10 The populist reforms in Italy and the instrument of the constitutionally conforming interpretation

*Gianmario Demuro and Riccardo Montaldo**

10.1 Could the Italian context be defined as populist?

A first question to be analysed for the purposes of this chapter is whether the Italian polity can be defined as effectively populist, based on the definition of populism elaborated by the most relevant literature on the subject and by the conceptualisation of this book.[1]

In this regard, a first element emerging from this analysis is the difficulty of identifying a 'typical' populism, as an ideology or political current, since populisms are in fact characterised by their approach to politics and their communicative style, which in particular exploits modern communication technologies.[2] In fact, each populist party and leader tends to present, in its own communications, a Manichean division of society into homogeneous groups,[3] dividing the 'pure' people from the corrupt elites, particularly the parliamentary ones, emphasising the need for a leader. A leader who immediately interprets the people's will and protects it from all that is different from the people themselves, be it intermediary bodies and entities, international organisations such as the European Union, or the financial market, but also and above from all the individuals that stand out from the majority: immigrants, Muslims, Jews, Roma, and so on.[4]

There is indeed a clear correlation between populism, xenophobia and racism: populisms overestimate, in their programs and communications, the theme of migration and foreigners, indicating them in particular as risk factors for the cultural values of the 'people'.[5]

A further element common to all populisms is also represented by the use of various media to their advantage, and in particular new media, which allow

* Although the present contribution is the result of a joint work and reflection, paragraphs 10.1 and 10.4 should be ascribed to Gianmario Demuro, while the paragraphs 10.2 and 10.3 should be ascribed to Riccardo Montaldo.

1 See Zoltán Szente, Chapter 1 in this volume.

2 Ilvo Diamanti and Marc Lazar, *Popolocrazia. La metamorfosi delle nostre democrazie* (Laterza 2018), 6–7.

3 Moreno Mancosu, 'Populism, Emotionalized Blame Attribution and Selective Exposure in Social Media. A Comparative Analysis of Italy and UK' (2018) 1 Comunicazione politica, 76; Yves Mény and Yves Surel, *Populismo e democrazia* (Il Mulino 2000), 66.

4 Carlo Fusaro, 'L'ascesa del populismo in Europa. Italia, la terra promessa' (2019) forumcostituzionale.it, 26 August 2019, 2.

5 Mény and Surel (n 3) 192–193.

populist leaders to communicate directly with the electorate and exploit new technologies to obtain the greatest consensus possible,[6] exploiting a communication style based on simple messages and characterised by a strong emotional charge.[7]

Finally, all populisms present the common trait, derived from the aversion to the establishment, of the promotion of mechanisms of direct democracy, which in particular exploit new technologies, as the only solution to effectively give a voice to the people.[8]

Having defined the common traits of populism, it can be said that Italy is not only a context characterised by the presence of several political movements that could be defined as populist, but that it has also been at the forefront of the development of contemporary populism[9] and has therefore constituted a context in which populism has been able to develop and prevail quite easily,[10] and this even before the period covered by this study, relating to the period in which the majority was composed of the two populist parties of *Movimento5Stelle* and *Lega*. Italy indeed witnessed the unprecedented success in the 2013 parliamentary elections of the populist party *Movimento5Stelle* (which received 25% of the votes), a social movement created around a network and revolving around an online platform that is opaque and controlled by a private individual. Moreover, the 2018 elections resulted in the union between the *Movimento* and the right-wing populism of the *Lega*, with which a parliamentary majority was formed until August 2019.[11]

The roots of current Italian populism can be found in the crisis of the parties of the early 1990s,[12] in particular thanks to the birth of new parties such as Silvio Berlusconi's *Forza Italia*, a party that already embodied all the typical aspects of current populisms, starting from the use of the media, which replaced the parties themselves as a tool for mobilising public opinion.[13] However, as observed by Fusaro,[14] neither *Forza Italia* nor leaders of parties born in the same period (in particular Antonio di Pietro and Umberto Bossi) can be defined as fully populist,[15] since they accepted dialogue with opposing political forces and recognised the role of the European Union

