

Populist Constitutionalism

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Introduction

In recent decades, constitutional reform appears to be gaining momentum (see Ginsburg and Melton 2015: 4). One might argue that we are experiencing times of ‘constitutional acceleration’ (Palermo 2007), in that political actors appear to be increasingly taking recourse to the instrument of constitutional reform. Innovative, popular forms of constitutional reform have emerged, which stress the importance of, and bring into constitutional practice, citizen participation in constitutional reform. But the people is equally a central dimension in a different type of engagement with constitutionalism, a phenomenon which can be identified as *populist constitutionalism*. In the European context, with which this chapter is predominantly concerned, populist engagement with processes of constitution-making and constitutional reform is a distinctive, and in some significant ways worrying, tendency. Populism is explicitly present in the constitutional developments in countries such as Hungary and Poland, and is causing significant tensions in the European Union, which is formally grounded in the values of democracy, the rule of law, and fundamental rights. The populist-constitutional phenomenon spawns debates on democratic backsliding and illiberal democracy in Europe as well as on the supranational monitoring of democracy (cf. Closa and Kochenov 2016). At the same time, current European manifestations of populist constitutionalism need to be put into the larger context of important and diverse manifestations elsewhere, including in Latin America and the United States (Urbinati 1998; Kaltwasser 2013).

The chapter provides an attempt to more systematically conceptualize populist constitutionalism, predominantly focusing on the European context. While there is some emerging literature on the phenomenon of populist constitutionalism (Mudde 2013; Müller 2016; Thio 2012), a more robust and theoretical treatment of the relation between populism and constitutionalism stills appears absent.¹ The chapter starts, therefore, with a theoretically informed discussion of the relation between populism and constitutionalism. Three different reasons warrant such an investigation. First of all, there exists an internal link between populism and the idea of *popular sovereignty*. Modern constitutionalism is equally said to find its ultimate legitimation in the people (cf. Loughlin and Walker 2007), grounding a democratic regime in both institutions of order and self-limitation, and of self-government (cf. Blokker 2017). Populists claim that the principle of popular sovereignty is insufficiently guaranteed in liberal, constitutional regimes. A key question therefore emerges, i.e., what is the difference in interpretation or understanding, if both modern constitutionalism and

¹ For an important exception, see Corrias 2016.

populism are said to be grounded in popular sovereignty? Secondly, an intrinsic part of populism concerns a form of *legal skepticism*, in the sense that populists are wary of the institutions of and limits of liberal constitutionalism, even if they are not necessarily against the idea of a constitutional order as such. In other words, populist constitutionalism can be understood as a strongly critical countercurrent to modern constitutionalism in its liberal guise. In this, in particular the views expanded by Carl Schmitt may be of aid in exploring this dimension further (cf. Antal 2017; Kahn 2011; Urbinati 1998). Thirdly, populism includes political engagement in projects of *constitution-making* and *constitutional reform*. Populists, when in power, are frequently engaging in intense reform (and abuse) of the existing constitutional arrangements, indicating the crucial dimension of state power in populist projects, in contrast to the idea that populism consists of a merely oppositional, anti-political phenomenon.

The chapter is structured as follows. First, I will generally discuss the relation between populism and constitutionalism in the light of two main constitutional traditions. Subsequently, the chapter deconstructs the notion of populist constitutionalism, discussing four key dimensions, i.e., the popular will, majoritarianism, legal resentment, and constitutional instrumentalism. The *popular will* tends to be understood by populists in a closed, unitary manner, and in negation of the pluralist and diarchic nature of representative democracy. Populists understand the *majority* as a collective, unitary entity, rather than as an aggregate as in liberalism, and in contrast to, and denial of, political minorities and opposition. *Legal resentment* entails a critique of the tendency to formal-rationalization and juridification in liberal constitutionalism, and exalts the political in constitutionalism. *Constitutional instrumentalism* entails a conflation of the constituting and the constituted, in that the constitution is not understood as a higher law, but as a fundamental law that can be changed according to political necessity. In conclusion, it is argued that populist constitutionalism's challenge for both liberal constitutionalism and representative democracy lies in its connection to the revolutionary constitutional tradition, which is however interpreted in distorted, and problematic ways, as expressed in the distinctive populist approach to the popular will, the political majority, the rule of law, and constitutionalism.

Populism and Constitutionalism

Populism is generally understood as the negation of, or at least the existence of a problematic relationship with, constitutional democracy. Populism plays on the second ingredient of 'constitutional democracy', in that populists claim to defend a pure form of rule of the people, while having difficulties with the first ingredient, constitutionalism, at least in the way it is generally understood.² As Jan-Werner Müller has recently put it, 'populism is inherently hostile to the mechanisms, and ultimately, the values commonly associated with constitutionalism: constraints on the will of the majority, checks and balances, protections for minorities, and even fundamental rights' (Müller 2016: 68; cf. Urbinati 2014). According to Nadia Urbinati, populists seek to 'implement an agenda whose main and recognizable character is hostility against liberalism and the principles of constitutional democracy, from

² Modern constitutionalism is predominantly understood as a set of constraints on the exercise of popularly legitimated political power.

minority rights, division of powers, and pluriparty system' (2014: 129). Populists are seen as impatient with procedures and institutions, and as loath of intermediary bodies, as they prefer unmediated relations between the populist ruler and the people. Populists prefer direct, 'natural' or 'pure' forms of politics, in contrast to indirect and artificial ones (Urbinati 1998: 111).

