

# Popular Sovereignty, Constitutionalism, and the Indian Constitution

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India's next Constitution Day will mark seventy years since the adoption of the Constitution.<sup>1</sup> The Preamble to the Indian Constitution affirms that on 26 November 1949 the people of India adopted, enacted and gave to themselves the Constitution, 'having solemnly resolved to constitute India into a sovereign democratic republic'.<sup>2</sup> This resolution can be interpreted as a successful exercise of sovereignty by the Indian people. More precisely, one may argue that (i) the Indian Constitution stemmed from the sovereignty inherent in the people of India; and that (ii) the legitimacy of the Constitution is, therefore, grounded in the principle of popular sovereignty. When considering the idea of sovereignty in relation to the Indian Constitution, one may also argue that (iii) the Constituent Assembly identified (state) sovereignty as a status that the Indian political community should enjoy – together with democracy and a republican form of government; and that, accordingly, (iv) the Indian Constitution recognises the Indian Republic as a sovereign state.<sup>3</sup>

This year's anniversary, which shortly follows the 70<sup>th</sup> anniversary of India's independence (acquired on 15 August 1947) provides a fitting occasion for reflection upon the foundations of the Constitution of India. In particular, I would like to discuss the role of the principle of popular sovereignty in the contemporary Indian constitutional framework: an issue that can be illustrated with a brief analysis of propositions (i) and (ii) above.<sup>4</sup>

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<sup>1</sup> Constitution Day was established on the occasion of the 125<sup>th</sup> birthday of Bhimrao Ramji Ambedkar (1891-1956), the chairman of the Drafting Committee selected by the Indian Constituent Assembly. The Constitution of India came into force on 26 January 1950: this event is celebrated every year on Republic Day.

<sup>2</sup> In the Preamble, the adoption of the Constitution is explicitly linked to securing justice (social, economic and political), liberty (of thought, expression, belief, faith and worship), and equality (of status and of opportunity) to all Indian citizens; and to promoting fraternity among all Indian citizens.

<sup>3</sup> The Preamble aside, the term 'sovereignty' occurs three times in the text of the Constitution, always in relation to India's state sovereignty – e.g. in the expression 'the sovereignty, unity and integrity of India' (Art. 51A).

<sup>4</sup> For the purposes of this article, propositions (iii) and (iv) are helpful insofar as they clarify the differences between *popular* sovereignty and *state* sovereignty: most importantly, the former is the sovereignty enjoyed by a people, whereas the latter is the sovereignty enjoyed by a state political community.

While proposition (i) seems to tell us something about the birth of the Indian Constitution, (ii) can be seen as a proposition about the current life of the Constitution. From this perspective, the proposition that the legitimacy of the Indian Constitution is grounded in the principle of popular sovereignty appears to suggest that popular sovereignty is a fundamental, operative principle in the constitutional framework of today's India.<sup>5</sup> However, are there good reasons to read (ii) as a proposition that ascribes ongoing relevance to the principle of popular sovereignty – as the principle that underpins the legitimacy of the Indian Constitution, here and now?<sup>6</sup> It may be that the best way to make sense of (ii) is to read it, instead, as a historical claim entailed by (i); in the sense that the Indian Constitution is legitimate because it originated from a successful exercise of popular sovereignty by the Indian people. According to this reading, the principle of popular sovereignty performed a crucial role when the Constitution was enacted, but its function terminated once the Constitution was adopted. In order to decide between these conflicting readings of (ii) – viz. how to best interpret the claim that the legitimacy of the Indian Constitution is grounded in the principle of popular sovereignty – a more general question must be answered: what role *can* the principle of popular sovereignty (still) play in the Indian constitutional framework, seventy years after the enactment of the Constitution? Of course, it may be possible to argue that the principle of popular sovereignty has no role to play on the basis that it is incompatible with the contemporary Indian constitutional framework. This argument might be made in one of two ways. First, at a theoretical level, it can be argued that popular sovereignty and constitutionalism are always incompatible: therefore, each and every instance of constitutionalism (including Indian constitutionalism) cannot be reconciled with popular sovereignty. Alternatively, one could argue that even if popular sovereignty and constitutionalism were compatible in theory, the characteristic features of the Indian Constitution make it impossible for the contemporary Indian constitutional framework to accommodate popular sovereignty in practice. In this article, I reject this two-fold argument

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<sup>5</sup> Throughout the article I use 'constitutional framework' to mean: the system of constitutional rules, principles, and doctrines that are held to be valid, in a given jurisdiction, by that jurisdiction's legal community. As such, the constitutional framework of a given political community is influenced not only by that community's constitution, but also by the model of constitutionalism used to conceptualise, interpret and implement the constitution.

<sup>6</sup> For a very interesting discussion of the relationship between popular sovereignty and the Indian Constitution, see: S. Sen, *The Constitution of India – Popular Sovereignty and Democratic Transformations*, OUP, 2007. This book investigates the issue of whether the Indian Constitution is authorised by the principle of popular sovereignty. In discussing this issue, the author adopts an historical approach and examines 'how the idea of popular sovereignty and its relation to constitutionalism developed as a result of inter-generational discourse in Indian political thought during the pre-founding colonial period.' *Ibid*, p. 43. I consider Sen's work in §5.

and suggest that the principle of popular sovereignty, when properly understood, is beneficial to – and not simply compatible with – the contemporary Indian constitutional framework.<sup>7</sup>

This article is organised in five Sections. First, I clarify the pivotal idea of constitutionalism, with a view to illustrating some of the distinctions upon which my main argument will rest. Then, in Section 2, I present the two-fold argument on the incompatibility between popular sovereignty and the contemporary Indian constitutional framework. I resist this argument in Section 3, where I defend the conceptual compatibility of popular sovereignty and constitutionalism: this move is important, as it opens up the logical space to examine the way in which popular sovereignty can be accommodated within specific constitutional frameworks. Consequently, in Section 4, I consider a theoretical proposal – inspired by the Italian constitutional experience – that combines the principle of popular sovereignty with a constitutional framework characterised (like the Indian one) by a long, rigid Constitution that includes the protection of different classes of rights and is accompanied by limitations on the scope of the amendment process. Finally, in Section 5, I draw upon the insights gained in Sections 3 and 4 to elucidate the role that the principle of popular sovereignty can play in the contemporary Indian constitutional framework.

## 1. The idea of constitutionalism

The term ‘constitutionalism’ occurs in the realm of different disciplines: most significantly, constitutional law and theory, legal and political philosophy, legal and political history.<sup>8</sup> However, even in the same context, the term ‘constitutionalism’ can be used to communicate different concepts (and/or conceptions<sup>9</sup>) of constitutionalism. For example, in constitutional theory, it is possible to distinguish between a negative and a positive model of

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<sup>7</sup> Constitutionalism, constitution, and constitutional framework are three ideas that constantly interact with each other. For an overview of the main ways in which a constitution can be conceptualised, and for an explanation of two models of constitutionalism, see *infra* §1.1 and §1.2, respectively.

<sup>8</sup> See, e.g.: C.H. McIlwain, *Constitutionalism: Ancient and Modern*, New York University Press, 1947; M.J.C. Vile, *Constitutionalism and the Separation of Powers*, Clarendon Press, 1967; L. Alexander (ed.), *Constitutionalism: Philosophical Foundations*, CUP, 1998; R. Bellamy, *Political Constitutionalism*, CUP, 2007; P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?*, OUP, 2010; A.V. Dicey, *Comparative Constitutionalism* (ed. by J.W.F. Allison), OUP, 2013; D. Grimm, *Constitutionalism: Past, Present, and Future*, OUP, 2016; M. Tzanakopoulou, *Reclaiming Constitutionalism – Democracy, Power and the State*, Hart Publishing, 2018; N. Barber, *The Principles of Constitutionalism*, OUP, 2018.

<sup>9</sup> On the distinction between concepts and conceptions, the *locus classicus* is: J. Rawls, *A Theory of Justice*, Belknap Press of Harvard University Press, (1971; revised edition, 1999), p. 5. On this distinction, cf. R. Guastini, *Le fonti del diritto* [The sources of law], Giuffrè Editore, p. 156, n. 2.

constitutionalism.<sup>10</sup> At a theoretical level, the idea of constitutionalism is associated with the notion that political power should be legally limited, and that these limitations should be enshrined in a Constitution. Both the theory and the practice of constitutionalism appear to be inherently connected with the concept of a constitution. For this reason, before considering the idea of constitutionalism (and its connection with the concept of a constitution), it might be helpful to briefly analyse the polysemous term ‘constitution’.

