8] Legal Studies on Migration Association (ASGI), Accesso civico ai Ministeri dell'interno e dei Trasporti: nessun provvedimento formale di chiusura dei porti, 10 January 2019 (URL: https://www.asgi.it/media/comunicati-stampa/chiusura-porti-accesso-civico/).

and procedures. This "heterogony of ends" has facilitated the jurisdictionalisation of populist policies, which have been legitimised and have undoubtedly been grafted onto a legal terrain which is fertile, or in any case not entirely refractory to accept their social and cultural sustainability. The concrete manifestations of this paradigm shift are manifold, and not limited to the decrees analysed. Limiting ourselves to two areas that symbolically express this trend, we shall focus on the abolition of the humanitarian protection status and the reform of the asylum seekers' reception system.

Decree no. 113/2018 (Section 1) repealed the status of humanitarian protection, replacing it with alternative forms of protection intended to cover fewer cases and to guarantee lower standards of protection. This change is symbolic from a two-fold perspective: it concretises the rhetoric of an instrumental and excessively "bleeding-heart/liberal" determination of international protection, which is allegedly caused by an alliance between migrants/the "Others" and judges/the "elite", who support a broad implementation of the concept of "humanitarian reasons" contrary to the letter of the law; and it demonstrates how legislative reforms based on populist rhetoric can produce a striking contraction of the scope of application of constitutional guarantees, as the possibility of granting a status for humanitarian reasons guarantees the full and complete enactment of the constitutional right to asylum (Article 10, third paragraph, of the Constitution; Benvenuti 2018).

Legislative enactment of populist rhetoric materialised also in the field of asylum seekers' reception. In this case, the symbolic role of the reform is even more patent: the exclusion of asylum seekers from the ordinary reception system, now reserved only for holders of international protection and for unaccompanied minors, has had the immediate effect of excluding them from involvement in reception projects aimed at their social integration; thus, the most vulnerable categories of migrants – asylum seekers – are actually deprived of a comprehensive linguistic, psychological and social support. In this way, reception is not formally denied to this category of people, but they are provided with a purely emergency-focused and reduced version: they will be allocated to extraordinary reception centres, where only primary and basic assistance is ensured (Article 10, Legislative Decree 142/2015). The result is likely to be paradoxical, since the inevitable outcome will be to further increase the percentage of people "hosted" in extraordinary reception facilities, which are precisely those in which distortions and inefficiencies – or even actual illegalities – are more frequent. Additionally, the indirect result will be to reduce ordinary reception, founded on the principle of rebuilding individual autonomy and subsequently integrating the migrant through pre-authorised and assessed *ad hoc* projects implemented at the local level, to a merely symbolic function. In this case, the symbolic function of the law becomes particularly dominant, unless the real purpose was to hinder the stay and social inclusion of those who – as asylum seekers – have the right to stay and to enjoy adequate reception conditions (see European Court of Human Rights, Khlaifia and Others v. Italy, GC, 15 December 2016).

MIGRATION POLICIES AND CONSTITUTIONAL PLURALISM: HOW SUSTAINABLE ARE POPULIST STRATEGIES?

Given the complexity that characterises the most recent seasons of migration policies in Italy, it is now necessary to return to the premises from which we started: Is it possible to trace populist policies back to a sustainable implementation of constitutional principles? In this light, it must be assumed that – avoiding any Manichaean setting (Martinico 2019: 73) – a populist interpretation can be also considered the expression of the pluralist nature of the constitution, within the limits of due respect for its essential core. In order to assess the concrete scope of this compatibility, the case-law of the Italian Constitutional Court has been chosen as benchmark: What is the reaction to laws which are "carriers" of populist policies?

From this point of view, the Constitutional Court has not ruled on the merits of the aforementioned decrees. In broader terms, it is possible to identify two tendencies within constitutional case-law, which refer respectively to issues related to entry and stay and to the conditions for the enjoyment of social rights of foreigners.

With regard to the first issue (entry conditions, expulsion, status determination), the discretionary power of legislature reaches its highest density as it is connected to the need to protect essential public interests such as border control, security and public order. With regard to legislative choices on entry and status determination of migrants, the Constitutional Court usually implements the paradigm of "citizenship", according to which public interests prevail on the protection of individual freedoms; accordingly, the legislature enjoys a wide margin of appreciation in the selection of public interests which are likely to determine a limitation of non-citizens' freedoms (Savino 2017). Consequently, the Constitutional Court's scrutiny is weak: political choices will be illegitimate only when manifestly unreasonable or arbitrary. This approach leads the Court to frequently take refuge in procedural decisions, thus avoiding ruling on the merits of political choices by identifying grounds of inadmissibility due to a lack of legitimacy to sue (Salvini Decree, Judgment no. 194/2019; Libya Memorandum, Order no. 163/2108) or of relevance of the question referred (case related to the "deferred refoulement", Judgment no. 275/2017). In some cases, when the Constitutional Court perceives that the democratic-representative circuit of sovereignty has produced a legislative framework that stretches excessively – even without breaching it – the balance between opposing constitutional interests, it may ask the legislature to intervene in order to trace the tension produced back to physiology.