While it seems true that a general skepticism towards liberal constitutionalism and the rule of law can be found amongst many populists, it equally appears correct to sustain that populists are increasingly engaging with constitutionalism as a discourse and practice of power (cf. Müller 2016, chapter 2). Populists, in particular once in power, engage with the constitution in a variety of ways, not least in order to safeguard and perpetuate their political power in the name of a 'pure' people. Forms of populist constitutionalism in practice are visible in cases of what many see as forms of 'backsliding' or the emergence of 'illiberal' democracy in Central and Eastern Europe, in particular Hungary, but it is equally observable in Latin America (Venezuela, Bolivia, Ecuador), and even in so-called established democracies, such as the United States.³ What is more, it is possible to identify populist forms of behavior with regard to constitutionalism also beyond populist movements in strict terms.

It is tempting to dismiss the relation of populists with constitutionalism as merely one of abuse (Landau 2013) and of practices that go against constitutionalism and the rule of law (see, e.g., Closa and Kochenov 2016). The relationship between constitutionalism and populism is, however, more complex than a straightforward dichotomic view would allow for. First, in their political projects, populists frequently take recourse to constitutional change. It appears that populist constitutional projects cannot be entirely reduced to a mere dismantling of constitutional democracy, but also include forms of constitution-making, for better or worse. A second issue regards the fact that (distinctive dimensions of) populist constitutionalism equally emerge in the discourses and actions of political actors, who are not normally or predominantly defined as populist. This indicates a potential diffusion of a populist-constitutional mindset into the political mainstream, which potentially leads to a wider erosion of liberal-constitutional ideals. It may also indicate more structural trends of change regarding the relation between democracy and constitutionalism. A third matter regards the complexity of the claims that populists tend to make regarding constitutions, which may be said to find reflections in constitutional-theoretical debates over the relation between popular government and constitutionalism. A final issue is that a more in-depth understanding of the populist-constitutional phenomenon is necessary if one wants to elaborate, and put into practice, valid democratic alternatives. This last matter reflects the idea that the manifestation of populism signifies a deep discomfort with, and malfunctioning of, existing democratic institutions. It also indicates that a mere strengthening of the liberal, constitutional-democratic state might not be sufficient nor effective.

The populist approach towards constitutionalism is, then, not entirely negative, as not least becomes evident from projects of constitution-making and constitutional reform, as have emerged in (the highly diverse) cases in Latin America or East-Central Europe, in which

³ See for the Tea Party's constitutional programme, Goldstein 2011; Schmidt 2011; Zietlow 2012.

populism is claimed to play a role (De La Torre 2016; Batory 2016). In this, it can be argued, as recently suggested by Luigi Corrias (Corrias 2016), that populism is related to a specific – revolutionary and democratic - constitutional tradition, which can be best explored through reference to the work on constitutionalism of radical-democratic thinkers, such as Hannah Arendt (Arendt 1990; cf. Blokker 2017; Brunkhorst 2014; Laclau 2005; Möllers 2009). The revolutionary tradition emphasizes constituent power, understood as a founding act of the people, founding the polity *anew*. As Corrias argues, the understanding of the constituent power of the people in the revolutionary tradition appears as almost absolute, and as potentially being exercised directly in the polity (Corrias 2016: 16). What further emerges is a primacy of politics over law in the revolutionary tradition, in that law is understood as ultimately the outcome of political action, not the other way around. On this view, constitutions are less understood as higher, universal principles that limit and bind political power, as in legal or liberal constitutionalism, but rather seen as positive, political expressions of the rules and norms that a political community wants to give itself.

The revolutionary understanding of constitutionalism is in contrast to a second tradition, the evolutionary tradition, which understands constitutionalism as a negative, limiting instrument, which seeks to create order and stability (Blokker 2017) and to ‘tame politics’ (Corrias 2016: 15). The pedigree of this understanding of constitutionalism is less a democratic one, but rather related to liberal and statist understandings of constitutionalism. The evolutionary approach is endorsing a primacy of the law over politics, displaying a certain distrust of the people and of popular sovereignty, and understanding popular politics as potentially threatening the constitutional order itself. It may be argued that whereas the revolutionary tradition keeps the idea of constituent power alive in the constituted order (Kalyvas 2008), in the evolutionary approach, constituent power is seen as absorbed in (the institutions of) constituted power. The populist understanding of constitutionalism hinges on the revolutionary tradition, but with a specific twist. Populism captures the popular will and claims it its own, against other social forces, in- or outside society. Populists tend to define the people in strong contrast to some significant Other (elites, foreign forces), and in this turn their (idealized) construction of the People into the only acceptable, non-corrupted one. The people is in this equated with a majority, which is understood in contrast to minorities. The rule of law and constitutionalism cannot, according to populists, override the popular will. Constitutionalism as such becomes a device in the populist project of rebuilding the state.

Let us now turn to the distinctive populist approach to constitutionalism, in its specific interpretations of the popular will, the political majority, the rule of law, and constitutionalism.

