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### **SYMPOSIUM: PUBLIC LAW AND THE NEW POPULISM**

Paul Blokker

### **Populism as a Constitutional Project**

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## **Populism as a Constitutional Project**

**(Forthcoming in I.CON)**

Paul Blokker<sup>1</sup>

The engagement of conservative, populist governments with constitutional reform and constitution-making is perceived as a significant threat to the rule of law and democracy within the European Union. Constitutionalists often assume a relation of mutual exclusion between populism and constitutionalism. In contrast, I argue that while populism ought to be understood as a rejection of liberal constitutionalism, it equally constitutes a competing political force regarding the definition of constitutional democracy. The article first discusses populist constitutionalism in the context of the two, main modern constitutional traditions: the modernist and the revolutionary ones. Second, I discuss the populist critique of liberal constitutionalism, with a central focus on the recent cases of right-wing populism in power in East-Central Europe. Four dimensions are prominent: 1) popular sovereignty as the key justificatory claim of populism; 2) majority rule as the main populist mode of government; 3) instrumentalism as the legal-practical approach of populists; and 4) legal resentment as the populists' main attitude towards public law. In conclusion, I argue that while the populist critique of liberal constitutionalism provides significant insights into structural problems of liberal democracy, populist constitutionalism ultimately fails to live up to its own democratic promise.

**Keywords:** Instrumentalism; Legal Resentment; Majoritarianism; Popular Sovereignty; Populist Constitutionalism

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## Introduction

A key, but much neglected, instrument of the populist political programme is the constitution. The argument in this article is that populist approaches to constitutionalism and the rule of law need to be understood – at least in part - in their distinctive engagement with *legal* or *liberal* constitutionalism. Populists share with other approaches critical to liberalism a number of points of critique to liberal understandings of constitutionalism and the rule of law. Populists criticize liberalism's tendency to depoliticization, and to distancing and potentially alienating citizens from the institutions. Populists further claim that an emphasis on legal rationality, the neutrality of the state, and formal-legal proceduralism tends to weaken the polity, due to its lacking potentiality in terms of symbolic, sentimental, and collective engagement. Populist constitutionalism endorses, in this, a programme that promises to reduce the distance between ordinary citizens and the institutions. Populists want to directly link the people to the institutions, and to re-enchant democracy, to make it meaningful to its citizens.

An important thrust in populist constitutionalism is the claim to directly represent the people and to overcome the significant constraints to popular rule that they observe in liberal or legal constitutionalism. Constraints that are *inter alia* related to the entrenchment of norms, judicial independence, and the closed nature of the legal system. But does its claim to unconstrained popular rule make populism a democratic project? Similar to observations made by Nadia Urbinati,<sup>2</sup> I argue that populist constitutionalism draws on the principles of popular sovereignty and majority rule, central to modern, constitutional democracy. Populist constitutionalism could then be mistaken for a democratic project,<sup>3</sup> because of its alleged endorsement of popular rule, but my argument in the article is that populism has to be qualified differently. While populism draws on democratic principles, by drawing extreme, one-sided conclusions, it violates key

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<sup>2</sup> Nadia Urbinati, *Populism and the Principle of Majority*, in THE OXFORD HANDBOOK ON POPULISM (Cristóbal Rovira Kaltwasser et al. eds., 2017).

<sup>3</sup> This is clearly the thrust in Laclau's approach, see ERNESTO LACLAU, ON POPULIST REASON (2005).

dimensions of democratic constitutionalism, such as those of pluralism, inclusiveness, and actual civic participation in constitutionalism.

The article explicitly focusses on the European context, and in particular on the recent cases of conservative populism in power in East-Central Europe, notably in Hungary and Poland, from which it will draw a number of examples. First, I will situate the populist approach to constitutionalism in relation to two main constitutional traditions in modern times, which I will call the modernist and the revolutionary traditions. I will emphasize that, while populism can be situated within a modern democratic tradition of constitutionalism, it produces a distorted, one-sided version, which leads to an undoing of its democratic potential and pushes the populist project towards democratic dictatorship, that is, a dictatorship in the name of people. Second, in a more detailed fashion, I will engage in an analysis of the critique populist constitutionalism raises against liberal or legal constitutionalism. I will focus on four prominent dimensions of the populist critique on liberalism. The four dimensions are: 1) *popular sovereignty* as the key justificatory claim of populism; 2) *majority rule* as the main mode of government as identified by populists; 3) *instrumentalism* as the predominant approach of populists in engaging with public law; and 4) *legal resentment* as the populists' main attitude towards public law. In conclusion, I argue that while the multi-faceted populist critique of liberal constitutionalism and the rule of law provide us with important insights regarding the latter's inconsistencies and failures, populist constitutionalism clearly fails to live up to its own democratic promise.

### **Contrasting constitutional imaginaries**

Populism ought to be understood as both a rejection of liberal constitutionalism and as a political force of competition regarding the meaning, justification, and realization of constitutional democracy.<sup>4</sup> I argue that while populism, in its different guises,<sup>5</sup> tends to

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<sup>4</sup> See Urbinati, *supra* note 2.

<sup>5</sup> As mentioned, here I will predominantly focus on the recent cases of populist constitutionalism in East-Central Europe, which tend to be of a right-wing, conservative nature. A more complete, historical discussion would need to take due account of cases in Latin America, as well as left-wing populism more in general (I have made some attempts to do so elsewhere, Paul Blokker, *Populist constitutionalism*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF GLOBAL POPULISM (Carlos de la Torre ed., forthcoming, 2018)). Both left-and right-wing populism tend to deny a strong separation of politics and law and endorse a

consist of a rejection of what I will call here legal or liberal constitutionalism, it has a claim to a different understanding, which purports to more intensely realize basic ingredients of democracy, in particular *popular sovereignty* and *majority rule*.<sup>6</sup> My suggestion is that, in order to make the populist position towards liberal constitutionalism clearer, one needs to situate it in relation to the two main constitutional imaginaries in modernity, i.e., what I will call here (following, but also differing somewhat from, other scholars' accounts) the modernist imaginary and the democratic imaginary. The argument here is that while populist constitutionalism raises important critiques regarding legal constitutionalism, and in this approximates a radical, democratic understanding, its alternative take on constitutionalism undermines democracy and in particular the idea of the constitution as a vehicle of popular sovereignty.

