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"We, the People" entitlement within constitutional change

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SUMMARY

1. Introduction

In 1890, John W. Burgess stated that a "complete constitution" cannot get enough without the amending clause and the power that it describes and regulates, that is the amending power (Burgess, (1890), p. 137). One hundred years later, Akhil R. Amar's description of the unsurpassed importance of the rules that govern its amendment and its entrenchment against it (Amar (1994), p. 461) revives Burgess' reasoning. Recently, Yaniv Roznai opens his remarkable book in the same spirit, explaining the meaning and importance of constitutional amendments arguing that "formal constitutional amendments not only remain an essential means of constitutional change but also […] raise imperative questions for constitutional theory" (Roznai (2017a), p. 2).

There is a tight legal link between constitutionalism and constitutional amendment power. The amendment power is an "extraordinary [mutable] authority"[1] in the hands of the people and the amendment process is a mechanism to share (Tribe and Landry (1993), p. 631) and delegate (Roznai (2017b), p. 5) part of their authority to future generations. The theory of constitutional amendments, especially that focusing on formal amendment rules, has emerged as one of the most central issues for modern constitutional theory. Constitutional change occurs in two ways, constitutionally or unconstitutionally, depending on the conceivability of constitutional amendments to modify and enrich the existing constitutional content and/or the established supreme principles. If a *constitutional* constitutional amendment should be able to stand alone without compromising the spirit of the constitution, an *unconstitutional* constitutional amendment compromises those principles and values on which a democratic constitutional order is founded.

In recent years, scholars have produced literature on constitutional amendments, in particular on the analysis of the unamendability phenomenon and its relationship with democracy, abusive and populist constitutionalism. The study of constitutional design is of interest, in large part, because a constitution can be amended and such processes make room for the fundamental questions about legitimacy of the constitutional order, the holder and the locus of sovereignty, especially in those legal orders where a popular legitimated process of altering the constitution is entrenched. Indeed, in some legal orders "We, the People" are called to initiate and/or approve any constitutional change, but, as demonstrated, democratic constitutions undermine popular participation in such processes.

1 There are many interpretations about the nature and the function of this "extraordinary authority" (Cf. Schmitt (2008), p. 150). Scholars consider it a constituent power and/or a constituted power, having a *sui generis* character that moves within a spectrum. See Roznai (2017), pp. 117 ss.

The need for further discussion on citizen-led constitutional change exists because constitutional change is a complex 'labyrinth' intertwining amendment procedures, political actors, and centres of authority, and such processes must be studied in any part, considering them from an integrated perspective. Exploring and modelling constitutional change demands a correlation between actors and mechanisms within a given legal order, and this process inevitably touches all areas of constitutional law and the allocation of powers. As long as amendment procedures are designated as adaptive approaches to altering circumstances, formal changes provide means for resolving conflicts between constitutional actors, especially with regard to the allocation of amendment power. Scholarship has well-described the principle of vertical separation of powers, the "people" sovereignty, and the enforcement of the theory by the courts. However, the people's role in constitutional changes are less scrutinized. The narrowness of the literature regarding people's capacity to strengthen constitutional rigidity is not because their amendment power is irrelevant or consists in a secondary matter within democratic constitutional design, nor because of its misperceived secondary nature within the institutional structure of a political system. From the constitutional theory's outlook, what "the People" is, is an never-ending saga. As constitutional authority, the concept has been considered and reconsidered; it is a component that emerges and re-emerges in certain historical moments and specific political, social and cultural circumstances in which institutions, politicians, scholarship or jurisprudence dedicate more or less space and interest to it. In recent times, modern constitutionalism is threated or challenged by changing movements and, facing the populist waves, "'the People' have become constitutional theory's hottest fashion." (Gewirtzman (2005), p. 898)

In this view, the paper brings the reader alongside the "We, the People" claim, stressing, though in restrictive manner, who "the People" are, how they act and react, and when their actions unveil a(n) (un)constitutional change, in order to draw citizen-led constitutional changes grounded on three keywords – populism, (un)constitutional amendments and constitutionalism. The paper is an invitation to the development of "the people" approaches in a constitutional framework that struck populism as democracy's sentinel.