Populist Constitutionalism Deconstructed

In order to understand the specific take of populists on the democratic constitutional tradition, an important exercise is a detailed exploration of how populism relates to constitutionalism, what claims are being made, and what justifications are being articulated by populists. The exploration offered here will discuss four key dimensions of populist constitutionalism, i.e., the popular will, majoritarianism, legal resentment, and constitutional instrumentalism. Among others, these four dimensions may serve as benchmarks for comparative, empirical

analyses of manifestations of populist constitutionalism, and help to explain the specific approaches towards constitutionalism by populists.

The popular will

As related to above, populism shares with constitutionalism the intrinsic relation to popular sovereignty, and the idea of the popular will as the legitimatory basis of politics and the legal order. As Margaret Canovan has stated, populists ‘their common feature is a political appeal to the people, and a claim to legitimacy that rests on the democratic ideology of popular sovereignty and majority rule’ (Canovan 2002: 25). Populism criticizes existing institutions for failing to effectively make the voice of the ordinary people heard and to display forms of distrust towards the people. If modern democracy is to be based on the idea of popular sovereignty, from which it ultimately derives its legitimacy, then contemporary manifestations of democracy, in terms of liberal, representative systems with strong judicial components, tend to turn popular sovereignty into an unrealized fiction. Populists call for making popular sovereignty a reality, which in constitutional terms means the creation of a more direct relation between the people and the constitutional complex of norms and values.

Populists endorse, in this, a distinctive interpretation of what the popular will entails. Populism is based on the conviction of populist forces to be representing the genuine will of the ‘pure’ or ‘ordinary’ people, against their ‘enemies’, the latter being identified in incumbent political classes and technocratic elites, as well as in any other opposing forces (not least ‘international’ ones) to the populist political programme. The populist perception is then frequently (even if not necessarily so) one of political closure and exclusion, meaning a negation of the pluralistic nature of society and the ultimate diverse composition of any national population, and, in its stead, the promotion of a (potentially totalitarian) idea, similar to what Claude Lefort has called the People-As-One. As Nadia Urbinati recalls, populism criticizes parliamentary democracy for ‘making politics a terrain of bargaining among a plurality of interest and parties’ (Urbinati 2014: 128). Populism, in contrast, prioritizes the political will of the real people over any kind of value pluralism or societal plurality of groups. In Urbinati’s words, populists seek to overcome the ‘diarchic’ nature of representative democracy, in which formal, political society and civil society are distinct. Populists want to unite the rulers and the ruled into one common body, the People (Urbinati 2014: 130). The People envisioned by populists tends hence to be a *Schicksalsgemeinschaft* or community of belonging, based on a thick identity, rather than a ‘procedural people’ that emerges in the ballot boxes.

An example of a closed, populist construction of the People and its will can be found in the discourses of Marine Le Pen, the leader of the *Front National*, and in her crusade against ‘communautarisme’ or the co-habitation of different ethno-religious communities within the secular French Republic. Le Pen opens her programme for the 2017 presidential campaign by stating as key objective: ‘To regain our freedom and control over our destiny by restoring the sovereignty of the French people’ (Le Pen 2017a: 3). The programme contains various calls for constitutional reform, including the following proposals:

The defence of national identity, [and] the values and traditions of French civilization. To inscribe into the Constitution, the defence and the promotion of our historical and cultural patrimony...The

promotion of secularism and the fight against communitarianism. Inscribe into the Constitution the principle: «The Republic does not recognize any [ethnic, religious] community». Restore secularism everywhere, extend it to the entire public sphere, and inscribe it into Labour Law. (Le Pen 2017a: 15).

While the relation between populism and the people is intrinsic, the populist idea of the people does not need to be an *exclusionary* one (cf. Mudde and Kaltwasser 2013). While in distinctive forms of (right-wing) populism, the people is equated with an ethnic nation or a distinctive, closed politico-cultural community, this is not always the case. Some forms of populism emphasize a positive and more inclusionary image of the capacity of ordinary citizens and contest the latter's exclusion from elite-dominated democratic politics. In relation to constitutionalism, such populists critique elitist, judicial constitutionalism, and endorse the participation of ordinary citizens in constitutional politics. In such a more inclusionary understanding (Mudde and Kaltwasser 2013), populism consists of the promotion of the ordinary people - even of the marginalized, the formally non-enfranchised, the 'plebs' - against the incumbent elite. The aim is to more fully realize the popular will in democratic politics, without necessarily equating the popular will with a clearly circumscribed people.

A good example of an inclusionary approach⁴ to defining the People is that of the Spanish movement-party Podemos, which is frequently taken as an example of left-wing populism. For instance, in its promotion of human rights, Podemos 'constructs rights in ways that blur the distinction between citizens and migrants – without eradicating it' (Nash 2016: 1298). For Podemos, foreigners are not the 'enemy within', and its construction of the People is rather one which groups together those citizens (and non-citizens) that are victims of globalization and neoliberal capitalism. This does not mean that forms of nationalism and patriotism are entirely absent in Podemos' discourse, but that its understanding of the People is closer to an idea of the 'plebs', i.e., those that until now have been in different ways excluded from effectively partaking in political rule (cf. Nash 2016: 1298).