In modernity, two main constitutional imaginaries and related mindsets can be identified.<sup>7</sup> As I have suggested elsewhere<sup>8</sup>, these two imaginaries may be called the *modernist constitutional imaginary* (which has largely prevailed, even if in different guises, since the end of the 18th century) and the, much less solidly institutionalized, *democratic constitutional imaginary*.<sup>9</sup> The imaginaries are understood here as historically predominant constellations of meaning that – in a variety of ways - have instituted the indeterminate imaginary significations of mastery and autonomy in

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stronger link between constitutions and the people. And while arguably left-wing manifestations of populism (as in Latin America) have shown a more direct engagement with genuinely participatory projects of constitutionalism (in the form of, e.g., constituent assemblies), both forms of populism tend to suffer from an exclusionary tendency, which results from the quest for an authentic people, and in practice risk sliding into either authoritarian or 'leaderist'-plebiscitarian modes, ultimately denying their democratic thrust.

<sup>6</sup> The thrust of my argument is not unlike that of Jan-Werner Müller in claiming that populists are not against institutions per se, but rather attempt to institutionalize their own populist political programme. Cf. J.W. Müller, *Populism and Constitutionalism*, in THE OXFORD HANDBOOK OF POPULISM (C.R. Kaltwasser et al., eds, 2018). I believe I differ from Müller in my acknowledgement of structural deficiencies in liberal constitutionalism, which in a distinct manner are taken up by populists.

<sup>7</sup> Paul Blokker, *The Imaginary Constitution of Constitutions*, 3:1 SOCIAL IMAGINARIES 167 (2017); HAUKE BRUNKHORST, CRITICAL THEORY OF LEGAL REVOLUTIONS: EVOLUTIONARY PERSPECTIVES (2014); Martti Koskenniemi, *Constitutionalism as mindset: Reflections on Kantian themes about international law and globalization*, 8(1) THEORETICAL INQUIRIES IN LAW 9 (2007); Christoph Möllers, *Pouvoir Constituant—Constitution—Constitutionalisation*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (J. Bast and A. von Bogdandy eds., 2010). Brunkhorst, building on Koskenniemi's work, makes a similar distinction between 'Kantian' and 'managerial' 'constitutional mindsets'.

<sup>8</sup> See Blokker, *supra* note 7.

<sup>9</sup> Cf. Johann P. Arnason, *The theory of modernity and the problematic of democracy*, 26:1 THESIS ELEVEN 20, 39 (1990).

distinctive constitutional orders.<sup>10</sup> Rational mastery refers to the distinctively modern idea of the social world as an object of control, whereas autonomy entails the equally modern idea of self-constitution and self-government. What is significant is that the two constitutional imaginaries invoke a contrasting understanding of the modern polity, but remain partial visions, emphasizing either preservation or innovation, and are of equal significance for the viability and legitimacy of modern constitutional orders in a democratic sense.<sup>11</sup>

The *modernist imaginary* can be related to a view of constitutionalism as the Enlightenment ‘belief that political institutions obtain legitimacy if they enshrine constitutional laws translating abstract notions of justice and personal dignity into legal and normative constraints for the use of public and private power’.<sup>12</sup> The modernist imaginary understands constitutions as devices of order and stability that tame the human propensity to violence and unreason.<sup>13</sup> Rather than promoting a radical break with the preceding societal order, the modernist imaginary endorses the idea of a gradual limitation of political power by legal means, so as to create a system of limitations to sovereign power.<sup>14</sup> The idea tends to be an evolutionary one, in the sense of a continuous constitutionalization of the polity, and it displays a distinctive emphasis on the rule of law, juridification, and the orderly limitation of power. Modernist constitutionalism is hence not necessarily about democracy, understood as popular self-rule and empowerment.<sup>15</sup> It is rather about the preservation, stabilization, and careful management of an existing order, by means of a closed, independently operating legal system.<sup>16</sup>

The *democratic imaginary* finds (theoretical) reflection in the thinking of scholars such as Hannah Arendt, Sheldon Wolin, Cornelius Castoriadis, or, more recently, Hauke

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<sup>10</sup> For the notion of social imaginary significations, see CORNELIUS CASTORIADIS, *THE IMAGINARY INSTITUTION OF SOCIETY* (1987).

<sup>11</sup> See Möllers, *supra* note 7.

<sup>12</sup> CHRIS THORNHILL, *A SOCIOLOGY OF CONSTITUTIONS: CONSTITUTIONS AND STATE LEGITIMACY IN HISTORICAL-SOCIOLOGICAL PERSPECTIVE* (2011).

<sup>13</sup> Cf. Koskeniemi, BRUNKHORST, *supra* note 7.

<sup>14</sup> See Möllers, *supra* note 7, at 174.

<sup>15</sup> See Möllers, *supra* note 7, at 176.

<sup>16</sup> See BRUNKHORST, *supra* note 7.