2. Excursus alongside of "We, the People" entitlement

The common trait of modern constitutionalism lies in democracy rising from the "We, the People" will. Nowadays, it is a formalized expression in more than fifty world constitutions. This part highlights some paradigms in the definition of "the people", emphasizes the conditions and the key moments of its authority.

This part tries to give an answer to three main issues concerning the identity of this entity, the timeline and the modality in which it governs constitutional changes.

2.1. Who are "we, the People"?

From the constitutional theory's outlook, "the People" is a never-ending saga: from the wording of ancient Greeks as *demos, populus, plithos,* óchlos*, syllogikótita, ethnos* to the arguments of modern constitutionalists in favor of an actor *holder*, *bearer* or *protagonist* of a constitutional order, the vexed issue of "we, the People" identification still remains a question with no complete answer. Defining this notion is a carousel and it looks a lot like «Woody Allen's Zelig, inhabiting whatever incarnation is needed to conform with the theoretical backdrop» (Gewirtzman (2005), p. 898). At different times, "the People" embody the nation or a unity, the society or a collectivity, dwell in the shoes of different entities, the electorate, interest groups, identity-based social movements, the Parliament or Congress, the President or Head of State, government and its institutions, political parties, or impact-litigation plaintiffs. Going beyond any other imagination, "the People" figure an *arbiter*, a *warden* or a *manager* (Oklopcic (2017), pp. 48-9) of their own expectations in every sector of their life.

Nowadays, the revival of attention to this notion and its variegated interpretation allow us to identify a three-dimensional pattern considering three connotations: substantiveness, representativeness and inclusiveness. The first dimension, of the substance, mirrors the *classic paradigm* of people as *unity* or *collectivity*, drawing on *popular sovereignty* doctrine. The second aspect, of representativeness, runs into an *emergent paradigm* based on the binomial issue of crowd and few, and developed around the "pure" people vs. elite debate. The third element, of inclusiveness, brings in an *immanent paradigm* facing the people as *citizens* or *residents* within a territory and related to the *constitutional identity* matter.

The *classic paradigm* delivers two interpretations of "the people"– "We, the People" as *preternatural organic unity* or "us, the People" as a *group of individuals* – harks back to the popular sovereignty theory. Framing popular sovereignty as constituent power is to affirm the basic democratic value of self-government, that is, collective acts of self-legislation and public events of self-alteration. In this context, the people regard *themselves* as the agents able to institute and adjust a constitution, so, they are responsible for a foundational constitution's content and in the years to come. In our time, democracy is seen as an "evolutionary democracy" in which the people not only transfer (or delegate) the general will to

the representatives, but adjust their will over time through different institutions. The participatory and representative aspects of democracy become complementary, endowing the people with greater protagonism within the process of forming the *general will* both as an organic unity through "the people-as-one" and through social groups. The normative content of the constituent sovereign is one of participation and the binding higher law is valid only if the act created complies with the principle of participation and reflects the "superhuman general will" of the "supernatural body" (Arendt (1963), p. 60; Friedrich (1950), p. 128), intrinsically and substantively limited by norms of international law, super-constitutional principles, and values of modern constitutionalism (Bachof (1951), pp. 29-32).

The "who" of democracy has long been defended and contested and rarely democracy has been understood as rule by *all the people* (Brown (2015), p. 19). According to Ackerman (Ackerman (1991), p. 186) and Kramer (Kramer (2004), p. 253), "We, the People" are the collection of human persons, are ultimately a group of individuals, "an actual authority" who participates in various ways in the founding or the interpreting of a constitution, but only performing through government because their corporate capacity cannot exist outside institutional forms; thus, individual persons have to be represented.