Left-wing populism is a dynamic and complex phenomenon, as one can even identify attempts to construct the People on the transnational level, as is the case of the European movement DiEM-25, led by former Greek Finance minister Yanis Varoufakis. This pro-democracy movement, whose key purpose is to establish a citizens-based, 'new

⁴ Another relevant, but qualitatively different, example, is the (self-defined) scholarly strand of North American populist constitutionalism, which consists predominantly in an academic debate (cf. Ackerman 1991; Kramer 2004; Levinson 1999; Tushnet 1999). This legal approach of populist constitutionalism draws on the American tradition of populism (see Corso 2014), emphasizing the role of the people in constitutionalism and criticizing elitism and judicial review. The democratic promise of populism becomes perhaps most clear from this debate. Populist constitutionalists engage in 'deploring "chronic fetishism of the Constitution, constitutional law, and the Supreme Court," [while] these scholars are presently calling for constitutional theory that acknowledges "that 'common' people, ordinary people-not their 'betters,' not somebody else's conception of their supposed 'better selves' are the ones who are entitled to govern our country' (Parker 1994, cited in: Graber 2000: 373). On this view, a populist understanding of constitutionalism seeks to recover the role of the common people in constitutional matters, in contrast to the elitist, technocratic understandings of liberal or legal constitutionalism. The reference to popular sovereignty is one based on the idea of participatory democracy and is defined in an inclusive and participatory manner. Many of the contributors to the debate question the prominence of the American Supreme Court, and judicial review in constitutional interpretation, and argue for a more significant and effective role of the people instead.

Constitutional Assembly’ to ‘draft a Democratic European Constitution’ (Panayotu 2017: 14), states in its manifesto:

We, the peoples of Europe, have a duty to regain control over our Europe from unaccountable ‘technocrats’, complicit politicians and shadowy institutions. We come from every part of the continent and are united by different cultures, languages, accents, political party affiliations, ideologies, skin colours, gender identities, faiths and conceptions of the good society. We are forming DiEM25 intent on moving from a Europe of ‘We the Governments’, and ‘We the Technocrats’, to a Europe of ‘We, the peoples of Europe’ (Manifesto 2016: 7).

Left-wing populists tend to construct the People in relation to the democratic participation of marginalized persons. In this, they endorse human rights as ways of protecting ordinary people (for instance, through social rights, Nash 2016) and promote participatory understandings of constitutionalism. Such views, which have not yet been extensively put into practice in Europe (in contrast to Latin America), are radically different from currently ‘really-existing’, populist constitutional projects in Europe, as in Hungary and Poland. The latter are predominantly grounded in a mixture of an exclusionary, ethno-nationalist, and religious construction of the people, skepticism towards the rule of law, and strong leadership (Corso 2014). In this regard, the left-wing populism of Podemos, Syriza, and DiEM-25, - with its emphasis on a positive image of the ordinary people and popular political participation - has more affinity with some of the populist claims and practices in Latin America (cf. Mudde and Kaltwasser 2013; Panayotu 2017).

Latin American neo-constitutionalism, and later radical democratic constitutionalism (Couso 2012), which emerged from the early 1990s onwards, entailed a rebellion against corrupt elites in the name of the ordinary, marginalized, and poor classes, and often engaged in innovative and inclusive constitution-making efforts (Noguera Fernández 2012). A relevant example is the first constitution of a new, radical democratic nature, the Venezuelan one of 1999, which states in its preamble:

The people of Venezuela,
Invoking ... the historic example of our liberator Simon Bolívar and the heroism and sacrifice of our aboriginal ancestors ... establish a democratic participatory and self-reliant, multi-ethnic, multicultural society in a just, federal and decentralized State that embodies the values of freedom, independence, peace, solidarity, the common good for this and future generations’ (cited in: King 2013: 373)

In Latin America, ‘popular constitutionalism’ puts strong emphasis on extensive popular participation and displays strong distrust to technocratic discourse (Couso 2012), as the ‘new constitutions expanded citizen’s rights while simultaneously concentrating power in the executive’ (De La Torre 2016: 124). In contrast to the invocation of the people of right-wing populists in Europe, i.e., in an ethno-national, exclusionary manner, in Latin America strong emphasis has been placed on the participation of the excluded and deprived social classes, including indigenous peoples, in constitution-making (cf. Colon-Rios 2012; Nolte and Schilling-Vacaflor 2012). Nevertheless, also in some of the – anyhow highly diverse - Latin-American experiences of populism in power, plebiscitarian and leaderist elements have emerged, even if definitions of the people have in distinctive cases remained heterogeneous and inclusionary (De La Torre 2016).

Important varieties of interpretation of the popular will in populist-constitutional projects are hence evident. In left-wing cases (in both Europe and Latin America), populist constitutionalism emphasizes a public claim to bring constitutionalism closer to the people by means of rights and participatory instruments,⁵ whereas in Europe, in right-wing populist programmes as well as ongoing processes of populist constitution-making, populist elites design constitutional orders on the basis of ethno-national constructs of the People. Despite such obvious differences, some affinities and conceptual overlaps are, however, undeniable and relevant. Such affinities include the idea shared by populists that constitutional law cannot be understood as radically distinct from politics, that constitutions are not reducible to negative instruments of individual rights protection, that constitutional law is not merely to be interpreted by higher courts but ought to be brought closer to the People and its needs, and, finally, that constitutions ought to reflect society's views and values (cf. Corso 2014: 445). In this, constitution-making or constitutional reform undertaken by populists tends to depict forces obstructing constitutional change as enemies of the (good of the) People or as representatives of particularist, private interests, rather than the common good.