An opposite paradigm – based on "territoriality" – is adopted for foreigners' access to social rights. In this context, legislative choices limiting the enjoyment of these rights are assessed in the light of a plurality of parameters (residence in the territory, concrete needs, nature of the social provision), which considerably compress the political discretionary space (Savino 2017: 60). Therefore, the scrutiny will be strict and will usually quash laws that impose unreasonable conditions (such as an excessively extended number of years of residency in the territory) which directly or indirectly discriminate against foreign citizens.

In conclusion, the implementation of the "citizenship" paradigm leads the Court to reiterate, more or less consciously, the traditional statist paradigm of tradition, through which a very broad margin of choice is granted to the majority of the citizens-insiders; regrettably, it occurs precisely when the risk of a limitation of migrants' rights becomes higher, that is the determination of the conditions for the entry and stay of migrants (Savino 2017: 68). On the contrary, the adoption of the "territoriality" paradigm allows the Constitutional Court to define in a clear-cut way the boundary that limits laws that express the implicit purpose of excluding foreigners – even those legitimately resident in the territory – from welfare benefits. Therefore, the Court identifies the limits between policies which are somehow linked to the pluralistic nature of constitutionalism, albeit with the indirect effect of excluding specific groups of people in need of assistance, on the one hand; and clearly-defined populist strategies, which produce in 'flag laws', which are manifestly illegitimate from the very beginning but correspond to a logic of political rhetoric and propaganda, on the other hand (Corsi 2019: 1184). Thus, the attitude of Constitutional Court seems to be dualistic: it applies a severe self-restraint when the need to protect public interests, such as public security and order or border control, is at stake; on the contrary, it becomes activist in those cases in which the need to protect such public interests is replaced by the need to effectively guarantee migrants' fundamental rights (right to health, right to education, right to social assistance, maternal rights).

ALL POPULISM, NO POPULISM? POPULISM AS A CONSTITUTIONAL ANTIGEN

We started this analysis by supporting the idea that "pure" populism is inherently incompatible with the essentials of constitutionalism. We referred to Berlin's distinction between "true" and "false" populism, where the latter is defined as «simply the mobilization of certain popular sentiments – say hostility to capitalism or to foreigners or Jews, or hatred of economic organization or of the market society, or of anything you like – for undemocratic ends» (Berlin 1968: 12-13, quoted by Halmai 2019). Additionally, we highlighted the "irresistible" attraction between some of the basics of

populism (the unsurmountable clash between "Us" and the "Others", an exclusive approach against the expressions of social pluralism) and those of current migratory policies (emergency and securitization). We then detected three degrees of possible attraction between populism and migration. These were identified in cultural rhetoric, political narrative and legal action, intended as different contexts where the connection between populist strategies and migratory management can flourish. Coherently with a non-Manichaean attitude towards the populism-constitutionalism relationship, we suggested that laws and policies built on populist rhetoric could also be the expression of constitutional pluralism: in this way, we shifted the paradigm from an irreducible ideological incompatibility towards a possible constitutional sustainability of "populist-based" laws. In the second part of the paper, we applied this scheme to the Italian social, political and legal context. We identified two seasons both of migrants' arrivals and coalitional governments: on the one hand, we experienced normalisation and then reduction in flows, which however continue to be tackled essentially with emergency measures; on the other hand, the two types of coalition governments in power are the expression respectively of the idea of the "people" (yellow-green" coalition) and of the "elite" ("*grandi intese*" coalition) channelled by populist semantics. We then tried to understand whether a line of continuity was detectable between the strategies adopted during the current season of migration management: on the one hand, we stressed a cultural and political discontinuity, due to an undisputable shift of ideological and rhetorical matrices; on the other hand, we observed a potential continuity when assessing those legislative measures concretely adopted. In the latter case, we identified an escalation in the implementation of a securitarian and exclusionist strategy which, linked to the paradigm shift that occurred at cultural and political level, led to legislative and administrative measures barely compatible with the principle of legality (measures enacted in a lack of formal legal ground, as in the case of the closure of ports) and the rule of law (the limitation of the concrete scope of application of constitutional rights, such as in the case of the abrogation of protection for humanitarian reasons). In very synthetic terms, populist strategies have benefited from – or have exploited – the presence of a long-lasting normative approach to migration essentially based on securitisation of policies and crimmigration of migrants. Therefore, in order to understand the concrete impact of populist strategies on the constitutional infrastructure, it is necessary to go beyond the surface of the populist rhetoric and assess whether – and to what extent– the latter can be traced back to the constitutional discourse.

Thus, if a populist shift occurred in Italy, it was *contingent* and not structural.

If we agree with this reconstruction, then the populist season experienced in Italy can be considered an *antigen*, rather than a parasite, within the constitutional system, able to activate antibodies which are traditionally linked to the core of constitutionalism: the central role of counter-majoritarian bodies; the separation of powers; the limitation of popular sovereignty, which must find implementation within the limits and through the forms set forth by the Constitution; a truly pluralistic social and cultural debate. Otherwise, it is destined to resurface, as a karstic phenomenon, especially if European democracies refuse to realise that the systematic adoption of policies which put excessive pressure on constitutional principles involved in the context of migration, may eventually lead to structural and not merely contingent populist drifts.

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