Hence, the second dimension categorizing an *emergent paradigm* based on the issue of the representativeness of the *mob* (the "ordinary, real or pure" people) vis-à-vis the *few* (the elite) developed around the contemporary debate on populism and constitutionalism, on their differences and oxymoronic interpretation (Halmai, 2017). On the one hand, the people from whom all governmental authority is supposed to derive does not comprise a subject with willpower and awareness. It only appears in the plural, and as *a people*, it is capable of neither decision nor action as a *unity* (Habermas (1988), p. 469). On the other hand, the people (in the singular) represents a political homogeneous and antagonistic unity (Mudde (2004), p. 543; Canovan (1999), pp. 1-16), an endless body, capable of action because it only is able to express the common will and take decisions suitable to the common people's interests (Canovan (2002), p. 34). The concept of authority cannot imply the concept of power. A whole, or better, popular mob exercises *de facto* power only in the context of a riot, but a *multitude* cannot exercise authority. The governors, political parties, leaders – only *few* – have the authority to represent the *mob* as a whole.

To better describe this perspective, it is worth bearing in mind the Schumpeter's definition according to which "the people" act as the electorate, realizing their "common good" by electing representatives/leaders who they believe will better represent their needs (Schumpeter (2008), p. 269). This understanding underpins the dichotomy between liberal democracy and populism,

between the *mob* and the *few*. Liberal or populist representatives, both want to give voice to the people and defend their interests. Still, the former, once elected, represent the nation in accordance with the imperative mandate principle, and in the latter, representativeness is only a tool to embody the will of that unity (Corrias (2016), p. 19). Therein lies the paradox of sovereignty and representation that populists fail to perceive: the nation is the source of a legal order, a singular entity that has to be represented. They defend only a specific part of representation overlooking the constitutive role of it.

The relationship and mediation between the *mob* and the *few*, particularly in the political will-formation, is reflected on the constitutional and governmental arrangements (Mair (2002), pp. 88-89). Populists prioritize an efficient government over representation and emphasize the role of individual leader in politics and its personalization vis-à-vis traditional party structures and in electoral competition (Blondel and Thiebault (2010)), as well as the individual responsibility of office-holders and decision-makers. Parliament is only an instrument of government rather than as an institution of unbiased representation. Thus, the main trick is who governs and who represents "the people", as it too frequently induces a leader of "the few" category.

A democratic system must not be reduced to mere participation in elections; it should disclose, design and promote the constitutional culture of popular involvement (Albert (2008), p. 3). And the populists have made this a slogan. But also in this perspective populists failed because they do not consider what Albert has termed the counterconstitutionalism, which undermines the premise of popular participation (Albert (2008), pp. 27-8, 37-44), assembling a heterogeneity of social identities and partial demands under some name, or empty signifier, which confers upon this plurality a fictional, precarious unity, thereby establishing a hegemonic order (Laclau (2005), p. 19). The constituted unity of «single ethnic or racial […], either implicitly or explicitly, in a deeply exclusionary manner» (Huq (2018), p. 1126) rejects itself other categories of a given polity; it could create, especially in illiberal democracies, what Tushnet hypothetically presumed, "the second-class" citizenry (Tushnet (2017), p. 1372) protected against arbitrary government action but with restricted rights. In this perspective, a third dimension, of the inclusiveness, provides for an *immanent paradigm* built on the dichotomy among *citizens* and *non-citizens* and related to the *constitutional identity* issue.

Mainly, as a normative concept, constitutional identity is a tangled issue (Martí (2013), pp.18-9) with no universal and uniform definition or scope of application (Rosenfeld (2012), p. 756; Jacobsohn (2006), pp. 361-397; Tushnet (2010), pp. 671-76). On the one hand, the identity of the constituent subject turns into the major standard of the assessments of the validity of democratic constitutions and institutional arrangements. If the locus of ultimate source of