The democratic potential of populist constitutionalism, in terms of the promise of a more extensive, true realization of the popular will and the actual involvement of citizens in democratic rule by means of constitutional change, remains in conflict with the exclusionary, even authoritarian tendencies in any attempt to define a unitary People. The imaginary construction of the latter as the collective subject is a negation of the ultimate diversity and plurality of any society, and hence risks resulting in forms of exclusion and oppression. This is particularly evident in the friend-enemy logics that is displayed in the right-wing populism of Le Pen, Orban, and Kaczynski, but it may be equally true for the Latin American experience with neo- or Bolivarian constitutionalism. As observed by Andrew Arato, the 'hopeless search for a subject that incorporates the authentic or genuine "people" ' undermines the democratic populist project (Arato 2016: 9), either due to a tendency to strong exclusion and authoritarianism, as in right-wing populism, or due to a tendency to strong-leader executivism or the democratic dictatorship of populist leaders, as in Latin-American, left-wing populism (Arato 2016: 291-2).

Majoritarianism

The populist constitutional project generally constitutes an attempt to 'correct', or even undermine, representative democracy as well as the idea of societal and political pluralism. Populists are inspired by the myth of the unitary People, against the fragmentation, conflictive divisions, and artificiality of representative democracy. The method of representative democracy to give meaning to the idea of popular representation and to verify the people, that is, predominantly by means of electoral procedures, is contested by populists. For populists, the aggregate that emerges in the democratic elections of representative democracy is not a People at all, as it is merely a calculated sum of individuals, without a form of substantive commonality and collective commitment. Populists assume that representative politics is deeply affected by partisanship and invisible interest groups behind the scenes that operate for reasons of self-interest, rather than the common good of the

⁵ See Corso 2014.

ordinary citizens. The political answer of populists is the majority, which is however not anymore understood as an aggregate of different groups and interests, expressing a temporary support to the government, but as a substantive and durable majority – still empirically verifiable - giving expression to the general will of the People. The majority is then exactly that part of society that is in agreement with the populist political programme (cf. Urbinati 1998) and can be embodied by a singular leader who expresses the popular voice. A good example of such a collectivist view can be found in a seminal speech pronounced in 2014 by Viktor Orbán, the head of the current populist government in Hungary:

[The] Hungarian nation is not a *simple sum of individuals*, but a *community* that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc.. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead.⁶

The homogeneous idea of the People as expressed in the majority is often identified by means of historical, cultural, and identitarian elements (the nation), but this is not necessarily the case. The majority can also, in a way simply, be identified as those that ‘are with us’, that is, those that until recently have been misrepresented by democratic politics and that have been victims of corruption, marginalization, deprivation, and/or impoverishment (cf. Mueller 2016: 49).

When coming to power, the populist leader, legitimated by the popular majority, replaces corrupt elites and will start a cleaning-up process, which is to result in a robust and direct representation of the victimized majority. For instance, in the case of Venezuela, Hugo Chavez engaged in a comprehensive process to ‘sweep the deck clean, removing opposition figures from power and replacing them with institutions he could control’, in the name of the People (Landau 213: 206). In constitutional terms, the populist emancipation of the People may involve the inclusion of explicit references to the People or the nation in the constitution (often, but not only, in its preamble), the codification of norms that can be related to values and ideas of the People, the concentration of executive power so as to be able to directly represent the People (and avoid contracted and pluralistic political processes that favour partisan interests), as well as the usage of participatory institutions, such as constituent assemblies. Populists promote constitutional, electoral and direct-democratic instruments that enhance majority or plebiscitarian rule, often to the detriment of political opposition.

Legal resentment

The relation between populism and the rule of law, as mentioned earlier, is a strained one. This relation is deeply affected by a critical attitude that could be labelled legal skepticism or ‘legal resentment’, a critical stance towards liberal and legal constitutionalism, and the latter’s juridification and rationalization of society (cf. Blokker 2013; 2016). In important ways, this attitude might be related to a Schmittian understanding of the constitution, and to Carl Schmitt’s critique of liberal constitutionalism and its conception of the rule of law (cf. Böckenförde 1997). A Schmittian view of constitutionalism understands the constitution as

⁶ Emphasis added. The English version is available at: <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadjurdo-of-26-july-2014>.

an expression of political unity and as a protection of the state's existence (cf. Kahn 2011). It does not accept the idea of the constitution as a higher law, emanating from a foundational or basic norm, but rather emphasizes the ultimately political nature of the constitution. In this, it places the political before the legal, rather than the other way around, as in liberal constitutionalism. This dimension is well-reflected in contemporary populism, as attested by a statement of Jarosław Kaczyński, the *eminence grise* of the Polish Law and Justice Party (PiS),

(...) the state based on the rule of law does not have to be a democratic state. In a democracy, the only sovereign is the nation. The parliament and, in the Polish conditions, the President are its representatives. These two state organs are responsible for the creation of law. To these bodies belongs the control over our lives.⁷

The people as the main source of legitimacy provides a core element in a variety of forms of populism. The populist emphasis of the unmediated, direct rule of the people means that any limitations on such rule – such as in the form of the division and limitation of powers, and the institutions of representative, parliamentary democracy found in liberalism, are viewed with great skepticism. For different reasons, such a skeptic attitude towards representative, parliamentary democracy and liberal understandings of the rule of law, rights, and constitutionalism is shared by left- and right-wing populists alike.