Brunkhorst. It can equally be found in reflections more closely related to (constitutional) practice, such as those of Thomas Jefferson, as well as in forms of dissent, as in the anti-foundationalist observations of Vaclav Havel, or in constitutional ‘anti-politics’, as for instance has emerged in recent years in Iceland.<sup>17</sup> The democratic constitutional imaginary understands constitutions as creative devices that push forward human liberty. The emphasis in the revolutionary understanding is the foundation of an entirely new order on the basis of emancipatory principles, such as equality, freedom, and self-rule. The constitutional order is understood as demanding justification in the exercise of public power,<sup>18</sup> linking public power to intra-societal legitimation. The democratic imaginary is closely related to the idea of a democratic *pouvoir constituant*, which perceives the constitution as a ‘founding act of the people’.<sup>19</sup> The democratic imaginary finds its most distinctive expression in the idea of self-determination and self-government.<sup>20</sup> In Brunkhorst’s ‘Kantian constitutional mindset’, this means that it is not just about ‘the *rule of law* – but *the emancipation from any law that is not the law to which we have given our consent*’.<sup>21</sup>

But how to fit the populist engagement with constitutionalism into the dual constitutional traditions of modernity? Populist constitutionalism seems a rejection of the modern, legal version and some kind of variant of democratic constitutionalism. The relation between populism and constitutionalism might be understood by reference to predominantly the democratic imaginary, even if with important differences and distortions, as populism strongly rejects the modernist, rule-of-law tradition and prioritizes popular sovereignty.<sup>22</sup> Populism rejects the emphasis on the limitation of political power through legal norms and the subjection of power to higher norms as in legal constitutionalism, while it

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<sup>17</sup> Baldvin Bergsson and Paul Blokker, *The Constitutional Experiment in Iceland*, in VERFASSUNG GEBUNG IN KONSOLIDIERTE DEMOKRATIEN: NEUBEGINN ODER VERFALL EINES SYSTEMS? (Kalman Pocza ed., 2013); NADIA URBINATI, *DEMOCRACY DISFIGURED* (2014).

<sup>18</sup> See Möllers, *supra* note 7, at 171.

<sup>19</sup> See Möllers, *supra* note 7, at 171.

<sup>20</sup> See BRUNKHORST, *supra* note 7, at 46-7.

<sup>21</sup> See BRUNKHORST, *supra* note 7, at 47; italics in original.

<sup>22</sup> Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12:1 EUROPEAN CONSTITUTIONAL LAW REVIEW 6 (2016). As Neil Walker states in his contribution to this Symposium, a significant dimension of populism as a strain of our political and constitutional imaginary, and of our scholarly preoccupation with it, ‘have to do with the relationship to an underlying tension within modern constitutionalism’.



promotes a constitutional order that puts popular sovereignty and constituent power upfront. It denounces the rule of law and the constitutional state as vehicles that promote the interests of minorities (elites) against the well-being of the people and claims to build a new constitutional order that will promote the common good against partial interests.

But does populism's emphasis on popular sovereignty, the people, and the common good put populism squarely in the democratic constitutional camp? There are undeniable indications that it does *not*. Democratic constitutionalism rejects the preceding order, or the existing order or status quo it agitates against, and wants to create a polity anew, eschewing any of the existing traditions. Democratic constitutionalism puts, in this, the rights of the individual and the idea of equality centre stage, against the corrupting and unequal implications of established traditions based on status and privilege.<sup>23</sup> In this, democratic constitutionalism targets legal constitutionalism as potentially leading to inequality, as in the lack of possibilities for popular engagement with constitutional politics and norms, and in the emphasis on elitist, higher public reason.<sup>24</sup>

Populist constitutionalism shares this thrust towards denouncing elite rule as detrimental to the common good and as potentially favouring partial interests. It equally denounces the professed neutrality and rationality of the law (as we will see below) as potentially resulting in inequality and exclusion. But where the thrust in democratic constitutionalism is the widening and deepening of possibilities of de facto citizen engagement with constitutional politics and norms, in populist constitutionalism the actual engagement of (different groups of) citizens in society is substituted for by the idea of a united People, represented by the populist leader. The main culprit is identified in corrupt elite rule, which simply needs to be replaced by government for the people, but not necessarily by the people.

Populism therefore, at least in part, criticizes legal constitutionalism on similar grounds as democratic constitutionalism, but its alternative constitutional solution, 'counter-

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<sup>23</sup> See Möllers, *supra* note 7, at 172.

<sup>24</sup> JOEL COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* (2012); JAMES TULLY, *PUBLIC PHILOSOPHY IN A NEW KEY* (2008).

constitution',<sup>25</sup> or 'constitutional counter-revolution'<sup>26</sup> is highly different from the democratic and *democratizing* idea. This becomes clear in at least some of the 'really existing' examples of populist constitutionalism, such as in Poland and Hungary. Populist constitutionalism rejects the existing order because of its inequalities and injustices, as in democratic constitutionalism, but it does so with the aim to restore (an ideal of) a preceding, historical order. But one can equally identify a messianic, redemptive dimension, which is future-oriented in that it aims at realizing a pure, non-corrupted polity in the future (in the Polish case, e.g., in the form of a 'Fourth Republic'). Populism understands liberal democracy and the rule of law as a historical interruption and aberration. It rejects the idea of the legal-constitutional order because, according to populists, it produces or favours inequalities (e.g., between the haves and have-nots, between cosmopolitans and locals, or between foreigners and nationals), as well as, more importantly, because it leads to the erosion of the historical nation. The hierarchy of the legal-constitutional order is not to be replaced by an inclusive, more universalistic order, but rather by a return to, or realization of, the past, that is, of a traditional order, based on 'natural' hierarchies related to ethnicity, family, and tradition.