### 1.1 Four concepts of a constitution

In the context of constitutional law and theory, there are at least four meanings that can be ascribed to the term ‘constitution’.<sup>11</sup>

(a) The first meaning of ‘constitution’ – possibly the first that springs to mind – is that of a legal document, in which a set of legal norms (i.e. rules and principles<sup>12</sup>) are codified. When referring to such documents, people often talk of Constitutions – with a capital C.<sup>13</sup> It should be noted that a Constitution does not necessarily contain all the norms of *constitutional significance* (see next meaning), given that some of these norms might be found in ordinary legislation.<sup>14</sup> The norms of constitutional significance may include, for example, the rules and principles that regulate the functioning of the organs of the State, as well as the relationship between citizens and the State.<sup>15</sup>

(b) Secondly, the term ‘constitution’ can be used to refer to the set of legal norms that have constitutional significance, whether or not they are codified in a single legal document.<sup>16</sup>

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<sup>10</sup> On this distinction, see *infra* §1.2.

<sup>11</sup> This overview combines the detailed linguistic and conceptual analysis carried out in: R. Guastini, *Il Diritto come Linguaggio* [Law as Language], Giappichelli, 2006, pp. 61-66; and S. Pozzolo, *Neocostituzionalismo e Positivism Giuridico* [Neo-Constitutionalism and Legal Positivism], Giappichelli, 2001, pp. 17-26.

<sup>12</sup> For the purposes of the present discussion it is not necessary to discuss the differences, if any, between rules and principles.

<sup>13</sup> In this article, I use ‘Constitution’ precisely in this sense – to refer to a single legal document in which the ‘constitutional’ norms of a given political community are codified.

<sup>14</sup> Moreover, it is possible for some of these norms to be (written or unwritten) constitutional conventions.

<sup>15</sup> Here, and in the rest of the article, I use ‘state’ to refer to a state political community, and ‘State’ to refer to the whole of the ‘centralised’ legislative, judicial and executive institutions (i.e. the union of the branches of government) of a given state political community.

<sup>16</sup> It is in this sense, for example, that people talk about the constitution of the United Kingdom. In order to avoid a circular definition, it is necessary to identify at least one criterion to distinguish between constitutional and ordinary legal norms, and the identification of this criterion must be prior to the identification of the constitution.

This is the most comprehensive concept of a constitution, as every political community can be said to have a constitution in this sense – for most, if not all, political communities have norms that, for example, identify certain basic political and legal institutions (e.g. legislative assemblies and courts) and authorise them to act; regulate the relationships between these institutions; and/or regulate the relationships between these institutions and the individual members of the community.

(c) In a third, less common sense, ‘constitution’ can be used to refer to a set of (political) facts – the facts that characterise the political order of a given political community. It is worth noting that, in this context, different understandings of the nature of a ‘political order’ generate different conceptions of a constitution. For example, the political order of a given community might be conceived of as the mere result of the constant clash of the political forces operating in that community: in this case, the constitution would equate to the day-to-day political life of that community.<sup>17</sup>

(d) Finally, the term ‘constitution’ can be used to refer to a desirable legal instrument to control political power. In this fourth meaning, constitutions are understood in light of a specific political project concerning the relationship between law and politics. In order to properly understand this concept of a constitution it is worth remembering the wording of Article 16 of the *Déclaration des Droits de l’Homme et du Citoyen de 1789* (1789 French Declaration of the Rights of Man and of the Citizen): ‘Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution’.

These four meanings of ‘constitution’ can be linked to a descriptive concept (what the constitution is) or a normative concept (what the constitution ought to be) of the constitution. Meanings (a), (b), and (c) above express a descriptive concept and manifest a positivist approach towards the constitution of a given political community. When thinking of constitutions in one of these three senses, one implicitly accepts the notion that a constitution is something – a written document, under (a); a set of norms, under (b); or a set of facts, under (c) – that can be described for what it is; bracketing the question of whether the relationship

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<sup>17</sup> It may be argued that this meaning of ‘constitution’ also captures the so-called ‘material constitution’ of a given legal order. See: M. Goldoni and M.A. Wilkinson, ‘The Material Constitution’, *The Modern Law Review*, Volume 81, 2018, pp. 567-597.

between law and politics, as crystallised in the constitution, is desirable.<sup>18</sup> Meaning (d) above, on the contrary, is linked to a normative concept of the constitution – a concept that allows one to distinguish between ‘good’ constitutions, which fully deserve recognition *qua* constitutions; and ‘bad’ constitutions, which do not deserve that recognition.<sup>19</sup> In this context, constitutions are thought of as concepts about what the legal and the political order of the community ought to be.

When studying the nature of a constitution, its *rigidity* is a salient property to consider. Rigid constitutions are those that can only be modified by means of a procedure more onerous than the ordinary legislative process.<sup>20</sup> On the contrary, flexible constitutions can be revised through the ordinary legislative process.<sup>21</sup> In a legal order with a rigid constitution, the legal norms included in the constitution are in a hierarchical relationship with all the other norms of that order, which can be called ‘ordinary legal norms’. This hierarchical relationship is characterised by a negative element – ordinary legal norms cannot modify constitutional norms; and, by a positive element – the validity of ordinary legal norms depends upon the conformity of these norms with the constitution.<sup>22</sup> Both elements are noteworthy: the special procedure required to amend a rigid constitution draws attention to the *power of constitutional amendment*; whereas the importance of the constitution for the intra-systemic validity of a legal order draws attention to the *power of constitutional control*.<sup>23</sup>

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<sup>18</sup> Constitutions, as in meaning (b), crystallise a relationship between law and politics in which the former regulates, and possibly controls, the latter. Constitutions, as in meaning (c), crystallise the opposite situation – where politics controls both constitutional and ordinary law, to the point that one might be sceptical about the existence of a legal sphere independent from the political sphere. Under (c), constitutions end up being identical with the political structure of a given political community; as such, they can be studied as social (instead of normative) phenomena.

<sup>19</sup> Indeed, Article 16 of the 1789 French Declaration of the Rights of Man and of the Citizen appears to suggest that ‘bad’ constitutions are not constitutions at all.

<sup>20</sup> It is possible to imagine ‘ultra-rigid’ constitutions that can never be changed. Some Constitutions include constitutional provisions that can never be changed (i.e. an eternity clause). A well-known example of an eternity clause is Article 79(3) of the German Basic Law, according to which some fundamental constitutional principles – e.g. the republican form of government – can never be changed. See, also, Article 139 of the Italian Constitution: ‘The form of Republic shall not be a matter for constitutional amendment.’ For a discussion of the Indian doctrine of the basic structure see *infra* §2.2.

<sup>21</sup> Flexible constitutions have the same ‘force’ of ordinary law, so in the case of a conflict between a constitutional law and an ordinary law it is not possible to use the *Lex superior* principle (according to which a ‘higher’ law repeals a ‘lower’ law). Instead, in the case of a conflict, interpreters can use the *Lex posterior* principle (according to which a ‘later’ law repeals an ‘earlier’ law).

<sup>22</sup> This conformity can be formal and/or substantive. See R. Guastini, ‘Invalidity’, *Ratio Juris*, 1994, pp. 212-226.

<sup>23</sup> The connection between these two powers and the central question of the article will become more apparent in §2.

The possibility of a rigid constitution is consistent with meanings (a), (b) and (d) above. However, it should be noted that in the context of (a) and (b), rigidity is a property that a given Constitution/constitution might or might not have, as rigidity is not conceived of as a necessary feature of a constitution. Only in relation to meaning (d) is rigidity seen as a necessary (and desirable) feature that constitutions must have in order to be constitutions (i.e. ‘good’ constitutions). This is because, under (d), constitutions can control political power and preserve individual freedoms if, and only if, they are rigid.<sup>24</sup> The normative concept of a constitution sees constitutional rigidity as particularly significant for constitutionalism, and especially – as the next sub-section will explain – for ‘negative’ constitutionalism.

## 1.2 Negative and positive constitutionalism

From an historical point of view, the idea of constitutionalism emerges with the American and the French Revolutions.<sup>25</sup> These two Revolutions brought to light two claims that, since then, have underpinned the development of the idea of constitutionalism: first, that the political (and legal) power exercised by public authority must flow from a ‘social contract’; and, secondly, that the authorisation to wield public power over a political community must depend upon the capacity of the authorised person(s) to protect the individual freedoms of the members of that community. The combination of these two claims has generated the central thesis of constitutionalism – i.e. that political power ought to be limited, and that these limitations must be established by legal rules enshrined in a constitution. This normative thesis is commonly understood as entailing the notion that the most important amongst these legal limitations should be constitutionally entrenched – hence the centrality of the concept of constitutional rigidity for the idea of constitutionalism. Constitutional limitations of political power can be substantive and/or procedural. Substantive limitations are usually linked to the jurisdictional boundaries of the organs of the State (individually and collectively) and/or the protection of fundamental rights; whereas procedural limitations are often expressed as manner and form doctrines that regulate the legislative process and/or the process of constitutional amendment.