As observed, this dimension of constitutional skepticism or legal resentment can be fruitfully explored by taking recourse to the works of Carl Schmitt. One dimension in Schmitt's understanding of constitutionalism is, as is well-known, his argument that ultimately any constitutional arrangement is grounded in, or originates from, an arbitrary act of political power. In the final instance, this means that the strength, legitimacy, and efficacy of a constitutional order cannot be reduced to a set of universalistically understood values and norms, but rather has to be traced to a 'coherent political decision by a particular "will" ' (Scheuerman 1999: 68). The *Rechtsstaat*, in Schmitt's view, is always preceded by the *Machtstaat* (Slagstad 1988: 108). According to Schmitt, the normativism of liberal constitutionalism hides the 'original moment' in which constituent power manifests itself. In other words, in liberalism, constituent power is believed to be adequately absorbed, or exhausted, in the institutions of constitutional democracy (cf. Kalyvas 2008; Scheuerman 1999: 70). The positivist edifice that, in the liberal narrative, emerges as the constitutional democratic state, constructs a political reality based on abstract, self-contained institutions and juridical norms. In this narrative of formal rationalization and juridification, the rule of law therefore rules over the people. Schmitt's anti-normativism comes through in his assessment that the formal-rational liberal construct weakens and depoliticizes the polity and denies that political reality is ruled by 'tangible people and organizations' (Slagstad 1988: 112). Liberal constitutionalism, in its 'references to norms and rules is pure rationalization that conceals an underlying struggle for power' (Slagstad 1988: 118).

⁷ Cited in A. Balcer (2017), 'Beneath the surface of illiberalism', WiseEuropa, p. 47; available at: <http://wise-europa.eu/wp-content/uploads/2017/02/Beneath-the-surface-of-illiberalism.pdf>. The frequent changes of the Hungarian Fundamental Law adopted in 2011 equally point to a primacy of politics.

This anti-normativism is equally a dimension found in contemporary populism. Populists express a critique of liberal constitutionalism as a-political, universalistic, and as an internalistic, legal matter, separated from politics, and concealing real political struggles, and liberal constitutionalism, with its independent and self-referential juridical institutions, is dismissed by populists as an artificial construct that weakens and alienates the popular will.

A second essential aspect in Schmitt's thought is the idea that the 'state is the political unity of the people' (Böckenförde 1997: 6). A constitutional order emerges from the 'relative homogeneity of the people held together by some sense of solidarity' (Böckenförde 1997: 7), defending itself against others, understood as enemies. This understanding of the people as a homogenous unity that stands at the basis of the constitutional order implies a specific understanding of constitutionalism, in which the latter is ultimately to guarantee the existence and survival of a homogenous people. As Böckenförde argues, '[c]onstitutional law then appears as the binding normative order and form determining the existence, maintenance, and capability for action of a political unity... It is and must be the specific telos of constitutional law to facilitate, preserve, and support the state as a political order and unity' (1997: 8). Constitutional law is to preserve the very existence of the political unity. In (in particular right-wing) populist constitutionalism, such a claim to the survival of the political unity appears as an essential, legitimacy factor in the engagement of populists with constitutions.

In populism, four dimensions of legal resentment stand out, indicating a problematic relation to the liberal ideas of the rule of law and constitutionalism. First, the liberal understanding of the rule of law is criticized as an obstacle to achieving political unity or to protect the existence of the collectivity; in this, as noted, the political is understood as prior to the rule of law (Böckenförde 1997: 12). Populists argue that the rule of law is not the framework of the decision-making process, as in liberalism, but rather the vehicle of the decisions of the true representatives of the People or political collective: 'the constitutional guarantee of the rule of law must be added to an existing political unity and form. It cannot exist independently of such a political unity; nor can it achieve efficacy by claiming a general priority over the political unity' (Böckenförde 1997: 12). Second, the indirect, representative and pluralistic view of democracy found in liberalism is contested, as it creates a division in society between rulers and ruled. With this, the procedures of liberal democracy (checks and balances, division of powers, parliamentary debate, rights of the opposition) are contested as cumbersome and artificial, and as constraining the true political will of the People. Third, the collectivity comes prior to the individual, and, hence, the individualistic and universalistic view of human rights in liberalism is viewed with suspicion. Human rights form in this reading obstacles to, and a relativization of, the political community. Fourth, there is a great suspicion of law and judicial decisions external to the domestic arena. In other words, a universalistic interpretation of law and international norms, and in particular of human rights, is denied. Rather, human rights ought to be always applied in a national context by national judges (Nash 2016; Oomen 2016). The critique is that international norms are not democratic (reflecting the popular will), and form an obstacle to domestic democratic decision-making

in the name of the People.⁸ A clear example of the latter is the recent constitutional reform proposal of Le Pen, entitled ‘La Révision constitutionnelle que je propose aux français par référendum’ (2017b). In the second chapter, Le Pen calls for the ‘re-establishment of the superiority of national law’, by means of the elimination of references to the EU in the French Constitution (title XV) and the revision of article 55, which renders international law superior to French domestic law (2017b: 4).