legitimacy is bottom-up, originating in "the people" (Preuss (2007), p. 211) and the constitution is an expression of constituent power of the people (Tushnet (2014), p. 24) to make and remake the institutional arrangements through which they are governed (Forsyth (1981), p. 191; Wintgens (2001), p. 274), the "constitutive essence" achieves broader interpretation in the context of the European Union (Faraguna (2017), pp. 1617-40) where, unlike the BVerfG[2] or the Italian Constitutional Court,[3] the Hungarian Constitutional Court empowered itself to review unconstitutional amendments (Drinóczi (2017), pp. 139-51) and recognized a new doctrine of constitutional identity rooted in the historical Constitution, informally amended in the Fundamental Law of 2012. But the Hungarian constitutional identity demonstrates an individualistic feature and detachment from the common European task (Körtvélyesi and Majtényi (2017), pp. 1721-44) and shapes a constitutionalism termed as abusive, authoritarian, and illiberal (Tushnet (2016), pp. 1 ss.; Landau (2013), p. 191). Interestingly, the ruling follows the asylum-seekers "quota decision" of the EU Council (Decision 2015/1601),[4] contested by the Government on the grounds of the alteration of the ethnic and religious composition of Hungary. In addition, the newly-adopted amendment to the Fundamental Law of Hungary enforcing the protection of Christian culture constitutionally legitimizes an "ethnic nation," a Christian community to which seems to belong only ethnic Hungarians and exclude those who are not Christians (Halmai (Jun 29, 2018)). Thus, is not this the context that can give rise to some sort of "second-class" citizenship as imagined by Tushnet?

On the other hand, constitutional identity can also be conceived quite naturally as the national identity[5] and the non-necessarily-national identity of a political community. As long as the constitution is not a mere legal norm, but the fundamental norm created for unifying a heterogeneous collectivity, it might be understood as a tool underpinning a *demos* (Ivison (1999), p. 84). The constitution itself

2 Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Dec. 15, 2015, 140 BVerfGE 317, para. 41. On the Lisbon decision and its effects on Member States, see Claes and Reestman, (2015). For a comparison between Italian and German interpretation of constitutional identity and the counter-limits, see Drinóczi (2018).

3 Constitutional Court decision, 31 May 2018, no. 115 (ECLI:IT:COST:2018:115), G.U. 06/06/2018, no. 23. For developments in the Taricco case, see Fabbrini and Pollicino (2017); Faraguna (2017); Krajewski (2017).

4 Calling on the Hungarian people to cast their ballot, a referendum concerning the European Union's power to impose the mandatory relocation of non-Hungarian citizens to Hungary without the consent of the National Assembly took place but did not attain the required structural quorum. As a consequence of this unsuccessful referendum, the amendment was intended to supplement the Fundamental Law with a provision that incorporate the alleged "constitutional identity" of Hungarian citizens stating that, in order to secure and defend the "nation-building" character, Hungary does not desire to surrender its "cultural homogeneity" and "alien peoples cannot be re-settled in Hungary."

5 It is not the case (to which I will not refer to) of pluri-national constitutional states such as Switzerland, Canada, Belgium or Spain, but also the United States.

«opens up to the idea of integration and calls for, at least expects some kind of inner acceptance, a basic identification by those who "live under" it» (Volkmann (2017), p. 1649).

Moreover, its interpretation by judicial and executive actors as well as certain norms enacted by the legislature[6] may influence collective self-identity of a *demos* in which both citizens and non-citizens find a foundation. And in this perspective, the immanent problem of immigration leads to the so-called *Leitkultur* (Habermas (2017)), the relationship between national culture and constitution. Undoubtedly, the cultural character of a nation takes time to change and no amendment procedure is available for such change (Jakab (2018), p. 5), but immigration law and policies contribute to the self-definition of a nation or community – they are relevant for the construction of a given constitutional self-image and the delimitation of who "we, the people" are.[7] But, the extent to which non-citizens (or, foreign residents) are mirrored in the self-image of a nation depends on a twofold willingness of inclusiveness: of the citizens to include non-citizens, and of the non-citizens to be included in that nation. Based on the same bidirectional axis of inclusiveness, non-citizens could be part of the *mob* and involved in constitutional changes, as well as encompassed in the *unity* and enjoying voting rights in national legislative elections (Finck (2015), p. 78). However, it is difficult in this context to legitimate the political community as a whole and define democracy with Schmitt's words as a "substantial identity" of all citizens, well suited to the populist vision of political community as a homogenous political body with a common, single will of the people.