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<sup>24</sup> In this context, it may also be argued that constitutional rigidity should imply the existence of a system of judicial constitutional review.

<sup>25</sup> When studying the history of the idea of constitutionalism, it is useful to consider constitutionalism in parallel with similar ideas, e.g. *Nomos basileus*, the Rule of Law, or the idea of *Rechtsstaat*. On this point, see: S. Pozzolo, *Neocostituzionalismo e Positivismo Giuridico* [Neo-Constitutionalism and Legal Positivism], Giappichelli, 2001, p. 37. What all these ideas have in common is the notion that political power must be legally regulated.

Reflecting upon the normative thesis at the heart of constitutionalism – i.e. that political power ought to be limited, and that these limitations must be established by legal rules enshrined in a constitution – allows one to distinguish two different models of constitutionalism: negative and positive constitutionalism.<sup>26</sup> Negative constitutionalism embraces the notion that the constitution should constrain political power, because it assumes that political power is, and often remains, a potential threat to the members of a political community (and, especially, to their individual freedoms). Negative constitutionalism sees constitutions as an instrument to limit, regulate, and constrain political power, which is conceived of as something that naturally tends to maximisation – both quantitatively and qualitatively.<sup>27</sup> The type of political power that modern negative constitutionalism intends to constrain is the power of the State. There are, of course, different conceptions of modern negative constitutionalism, depending on the way in which one answers the following questions:

- (1) What is the best way to restrict State power?
- (2) Should legal limitations of State power be expressed in the language of fundamental/human rights?
- (3) Should State power be restricted by legal limitations explicitly formulated as constitutional norms?
- (4) Should constitutional limitations of State power be entrenched?
- (5) What is the best way to review the constitutionality of State actions (including the constitutionality of ordinary legislation)?

These questions capture five issues that are key to the development of different conceptions of negative constitutionalism: (1) the principle of the separation of powers; (2) the significance of bills/declarations/charters of rights; (3) the desirability of a written/codified constitution (and the debate on legal vs. political constitutionalism); (4) the appropriate degree of rigidity of a constitution; (5) and the scope of judicial review.

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<sup>26</sup> For an illuminating discussion of this distinction, see: N. Barber, *The Principles of Constitutionalism*, OUP, 2018, Introduction.

<sup>27</sup> The maximisation of political power, the argument goes, would inevitably lead to authoritarianism and absolutism. Indeed, from an historical point of view, constitutionalism developed as a theoretical, and practical, response to tyrannical regimes and absolute monarchies. With the development of democratic states, the theory of constitutionalism has consequently expanded to include not only questions about the limitation of political power, but also questions about its legitimation.

The interaction between the first two issues – the separation of powers and the significance of bills/declarations/charters of rights – is an overarching thread that runs through the history of constitutionalism. This interaction is also significant for the theory of constitutionalism: in this context, it has been used to distinguish between weak and strong forms of constitutionalism.<sup>28</sup> Weak constitutionalism argues that it is desirable for a political community to have a constitution, in the sense of a set of norms limiting political power. However, these norms do not have to do so by establishing fundamental rights and liberties. The focus of weak constitutionalism is, instead, on the separation of powers – consequently, different theories of the separation of powers will result in different versions of weak constitutionalism. Strong constitutionalism, on the other hand, includes fundamental rights and liberties in the legal structure that should limit the power of the State. In doing so, strong constitutionalism creates a sort of superior law, that all the organs of the State must respect and, where appropriate, implement (e.g. in the case of judicial power). It is possible to have different versions of strong constitutionalism, depending on the different types of fundamental rights and liberties that are constitutionally protected; and on the different ways in which this protection is afforded. It should be remembered, however, that both weak and strong versions of constitutionalism are still instances of negative constitutionalism, insofar as they embrace the notion that State power should be legally limited, because it is a potential (and sometimes even an actual) threat to the freedom of the members of that state political community.

Negative constitutionalism has been criticised by Jeremy Waldron and, more recently, by Nicholas Barber.<sup>29</sup> According to Waldron, negative constitutionalism, especially when it includes entrenchment and constitutional review, is linked to a particular political ideology: minimal-state liberalism. For Waldron, the main problem with negative constitutionalism lies in its anti-democratic tendencies, as negative constitutionalism tries to embed a particular political ideology into the ‘rules’ of the (democratic) game. Developing a different line of criticism, Barber argues that negative constitutionalism builds upon an impoverished account of the State – an account that he calls the Weberian model of the State. According to Barber, if one works with a more ambitious model of the State, then negative constitutionalism becomes insufficient. In other words, if one conceptualises the State as an institution that

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<sup>28</sup> See S. Pozzolo, *Neocostituzionalismo e Positivismo Giuridico* [Neo-Constitutionalism and Legal Positivism], Giappichelli, 2001, pp. 27-28.

<sup>29</sup> See: J. Waldron, ‘Constitutionalism – A Skeptical View’, in T. Christiano and J. Christman (eds.), *Contemporary Debates in Political Philosophy*, Wiley-Blackwell, 2009, pp. 267 ff.; and N. Barber, *The Principles of Constitutionalism*, OUP, 2018, Introduction.

exists to advance the well-being of the members of its political community (as Aristotle did), then negative constitutionalism is unable to provide a model that may facilitate the State in realising its purpose.<sup>30</sup> For Barber, only positive constitutionalism can be fruitfully combined with this teleological model of the State. From the perspective of positive constitutionalism, political power (and, in particular, State power) is not perceived necessarily as a potential, or actual, threat. Instead, the power enjoyed by a State is conceived of as the capacity to benefit the members of the political community that State is responsible for.<sup>31</sup> Therefore, positive constitutionalism sees constitutions as sets of norms that primarily empower – rather than constrain – the organs of the State.<sup>32</sup>

I would like to conclude this sub-section with two remarks. First, the negative and the positive models of constitutionalism are not mutually exclusive. I think it is possible to develop a model of constitutionalism that focuses on the ‘positive function’ of a constitution, without disregarding the importance of constitutional safeguards against deviant exercise of State power. Secondly, it should be remembered that constitutionalism, constitution, and constitutional framework are three ideas that constantly interact with each other.<sup>33</sup> This means that the specific model of constitutionalism that is prevalent in a given legal community informs the way in which that community conceptualises its constitution; but, at the same time, the specific features of the constitution of that community is conducive to certain models of constitutionalism, which in turn influence the constitutional framework of that community.

## **2. Popular sovereignty vs. the contemporary Indian Constitutional framework?**

From an historical point of view, the origin of the principle of popular sovereignty (as we know it) lies in the constitutional history of the USA and France. The Preamble to the American Constitution – which came into force in 1789 – begins with the famous words ‘We

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<sup>30</sup> N. Barber, *The Principles of Constitutionalism*, OUP, 2018.

<sup>31</sup> At least, in the central case of the State. On this point, see: N. Barber, *The Constitutional State*, OUP, 2010.

<sup>32</sup> Often these norms are linked to ‘constitutional directives’. On the notion that constitutional directives are obligatory telic norms, addressed primarily to the State, see: T. Khaitan, ‘Constitutional Directives: Morally-Committed Political Constitutionalism’, *The Modern Law Review*, forthcoming (2019) – published online on 27 March 2019: <https://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12423>

<sup>33</sup> It is easier to appreciate the difference between the constitution and the constitutional framework of a given political community when the constitution is codified in a single document. On the notion of constitutional framework, see *supra* footnote 5.

the People of the United States'.<sup>34</sup> The French Constitution of 1793 affirms that sovereignty resides in the people.<sup>35</sup> Today, the expression 'popular sovereignty' occurs in the Constitutions of Argentina, Brazil, Bulgaria, Capo Verde, Djibouti, Dominican Republic, Greece, Honduras, and Togo. More importantly, the notion that sovereignty belongs to the people is affirmed in most of the Constitutions currently in force. Even when constitutional footing is absent, the constitutional law discourse of a given legal community might include references to popular sovereignty – and popular sovereignty might play a role, *qua* legal principle, in the constitutional reasoning and adjudication of that community.

As a matter of theory, the principle of popular sovereignty may be conceived of as a secondary rule (in the Hartian sense); and, in particular, as a power-conferring rule.<sup>36</sup> However, thinking of the principle of popular sovereignty in terms of power-conferring rules necessarily leads one to ask whether this principle *ascribes* (sovereign) power to the people; or rather *recognises* the pre-existing sovereignty of the people. This is an important issue, and the next Sections will show the significance of this issue for the central question of this article – i.e. what role can the principle of popular sovereignty (still) play in the contemporary Indian constitutional framework?