Legal resentment should be understood as a largely negative perspective and as a critical perception of liberal or legal constitutionalism. As has often been argued, constitutional democracy combines the ideas of order and the rule of law, on the one hand, and collective self-rule or autonomy, on the other. In the idea of order, the emphasis is on constitutionalism and the rule of law as external constraints put onto democratic politics. The rule of law provides protection from state abuse to individual citizens and different groups in society. In the idea of collective autonomy, the main principle is the idea that people ought to obey only to laws the making of which they themselves have participated in (cf. Vatter 2012: 43). Legal resentment criticizes this view of the rule of law as a means of institutionalizing elite rule rather than as providing protection from state abuse. In other words, the argument is that constitutional democracy institutionalizes a system with a strong distinction between ruling elites and the ruled, which prevents popular, collective self-rule from coming about. Legal resentment thus includes a critique of liberal constitutionalism as not living up to the idea of self-rule by the demos, but it does so by emphasizing a direct link between popular opinion and popular will. It should be noted, though, that this generally does not entail the endorsement of the actual participation of citizens in decision-making (Urbinati 2014: 131).

Legal resentment entails a negative view of liberalism and representative democracy, and, a negative concept, it does not provide a positive theory of the constitution itself. This is, as we have seen, in turn expressed in illiberal and populist ideas of constitutionalism, which propose a different understanding of (constitutional) law, emphasize the emancipation of the ‘plebs’ and which tend to emphasize the idea of the People-As-One (Lefort 1988). In this, legal resentment comes prior to ‘nonliberal constitutionalism’,⁹ ‘illiberal constitutionalism’ (Thio 2012), ‘abusive constitutionalism’ (Landau 2013), and ‘counter-constitutionalism’ (Scheppelle 2004), in that it indicates a skeptical or critical relation to legal formalism, the rule of law, and liberal democracy.¹⁰ While liberal constitutionalism promotes a universally valid and formalistic programme of the separation of powers, the rule of law (rather than the rule of men), and the neutrality of the state, illiberal and populist forms of constitutionalism question the universality of such notions. In some versions, such forms of constitutionalism prioritize particularist and historical values related to a distinctive political community, and on this basis, justify political interference in legal matters.

⁸ Barbara Oomen speaks of a ‘human rights backlash’ in discussing the case of the Netherlands, where since 2010 the legitimacy of the ECtHR is increasingly contested (Oomen 2016). Another obvious case is the UK (cf. Nash 2016).

⁹ According to Walker, in ‘postcommunist lands as elsewhere, there is sometimes less than full enthusiasm for the liberal, individual rights-oriented approach to constitutions’ (Walker 1997: 154).

¹⁰ Legal resentment is then not the same as populist constitutionalism. Radical and participatory democrats equally criticize liberalism and representative democracy, but come, on the basis of sometimes similar critique, come to very different positive programmes of constitutional democracy.

Constitutional instrumentalism

In the political practice of populists, in their ‘occupying the state’ (Mueller 2016; Urbinati 2014), one can detect a specific, instrumentalist approach to constitution-making and constitutional revision. In populist constitutionalism, this attitude is the result of the negative evaluation of liberal constitutionalism in legal resentment, and it manifests itself in the downplaying of the constitution’s status as a rigid, higher law (as much emphasized in liberal or legal constitutionalism). In this, an instrumentalist approach¹¹ engages on a rather frequent basis with constitutional revision, as a result of the view that a constitution ought to be open to amendment and change according to the needs of the political majority and/or the necessities of particular historical periods. A case in point is the new Hungarian Fundamental Law, which, since its adoption in 2012, has already been amended six times. A further example is the assault on the Constitutional Tribunal by the Polish government, informed by the idea that it is not the Tribunal that ought to have the final say on the Constitution’s interpretation, but parliament or the government. As recently stated by Lech Morawski, a law professor and one of the contested, new judges of the Tribunal, installed by the Law and Justice (PiS) government: ‘[t]he legislative activity of the [Constitutional Tribunal] significantly distorts the principle of separation and balance of powers, since in practice it means that the supreme legislative power is exercised not by the parliament and the government but by the constitutional court’.¹²

It should be stressed that an instrumental or at least a political/‘flexible’ view of constitutionalism is not exclusive to (right-wing) populists, but can equally be observed in, for instance, radical-democratic approaches. In some ways, constitutional instrumentalism can be understood as the down-grading of (comprehensive) constitutional reform, down from the level of higher law to the lower level of doing politics as usual, often serving narrow majoritarian or partisan objectives rather than the common good, or worse, abusing constitutional reform for illiberal or non-democratic purposes. In general terms, one can distinguish between two types of constitutional instrumentalism: 1) a *modernization approach*, which is predominantly concerned with the updating of the constitution, which emphasizes the anachronistic nature of the existing constitution and points to societal acceleration as a key cause of the need to revise the constitution; and 2) a *redemptive approach*, which emphasizes the need to radically change the constitution in order to (re-)establish the sovereignty and rule of the people, and to undo past wrongdoings.

In modern constitutional democracies, constitutional instrumentalism indicates a move away from dominant theories of legal constitutionalism. Liberal or legal constitutionalism as it has

¹¹ There is some affinity between constitutional instrumentalism in modern constitutional democracies and the so-called ‘theory of constitutional instrumentalism’ that has been prominent in the analysis of socialist or communist constitutions. According to Sidel, this theory was both a descriptive lens used by scholars observing socialist constitutional processes as much as it was a perception amongst components of Communist Parties themselves (Sidel 2008: 19). Constitutional instrumentalism emphasized the control of the Party over the Constitution and its manipulation of the Constitution as a mobilizational device, to be revised when necessary to serve political purposes (cf. Sidel 2008: 18-9).