"The people" as sovereign actor of intra-constitutional and extra-constitutional identity is meant to evolve (Rosenfeld (2010)). Its consistence and dimension change over time (Dixon and Holden (2012), p. 195) and any change in its structure brings about an alteration in the people's collective constitutional identity. Moreover, political aspiration and the desire to transcend the nation's past via formal procedures of constitutional amendments has the potential to alter the identity of the people itself.[8] Amending constitutional identity in the attempt to render it more inclusive isn't always successful and depends on the popular

6 Legislatures enjoy an effective power to overrule rights and court decisions interpreting rights, either by legislative override or constitutional amendment, in particular in those countries where there is a strong culture of constitutional amendment and feasible rules to override court interpretations. Cf. Dixon and McManus (2018); Dixon and Landau (2015).

7 See for example, the burka-ban in France, constitutional amendments or national laws on abortion in Ireland, Germany, Latin America, on same-sex marriage in Romania or on asylum-seekers in Hungary. In this sense, see Nagy (2017) on amendment to the Hungarian Asylum Law. See also Halmai (2018).

8 For such examples in India, Ireland, Israel, and the United States, see Jacobsohn (2010).

attitude towards such constitutional changes.[9] Tensions within a constitutional order and disharmony between a constitutional document and the society it seeks to regulate modify the dynamics of constitutional identity with the risk of inducing constitutionalism's most vexing question: an unconstitutional constitution (Landau, Dixon and Roznai (forthcoming 2018).

2.2. When do "We, the People" act?

"The people" is a protean concept and as a consequence they act differently depending upon which "moment of democracy" they are in (Kalyvas (2000), pp. 1525-65). Thus, the element of time is a variable that must be considered in order to establish whether the people are constituting, governing, or amending a constitution.

Through a Schmittian lenses, there are three moments of the manifestation of the people's power in relation to the constitution: first, the constituent power is exercised prior to or in the moment of constitutional creation; second, once a constitution is created, the people's power persists during its "life" through the elected representatives who act on behalf of them; third, it exists alongside the constitution as a continuous presence which can be reactivated in any moment through popular mobilization, which as a revolutionary power, remains inalienable and unlimited. That the people can act directly or through representative institutions does not undermine the juridical utility of the concept. In fact, theoretically and juridically, the people are at their strongest when it is possible for them to act in each of these moments. Nonetheless, I will try to answer the question regarding part considering popular constitutional time in terms of three cycles: *creation*, *transition*, and *replacement*.

The *creation* corresponds to that genuine moment of "pure foundation" in which the constituent power is "an absolute beginning" understood as principle (Schmitt (1993), pp.23-4). The *transition* itself states a change or an alteration by means of amendments allowing the constituent power to continue alongside the constitution it created and preserving its identity over time, until a "constitutional revolution" takes place and favours the *replacement*, a sort of a "new foundation", a "reconstitution". Such configuration of "constitutional moments" conceals some complexities.

One of the core difficulties concerns the relationship *people – constitution*. The way of identifying this link is assumed by a tricky question: do the people create a constitution or does a constitution create "the people"? On the one

9 On how forms of constitutional "amendment gap" undermine constitutional identity in the United States and Australia see Dixon (2012),.

hand, constituent power is called into being by the very process of *creation*, that is, a constitution-making power that presupposes the existence of a *demos*. On the other hand, constitution-making involves nation building, the creation of a single nation unifying previously diverse entities and the constitution creating its people (Tushnet (1983).

Another perplexity regards the *foundation – revolution* tie. Constitutional foundation is the very establishment of a new constitution, and a legal order and constitutional revolution are synonyms of constitutional change, peacefully or conflictually occurred. If the former does not give rise to misconstructions as "pure, absolute beginning" in the strict sense, difficulties and shortfalls depend on the meaning given to the constitutional moment as a "new, different beginning" that compromises the meaning of the later. There is only one moment in the Schmittian sense when constituent power is prior in authority and time and in which the addressees of the law become its authors; all subsequent constitutional changes are consequences of political processes that precede a constitution's enactment, "imposed" from above and not a result of a "constitutional revolution" by the people (Arendt (2018), p. 299). Yet, as Antonio Negri has claimed, the revolutionary power of "the multitude" can disrupt constituted boundaries (Negri (1999), p. 333).[10] It appears that *creation* and *replacement* cycles could overlap because "constitution-making tends to occur in waves," (Elster (1995), p. 368) either creating *ex novo* a political order or reversing the existing one.