The purpose of this Section is to consider the possibility that the principle of popular sovereignty might have no role to play in the contemporary Indian constitutional framework. This possibility arises from a two-fold argument according to which popular sovereignty is incompatible with the contemporary Indian constitutional framework. First, it could be argued that, at a general level, popular sovereignty and constitutionalism are always incompatible: therefore, each and every instance of constitutionalism (including Indian constitutionalism) cannot be reconciled with popular sovereignty. Secondly, one could argue that, even if, in

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<sup>34</sup> These words have inspired many books and articles on popular sovereignty. A well-known example is provided by B. Ackerman, *We the People*, Belknap Press of Harvard University Press, 1991-2014 (Volume 1: *Foundations*; Volume 2: *Transformations*; Volume 3: *The Civil Rights Revolution*).

<sup>35</sup> Article 25 of the Declaration of the Rights of Man and Citizen (French Constitution of 1793) reads as follows: 'The sovereignty resides in the people; it is one and indivisible, imprescriptible, and inalienable'. According to Article 7 of the Constitutional Act (French Constitution of 1793), 'The sovereign people is the totality of French citizens'.

<sup>36</sup> According to Hart, secondary rules are rules of recognition, change, and adjudication which provide a remedy to the defects of a simple social structure consisting of primary rules of obligation alone. H.L.A. Hart, *The Concept of Law*, OUP, (1961; 3<sup>rd</sup> edition, 2012), pp. 79 ff. Rules of change and adjudication are power-conferring rules; the nature of the rule(s) of recognition is more complex. On the nature of the rule(s) of recognition, see, e.g.: G. Lamond, 'The Rule of Recognition and the Foundations of a Legal System', in L. Duarte d'Almeida, J. Edwards, and A. Dolcetti, *Reading HLA Hart's 'The Concept of Law'*, Hart Publishing, 2012.

theory, popular sovereignty and constitutionalism were compatible, the specific features of the Indian Constitution make it impossible for the contemporary Indian constitutional framework to accommodate popular sovereignty. The next two sub-sections will consider these two lines of argument, respectively.

## **2.1 The conceptual incompatibility of popular sovereignty and constitutionalism**

The conclusion that popular sovereignty and constitutionalism are conceptually incompatible can be reached by arguing that popular sovereignty and constitutionalism exclude each other, on the basis that the people is (properly) sovereign only before the establishment of a constitution – once a constitution is in place, the people is either powerless, or the power it enjoys is not sovereign at all.<sup>37</sup> In order to understand the structure of this argument it is necessary to consider the so-called ‘paradox of constitutionalism’ – a paradox that is generated by the irresolvable tension between *constituent power* and *constituent form*.<sup>38</sup> According to Loughlin and Walker:

‘Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the “consent of the people” and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms. The people, in Maistre’s words, “are a sovereign that cannot exercise sovereignty”; the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established. This indicates what, in its most elementary formulation, might be called the paradox of constitutionalism’.<sup>39</sup>

The paradox of constitutionalism captures the tension between the notion that governmental power must flow from the sovereignty of the people, and the notion that governmental power must be regulated and constrained by legal rules and principles. This tension seems to be irreconcilable, because the former notion appears to suggest that governmental power cannot have legal limitations (in the same way in which sovereignty is absolute); whereas the latter

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<sup>37</sup> I use the term ‘constitution’ to refer to a set of legal norms that have constitutional significance, whether or not they are codified in a single legal document – see meaning (b) in §1.1.

<sup>38</sup> See: M. Loughlin and N. Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, OUP, 2008, Introduction.

<sup>39</sup> *Ibid.*

notion appears to suggest the opposite.<sup>40</sup> Indeed, it seems impossible to hold that the power enjoyed by the people is sovereign, and therefore absolutely free (including the freedom to shape the constitution in any desirable form); and, at the same time, that the sovereign power of the people ‘can only be exercised through constitutional forms already established or in the process of being established’.<sup>41</sup>

The paradox of constitutionalism is based upon the distinction between *constituent power* and *constituted power* – a distinction that is also material to the argument that popular sovereignty and constitutionalism exclude each other.<sup>42</sup> The point of this distinction is to differentiate between the power enjoyed by the people, as a whole, and the power enjoyed by the State (i.e. the union of the branches of government). This distinction makes it possible to argue that the authority of the State depends upon its connection with the power of the people; and that the system of government of a state political community owes its structure to a fundamental decision of the people. It would appear, therefore, that the State and the constitution are *constituted* by the people, as a result of a successful exercise of the *constituent* power vested in the people. This connection, however, generates three issues that lie at the heart of the paradox of constitutionalism. First, if the constituted power of the State flows from the constituent power of the people, how can the constituted power of the State be limited by a constitution that also flows from the same constituent power? Secondly, how can the people, as a whole, exercise its constituent power otherwise than through some institutional mechanisms that, to be in place, presuppose some form of constituted power?<sup>43</sup> Finally, provided that the constituent power vested in the people can be successfully exercised, does the people retain this power even after a constitution, and the system of law and government

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<sup>40</sup> For the purposes of this argument, the relationship between the power of the people and the power of the government is of great importance.

<sup>41</sup> M. Loughlin and N. Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, OUP, 2008.

<sup>42</sup> The notion of constituent power is usually associated with Sieyès’ pamphlet *Qu’est-ce que le Tiers Etat?* [What is the Third Estate?], published in 1789. On Sieyès’ constitutional theory, see: M. Goldoni, *La Dottrina Costituzionale di Sieyès* [The Constitutional Theory of Sieyès], Firenze University Press, 2009. See, also: M. Goldoni, ‘At the Origins of Constitutional Review: Sieyès’ Constitutional Jury and the Taming of Constituent Power’, *Oxford Journal of Legal Studies*, Volume 32, 2012, pp. 211-234. Cf. D. Dyzenhaus, ‘Constitutionalism in an old key: legality and constituent power’, *Global Constitutionalism*, Volume 1, 2012, pp. 229-260, arguing that legal and constitutional theory should avoid using the idea of constituent power.

<sup>43</sup> This question assumes – as the entire Section does – that the people, as a whole, is capable of exercising (a set of) sovereign power(s). It is possible to call this assumption into question, even though I think it is not necessary to do so in the context of this article. From a logical point of view, there are three problems associated with the ability of peoples to exercise sovereignty: whether peoples are groups (with the potential of being collective agents); whether peoples, *qua* groups, can actually act; and whether peoples, *qua* collective agents, can act with intention (and/or reflectively).

authorised by that constitution, have been put in place? This last question is key to understanding the argument that popular sovereignty and constitutionalism exclude each other – for this argument assumes that popular sovereignty refers to the sovereign, constituent power enjoyed by the people prior to the establishment of a constitution. But what happens to this power once the constitution, and the system of law and government authorised by that constitution, are established?

Let us call the moment a given people P comes into existence,  $t_0$ ; and the moment a constitution is established by P,  $t_1$ . Let us also assume that P enjoys sovereign, constituent power between  $t_0$  and  $t_1$ ; and that P exercises this power to establish the constitution at  $t_1$ . The question above requires one to determine the type of power that P enjoys at  $t_2, t_3, \dots, t_n$  – i.e. after the establishment of the constitution.<sup>44</sup> More precisely, one should determine whether the sovereignty that P is said (by the constitution) to enjoy at  $t_2, t_3, \dots, t_n$  is the same type of power that P enjoyed between  $t_0$  and  $t_1$  (i.e. a sovereign, constituent power). Now, it would seem that the sovereignty of the people after the establishment of the constitution is qualitatively different from the sovereignty that established the constitution. Arguably, after the establishment of a constitution, only constituted powers can exist: this means that the type of power enjoyed by P at  $t_2, t_3, \dots, t_n$  is *constituted* power. But, if the principle of popular sovereignty is meant to capture the sovereign, *constituent* power of the people (as it is usually entailed by the concept of sovereignty), then this principle is inconsistent with constitutionalism, as it is inconsistent with the existence of a constitution.

In this Section I have used the paradox of constitutionalism to explain the argument that popular sovereignty and constitutionalism exclude each other, on the basis that the people can be (properly) sovereign only before the establishment of a constitution.<sup>45</sup> This argument entails the view that popular sovereignty and constitutionalism are incompatible at a

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<sup>44</sup> It might be possible that at  $t_2, t_3, \dots, t_n$  the people does not enjoy any type of power (constituent, or constituted). However, for the purposes of this Section, it is more useful to consider the scenario in which the constitution somehow incorporates the principle of popular sovereignty; and, because of this, it can be assumed that the people has some type of power under the constitution.