#### **Four populist critiques of liberal constitutionalism**

To explore the distinctive nature of populist constitutionalism in a more detailed fashion, I propose to 'unpack' the populist constitutional approach by analysing four of its critical components. These components can be understood as distinctive parts of the populist critique on liberal or legal constitutionalism. First, populists emphasise the people and popular sovereignty. This reference to the people provides the main *normative justification* for the populist constitutional programme. Second, the populist project is based on an extreme form of majoritarianism, which is the core of the populist *mode of government*, or the way in which populists imagine their project politically. Third, the populists' *practical approach* to the law is based on instrumentalism, which mobilizes

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<sup>25</sup> Kim Lane Scheppele, *Counter-constitutions: Narrating the Nation in Post-Soviet Hungary*, paper given at George Washington University, Washington DC, 2 April (2004); Kim Lane Scheppele, *The Social Lives of Constitutions*, SOCIOLOGICAL CONSTITUTIONALISM (Paul Blokker and Chris Thornhill eds., 2017).

<sup>26</sup> Gabor Halmai, *The Rise and Fall of Constitutionalism in Hungary*, in CONSTITUTIONAL ACCELERATION WITHIN THE EUROPEAN UNION AND BEYOND (Paul Blokker ed., 2017).

the law in the name of a collectivist project. Fourth, the populist *attitude towards the law*, or its main prescriptive and evaluative judgments of the law, consists of a critical, emotional stance, or what I call ‘legal resentment’.

### *The People and Popular Sovereignty*

The main justification for the populist constitutional project is the claim to popular sovereignty. For 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’.<sup>27</sup> Such a perception of popular sovereignty is, for instance, articulated in an extensive expert opinion, written by Polish constitutionalists close to the populist government of the Law and Justice Party (PiS). The experts argue in favour of an idea of Polish democracy in which the ‘nation as a political community of all citizens that constitute the state is the primary category’, against a view which is portrayed as primarily legalistic, in which ‘the attribute of sovereignty is transferred to the law itself, in particular to the most important of normative acts – the constitution’.<sup>28</sup>

Populists further claim that liberal, representative systems with strong judicial components tend to turn popular sovereignty into an unrealized fiction. In the ‘White Paper on the Reform of the Polish Judiciary’, for instance, issued as a response to the European Commission’s initiation of the Article 7 procedure in late 2017, PiS argues that judicial reforms are necessary to counter an ‘imbalance between powers’. PiS states that a ‘related problem is the peculiar bureaucratic corporate culture which has emerged in the Polish administration of justice. Citizens view the courts as a closed community that is very difficult to access, and consider procedures to be complex and incomprehensible. There is a general sense that the courts are dominated by the “cult of formalism”; in other words, it is more important that a judgement be justified on formal grounds rather than

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<sup>27</sup> Margaret Canovan, *Taking politics to the people: Populism as the ideology of democracy*, in DEMOCRACIES AND THE POPULIST CHALLENGE 25-44, 25 (Yves Mény, Yves Surel eds., 2002).

<sup>28</sup> Jan Majchrowski et al., *Report of the Team of Experts on the Issues Related to the Constitutional Tribunal of 15 July 2016* 3 (2016).

for it to be actually fair'. '[E]xternal agents' are unable to influence the judicial institutions, while 'citizens were deprived of the ability to exert such influence either'.<sup>29</sup>

Populists call for making popular sovereignty a reality, or better, the pinnacle of a new constitutional order, which hinges on the creation of a more direct relation between the people and the constitutional complex of norms and values. Indeed, the title of a debate organized by the PiS in August 2017 was 'A constitution for the people, not for the elites', was. On various occasions, president Duda has articulated this idea, for instance by stating that '[i]t is time for a serious debate on the constitution,' '[n]ot only among elites and politicians, but among the Polish people,' and 'Poles and Poland have earned a new constitution'.<sup>30</sup>

The notion of the people as promoted by populists is in itself, however, highly problematic and in tension with an understanding of democracy as an open and inclusive political regime. The latter understanding of democracy is based on forms of immanent legitimacy, that is, a legitimacy grounded in society itself. Popular sovereignty in this understanding means that every member of a political community is able to co-decide the laws of that very same community. The people in this democratic narrative indicates a community of highly diverse individuals and social groups that actively engage with democratic politics precisely because the laws and final ends of that community are never transparent and need to be deliberated upon and ultimately decided upon every time, in a democratic manner, meaning including as many voices of society as possible and feasible.

The populist understanding of the people is of a highly different kind and tends to subject individual differences to a collective subject, which finds its origins outside of (the members of) contemporary society strictly speaking and is in this sense pre-political (as in tradition, culture, or identity). The people becomes that falls outside of an open, rational discussion over membership and the finalité of a political community, and rather takes on a closed, imposed form. Andrew Arato's work is highly pertinent here, in that Arato has rightly pointed out the theological nature of many key political concepts,<sup>31</sup>

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<sup>29</sup> White Paper on the Reform of the Polish Judiciary 19 (2018).

<sup>30</sup> See <http://www.dw.com/en/polands-president-calls-for-constitutional-referendum/a-38725200>.

<sup>31</sup> ANDREW ARATO, POST SOVEREIGN CONSTITUTIONAL MAKING: LEARNING AND LEGITIMACY 269-70 (2016).

including that of the people. In contrast to the descriptive concept of ‘population’ or of ‘all members of society’, the notion of ‘the People’ indicates a transcendental meaning of the concept, which has become closed, enchanted, metaphysical.

This collectivist, historical view comes through in the 2018 State of the Nation address of the leader of the Hungarian Fidesz party, Viktor Orbán: ‘I believe that we Hungarians have a future if we remain Hungarian: if we cultivate the Hungarian language, defend our Christian and Hungarian culture, and preserve independence and Hungarian freedom’. And, ‘Homeland is an anchor needed by everyone in their hearts. And, in spite of attacks and mockery, patriots deserve recognition for again and again lowering this anchor: for telling us to our face, time and again, that the homeland comes before all else’.<sup>32</sup> Populists turn to a political theology of the People for reasons of both legitimacy and the rejection of an indeterminate, pluralistic, and empirical understanding of modern society. Populists claim to promote the good of the ‘ordinary people’, which is, however, not reconstructed in any open-ended way as, for instance, all the members of a particular society, but rather as a distinctive, collective subject in its own right, identified by a common suffering, set of traditions, and destiny.