Hence another complexity is configured and regarding the dichotomy between *revision* and *revolution*. First of all, we have to start from the premise that constitutional change could regard a *transformation in the constitution* and *of the constitution* but not every "change *in* the constitution" entails a "change *of* constitution" (Martí (2013), pp. 17 ss). In this sense, there are two types of constitutional change: amendments and replacements. A conceptual distinction between 'amendment' and 'revision', pursuant to which different procedures are applied to amend or revise the constitutional text, allows assessing the classical distinction between total and partial revision (Albert (forthcoming 2019)).[11] Different degrees of rigidity allow to differentiate between formal amendment, as "normal revision", which aims to modify or integrate parts or single provisions of the constitutions, and constitutional revision as "qualified revision" implemented in order to totally change the constitutional text in an extraordinary manner that upsets the fundamental assumptions of the constitution (Viviani Schlein (1987), p. 1673; Bonfiglio (2015), p. 109). The former relates to a "change in the

10 See also Vatter (2007).

11 See also Albert (2018).

constitution" and the latter relates to a total revision, a "change *of* the constitution," a replacement of a whole constitutional text through a constitutional pre-ordained procedure that can only take place in the presence of a revolution (Mortati (1952), pp. 29-65; Barile (1950), p. 472); Locke (1980), pp. 226-7). Moreover, when the "constitutive essence" of the constitution is substantially amended, any change to it produces a "change *of* constitution" and requires not only an amendment of that part, but a whole revolution.

The last perplexity concerns the correlation between *transition* and *replacement*. They are distinct from the pure creation, and emerge and re-emerge over time. According to Schmitt, the constituent power continues alongside a positive constitution (Kelly (2004), p. 126). On the contrary, scholars of liberal constitutionalism consider that the constituent power disappears and runs out in the new constitutional regime and «it comes into play only when the existing regime has been dissolved» (Rawls (1993), p. 231). In the wake of the traditional distinction between *original* and *derived* constituent power, Yaniv Roznai has distinguished between *primary* and *secondary* constituent powers (Roznai (2017), pp. 120-3), which correspond to *framing* power and *amending* power (Klein and Sajó (2012), p. 414), that is, the power to establish a constitution and the power to amend it. The people have the *right* to establish a new legal order but have the *authority* to revise what they constitute.[12] Both constitution-making and constitution-amendment powers are *constitutive* because there is a constituent feature in both processes as long as they constitute (or institute) new constitutional rules. Developing a theory, Roznai has determined how unamendability blocks certain constitutional modifications through the exercise of amendment procedures, and how the primary constituent power always has the ability to re-emerge and disregard it. According to this theory, certain constitutional amendments can be unconstitutional because they attempt to create a new constitution.

2.3. How do "We, the People" change a constitutional order?

In a democracy, there is a fundamental political decision by those who hold the constitution-making power, more specifically, this is a decision *by the people* over the constitution (Schmitt (2008) p. 140), but constitutions do not adequately express the will of the people (Versteeg (2014), p. 1133). History has

12 Following Cicero's approach (*De Legibus* 3, 12, 38), Hannah Arendt (Arendt (2006), p. 91) made the distinction between constitution-making power possessed by the people and thus, "the power resides in the people", and constitution-amendment power as an authority vested in a constitutional organ, which "rests with the Senate".