<sup>45</sup> Here, there might be two parameters of distinction at play – one temporal and the other institutional. The temporal parameter allows one to distinguish between ‘sovereignty before’ and ‘sovereignty after’ the establishment of the Constitution. The institutional parameter allows one to distinguish between a political principle of popular sovereignty and a legal principle of popular sovereignty (that can be applied by the courts).

theoretical level.<sup>46</sup> In what follows, I am going to argue against this view, defending the conceptual compatibility of popular sovereignty and constitutionalism. Yet, before doing so, I will consider the second line of argument that may lead one to conclude that the principle of popular sovereignty has no role to play in the contemporary Indian constitutional framework.

## 2.2 Popular sovereignty and the Constitution of India

Even if popular sovereignty and constitutionalism were compatible as a matter of theory, it might still be possible for popular sovereignty to be incompatible with specific constitutional frameworks. In light of this, it is necessary to investigate whether the specific features of the Indian Constitution make it impossible for the contemporary Indian constitutional framework to accommodate the principle of popular sovereignty. As indicated at the beginning of the article, it is possible to link the legitimacy of the enactment of the Indian Constitution to a successful exercise of sovereignty by the Indian people. Yet, this possibility does not entail that popular sovereignty is an operative principle in the contemporary Indian constitutional framework. The Indian Constitution does not explicitly include references to the idea of popular sovereignty; furthermore, the kind of rigidity that characterise this Constitution appears to be at odds with the notion that the Indian people enjoys sovereignty under the Constitution.

The Constitution of India has been said to be characterised by a *variable rigidity*, since it identifies different constitutional amendments procedures in relation to different constitutional matters.<sup>47</sup> When considering the amendment process in Indian constitutional law, Article 368 of the Constitution is the first port of call. This Article, together with other constitutional provisions, is read as setting out ‘a three-pronged amendment process for different categories of constitutional provisions’.<sup>48</sup> The first category includes provisions that,

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<sup>46</sup> It is also possible to see this argument as a specification of a more general argument, according to which sovereignty – not simply popular sovereignty, but every type of sovereignty – is incompatible with constitutionalism and the existence of a constitution.

<sup>47</sup> In discussing the delicate question of how to balance constitutional rigidity and flexibility, Fusaro and Oliver affirm that: ‘India’s Constitution is probably the most sophisticated one in establishing a great variety of procedures to adapt and change its arrangements based upon the careful selection of different matters (almost a model of *variable rigidity* or even flexible rigidity, if an oxymoron is tolerated here).’ C. Fusaro and D. Oliver, *How Constitution Change – A Comparative Study*, Hart Publishing, 2011, p. 435 (emphasis added). See, also: R. Dixon and D. Landau, ‘Tiered Constitutional Design’, *The George Washington Law Review*, Volume 86, 2018, pp. 438-512.

<sup>48</sup> A.K. Thiruvengadam, *The Constitution of India – A Contextual Analysis*, Hart Publishing, 2017, p. 209.

in the Indian context, are considered to be relatively less significant – for example, the provisions about the creation of new States. This first group of provisions can be amended via a procedure (through a Constitutional Amendment Bill) that resembles the ordinary legislative process – i.e. with a simple majority, plus assent by the President. The second category includes ‘all provisions except those mentioned in the first category and that are viewed as being of vital significance’.<sup>49</sup> The amendment of this second group of provisions begins by introducing a Bill in either House of Parliament; then the Bill must be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting; finally, the Bill must receive the assent of the President. The third category includes provisions that are considered to be highly significant – viz. that refer to Indian federalism and/or affect the interests of the States.<sup>50</sup> In order to amend the provisions included in this third category, it is necessary to follow the procedure outlined in relation to the second category, but before the assent of the President, the amendment must be ratified by the legislature of not less than one-half of the States.

Article 368 generates two situations that may lead one to conclude that popular sovereignty is not compatible with the contemporary Indian constitutional framework. First, Article 368 does not identify the people as one of the actors in the process of constitutional amendments. Secondly, and more importantly, the provisions of Article 368 (together with the other provisions that are significant for the amendment of the Constitution) are, and have been, the object of judicial interpretation. This means that together with the Parliament, State Legislatures, and the President, the judicial power is the other important force underpinning the process of constitutional amendment; and the activity of the Supreme Court has indeed shaped the Indian constitutional framework. For the purposes of this article, the most important judicial element of the Indian constitutional framework is the doctrine of the basic structure.<sup>51</sup>

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<sup>49</sup> Ibid, p. 210.

<sup>50</sup> The provisions included in this third category refer to: Article 54, Article 55, Article 73, Article 162 or Article 241; Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI; any of the Lists in the Seventh Schedule; the representation of States in Parliament; and the provisions of Article 368 itself.

<sup>51</sup> On the doctrine of the basic structure as linked to the idea of common law constitutionalism, see: S. Swaminathan, ‘The long slumber of Dicey’s Indian monarch’, *Commonwealth Law Bulletin*, Volume 42, 2016, pp. 212-235. On the relationship between the doctrine of the basic structure and the judiciary, see: A. Sengupta, ‘Appointment of Judges and the Basic Structure Doctrine in India’, *Law Quarterly Review*, Volume 132, 2016, pp. 201-206.

The doctrine of the basic structure has been developed by the Supreme Court of India in four stages. The first stage is provided by *Shankari Prasad Singh v Union of India* (1952), where the Supreme Court held that Article 368 empowers Parliament to amend any provision of the Constitution. This position was re-affirmed some years later in *Sajjan Singh v State of Rajasthan* (1965). There is, however, an important difference between the two cases – a difference that makes *Sajjan Singh* the second stage of the development of the basic structure. While *Shankari Prasad* was decided with a unanimous judgment, in *Sajjan Singh* two of the five judges produced partial dissents. More importantly, *Sajjan Singh* identifies some matters that were not considered in *Shankari Prasad* – one of these matters is the issue of whether making a change in the *basic features* of the Constitution should be regarded as an amendment, or as rewriting part of the Constitution (and whether ‘rewriting’ the Constitution would fall within the scope of Article 368). The third stage coincides with an important interpretative change in the reading of Article 368; and, especially, in the interaction between Article 368 and Article 13(2).<sup>52</sup> In *Golak Nath v State of Punjab* (1967) – a case decided by an eleven-judge bench – it was held that Parliament’s power to amend the Constitution could not amount to a violation of the Fundamental Rights included in Part III of the Constitution. This decision was subsequently overruled in *Kesavanda Bharati v Union of India* (1973), where the Supreme Court held (by a majority of seven to six) that Parliament’s power to amend the Constitution can modify all parts of the Constitution. Yet, at the same time, the Supreme Court held that Parliament’s amending power cannot change the ‘basic features’, or the ‘basic structure’ of the constitution. This is the fourth, and arguably the most important, stage of development of the doctrine of the basic structure.<sup>53</sup>

The doctrine of basic structure shows that the power of constitutional amendment – i.e. the supreme power within the Indian constitutional framework – is distributed, and at times contended, between the Parliament (i.e. the *Lok Sabha*, the *Rajya Sabha*, and the President of India) and the Supreme Court. In this context, it seems that the principle of popular sovereignty does not have a role to play – at least, not a direct, explicit role – as the people is

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<sup>52</sup> Article 13(2) reads as follows: ‘The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void’.

<sup>53</sup> The reasoning that led to the decision in *Kesavananda* was reaffirmed and articulated in subsequent cases: *Indira Nehru Ganshi v Raj Narain* (1975); *Minerva Mills v Union of India* (1980); and *Waman Rao v Union of India* (1980). These cases are noteworthy for two reasons: first, they affirm that the decision on whether a given feature of the Constitution is part of the ‘basic structure’ belongs to the Supreme Court; and secondly, they identify several ‘basic features’ of the Indian Constitution.

not recognised as one of the actors that can amend the Constitutions. Moreover, the power to amend the Constitution has limitations; and these limitations are to be found by interpreting the Constitution itself – a position that is not surprising, when considered from the perspective of constitutionalism. Now, insofar as the power of constitutional amendment is the supreme power under the Constitution, one may wonder if this power could be a manifestation of sovereignty under the Constitution (given that sovereignty entails the notion of supreme power). Yet, the power to amend the Constitution of India is limited and, for this reason, irreconcilable with the idea of sovereignty (given that sovereignty is understood as entailing the notion of a power that is not only supreme, but also *absolute*).<sup>54</sup> It would appear, therefore, that the specific features of the Indian Constitution make it impossible for the contemporary Indian constitutional framework to accommodate popular sovereignty as an operative constitutional principle.