6 Fusaro (n 4) 3–4; Mancosu (n 3) 75.
7 Diamanti and Lazar (n 2) 24; Mancosu (n 3), 76.
8 Yves Mény, *Popolo ma non troppo. Il malinteso democratico* (Il Mulino 2019), 90.
9 Fusaro (n 4) 6.
10 Diamanti and Lazar (n 2) 11–12.
11 Fusaro (n 4) 7.
12 As noted by Mény (n 8) 158–159, the early 1990s showed an increase in populism in every context, probably due to the collapse of the Soviet bloc. Fusaro (n 4) 7. As a phenomenon, the increase of populism was, however, not fully understood and was minimised as a particular kind of right-wing extremism, and therefore there was a failure to analyse it correctly and to deal with it.
13 Mény and Surel (n 3) 111.
14 Fusaro (n 4) 7–8.
15 Diamanti and Lazar (n 2) 11–12 argue instead that *Forza Italia*, *Lega Nord* and *Italia dei Valori* represent examples of real populism, in particular defining Di Pietro's party as a 'justicialist populism'.

and the importance of international obligations. Yet, according to the same author,[16] it was precisely the use of populist forms of communication on the part of those representing the institutions that constituted a key element in the development in the following years – and in particular after the economic crisis of 2008[17] – of the modern parties, which are openly and proudly populist. It might, in fact, be remembered that the current President of the Italian Council of Ministers, i.e. Prime Minister Giuseppe Conte, has clearly stated on more than one occasion that he is proudly populist.[18]

The *Lega* and the *Movimento5Stelle* undoubtedly stand out among the Italian populist parties, being characterised by the typical elements of traditional populism, in particular the aversion to the parliamentary and European elites and, in the specific case of the *Lega*, to the migratory phenomenon as a problem of security and as an injury to the integrity of the 'Italian people', which must be protected from the 'other' represented by migrants;[19] it is also the main theme, as will be seen, of the *decreti sicurezza*. To these 'traditional' elements is then added, in the case of both parties, the constant use of the web as a direct communication tool, so much so that some authors talk of '*webpopulism*'.[20] For these reasons, it is therefore possible to affirm, as previously noted, that the Italian context is without doubt characterised by the strong presence of populism(s), according to the elements defining such phenomena.[21]

Nevertheless, even though this is an undeniable trend, it is also true that Italy cannot be defined as a 'populist regime', since there has never been a political movement or party, however openly and self-declaredly populist it might be, which has been able to move outside constitutional boundaries and to affect their foundation.[22] In this regard, it is particularly interesting to see how this capacity for resistance of the Italian constitutional order has been particularly put to the test by the parliamentary majority composed by the *Lega* and *Movimento5Stelle*, through two proposals for constitutional reform, both concerning the strengthening of direct democracy processes at the expense of the parliamentary one, and both markedly populist, with the

16 Fusaro (n 4) 8.

17 A typical reason for the birth of populist movements, as noted by Diamanti and Lazar (n 2) 31 ff. and Mény and Surel (n 3) 111.

18 Mény (n 8) 182.

19 Diamanti and Lazar (n 2) 17.

20 Ibid. 119.

21 Ibid.

22 An example that may be recalled is Judgment No. 262 of 2009, where the *Corte Costituzionale* declared the unconstitutionality of Law No. 124 of 2008, introduced by the will of the then President of the Council, Silvio Berlusconi, in order to grant to the four highest political offices (i.e. President of the Republic, President of the Council, President of the Senate and President of the Deputies' Chamber) a substantial immunity from criminal proceedings, through their suspension for the duration of the mandate. This was initiated with the aim, in theory, of protecting these offices from damage to the exercise of their functions deriving from a long judicial procedure, which in any case has no constitutional basis (Judgment No. 262, §§ 7.33 and 8) and which had in fact the aim of suspending various proceedings, which had just started, against Silvio Berlusconi himself.

intention of subverting the democratic representative system in favour of a populist model of the state.

The first reform, which has been definitively approved by the Italian Parliament,[23] concerns the reduction in the number of the members of Parliament, bringing it down from 945 (630 deputies and 315 senators) to 600 (400 deputies and 200 senators). As argued by scholars such as Algostino,[24] the reform should be considered markedly populist since, although justified by the (typically populist) argument that it reduces the numbers of the parliamentary elite and the excessive costs of politics, it actually undermines the spaces of representation and the opportunities for dialogue between the majority and the minority, which represent the true fulcrum of a pluralist democracy. As a result of this serious wound to minority political forces, the reform would therefore lead to an authoritarian state, where only the majority is recognised.

As regards the second reform proposal, which is still under discussion and must be read together with the previous one for its effects on the representative system,[25] it aims to strengthen the instrument of the popular law initiative, envisaged from Article 71, second paragraph, of the Italian Constitution, stating that '[t]he people may initiate legislation by proposing a bill drawn up in sections and signed by at least fifty-thousand voters'.