demonstrated that the constitutions are a result of the decision made by the people. The constitution-making body cannot actually be the people as a whole; it is a constituent assembly, a representative *of the people* that decides in the aggregate *for the people*. If the foundation of the constitution and State were to be treated as an act of representation, the constituent power would be absorbed into the constituted power. This does not mean that the constituted power – the *creature* – abolishes, overcomes and nullifies the constituent power – the *creator*. Furthermore, as recent democratic constitutional changes show, the *creator* becomes the *interpreter* of its creation, able to pour such authority beyond the constitution moment; those who draft the constitutional text often appoint those who lead the court that is charged with interpreting the new constitutional text (Dixon (2015), p. 3), and all this "in the name of the people". This way, drafter-interpreters bias the "negative legislator", which should be not a maker but an "unmaker" of amendments or laws given their unconstitutionality. This weak-form review allows to interpret laws and amendments so as to hold their consistency with the constitution or to appeal to the legislator by a declaration of incompatibility, without considering them "negative legislators" even though their review may have some indirect impact. (Tushnet (2011), p. 323; Hy Chen and Poiares Maduro (2013), pp. 102-3). A tricky issue may arise when constitutional courts are "positive law-makers" and positively design a law or constitutional amendments in accordance with their own "political" views, which may or may not be constitutional.[13]

Every action taken within the institutionalized constitutional framework is an exercise of constituted power. In this sense, constituent power is established and manifested by means of elective representatives. In times of ordinary legislation, of ordinary constitutional amendments, and even of constitutional replacements made according to the provisions of the constitution, the constituted government acts on behalf of the people. Rarely the people themselves call a constitutional change through a popular initiative. In any case, the constituent power always retains the power to reconstitute the constitution on its own terms, set at any time by the constituent power as sovereign. Even if the power to amend the constitution is given to the people, they do not act as a sovereign but rather like any other body of the State. The people act as sovereign when they abolish a constitution and only in this context. They return into the "state of nature" where no legitimate authority exists and where the constituent power of the people mirrors their natural right. But there is always a relation between past and present, nothing starts *ex novo*, thus, the constitution-change process takes many forms. Contrasting Ramaswamy Iyer, even if a constitution is silent,

13 For example, Article 68 of the Mongolian Constitution entrenches the specific right of the Constitutional Court to submit proposals for constitutional amendments (Gamper (2015), p. 440).

the amendment power is not merely granted to Parliament (Iyer (2006), p. 2065). Under the existing constitution even the people may amend it and only according to what the constitution allows. This suggests that their amendment power should be regarded as an *intermediate power* between the original constituent power and the derivate legislative power.

Recent exercises of constitution-making demonstrated how original constituent power, or the "people"'s power to remake the constituted powers in an existing constitution, thus, stepping outside of their existing political order, allows derivative powers, such as powerful political forces, to reshape their constitutional orders unilaterally, evading a need to negotiate with the opposition (Scheppele (2015); Landau (forthcoming 2019)). Their action might cover almost any kind of change, constitutional or unconstitutional but deemed as democratic, to the extent that "the people" sweeps in institutional arrangements or political movements that purport to articulate "We, the People".

Regardless of the way in which the people are called to express themselves, either through the representatives or as whole in different ways and moments, the people as the holders of a secondary constituent power are more an *amender* of the text than its author. The question as to how the people may change a constitutional order may find a clearer answer if we try to identify and shape taxonomies and various procedures. In the vast majority of cases, the reference to the people or nation who author the constitution is related to the constitutional amendment process. Such process may call for the involvement of the people both by initiative and by referendum. The system of checks and balances embedded in the constitution may require limitations on arbitrary action of the government but also on the people in exercising their sovereignty. Usually, constitutional changes are closely linked to the amendable nature of the provisions. A tiered procedure creates «different rules of constitutional amendment for different parts of the constitution»; such parts, usually consisting in eternity clauses, may be altered only by referendum and with the aforementioned replacement consequences (Dixon and Landau (2017)). The distinction between "amendment" and "revision" allows to identify different mechanisms of constitutional change in which people directly or indirectly take part: first, a *single-path procedure*, applied to all amendable provisions, requires a single session[14]; second, a *double-path procedure*, pursuant to which a single-path procedure is integrated by a referendum[15], or according to which formal amendments are adopted by the parliament after two successive divided debates[16]; and finally, a *multi-path*

14 Germany (Article 79); Austria (Article 44(3), if, in case of partial revision, one third of the members of the Federal Council or the National Council do not demand a referendum); France (Article 89(2)).