### **3. The conceptual compatibility of popular sovereignty and constitutionalism**

The purpose of this Section is to reject the argument (illustrated in Section 2.1) that popular sovereignty and constitutionalism are incompatible at a fundamental, conceptual level. This is necessary (although not sufficient) in order to establish the possibility of answering the central question of this article. In fact, if it were true that popular sovereignty and constitutionalism are conceptually incompatible, it would not even make sense to search for the role played by the principle of popular sovereignty within the Indian constitutional framework. In this case, the principle of popular sovereignty could simply not operate (or even exist) in a constitutional framework that embodies the idea of constitutionalism.

The incompatibility of popular sovereignty and constitutionalism can be questioned by conceiving of popular sovereignty as a *constitutive doctrine* of public authority, rather than as a *regulative doctrine* of political power. In a recent book, Daniel Lee articulates this argument in light of an historical study of the idea of popular sovereignty.<sup>55</sup> According to Lee, popular sovereignty entails the notion that the ultimate source of public authority – an authority enjoyed and exercised by State institutions – originates in the people; and constitutionalism

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<sup>54</sup> This means that, even if the Constitution of India gave to the Indian people a role in the process of constitutional amendment, this (constituted) power could not be recognised as a manifestation of sovereign (constituent) power.

<sup>55</sup> D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, OUP, 2016.

prescribes that the exercise of public power ought to be limited and regulated by law. For Lee, the idea of popular sovereignty is defined by the concept of sovereignty, which is conceived of as an extra-legal, and extra-institutional, power. As such, the idea of popular sovereignty is at odds with that of constitutionalism. More precisely, the idea of constitutionalism cannot be squared with the idea that the sovereign people hold (in reserve) an extra-legal, and extra-institutional, power that is, by definition, absolute and unlimited. The incompatibility between popular sovereignty and constitutionalism is identified by Lee in the contradiction between a doctrine of absolute and unlimited power (i.e. popular sovereignty) and a doctrine of relative and limited power (i.e. constitutionalism). In order to address this incompatibility, Lee's strategy is to look at the way in which popular sovereignty '...emerged in the history of constitutional thought but also how it was thought to fortify the constitutionalist aim of limiting and regulating public authority'.<sup>56</sup> It is worth considering Lee's historical study of popular sovereignty, as it provides some insights that will help me explain how to argue for the compatibility of popular sovereignty and constitutionalism.

According to Lee, the 'conventional view' sees popular sovereignty as a doctrine of (popular) resistance against absolute power. This view conceptualises the people as a 'sleeping sovereign' that retains the power to overthrow a tyrannical government – a power that manifests itself in moments of constitutional crisis. This doctrine of popular sovereignty also provides an appropriate standard to evaluate the legitimacy of political power, and of its exercise by public authorities. The conventional view on popular sovereignty is a regulative doctrine of political power; and it focuses attention on the issue of the limitation, and control, of political power. Lee argues that the debate about the best regulative doctrine of political power became top priority when modern political thought began to investigate the power exercised by the government within a nation-state; whereas constitutive doctrines of public authority were highly debated in medieval times, when nation-states were still to become the paradigm of a political community.<sup>57</sup> Conceiving of popular sovereignty as a constitutive doctrine of public authority is important, because it shifts attention from the issue of the limitation of political power to that of the constitution of public authority. Historically, popular sovereignty was introduced in the debate about the best constitutive doctrine of public authority to elucidate the constitution of unitary nation-states. In this context, popular

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<sup>56</sup> Ibid, p.3.

<sup>57</sup> Lee seems to suggest that the interest in debates about the best constitutive doctrine of public authority is inversely proportional to the prominence of the nation-state.

sovereignty was a *constitutive doctrine of legitimation*, which provided a solution to the (medieval) problem of overlapping public authorities. In early modern times, popular sovereignty was conceptualised as inseparable from the concept of the state, in the sense that sovereignty became a necessary (although not sufficient) condition for statehood.

For the purposes of this Section, I would like to highlight two elements of this early modern understanding of popular sovereignty as a constitutive doctrine of public authority. First, in this context the concept of sovereignty is detached from the idea of personal rule: sovereignty is a property that is independent from the person, or the group, that wields power in a given political community.<sup>58</sup> Secondly, this doctrine sees popular sovereignty as a ‘negative notion’, in the sense that it primarily identifies those who are not sovereign (i.e. the monarch, and other individuals/groups within the political community) – rather than positively indicating who is sovereign. These two elements suggest an understanding of popular sovereignty different from the one implicitly accepted by the argument supporting the conceptual incompatibility of popular sovereignty and constitutionalism.

The argument supporting the incompatibility of popular sovereignty and constitutionalism can be challenged by attacking its implicit understanding of (popular) sovereignty. For a start, it may be suggested that sovereignty should be associated not only with constituent power, but also with the constituted powers that are recognised, and authorised, by the constitution. It would seem that, by re-conceptualising sovereignty in this way, popular sovereignty could be combined with the existence of a constitutional framework – because the sovereignty of the people could be seen as one of the constituted powers recognised, and authorised, by the constitution. There are, however, two problems with this suggestion. First, this suggestion stretches the concept of sovereignty well beyond its meaningful boundaries: how could sovereignty be, at the same time, unlimited (when associated with constituent power), and limited (when associated with constituted power)? Secondly, it is not at all clear why, amongst all the constituted powers recognised, and authorised, by the constitution, only the power enjoyed by the people should be called ‘sovereign’. Potentially, all constituted powers under the constitution could be associated with sovereignty, but this would dilute the concept of sovereignty (in addition to the first problem, which remains).

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<sup>58</sup> According to Lee, this understanding of sovereignty was developed by jurists, using some key Roman law concepts such as *imperium*, *iurisdictio*, and *dominium*. In particular, jurists conceptualised sovereignty in light of the distinction between the existence of a right and the exercise of that right (e.g. while the owner has, and retain, their right in relation to their property, the usufructuary may use and enjoy that property).

In light of these two problems, it appears that this re-conceptualisation of sovereignty is not decisive in challenging the incompatibility of popular sovereignty and constitutionalism. Nonetheless, the task of re-conceptualising (popular) sovereignty should not be abandoned, given that the key to argue that popular sovereignty and constitutionalism are compatible is to show that it is possible for popular sovereignty to exist not only before, but also after the establishment of a constitution. In order to achieve this result, it is necessary to re-conceptualise not simply popular sovereignty, but also constitutionalism – paying more attention to the positive model of constitutionalism.

Negative constitutionalism is based on a fracture between the people and the State; whereas positive constitutionalism capitalises on the connection between them. From the perspective of positive constitutionalism, the constitution should empower, and help, the State to realise its purpose. Popular sovereignty can be conducive to this, if it becomes a way to anchor the establishment of a constitution to the will of the sovereign people. Also, once the constitution is in place, popular sovereignty can work as a reminder of the fact that the constitution, the legal order that flows from that constitution, and all State organs (and public authorities) empowered by the constitution have their point in the people who established the constitution and keep it alive.

In this Section I have shown that popular sovereignty and constitutionalism can be compatible, provided that popular sovereignty is re-conceptualised as a constitutive doctrine of legitimation, and constitutionalism is understood in its positive dimension. This is a crucial (although intermediate) result for the purposes of this article, because it opens up the logical space in which my main argument can be developed. However, the conceptual compatibility between popular sovereignty and constitutionalism is only a necessary condition that must be established before answering the central question of the article; it is necessary, but not sufficient to answer that question. In other words, this Section has provided a response to the argument offered in Section 2.1; but it is still necessary to respond to the argument offered in Section 2.2. This means that the next step must be to explain how the principle of popular sovereignty can be included in a constitutional framework characterised, amongst other things, by the specific kind of constitutional rigidity conveyed by the doctrine of the basic structure.

#### 4. Popular sovereignty and constitutional rigidity: a theoretical proposal from Italy

The purpose of this Section is to explain how the principle of popular sovereignty can be (re-)conceptualised in order to fit in with a constitutional framework that includes a rigid Constitution, as well as limitations on the scope of the constitutional amendment process. In order to do so, I will illustrate the doctrine of popular sovereignty developed by Luigi Ferrajoli in the second Volume of his *Principia Juris*, entitled *Teoria della Democrazia* [Theory of Democracy].<sup>59</sup> Ferrajoli's proposal is theoretical in nature, but it is inspired by the Italian constitutional experience. Because of this, before focusing on his doctrine of popular sovereignty, it would be helpful to explain the relevance of the Italian constitutional framework for the purposes of this article.