The unity and undivided nature of the People becomes in this of primary importance, while any pluralism or fragmentation is understood as a threat to the populist mission. The relation between the People and the populist leader needs to be in full harmony, as it is the latter’s task to promote the People’s real and indivisible will.<sup>33</sup> In this, the leader and his populist party have the task to ‘regenerate’ the People, as the ‘empirical people’ does not (yet) coincide with the ‘ideal people’, the chosen ones or those that are to be ‘saved’. Arato likens this to the transposition of the idea of the king’s two bodies, which in modern times has shifted from the monarch to the People.<sup>34</sup> It is the populist leader – as a ‘church-like’ agency - who ideally represents the empirical people and the leader’s

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<sup>32</sup> See <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-state-of-the-nation-address>.

<sup>33</sup> See ARATO, *supra* note 31, at 272-3.

<sup>34</sup> See ARATO, *supra* note 31, at 272.

mission is to lead it to become a purified ‘ideal people’. This becomes evident in populist argumentation. As Orbán has formulated it:

[W]hat is happening today in Hungary can be interpreted as an attempt of the respective political leadership to *harmonize relationship between the interests and achievement of individuals* – that needs to be acknowledged – *with interests and achievements of the community, and the nation*. The Hungarian nation is not simply a group of individuals but a community that must be *organized, reinforced and in fact constructed*. And so in this sense the new State that we are constructing in Hungary 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 (emphasis added).<sup>35</sup>

The idea of ‘regeneration’ of in this case the Hungarian people can also be observed from the preamble or ‘avowal’ of the new Hungarian Fundamental Law that was adopted in 2011:

We hold that after the decades of the twentieth century which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal. We trust in a jointly-shaped future and the commitment of younger generations. We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength.<sup>36</sup>

### *Majoritarianism*

Populists imagine political power in a distinctive manner, that is, as the expression of the will of a cohesive majority. Political government hence means to govern in the name of the majority. Populism in power consists of a political project that wants to radically

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<sup>35</sup> See <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014>.

<sup>36</sup> Fundamental Law of Hungary of 2012, available at: <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>.

change the rules of the game, so as to correct alleged past wrongdoings to the People and to realize a more intimate relation between political institutions and larger society (which de facto means an attempt to fuse the populist party and state institutions). The liberal understanding of parliamentary politics and representation is rejected. The populist claim is that it leads to a fragmentation of society and a loss of social unity. In this, populists approach the majority as a durable and pre-political entity, and equate it with a material, social unity, which in right-wing, conservative populism takes the form of the nation.<sup>37</sup> This is in sharp contrast to the liberal understanding of the majority in procedural terms. In liberalism, the majority is as a constructed and always again reconstructed set of political forces, which represents social interests. Populists deny conflict within society or they understand conflict as an inherently problematic phenomenon, rather than as a legitimate expression of different viewpoints and interests. Populists such as Orbán and Kaczynski refer to ‘enemies’, ‘those that oppose us’ and do not support ‘our political project’, ‘good’ and ‘bad’ members of society, and often equate enemies with international, liberal forces (the ‘George Soros network’, the ‘international bureaucrats’, ‘pro-migrant NGOs’, or ‘pseudo-civil society organisations’<sup>38</sup>).

Democracy is not to institutionalize conflict, but rather to unambiguously promote the national interest. Orbán has criticized liberal democracy for promoting partial (foreign) interests, rather than the national interest and the common good:

[I]n the past twenty years the established Hungarian liberal democracy could not achieve a number of objectives. I made a short list of what it was not capable of. Liberal democracy was not capable of openly declaring, or even obliging, governments with constitutional power to declare that they should serve national interests. Moreover, it even questioned the existence of national interests. It did not oblige subsequent governments to recognize that Hungarian diaspora around the world belongs to our nation and to try and make this sense of belonging stronger with their work. Liberal democracy, the liberal Hungarian state did not

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<sup>37</sup> Paul Blokker, *Populist nationalism, anti-Europeanism, postnationalism, and the East-West distinction*, GERMAN LJ, 6 371 (2005).

<sup>38</sup> See <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-state-of-the-nation-address>.

protect public wealth. ... And – and here I mostly mean the system of foreign exchange loans – it failed to protect families from bonded labor.

Therefore, Orbán proposes a different type of democracy, an illiberal democracy or a ‘workfare state’, which prioritizes the national interest, which, in a wholly non-sociological manner, is assumed to be a homogeneous and self-evident interest, that is, the interest of ethnic Hungarians.

The populist, *pars-pro-toto* understanding of the majority - not as politically or procedurally constructed, but rather as socially given – results in a denial of the distinction between ordinary politics (in which conflicts between different social forces play out) and foundational or constitutional politics (in which the rules of the game are fixed). As the only subject that deserves representation is a unified people, which is equated with the majority, there is no need for a higher law that mediates between and integrates different social forces that compete for political power. Rather, the populist mission becomes one of more thoroughly and extensively inscribing the people’s standing, values, and necessities in the constitution. In this, there is a tendency to ‘embed’ the populist party itself into the state institutions, by means of entrenching the political power of the populists, in the name of its promotion of the ‘real people’, and against divisive forces. It should be further stressed that the constitutional project of populists is not merely about entrenching political power and changing the rules of the game, but there is equally an attempt to mobilize the constitution around a specific socio-political bloc.<sup>39</sup> This harks back to Arato’s idea of the populist regeneration of the people. In constitutional terms, it includes a cultural-symbolic reshaping of the constitution (as in the preamble or ‘avowal’ of the Hungarian Fundamental Law or the preamble of the PiS draft constitution of 2010), an approach which also comes through in the more specific, conservative redesigning of constitutional norms and principles, as in the case of the attempt of PiS to reshape abortion laws around the idea of the right to life or in Fidesz’s redefinition of marriage between a man and a woman and, in general, its political