The reform proposal aims to strengthen this instrument by introducing a 'deliberative' or 'propositional' referendum, which would be called for if a law initiative is not approved by the Parliament within 18 months, or if it is approved with substantial changes. As with the previous reform, this also hides, behind the intent to strengthen direct democracy and therefore the will of the people, a clearly populist and authoritarian intent. This is mainly due to the role that the reform attributes to the committee of the promoters of the law initiative: they can indeed renounce the referendum, acting as the only negotiators with the Parliament,[26] thus becoming subjects within the political debate,[27] even though they have no representative function as regards the electorate nor any political responsibility towards it.[28] The reform would therefore

23 With a very wide approval, coming from 553 members out of the 600 total voters of the Chamber of Deputies, and moreover following the change in the majority of the Government, confirming that now the communication tools and populist propaganda are well established, even in parties that are not considered populist.

24 Alessandra Algostino, Perché ridurre il numero dei parlamentari è contro la democrazia (2019) forumcostituzionale.it, 30 September 2019, 8.

25 Enzo Cheli (2019), Intervento alla Tavola Rotonda AIC, 'Iniziativa legislativa e referendum, le proposte di revisione costituzionale', (2019) 1–2 Osservatorio Costituzionale, 181; Massimo Luciani, Intervento alla Tavola Rotonda AIC, 'Iniziativa legislative e referendum, le proposte di revisione costituzionale' (2019) 1–2 Osservatorio Costituzionale, 200.

26 Luciani (n 26) 206.

27 Giulio M. Salerno, Intervento alla Tavola Rotonda AIC, 'Iniziativa legislative e referendum, le proposte di revisione costituzionale' (2019) 1–2 Osservatorio Costituzionale 226.

28 Michele Belletti, 'I rischi di sbilanciamento e di contrapposizione tra democrazia partecipativa e democrazia rappresentativa nel ddl AS n. 1089, di riforma costituzionale, recante Disposizioni in materia di iniziativa legislativa popolare e di referendum' (2019) federalismi.it, 22 May 2019 7ff.

essentially introduce a sort of extra-parliamentary elite,[29] capable of distorting the function of the referendum, complementary to the representative dynamics, attributing to it instead a power of opposition and subversion of the parliamentary will.[30] This therefore transforms the promoting committee into an alternative legislator,[31] which could well exploit the new technologies, exactly as populist movements do, to exploit and further accentuate the plebiscite nature that every call for a referendum naturally possesses.[32]

Like the previous constitutional reform, therefore, the one relating to the strengthening of the popular law initiative also shows a clear subversive tendency of the current representative and parliamentary order, thus further confirming that the Italian context is characterised by the presence of strong populist movements and political parties.

A very evident tendency, which is further demonstrated in the normative acts introduced by the majority *Movimento5Stelle-Lega*, in particular, is the aforementioned '*decreti sicurezza*'.

10.2 The so-called '*decreti sicurezza*' and the containment of illegal migrants

Proceeding to the analysis of the two decrees, these are the Law Decree no. 113 of 2018, or '*Security and immigration decree*', and the Decree no. 53 of 2019, containing '*Urgent provisions regarding public order and security*', also known as '*Security Decree* bis'.

The importance of these provisions for the present analysis is justified by their markedly populist imprint, which allows us, as will be seen in the rest of this contribution, to analyse their impact on the constitutional order and its ability to react to them, in particular by means of the common judges and the Constitutional Court.

29 Pasquale Pasquino, 'Popolo o élite? Il referendum propositivo e la retorica della democrazia diretta' (2019) lacostituzione.info, 23 April 2019.

30 Ida Angela Nicotra, 'Referendum propositivo e democrazia rappresentativa: alla ricerca di una sintesi' (2019) federalismi.it, 22 May 2019, 8.

31 Pasquino (n 30).

32 Adele Anzon Demmig, 'L'iniziativa legislativa popolare "indiretta" (c.d. referendum propositivo) nel progetto di legge costituzionale in itinere' (2019) forumcostituzionale.it, 22 March 2019, 2–3; Antonino Spadaro, Su alcuni rischi, forse mortali, della democrazia costituzionale contemporanea. Prime considerazioni (2017) 1 Rivista AIC 9.

Moreover, there are further problems, which the reform proposal does not consider, in delegating the solution to a future implementation law. One of the most significant problems is the lack of regulation on the relationships that could emerge not only among several popular law proposals on the same subject, but also between the popular law proposals and those of parliamentary or governmental initiative, which could, in theory, remain ineffective (Ugo de Siervo, Intervento alla Tavola Rotonda AIC, 'Iniziativa legislativa e referendum, le proposte di revisione costituzionale' (2019) 1–2 Osservatorio Costituzionale 236–238). This creates the potential for the atrophy of parliamentary activity on the matters which are subjects of popular initiative(s), which on the contrary would have the certainty of leading to a legislative text, albeit with minimal modifications: a fast track, in essence, to which no other law proposal has access. Belletti (n 29) 6.