The Constitution of the Italian Republic was enacted by the Constituent Assembly on 22 December 1947, and came into force on 1 January 1948.<sup>60</sup> The Italian Constituent Assembly was elected on 2 June 1946. This date is particularly important in Italian history for three reasons: it was the first election with universal suffrage; it was the first free election after more than twenty years of Fascism; and, together with the election of the Constituent Assembly, the Italian people were asked to choose, via a referendum, between a republican and a monarchical form of government.<sup>61</sup> The Italian Constitution (1948) is more or less coeval with the Indian Constitution (1950); both Constitutions represent a fracture with the previous (constitutional) history of their countries, and in both cases the Constitution is explicitly linked to a new political life characterised by a democratic and republican government. Moreover, the Italian Constitution is written, codified, long, and rigid: these are all characteristic that the Italian Constitution shares with the Constitution of India. For the purposes of this article, the rigidity of the Italian Constitution is particularly relevant. According to Italian constitutional law the process of constitutional amendment is regulated not only in terms of form, but also of substance; and the substantive limitations identify certain constitutional matters that cannot be amended. Some of these matters are the so called 'supreme principles of the constitutional order' – a doctrine developed by the Italian

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<sup>59</sup> L. Ferrajoli, *Principia Juris*, Laterza, 2007. Luigi Ferrajoli (1940) is Emeritus Professor of Law at Roma Tre University. Over last forty years, he has published more than 30 books, and more than 500 articles and chapters. Ferrajoli's scholarship is widely read and discussed not only in Europe, but also in Latin America.

<sup>60</sup> The Italian Constitution was approved with 453 votes in favour and 62 against. Following its approval, the text of the Constitution was promulgated in the *Gazzetta Ufficiale* on 27 December 1947.

<sup>61</sup> The question was straightforward: 'Republic or Monarchy?'. As a result of this institutional referendum the Italian Republic was established, and the 2 June is celebrated every year as *Republic Day*.

Constitutional Court (which can be compared with the Indian doctrine of the basic structure).<sup>62</sup>

Furthermore, Article 1 of the Italian Constitution includes an explicit reference to popular sovereignty: ‘Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution’.<sup>63</sup> This article could appear as a formulation of the paradox of constitutionalism, as explained in Section 2.1. Yet, Italian constitutionalism has theorised the principle of popular sovereignty with a view to retaining it as an operative principle in the Italian constitutional framework. For all these reasons – the parallelisms between the Italian and the Indian Constitution; the kind of rigidity that characterises the Italian Constitution; the presence of popular sovereignty in the Italian constitution architecture – it seems to me that a theoretical proposal inspired by the Italian constitutional experience may offer some insights also relevant in the context of the contemporary Indian constitutional framework.

Ferrajoli observes that the idea of popular sovereignty appears to assume the existence of a relationship between the people and (a formal understanding of) democracy. Ferrajoli’s argument begins by focusing on the idea of democracy: his strategy is to suggest a different understanding of democracy, which will affect the way in which the relationship between the people and democracy is understood; and this, in turn, will help one re-conceptualise popular sovereignty. According to a widespread view, democracy is a method that allows the members of a political community – viz. the majority of the members – to make public decisions. By granting the power to identify and choose public decisions to the people, this method is based on the value of autonomy (in the sense of self-governing). The value of autonomy supports the view that public decisions must depend upon the general will of the people, which is seen as an expression of the sovereignty of the people. This understanding of democracy is formal (or procedural), because it only establishes who should make public decisions (the people), and how these decisions should be made (majority rule); but it is silent on the content of these decisions. This formal understanding of democracy assumes that the

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<sup>62</sup> An explicit, substantive limit to the amendment of the Italian Constitution is expressed in Article 139 of the Constitution. See *supra* footnote 20.

<sup>63</sup> Article 1 of the Italian Constitution reads as follows: ‘Italy is a democratic Republic founded on labour. Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution.’

point of democracy is to ensure that public decisions are made by those who will be affected by those decisions – and to this end, only procedure, not substance, matters. Ferrajoli’s argues that the formal dimension of democracy is only one of the necessary conditions needed to identify a democracy and, in particular, a constitutional democracy. Together with the formal dimension, a sound theory of democracy should also pay attention to the substantive dimension of democracy.<sup>64</sup>

Ferrajoli observes that one’s understanding of popular sovereignty depends upon the way in which one conceptualises sovereignty. If sovereignty is conceived of as a matter of absolute power (*potestas legibus soluta*), then popular sovereignty is the notion that the people enjoys absolute power. For Ferrajoli, the problem with this concept of sovereignty is that it makes popular sovereignty incompatible with the existence of a constitutional democracy (and/or the idea of *Rechtsstaat*<sup>65</sup>). Secondly, sovereignty can be conceptualised as a guarantee. From this perspective, popular sovereignty is the notion that *only* the people enjoys sovereignty. This understanding of popular sovereignty entails a negative principle that legitimises democracy as a political regime. In this case, the principle of popular sovereignty is understood as a negative principle because it precludes sovereignty to any person and/or group other than the people as a whole. In other words, the negative principle of popular sovereignty guarantees that only the people as a whole is sovereign. Thirdly, sovereignty can be thought of in terms of ‘fragments’. In this sense, popular sovereignty means that sovereignty belongs to the individuals that, all together, constitute ‘the people’. In other words, sovereignty belongs to each and every member of the community that we call ‘the people’. According to this interpretation, popular sovereignty amounts to the sum of the fundamental rights that are constitutionally recognised to each and every member of the community.<sup>66</sup> According to Ferrajoli, the second and the third concept of sovereignty are both compatible with the idea of a constitutional democracy, understood not only in its formal, but also in its substantive dimension. This re-conceptualisation of popular sovereignty – in light the second and the third

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<sup>64</sup> For Ferrajoli, there are four reasons for this: (i) a formal account of democracy lacks explanatory power; (ii) the internal consistency of the notion of democracy; (iii) the importance of the connection between popular sovereignty and fundamental rights; (iv) the difficulty with the idea of ‘the people’.

<sup>65</sup> On the incompatibility between (internal) sovereignty and the idea of *Rechtsstaat*, see: N. MacCormick, *Questioning Sovereignty*, OUP, Chapter 8.

<sup>66</sup> Ferrajoli identifies a concrete example of this third meaning of popular sovereignty in Article 34 of the Declarations of Rights included in the 1793 French Constitution, which reads as follows: ‘There is oppression against the social body when a single one of its members is oppressed: there is oppression against each member when the social body is oppressed’.

concept of sovereignty above – has the advantage to be able to avoid the tension between the principle of popular sovereignty and the existence of a rigid constitution that includes the protection of a set of fundamental rights. In fact, Ferrajoli’s proposal identifies in popular sovereignty, fundamental rights, and constitution rigidity the three essential elements of a constitutional democracy.

Ferrajoli sees rigidity as an essential, almost natural feature of a constitution.<sup>67</sup> Rigidity is a structural feature of the constitution, linked to the supreme position occupied by the constitution in the hierarchy of legal sources. According to Ferrajoli, a constitution is rigid by definition, in the sense that a flexible constitution is, despite its name, just ordinary law. For the importance of the rigidity of the constitution lies in its capacity to provide a safeguard against authoritarian and/or fascist regimes, as demonstrated by the Constitutions of some European countries – e.g. Italy (1948) and Germany (1949); and, later, Portugal (1976) and Spain (1978).<sup>68</sup> Ferrajoli argues that the idea of constitutional rigidity can be unpacked in the following notions: the rigidity of constitutional norms; the ensemble of the constitutional guarantees; and the ensemble of the legislative guarantees required by the constitution to realise the rights that are constitutionally protected. The notion of the rigidity of constitutional norms is particularly interesting here, because it seems to be in tension with the idea of popular sovereignty. Indeed, it seems that by increasing the degree of rigidity of a Constitution, the generation of people who established the Constitution decreases the freedom of future generations (that should be free, in light of the principle of popular sovereignty, to live under ‘their’ Constitution, instead of their ancestors’ Constitution). According to Ferrajoli, the opposite is true: constitutional rigidity is an expression of popular sovereignty and a guarantee for future exercises of popular sovereignty. This is the reason why constitutional rigidity tends to touch upon those key features of the political and legal order that are the pre-conditions of popular sovereignty. In other words, constitutional rigidity, especially in its strongest form, should disallow the people to use its sovereign freedom to destroy its own freedom.

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<sup>67</sup> Ferrajoli accepts Alessandro Pace’s idea of a ‘natural rigidity’ of constitutions. L. Ferrajoli, *Principia Juris*, Laterza, 2007, p. 37. See A. Pace, ‘La “naturale” rigidità delle costituzioni scritte’ [The natural rigidity of written constitutions], *Giurisprudenza Costituzionale*, 1993, pp. 4085 ff.