¹² Lech Morawski, ‘A Critical Response’, VerfBlog, 2017/6/03, <http://verfassungsblog.de/a-critical-response/>, DOI: <https://dx.doi.org/10.17176/20170603-165621>.

become predominant in the post-Second World War period is firmly grounded in the idea of constitutions as higher laws, as a distinct set of foundational norms, largely separated from (majoritarian) politics. This is equally visible in the trend towards independent courts as final arbiters of constitutional norms through judicial review and the idea of entrenched fundamental rights. In the legal view of constitutionalism, amendment is normally made difficult (or even virtually impossible) by means of different types of hurdles (adoption of amendments by supermajorities, eternity clauses or the absolute entrenchment of norms, constitutional review, minimum quota for initiation, territorial conditions, restricted access to initiation, the usage of *ex post referenda*).

A constitutional-instrumentalist attitude perceives constitutional temporality in a different way. In liberal or legal constitutionalism, endurance of the constitution is highly valued, also as an expression of a consensus on the foundational values of the political community. In the perception and practice of constitutional instrumentalism, such a static view of the constitution is often absent or downplayed. A dynamic engagement with the constitution is seen as a necessary response to the rapid changes of ‘post-modern’ society (in which politics needs to rapidly respond to societal change) (cf. Prandini 2013) or as an urgent answer to imminent threats to the political community. In either way, the static temporality of legal constitutionalism is abandoned in favour of a view of a more upfront political relation to constitutionalism.

In practice, this means in the most radical instances a much less clear-cut distinction between constitutional and ordinary politics. In some ways, constitutional instrumentalism might indicate a relation to political constitutionalism, in which parliament plays an important role in constitutional interpretation and change. While constitutional instrumentalism is clearly not a phenomenon that is reducible to populist constitutionalism (a variety of democratic interpretations of constitutionalism equally perceive constitutions in a more open and flexible way, cf. Tully 2008), it is a significant part of the populist approach to constitutions, in that the latter understands constitutions vehicles *of* the popular will, rather than as significant constraints *on* that will.

Concluding Remarks

Populist constitutionalism cannot be understood in a straightforward, dichotomic way, that is, as an outright denial of liberal constitutionalism and the rule of law. Rather, it is better understood as a form of constitutional critique and ‘counter-constitutionalism’. While I agree with Nadia Urbinati that populism in general cannot be seen as democratic (for instance, due to the populist tendency to deny pluralism and political opposition, its insistence on political unity and the People-As-One, its emphasis on strong leadership, and its negation of *isegoria*) (Urbinati 1998; 2014), the populist critique on liberal constitutionalism does invoke relevant critical dimensions of the current democratic malaise. In addition, a variety of manifestations of populism construct the People differently, and have different interpretations of what popular sovereignty and the popular will signify.

The argument here has been that populist constitutionalism in its variegated manifestations can be explored by reference to four dimensions: the popular will, majoritarianism, legal

resentment, and instrumentalism. The popular will pertains to the dimension of legitimacy and the ultimate origins of political power. Populists claim to represent and give voice to the 'pure' People, a construction that cannot be equated with the empirical People, but rather consists of a symbolic invention of a People which in many ways is still to come. The populist-constitutional project is then to significantly further and defend the will of the mythical People by constitutional means. Many forms of populist constitutionalism do not build on a consensual view of society, in which various forces need to support the constitutional arrangement that binds all, but rather takes a majoritarian approach that defends and expands the interests of an imagined majority. This often means contrasting of a 'good' or 'moral' majority against an 'immoral' minority. The populist-constitutional promotion of the 'good' majority equated with the People is generally skeptic of the potential of existing legal instruments and institutions, not least due to their compromised nature, that is, as institutions of the status quo. Populist constitutionalism endorses a different view of constitutionalism, non-liberal, of which a closer proximity to popular needs and input is claimed. This also means that populist constitutionalism tends to be more prone than liberal constitutionalism to use formal and informal constitutional instruments of amendment in order to further its constitutional cause.

These dimensions indicate a populist claim towards the *repoliticization* of democracy – against juridified, depoliticized understandings of constitutionalism - and attempts at the collective mobilization for, and engagement in, a political project. In this regard, populist constitutionalism claims to pursue emancipation from the heteronomy that results from too strong an emphasis on legal order, abstract (external) rules and norms, and it provides an appreciation of the dimension of power and struggle underlying constitutional arrangements, while denouncing the lack of inclusion of ordinary and marginalized people in politics. In its critical dimension, populist constitutionalism brings to the fore the intrinsic problems of a one-sided legal constitutionalism grounded in hierarchy, judicial prerogative, foundationalism, and depoliticization, which tends to result in a lack of democratic interaction and engagement of larger society with constitutionalism. The answer provided by populist constitutionalism is, however, a tendentially authoritarian and even despotic one, which ultimately risks to undermine a radical-democratic innovation of constitutionalism that prioritizes constitutional engagement and authorship of the people qua democratic citizens.

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