15 Austria (Article 44(2) and (3); Article 35(4)); France (Article 89(1)).

16 In Italy, the amendments proposed shall be adopted by each house after two successive debates at

procedure, which features a referendum to give additional consent – whether as an alternative in cases where the legislative chambers do not reach the necessary supermajorities on the proposed amendments (optional referendum),[17] or if this tool is constitutionalized (mandatory referendum).[18] A universal popular mobilization in support of the proposed constitutional change may bring such procedures to a successful conclusion. From an institutionalist perspective, the constitution is not a mere catalogue of constitutional rules, but also the tangible sum of the constitutional bodies' practice and narratives surrounding it. Thus, the more distant people are from the constitutional amendment process, the stronger the narratives for a direct involvement are requested (Fotiadou (2017), pp. 156 ss). Sometimes, difficulties and obstacles encountered in the procedures lead to important changes and innovations in the "popular participatory continuum", as demonstrated by the Iceland, Ireland or UK experiences.[19]

Ultimately, constitutional amendments differ from a popular involvement point of view; such processes may be: i) *permissive*, which include explicit or implicit popular initiative (Switzerland, Austria, Italy, Spain, Romania, Latvia, Slovenia); ii) *consultative* in the presence of popular support expressed by both discretionary and mandatory referendum (Switzerland, Italy, Romania, Latvia, Slovenia, Croatia); iii) *strict*, without popular initiative or referendum (Hungary).

In various legal systems, the need to protect constitutional rigidity and the division of powers is bound up with the representation and participation of the people in the constitutional amendment process (Aroney (2006), p. 326). Formal amendment rules laid down by the constitutions provide different models to drive constitutional change,[20] which allows for some observations. First, the amendment process generally favours an *indirect* participation through their representatives; thus, people may influence constitutional change via elections carrying out those "transformative constitutional moments" in which a strong majority or a charismatic leader/president elected by the voters paves the way for a new interpretation of the constitution. Nonetheless, a few systems allow them to

intervals of not less than three months (Article 138(1)). The constitutions of Belgium (Article 195) and Spain (Article 168) impose electoral preconditions upon formal amendment rules, requiring dissolution of the chambers and successive votes separated by the election of the new chambers, which must ratify the decision and examine the new constitutional text.

17 Within certain time limits, senators, groups of senators or subnational legislatures may demand that the approved amendments be submitted to a referendum (Article 138(2) Italian Const.; Article 167(3) Spanish Const.)

18 Spain (Article 168 Spanish Const.). See Ferreres Comella (2000), p. 45; Elvira (2011), p. 281; Barrero Ortega and Sobrino Guijarro, (2013), pp. 299, 302.

19 Cf. Thorarensen, and Farrell, Harris and Suiter (2017), pp. 101 ss.; Suteu (2015).

20 For a general account of the formal (and informal) amendment processes based on drivers of constitutional change, see Fusaro and Oliver (2011).

directly initiate constitutional amendments. Such constitutional arrangements (Friedrich (1950), p. 295) legitimate the equal participation in the constitutional amendment process. In any case, direct inclusion is rare because it actually divides amendment powers among vertical levels of government, which affects constitutional rigidity (Dicey (1885), pp. 142-5). Second, the use of a nationwide referendum as an alternate constitutional amendment procedure is a "threat" through which to bypass the legislature. By giving people strong veto powers, this tool could reverse the entire amendment process through a rejection of the changes proposed, and it could undermine the consistency of the representative chambers.[21]

3. Conclusions

It is now rooted the creed that the constitution is the political heart of "the people" as nation and that amendment rules are at the core of constitutionalism, defining the conditions under which all other constitutional norms may be legally displaced, and providing mechanisms for societies to refine their constitutional arrangements. Formal constitutional amendment rules consider the overall framework of the political system to dictate how constitutional change should occur even in such historical moments of populist turn. This paper tried to emphasize the role of the people, stressing a tridimensional definition, their claim in different constitutional moments and the way in which such alterations may be initiated. Still, many questions remain open to debate.

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21 For instance, Italian amendment rules regarding referenda establish only structural quorum; thus, amendments are passed if the law submitted to a referendum is approved by a majority of valid votes.

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