Indeed, as can be clearly seen from the title of the first decree, these provisions actually represent two markedly populist measures, in particular in terms of the xenophobic and racist character that distinguishes populist movements, especially if expressed by right- and extreme-right-wing parties. In fact, defining 'security and immigration' as goals of the decree, it clearly recalls the *topos* of the foreigner as the main cause of public safety problems in the country.[33]

A *topos*, a goal that is in clear contrast to the personalist principle expressed by the Italian Constitution in Article 2,[34] which, read together with the ample right of asylum recognised in Article 10, paragraph 3, and the opening to the international community in name of the values of peace and justice according to Article 11, would impose a very different treatment of the foreigner, who should be considered as a person, and who should be entitled – just like any citizen – to universal and intangible rights. The two latter provisions indeed state, respectively, that:

> A foreigner who is denied the effective exercise of the democratic liberties guaranteed by the Italian Constitution in his or her own country has the right of asylum in the territory of the Italian Republic, in accordance with the conditions established by law;

And that:

> Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes.
>
> Italy 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.
>
> Italy promotes and encourages international organisations having such ends.

Beyond the obvious doubts regarding the legitimacy of the use of the instrument of the emergency decree, unjustified both by the absence of the requirements of necessity and urgency and by the heterogeneity of the content,[35] both decrees in fact present numerous provisions that go against these principles, limiting the protection of rights not only to irregular immigrants, but also to asylum seekers.

33 Alessandra Algostino, 'Il decreto "sicurezza e immigrazione" (decreto legge n. 113 del 2018): estinzione del diritto di asilo, repressione del dissenso e diseguaglianza' (2018) 2 Costituzionalismo.it 173.

34 According to the personalist principle, expressed in Article 2 of the Italian Constitution, there is an ontological priority of the human being with respect to the State, and the latter has a constitutional obligation to grant the development, in every aspect, of the personality of each individual (Anna Maria Poggi, *Per un 'diverso' Stato sociale. La parabola del diritto all'istruzione nel nostro Paese* (Il Mulino 2019) 75ff. The text of Article 2 states, in its first paragraph, that 'The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed'.

35 Algostino (n 34) 168–170.

In particular, the first Law Decree substantially eliminated the residence permit for humanitarian reasons, limiting it to a few specific cases, while extending the hypothesis of a limitation of personal freedom to foreigners, both by prolonging the time of detention in the reception centres for foreigners awaiting forced repatriation, which could reach 180 days, and by providing that asylum seekers could be detained for identification purposes, for the same number of days: a treatment that is hardly compatible with the right to asylum recognised by the Constitution. The decree also shows a clear populist tendency in its provisions aimed at suppressing dissent and punishing social hardship, for example by tightening the penalties for road blockades and illegal occupation of buildings.

The 'safety bis' decree represents a reinforcement of the previous one, containing provisions for combating illegal immigration, and for strengthening the effectiveness of administrative action in support of security policies. Among these, in order to emphasise the populist and xenophobic nature of the provision, the one that stands out the most is the attribution to the Ministry of the Interior, as national authority for public security, of the power to limit or prohibit the entry, transit or docking of ships in territorial waters for reasons of order and public safety, with the provision of sanctions between ten and fifty thousand euros for the commanders of any ships that do not respect the prohibitions imposed. This is a provision which is clearly adopted in order to limit the intervention of the various NGOs operating in the Mediterranean dedicated to the rescue of migrants, and which also represents a clear consequence of the numerous interventions of the former Minister of the Interior, Matteo Salvini, aimed at preventing them from entering and docking on Italian territory.

10.3 The application of the constitutionally conforming interpretation

The two Security Decrees therefore undoubtedly constitute an example of a clearly populist-inspired measure, characterised in particular by a xenophobic and foreigner-hostile inspiration, and aimed at suppressing dissent and minorities' right to expression, which features various elements of doubtful legitimacy on the constitutional level.

Therefore, the discussions to reform and mitigate the scope of these measures, recently launched after the change in the Government majority, and which must be monitored in the future, must be undoubtedly deemed as positive. Pending such reforms, in order to proceed in the analysis outlined in the previous paragraph – that is, to understand whether or not these markedly populist provisions can stand up to the examination of the Italian constitutional order – it is necessary to question whether the common judges have sufficient tools to limit the negative effects of the two decrees, or whether instead recourse to the Constitutional Court is needed.