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<sup>39</sup>JAN-WERNER MÜLLER, WHAT IS POPULISM? 62 (2016).



programme of ‘hard work, supporting families, retaining national identity and preserving independence’.<sup>40</sup>

### *Instrumentalism*

The practical approach of populists to the law is an instrumental one, which mobilizes the law in the name of a collectivist project.<sup>41</sup> As observed above, there is a tendency in populist constitutionalism to collapse the distinction between ordinary and constitutional politics. In Ackermanian terms, this means that there is a permanent mobilization of constitutional norms and constitutional issues in daily politics. This mobilization is not driven by popular mobilization from below, but rather by populist elite entrepreneurship from above. In the political practice of populists - in their ‘occupation of the state’<sup>42</sup> - one can detect a specific, *instrumentalist* approach<sup>43</sup> to constitution-making and constitutional revision. The populist constitutional attitude can be understood as the result of populism’s overall negative evaluation of liberal constitutionalism, and it manifests itself in the downplaying of the constitution’s status as a rigid, higher law (a cornerstone of liberal or legal constitutionalism). A number of dimensions deserve specific attention with regard to populists’ instrumental approach to constitutions,<sup>44</sup> including the frequency of constitutional action, the resulting increase in the arbitrariness

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<sup>40</sup> See <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-state-of-the-nation-address>.

<sup>41</sup> See also Neil Walker’s contribution to this Symposium.

<sup>42</sup> See MÜLLER, *supra* note 39; URBINATI, *supra* note 17.

<sup>43</sup> The term instrumentalism is used here in a (pejorative) sense akin to the one expressed by the Venice Commission, in its opinion on the fourth amendment of the Hungarian Fundamental Law, see Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDLAD(2013)012, Strasbourg, Council of Europe, 17 June 2013, [www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e). The Commission argued that ‘[f]requent constitutional amendments are a worrying sign of an instrumental attitude towards the constitution as is the resort to the exceptional two-thirds majority in constitution-making without a genuine effort to form a wide political consensus and without proper public debates’ (2013: 30). The Commission decries the frequent and in-transparent nature of reforms and the abuse of the majority-position of the government. There is also affinity with the American concept of ‘legal instrumentalism’, at least when it is taken to mean that law is ‘seen decreasingly in terms of an order of binding rules, and increasingly as a tool or weapon to be manipulated to achieve desired ends’ (Tamanaha 2006: 2). Instrumentalism refers then to different aspects: to the frequency of legal change, to the lack of respect for oppositional forces and consensual procedures, to the neglect of existing rules and procedures, and to a goal-oriented, political use of the law.

<sup>44</sup> David Landau, *Populist Constitutions*, 85 UNIVERSITY OF CHICAGO LAW REVIEW, 521 (2018).

of the law, the overall drive towards extreme majoritarianism and neglect of oppositional forces, and a certain path dependency in terms of legal culture.

An important dimension of the populists' instrumentalist approach is the *frequency* of constitutional interventions. Populists tend to engage on a frequent basis with constitutional revision, not least because they understand the existing order as tainted with legacies from the past (e.g., communism), and as an order which can be at best considered a 'façade democracy'.<sup>45</sup> Frequent intervention is hence necessary to rapidly change the existing order and realize a 'truly' sovereign and independent constitutional state, as in the project for a Fourth Republic in Poland. The latter project includes a frequent and enduring legal assault on the Constitutional Tribunal and the independence of other judicial institutions by the Polish government. Another case in point is the new Hungarian Fundamental Law, which, since its adoption in 2012, has already been amended six times (anno 2017), while before its entering into force in 2012, and from the moment Fidesz gained its supermajority in 2010, the prior, 1989 Constitution was amended twelve times.<sup>46</sup>

From a liberal or legal perspective, populist constitutionalism leads to a rule of law crisis and heightens the *arbitrary nature* of the political regime. This means three things: that rulers become less accountable due to the absence of institutional control (for instance, by reducing powers of constitutional courts), law-making becomes increasingly unpredictable and in-transparent for wider society (by, for instance, frequent usage of decree laws), and it becomes more difficult for citizens to contest the law, and to voice their concerns and interests regarding new legislation.<sup>47</sup>

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<sup>45</sup> Marta Bucholc and Maciej Komornik, *Die PiS und das Recht. Verfassungskrise und polnische Rechtskultur*, 66(1-2) OSTEUROPA, 79 (2016).

<sup>46</sup> Petra Burai et al., DEMOCRATIC BACKSLIDING AND ECONOMIC PERFORMANCE. BUILDING UNITY AND SUPPORT FOR DEMOCRATIC AND FREE MARKET VALUES IN CENTRAL AND EASTERN EUROPE, COUNTRY REPORT ON HUNGARY, Transparency International: 9 (2017).

<sup>47</sup> Martin Krygier, *The rule of law: pasts, presents, and two possible futures*, 12 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 199 (2016); Gianluigi Palombella, *Illiberal, Democratic and Non-Arbitrary?*, 1 HAGUE JOURNAL ON THE RULE OF LAW (2017).