<sup>68</sup> In all these countries, the rigidity of the constitution was a way to express in a legal form a clear political ‘never again’ to illiberal, authoritarian and totalitarian regimes such as Fascism and Nazism.

For the purposes of this article, Ferrajoli's theoretical proposal is very interesting, because it shows that the principle of popular sovereignty can be accommodated by a constitutional framework characterised by both constitutional rigidity and substantive limitations on the process of constitutional amendment. It should be noted that to make this possible one has to (re-)conceptualise popular sovereignty as the guarantee that only the people is sovereign, and that sovereignty belongs to each and every member of the political community. In light of this understanding of sovereignty, popular sovereignty can be seen as the sum of the fundamental rights that are constitutionally recognised to each and every member of the community. Conceived in this way, popular sovereignty is not in tension with a rigid Constitution that includes a strong protection of fundamental rights – even when these rights are not only civil and political, but also economic, social, and cultural (as it is the case in the Italian and in the Indian constitutional framework).

## **5. What role for popular sovereignty in the contemporary Indian constitutional framework?**

The previous Sections have established that the principle of popular sovereignty is conceptually compatible with constitutionalism (Section 3), and illustrated how this principle can be accommodated in a constitutional framework characterised by constitutional rigidity, limitations of the power of constitutional amendment and judicial protection of different classes of rights (Section 4). This final Section builds upon the results achieved in Sections 3 and 4 to explain what role the principle of popular sovereignty can (still) play in the Indian constitutional framework, seventy years after the enactment of the Constitution. This will also allow me to suggest how to interpret the claim that the legitimacy of the Indian Constitution is grounded in the principle of popular sovereignty.<sup>69</sup>

In *The Constitution of India: Popular Sovereignty and Democratic Transformations*, Sarbani Sen offers a very interesting study of Indian constitutionalism, illuminated by an examination of the nature of the Indian constitutional 'founding moment', seen as an exercise of popular sovereignty by the Indian people.<sup>70</sup> More precisely, Sen's study aims to clarify the nature, and

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<sup>69</sup> This is proposition (ii) identified at the beginning of the article. The problem of how to best interpret this proposition led me to ask the question: what role can the principle of popular sovereignty (still) play in the Indian constitutional framework, seventy years after the enactment of the Constitution?

<sup>70</sup> S. Sen, *The Constitution of India – Popular Sovereignty and Democratic Transformations*, OUP, 2007.

the development, of the relationship between popular sovereignty and constitutionalism in the Indian constitutional context. Sen identify three stages in the modern Indian constitutional tradition:

‘...first, the revolutionary struggle to define new principles of government and to articulate the concept of popular sovereignty, through a prolonged and ongoing dialogue between the Indian leaders and the people; second, the culmination of the revolutionary endeavour in the sovereign act of remaking/founding of a new political order, and the articulation of the primary constitutional themes that emerged in the Constituent Assembly debates; and third, tracing the path of post-founding acts of transformative constitutional politics within the context of an institutionalized republic’.<sup>71</sup>

According to Sen, each stage corresponds to a redefinition of the principle of popular sovereignty. Initially, this principle captures a republican sense of direct exercise of sovereign power by the people (to redefine the political identity of India). At the second stage, the principle of popular sovereignty realises its potential, by constituting a new polity and being concretised in certain primary constitutional themes (e.g. the separation of powers and judicial review). Finally, the principle of popular sovereignty operates in an institutionalised context, allowing ‘fundamental disagreements on higher law principles to be resolved not through a show of force but through generation of institutional discourse and opportunities for the people to again make a commitment to active citizenship’.<sup>72</sup>

For the purposes of this Section, the third re-definition of the principle of popular sovereignty is particularly interesting, as it provides a possible answer to the central question of this article. According to Sen, the role that the principle of popular sovereignty can still play in the contemporary Indian constitutional context is that of allowing public participation in the resolution of ‘disagreement on higher law principles’. In doing so, the principle of popular sovereignty invites people to actively engage, as citizens, with various institutional branches to determine political changes that have constitutional significance. For this reason, today’s

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<sup>71</sup> Ibid, p. 39.

<sup>72</sup> Ibid, p. 191. For Sen, examples of this exercise of popular sovereignty (in the third stage of re-definition) are provided by the constitutional changes to the right to property, and to the extent of Parliament’s amending power.

popular sovereignty can still be seen as a reiteration of the political mobilisation that supported the ‘founding moment’ in Indian constitutional history.<sup>73</sup>

In answering the central question of this article, I find myself in agreement with Sen’s view that popular sovereignty has been exercised, but not totally spent in the founding moment that established the Constitution. However, the insights from the previous Sections – in particular, the attention to the positive dimension of constitutionalism and the notion that popular sovereignty resides not only in the people as a whole, but also in the individual members of the political community – provide an important complement to her view, improving its explanatory power. Sen sees the expression of the principle of popular sovereignty in the contemporary Indian constitutional framework as something that can be explained in terms of Ackerman’s constitutional politics. This view links the expression of popular sovereignty to ‘processes of constitutional transformation that break through existing procedures for constitutional change’.<sup>74</sup> In my opinion, by focusing attention on the moments of constitutional change, Sen’s view does not manage to properly explain the role played by popular sovereignty in the ‘ordinary’ constitutional life of the Indian political community. Indeed, Sen’s view does not appear to recognise this ‘ordinary’ role, when she affirms that the expression of the principle of popular sovereignty (in the third stage of its re-definition) is different from ‘the Habermasian theory of proceduralized popular sovereignty’.<sup>75</sup> Furthermore, in the context of the third stage, Sen examines ‘whether and to what extent popular sovereignty can be exercised outside of its “proceduralized” role in the modern democratic state, during transformative moments post-founding’.<sup>76</sup>

It is worth remembering that in the Preamble to the Indian Constitution, the adoption of the Constitution is explicitly linked to securing justice (social, economic and political justice), liberty (of thought, expression, belief, faith and worship), and equality (of status and of opportunity) to all Indian citizens; and to promoting fraternity among all Indian citizens. It

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<sup>73</sup> Sen’s view is that the expression of popular sovereignty ‘falls in between the direct exercise of sovereign power by the people to alter and abolish an arbitrary colonial government that occurred in the pre-founding period, and the proceduralized form of opinion and will formation serving to legitimate ordinary law-making in the nation state’. Ibid, p. 164.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid, p. 163: ‘In the post-founding period, the principle of popular sovereignty reaches its third stage of redefinition, as it interacts with the institutionalized structures of a modern Indian nation state to create new political meaning. This expression of the principle is different from the Habermasian theory of proceduralized popular sovereignty in the context of a modern nation state’.

<sup>76</sup> Ibid, p. 160.

seems to me that only an appreciation of the positive dimension of constitutionalism can properly explain how the Indian legal order, and the State organs empowered by the Constitution, can bring about the political project embedded in the Indian Constitution. Similarly, only the notion that popular sovereignty resides in the people as a whole, and, at the same time, in each individual members of the political community, can properly explain the way in which the constitutional protection of different categories of fundamental rights (including economic and social rights) can be combined with the exercise of popular sovereignty within the constitutional framework of today's India.<sup>77</sup>

My conclusion is that the role of the principle of popular sovereignty in the contemporary Indian constitutional framework should be two-fold. On the one hand, it should help people to engage in moments of constitutional change – as convincingly explained by Sen's view. However, as long as popular sovereignty is conceived of as a *constitutional* principle (and not as extra-ordinem, de facto power), it can only find expression in constitutional changes that are permitted by the Indian constitutional framework. On the other hand, the principle of popular sovereignty should provide positive guidance for the main constitutional actors – i.e. the Parliament and the Supreme Court – in the activity of realising their constitutional mandate and keeping the legal order aligned with the Constitution. This understanding of the role of popular sovereignty *qua* constitutional principle also sheds some light on the claim that the legitimacy of the Indian Constitution is grounded in the principle of popular sovereignty. This claim should be read as referring not only to the 'founding moment' in the history of the Indian Constitution, but also to the current life of the Constitution. As such, this claim expresses an ongoing requirement of political morality about the legitimacy – and not simply the legality – of the Constitution. This requirement makes the Constitution accountable to the sovereign people, in the sense that its ongoing legitimacy depends on whether the legal order and the institutions empowered by the Constitution are recognised by the Indian people to realise the *point* of the Constitution – i.e. securing justice, liberty and equality to all Indian citizens; and promoting fraternity among them.

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<sup>77</sup> The articulation of the fundamental rights that fall within the scope of popular sovereignty has two dimensions: one is institutional, and should be carried out by the two main constitutional actors – the Parliament and the Supreme Court; the other is theoretical, and should pertain to the activities of legal scholars.