The answer to this question is positive, and it resides in the interpretative tool of the so-called '*constitutionally conforming interpretation*'[36] or '*adjust-*

36 Giusi Sorrenti, *L'interpretazione conforme a Costituzione* (Giuffrè 2006).

ing interpretation',[37] that is, the duty of all common judges to apply the provisions of the law even though these present some doubts regarding constitutional legitimacy, and overcoming such doubts by means, specifically, of an interpretation that allows a reading of it according to the Constitution. This mechanism, developed primarily by Italian constitutional jurisprudence in order to maintain the declaration of constitutional illegitimacy as a last resort, thus making it possible to 'save' the provision if it is possible to interpret it in accordance with the Constitution, subsequently developed as a real '*doctrine of conforming interpretation*', which directly concerns the common judge and his/her role as interpreter of the law.

It seems appropriate to briefly outline the development of the doctrine of conforming interpretation in the Italian constitutional context, which can be divided into three time phases.[38]

The first phase, between 1956 and the first half of the 1970s, saw the Italian Constitutional Court exclusively adopt the role of 'conforming interpreter' of the constitutional charter. This was done, on the one hand, in order to eliminate from the legal system or adapt to it the old legislation enacted prior to the Constitution and which conflicted with its provisions; and on the other hand, because the common judges had not yet developed sufficient constitutional sensitivity.

The second phase started in 1965, in the years in which another interpretative doctrine was itself affirmed, that is, the 'living law' doctrine, according to which the text of the provision should not represent the sole basis of the interpretation of the Court, but instead that the judges should also consider the way in which the provision is mainly interpreted.[39] The Court would therefore not have to declare a rule illegitimate if the prevailing interpretation is in accordance with the Constitution.[40]

37 Alessandro Pace, 'I limiti dell'interpretazione "adeguatrice"' (1963) Giurisprudenza Costituzionale.

38 For a more detailed analysis of the historical evolution of conforming interpretation in the Italian constitutional context, please refer to Giuseppe Laneve, 'L'interpretazione conforme a Costituzione: problemi e prospettive di un sistema diffuso di applicazione costituzionale all'interno di un sindacato (che resta) accentrato' (2011) federalismi.it, 7 September 2011, 14ff.

39 This process started, in particular, with Judgments No. 11 and 52 of 1965.

40 Although, as pointed out by Martinuzzi (Alessandro Martinuzzi, 'Il ritorno senz'armi su un vecchio campo di battaglia: nota alle sentt. nn. 1 e 3 del 2015 della Corte costituzionale' (2015) forumcostituzionale.it, 13 March 2015, 9), living law can, on the contrary, represent an obstacle to conforming interpretation, if the interpretation of living law proves to be contrary to the constitutional dictate; this is also the opinion of the Constitutional Court, as was well established in Judgment No. 350 of 1997, § 2. One critic of such evolution of conforming interpretation, Ruotolo (2011, 11), recalls the position of Pace (Alessandro Pace, 'Identità o differenza tra la questione di costituzionalità della norma e la questione di costituzionalità dell'interpretazione?' (1965) Giurisprudenza Costituzionale 1656), who observed instead that the Constitutional Court should always declare the illegitimacy of a norm, even if only one of the possible interpretations is unconstitutional. Therefore, in the words of Pace, 'unless a binding interpretation, in a sense in accordance with the Constitution, can be given, the acts must, in actual doubt as to their legitimacy, be declared unconstitutional'; Pace (n 38) 1073.

The third and final phase started in the second half of the 1990s and is distinguished by a clear favouring of the conforming interpretation made by the common judges, as can be clearly seen in a 2000 decision where the Court declared that all judges should consider,

> as the pre-eminent hermeneutic canon, the principle of constitutional supremacy. This requires the interpreter to opt, among as many abstract solutions that are possible, for the one that makes the provision in accordance with the Constitution.[41]

Despite this, as Napoli observed,[42] the presence of an interpretation that may lead to a result that does not comply with the constitutional provisions always allows the judge to raise a question of legitimacy before the Constitutional Court.

The efficacy of this interpretative tool, used in order to limit the scope of the Security Decrees, has emerged in particular in some recent rulings of the Courts of Bologna, Genova and Firenze, all of which relate to the interpretation of Article 13 of the first Security Decree, regarding enrolment in the population register. With regards to this, Article 13 of the Decree in fact provides that a residence permit does not constitute a title of registration. This has led several public offices to deny the requests for enrolment presented by several foreign applicants, including an asylum seeker who appealed to the aforementioned Courts to challenge these decisions.