The issue of arbitrariness needs, however, further investigation, as recently suggested by Gianluigi Palombella.<sup>48</sup> The enhanced arbitrariness of political power is a main ingredient of the rule of law crisis, and is caused by populist politico-legal action, but should be understood in a comprehensive analytical, rather than merely normative, manner. If we want to get an analytical grip on populist constitutionalism, we need to avoid a simplistic (and problematic) counterposing of non-arbitrary, well-functioning rule of law systems to arbitrary, unruly populist regimes. Rather, we want to explore the underlying assumptions and phenomena that invoke a drive towards a politically-motivated move against liberal, rule of law ideas. This means we need to, first, scrutinize the erosion of a formalistic understanding of the law due to populist legal action, but at the same time, and second, we need to analyse the dimensions in the liberal understanding of the rule of law that may in some ways provoke distinctive reactions of ‘re-politicizing’ the polity. This means we ought to pay due attention to the public origin of modern public law (as in the democratic imaginary) and the sociological dimension of a local/domestic embedment of the law for reasons of legitimacy and societal relevance.<sup>49</sup>

If the three dimensions of arbitrariness indicate the need for the rule of law as a constraint on ruling classes, eroded by populists, a fourth dimension ought to be considered. This fourth dimension indicates the public, societal nature of legal regimes, as suggested by Palombella. This fourth dimension emphasizes a potential arbitrariness of law that diverges from the ‘perceived normative legality constituting the *raison d’être* of the polity’.<sup>50</sup> This latter, political idea of the law or ‘*droit politique*’ is invoked by populist forces, who justify their actions by indicating a societal estrangement from (externally and ‘arbitrarily’) imposed norms and rules.<sup>51</sup> Instrumentalism in the form of goal-

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<sup>48</sup> See Palombella, *supra* note 47.

<sup>49</sup> Paul Blokker, *EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections*, in REINFORCING THE RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, (Carlos Closa and Dmitry Kochenov eds., 2016).

<sup>50</sup> See Palombella, *supra* note 47.

<sup>51</sup> As Palombella has forcefully argued, to combat the decline of the rule of law in countries such as Hungary and Poland by external legal censorship, from for instance the part of the EU institutions, would not necessarily produce positive results and might even increase the weakness of the rule of law in the cases of increasingly illiberal democracies. The societal dimension invoked by populists, in terms of a political, fundamental or constituent dimension to the law regarding the ‘constitutive principles underpinning the right ordering of the state’, indicates the limitations of a transfer of universalistic rules and norms into local contexts. See Palombella, *supra* note 47.

oriented constitutional action reflects here the populist claim/justification to re-fashion legal structures in order for these to serve the needs and values of the 'real' people, rather than those of abstract foreign (economic) interests.

The frequent legal interventions of populists are for a significant part informed by what Nadia Urbinati has called an *extreme majoritarianism*,<sup>52</sup> that is, an attempt to turn the majority into a *permanent* majority. The majority is not anymore mutable and temporary, but needs, through legal interventions, to be consolidated into a durable power basis. The populist majority-government tends to take on the role of constituent power, in a Schmittian move, in order to liberate the people from the constraints of the liberal, rule-of-law regime. This form of constitutional executivism tends to be uni-vocal, partisan, and monistic, and therefore to violate any idea of inclusive, broad-based constituent power.<sup>53</sup> A particularly manifest populist form of legal-instrumental action regards judicial independence and judicial review, as independent judges and courts are understood as an illegitimate constraint on majority rule, and hence legal means are to be employed to counter this situation. This critique can be understood as a populist version of the theoretical critique raised against legal constitutionalism in the form of a 'political constitutionalism', as endorsed, for instance, Jeremy Waldron and Richard Bellamy, *inter alia* in its questioning of the political engagement of unaccountable constitutional courts and the status of judicial review.<sup>54</sup> This comes, for instance, through in the Polish constitutional crisis, in which the ruling party is guided 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, which have been directly chosen by the majority. As stated by (the recently deceased) Lech Morawski, a law professor and one of the contested, new judges of the Polish Tribunal, installed by the PiS government: '[t]he legislative activity of the [Constitutional Tribunal] significantly distorts the principle of separation and balance

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<sup>52</sup> See Urbinati, *supra* note 2.

<sup>53</sup> William E. Scheuerman, *Constitutionalism in an Age of Speed*, in 19 CONSTITUTIONAL COMMENTARY 353, 383 (2002).

<sup>54</sup> Jeremy Waldron, *The core of the case against judicial review*, 115 YALE LAW JOURNAL, 1346 (2005); Richard Bellamy, *Political constitutionalism: a republican defence of the constitutionality of democracy* (2007). Indeed, as argued by Tamas Gyorfy, it was after Fidesz came to power in Hungary in 2010 that Hungarian right-wing intellectuals discovered the theory of political constitutionalism, Tamas Gyorfy, *Against the new constitutionalism* 26 (2016). See further Agnieszka Bień-Kacała et al. (eds), *Liberal constitutionalism - between individual and collective interests* (2017).

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'.<sup>55</sup> The populist project to dismantle judicial independence and judicial review consists then of a 'wholesale constitutional revolution cloaked as a statutory revision and piecemeal tinkering'<sup>56</sup> (as PiS does not have, paradoxically, a sufficiently large majority to change the constitution).

As a final point, some have argued that a certain path-dependency in terms of *legal culture* can be observed in the populist approach to the law in East-Central Europe. Bucholc and Komornik speak for instance of a certain 'legal nihilism' and an instrumental attitude towards the law manifested by political elites during communist times, which may be re-appearing in current populist attitudes.<sup>57</sup> One might detect some affinity between constitutional instrumentalism in the post-communist democracies and the so-called 'theory of constitutional instrumentalism', which 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 in Soviet societies as much as it was a perception amongst components of Communist Parties themselves.<sup>58</sup> 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.<sup>59</sup>

### *Legal resentment*

We have already established in a number of ways that the relation between populism and (the rule of) law is a strained one. But how can we define the populist attitude to the law, that is, what are its prescriptive and evaluative judgments of the law? I suggest the

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<sup>55</sup> Lech Morawski, *A Critical Response*, VerfBlog, 2017/6/03, <http://verfassungsblog.de/a-critical-response/>, DOI: <https://dx.doi.org/10.17176/20170603-165621>.