In particular, the Court of Bologna, acting similarly to what was done in a previous judgment of the Court of Firenze (RG 361/2019, 18 March 2019), and in a subsequent one by the Court of Genova (RG 2365/2019, 22 May 2019), imposed, in its decision of 22 May 2019, that the asylum seeker's application for registration should be accepted, based on a conforming interpretation of the aforementioned provision, representing the first case of this kind as regards the Security Decree. In fact, as justified in the sentence, such a provision does not entail a general prohibition on foreigners enrolling on the register, which would represent a clear violation of the equality and non-discrimination principle and would therefore impose a declaration of unconstitutionality on the part of the Constitutional Court. On the contrary, such a violation was not found in the contested provision by the aforementioned courts, who could therefore interpret them in accordance with the Constitution, understanding them in the sense that the residence permit must not (and cannot) be considered as the sole requirement for entry in the population registry, since, as also evidenced by the courts, this has never been the case. Enrolment in the registry depends on several factors, which are assessed by the public offices: these do include the residence permit in the case of foreign applicants, which

41 Judgment No. 113 of 2000, § 3.

42 Cristina Napoli, 'A proposito della lingua italiana nelle Università (sentenza n. 42 del 2017) l'opportunità dell'intervento della Corte attenua l'onere di interpretazione conforme?' (2017) 2 Quaderni Costituzionali 367, commenting on Judgment No. 42 of 2017.

is therefore subject to evaluation, but does not represent, in any case, a determining factor, as underlined by the Court of Bologna itself.

The provision can be interpreted in this sense in the light of the context in which it is placed, above all the constitutional one, in consideration above all of the protection of fundamental rights, for which there can be no discrimination between citizens and foreigners. The enrolment on the population registers, in fact, despite being the result of a mere anagraphic identification, is in particular a necessary requirement for access to various rights: school enrolment, signing of an employment contract, determination of revenue values for access to social benefits, etc.

An interesting question, which must be examined, is whether the judges have correctly used the instrument of the conforming interpretation, or if instead it was necessary to appeal to the Constitutional Court.

The first limitation of the conforming interpretation is naturally represented by the wording of the provision: the judge cannot transgress it, move in a substantial way to disapply it or find a meaning that is not there. This does not mean that the judge must stop at the literal criterion, since systematic (and constitutional) interpretation is possible, and indeed necessary: from this perspective, a conforming interpretation is almost a kind of logical-systematic interpretation. The judge should raise an issue of constitutional legitimacy only when the provision has an unambiguous wording, from which an interpretation conforming to the Constitution cannot be derived. In this respect – which also pertains to the duty of conforming interpretation as a requirement of admissibility for raising a question of constitutional legitimacy – it is appropriate to consider how constitutional jurisprudence has evolved with respect to Judgment No. 356 of 1996. In this judgment, the Constitutional Court indeed stated that the provision is illegitimate only when it is impossible to give a constitutional interpretation, while more recent decisions[43] consider the duty sufficiently respected if a conforming interpretation is difficult or improbable. Considering this, it seems that the decision of the Court of Bologna has complied with this criterion, as the provision of the Security Decree may not be interpreted as unequivocal, so as not to allow a systematic and conforming interpretation.

A second limitation, particularly problematic, is then represented by the so-called 'living law'. That is, when facing an unconstitutional interpretation of a provision, which has been consolidated within the jurisprudence even if the provision allows a conforming interpretation, the judge is free to follow the latter with, however, a high risk that the decision will be annulled at the subsequent level of judgment. The question of 'living law' presents problems even in a case in which the judge deems it necessary to appeal to the Constitutional Court, which would face a difficult alternative: declare the illegitimacy of the provision, ignoring the possible conforming interpretation;

43 Such as Judgment No. 42 of 2017.

or reject the appeal with an interpretative sentence, which would, however, conflict with the consolidated interpretation.[44]

Even in this respect, however, the decision of the Court of Bologna, as well as the other decisions mentioned, does not present such issues, as no unconstitutional case law has yet been consolidated, and indeed, given the similar rulings of the Courts of Firenze and Genova, an opposite tendency seems to be affirming itself.

This seems, in fact, to be confirmed, as recalled by Chinaglia,[45] by the numerous court orders that followed the ones issued by the Courts of Bologna, Genova and Firenze.[46] The same author[47] nevertheless recalls the presence, of some court orders in the opposite direction as well,[48] with which a question of constitutional legitimacy was raised before the Constitutional Court, therefore expressing the belief, contrary to the currently prevailing interpretation, that the conforming interpretation does not represent a sufficient instrument for the protection of human rights, guaranteed by the Constitution and violated by the Law Decree, in particular on the basis of the observation, common to all court orders, that the intent of the legislator cannot be ignored by the interpreter. Therefore, given the aforementioned objectives of the Decree, which are openly populist and in contrast with the constitutional dictate, the only possible interpretation would be to consider the provisions of the decree as illegitimate, thus justifying the appeal to the Constitutional Court.[49]

It will therefore be of extreme interest, in the near future, to observe whether the Constitutional Court will follow the orientation of the conforming interpretation, or if it instead will deem a more incisive intervention more appropriate, declaring the contested provisions of the Security Decree unconstitutional.

44 As well emphasised by the Constitutional Court in the aforementioned Judgment No. 350 del 1997, § 2, if a provision has assumed in the 'living law' such an established unconstitutional interpretation, it is necessary that it is submitted to a judgment of constitutional legitimacy, given that the provision 'lives in such a rooted way in the legal order that it is hard to assume a change in the system without the intervention of the legislator or [of the] Court'. In this regard, please also refer to Martinuzzi (n 41) 9, and Ruotolo (M. Ruotolo, 'Quando il giudice deve "fare da sé"', in questionegiustizia.it, 22 ottobre 2018).

45 Francesca Chinaglia, 'Aspettando la Corte Costituzionale: gli orientamenti della giurisprudenza di merito sul divieto di iscrizione anagrafica del richiedente asilo' (2020) forumcostituzionale.it, 5 March 2020, 9.

46 In particular, the Author recalls the Court orders from: Prato (RG 1183/2019, 28 May 2019), Lecce (RG 5330/2019, 4 July 2019), Cagliari (RG 4521/2019,31 July 2019), Parma (RG 2379/2019, 2 August 2019), Catania (RG 12686/2019, 1 November 2019), Rome (RG 62244/2019, 25 November 2019), Bergamo (RG 8772/2019, 14 January 2020).

47 Chinaglia (n 46) 9.

48 Referring in particular to the court orders of the Courts of Ancona (RG 3081/2019, 29 July 2019), Milano (RG 14134/2019, 1 August 2019) and Salerno (RG 145, 153, 158 and 159/2019, 9 August 2019).

49 It is interesting to note that, despite considering the instrument of conforming interpretation insufficient to solve the issues deriving from the Security Decree, none of the court orders includes indications on interpretation methods that could instead represent a valid solution.

10.4 The (missing) intervention of the Constitutional Court on the Security Decrees

Before coming to the conclusions of this contribution, it should be noted that not only the common judges but also the Constitutional Court had the opportunity to deal with the legitimacy of the Security Decrees.

In fact, following the introduction of the first decree, eight Italian regions filed appeals against it to the Constitutional Court, complaining of an injury to their competences, procedural defects in the approval of the decree and above all – from a point of view which is particularly relevant for the topic discussed in this contribution, regarding the protection of individual rights – also in regard to the fulfilment of international obligations.[50] This relevance emerges even more when considering the fact that, among the objects of the appeal pertaining to individual rights, there was also the issue, examined by the Courts of Bologna, Genova and Firenze, of the enrolment of foreigners in the population registries. The applicant regions, in particular, stressed that the provision was a violation of the duty of protection of foreigners imposed in the aforementioned Article 10 of the Constitution, as well as the principle of equality, expressed by Article 3,[51] as the contested provision created an unreasonable discrimination between citizens and foreigners, who were also regularly resident in the territory thanks to their residence permit.[52]

This last profile, that of the protection of human rights, falls in particular within the doctrine of '*ridondanza*' (redundancy), that is to say the recourse by the Regions to parameters other than those of competence, in the event that a state regulation, in this case that of the Security Decree, still leads to an injury in the regional spheres of competence. That of redundancy, or 'indirect injury of competence',[53] represents a doctrine that has emerged since 1960,[54] as an exception to the general principle for constitutional appeals brought by Regions, expressed by the second paragraph of Article 127 of the Italian Constitution, which establishes that

> a Region may question the constitutional legitimacy of a State or regional law or measure having the force of law before the Constitutional Court

50 Diletta Tega, 'I ricorsi regionali contro il decreto sicurezza: la ridondanza dalla difesa delle competenze allo scontro sui diritti' (2019) 2 Quaderni Costituzionali 413.

51 Which indeed states that 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions' and, at § 2, that 'It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'.

52 Tega (n 51) 414.

53 Carlo Padula, 'Aggiornamenti in tema di ridondanza' (2019) 3 Le Regioni 762.

54 Starting from Judgment No. 32, where the Constitutional Court affirmed for the first time that Regions may lament the illegitimacy of provisions not related to their competence if these competences are still harmed by such provisions. See Padula (n 54) 739.

> within sixty days from its publication, when it deems that said law or measure infringes upon its competence.

Thus, through the redundancy doctrine, a literal interpretation of this constitutional provision is avoided, allowing a wider range to regional appeals.

Over the years, however, there has been considerable uncertainty regarding the conditions of admissibility of regional appeals motivated by such a doctrine,[55] which in recent times has pushed the Constitutional Court to give it a better understanding,[56] in particular by defining the limits of appeals motivated by redundancy, defining a framework favourable for regional appeals.[57]

And it is in this context of reorganisation that Judgment No. 194 of 2019 fits in, with which the Constitutional Court has ruled on the appeals of the Regions against the first Security Decree, declaring them, however, inadmissible. In fact, the Court denied the applicability of the redundancy, first of all in consideration of the generality of the appeals, and because of their failure to indicate the regional competences that were assumed to have been violated,[58] and probably also in response to the reconstruction carried out in the appeal of the Piemonte Region,[59] according to which the regional appeal should instead always be admissible, for any type of defect of constitutionality, regardless of considerations on competences.[60]

Beyond the specific arguments on the appropriateness of using redundancy as a parameter for the regional appeal, however, the Court has failed to pronounce itself, even incidentally, on the matters covered by the appeal, without offering any indication in this regard.[61] In particular, as regards the provision relating to the enrolment of foreigners in public registries, the Court affirmed that it could not pronounce itself, in the absence of a consolidated application practice,[62] reserving the evaluation of the appealed provision to any future appeal. This motivation did not, however, convince Rauti,[63] who claimed that the mere hypothesis of the violation should have prompted the Court to rule on the matter, providing an interpretation of the provision that could resolve its doubts regarding constitutionality, and guiding the future decisions of the common judges.

55 Emanuele Rossi, 'Il fine meritevole giustifica l'utilizzo elastico dei mezzi: la Corte e la "ridondanza"' (2012) 1 Giurisprudenza Costituzionale, 300.
56 Starting from Judgment No. 5 of 2018.
57 Padula (n 54) 759.
58 § 5.4 of the Judgment.
59 § 30 of the appeal of the Piemonte Region, available at https://www.regione.piemonte.it.
60 Padula (n 54) 761.
61 Alessio Rauti, 'Il decreto sicurezza di fronte alla Consulta. L'importanza (e le incertezze) della sentenza n. 194 del 2019' (2020) forumcostituzionale.it, 29 February 2020, 13.
62 § 7.8 of the Judgment.
63 Rauti (n 62) 21, 23.

10.5 Conclusions

In conclusion, in the light of the analysis carried out in this chapter, it clearly emerges that Italy represents a context characterised by a strong presence of populist political forces, which can be also defined as a populist system. Such populism is also clearly affirmed and established in the normative production and in the recent constitutional reform proposals that put the very parliamentary representative system at risk.

However, responding to the central question of this work – that is, whether the Italian context presents sufficient jurisprudential tools to counter these phenomena, or instead it is necessary to introduce new ones – it can be affirmed with certainty that the instrument of constitutionally compliant interpretation constitutes an effective and sufficient means for each judge. This instrument indeed allows the judiciary, as seen in the recent cases presented before the Courts of Bologna, Firenze and Genova, to directly apply constitutional principles and values, thus exercising a kind of judicial review power to contest a clearly populist provision[64] which has discriminatory and racist intent, limiting its meaning within the boundaries imposed by the constitutionally guaranteed rights and freedoms.

These conclusions are further strengthened in consideration of Judgment No. 194 of the Italian Constitutional Court, which, as seen in the last paragraph of this contribution, did not take this important opportunity to take a concrete position on the populist measures included in the first Security Decree.

In other words, it appears that the Constitution contains in itself and in its fundamental principles all the elements necessary to counter the populist phenomenon through the decision of common judges, and the instrument of constitutionally conforming interpretation is the means available to each judge to give these principles concrete implementation.

64 On the topic of judicial review, please refer to Gianmario Demuro, *Costituzionalismo europeo e tutela multilivello dei diritti. Lezioni* (Giappichelli 2009).