<sup>56</sup> Tomasz Koncewicz, *The "emergency constitutional review" and Polish constitutional crisis. Of constitutional self-defense and judicial empowerment*, 2:1 POLISH LAW REVIEW 73, 77 (2016).

<sup>57</sup> See Bucholc and Komornik, *supra* note 45, at 89; Robert Brier, *The Roots of the "Fourth Republic" Solidarity's Cultural Legacy to Polish Politics*, in 23(1) EAST EUROPEAN POLITICS AND SOCIETIES 63 (2009).

<sup>58</sup> Mark Sidel, *LAW AND SOCIETY IN VIETNAM: THE TRANSITION FROM SOCIALISM IN COMPARATIVE PERSPECTIVE* (2008).

<sup>59</sup> See Sidel, *supra* note 58, at 18-9.

populist attitude is a critical attitude that could be labelled legal skepticism or ‘legal resentment’, a critical, emotional stance towards liberal and legal constitutionalism, and the latter’s alleged juridification, depoliticization, and rationalization of society.<sup>60</sup> 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.<sup>61</sup>

Legal resentment, so I argue, is a crucial dimension of the populist constitutional programme, and comes forth out of a distinctive populist reading of liberal constitutionalism. The populist approach regards liberal constitutionalism as both a mindset and a practice. The latter could be aptly described as the post-Second World War ‘default design choice for political systems across Europe and North America’, in the form of a constitutionalism that ‘typically hinges on a written constitution that includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law’.<sup>62</sup> In this, the populist criticisms are not unlike those that have emerged in academic debates on ‘new constitutionalism’ and judicial review. Populists tend to be critical about the strong and independent nature of apex courts, the role and form of judicial review, and the extensive and entrenched nature of individual rights.

Different populists share a critical, resentful attitude towards the liberal understanding of the rule of law. I suggest that a number of dimensions clarify populists’ critical attitude towards the liberal understanding of the law. A first dimension is a critical evaluation of the idea of the law as *non-political and neutral*. Populists – much like Carl Schmitt –

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<sup>60</sup> PAUL BLOKKER, *NEW DEMOCRACIES IN CRISIS? A COMPARATIVE CONSTITUTIONAL STUDY OF THE CZECH REPUBLIC, HUNGARY, POLAND, ROMANIA AND SLOVAKIA* (2013).

<sup>61</sup> Ernst-Wolfgang Böckenförde, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory* (1997) 10:1 THE CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 5.

<sup>62</sup> Tom Ginsburg Aziz Z. Huq, and Mila Versteeg, *The Coming Demise of Liberal Constitutionalism* (2018) 85 UNIVERSITY OF CHICAGO LAW REVIEW 239. Populists mostly refer to some understanding of this institutionalized form of liberal constitutionalism. As rightly stressed by one of the reviewers, in liberal constitutional theory, different positions exist as to the relation between law and politics, and the role of morality in constitutionalism. However, the populist critique seems to particularly engage with a more formalistic and individualistic understanding, which it claims inter alia to marginalize or ignore collectivist, cultural traditions in the name of individual rights protection.

criticize what is perceived as a strong separation between law, on the one hand, and politics and morality on the other, in liberal constitutionalism. The populist understanding of the law denies its closed, self-sufficient and self-referential nature, and emphasises the ultimately always already political nature of the law. Hence, the law in the populist view becomes inseparable from extra-legal sources, such as political power and the societal community, and is in this repoliticized. As such, for populists the law always needs to be the expression of the ‘national interest’. This, for instance, comes through in a somewhat ‘vulgar’ way in which Polish populists of the PiS party attack judges (including those on the Constitutional Tribunal) and liberal politicians, related to the preceding government of Civic Platform, as (ab-)using the rule of law to promote particular (private or group) interests.<sup>63</sup> But there is clearly also a deeper claim, which is that the assumption of a neutral and higher law, which provides a depoliticized framework for politics, is dismissed. Kornel Morawiecki, the interim speaker of the Polish lower house, the Sejm, explicated this as ‘[t]he good of the nation is above the law. If the law conflicts with that good, then we’re not allowed to treat it as something that we can’t break’.<sup>64</sup>

A second dimension is the evaluation of the *locus of sovereignty* in the populist narrative. In liberal understandings of democracy, sovereignty is related to the state, and sovereignty is located in the legal system, and ultimately in the constitution.<sup>65</sup> In contrast, populists situate sovereignty squarely in the ‘nation’ or the People, which remains ultimately unbound by the law. Populists want to regain political sovereignty, and in order to do so, need to overcome the restrictions and limitations that rule of law considerations put onto political leaders. The ‘divided’ sovereignty of liberalism, in the sense of a division of powers between state institutions, is in this rejected, while a re-centralization of sovereignty is pursued, which re-invokes the religious and absolutist understandings of power of pre-modern times. In this view, power is not emerging from within empirical, modern, actually existing society as such, but has extra-societal, transcendental origins in

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<sup>63</sup> Similar denouncements have been made by Orbán, for instance in his 2014 speech, in which he criticizes liberal individualism as ultimately adding up to the right of the strongest, and hence as an instrument of strong economic and political forces, rather than of the ‘ordinary people’.

<sup>64</sup> See [www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/](http://www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/).

<sup>65</sup> Celina María Bragagnolo, *LEGITIMACY AND LEGALITY: CARL SCHMITT AND THE DIALECTIC OF MODERNITY*. PhD. Dissertation, State University of New York at Stony Brook 59 (2011).

the People or the 'eternal nation', and is in turn represented or 'embodied' by the populist leader.

Third, populists criticize the liberal understanding of the rule of law for its emphasis on individualism and hence its *eroding effect on unity*, as an obstacle to achieving political unity or to protect the long-term existence of the collectivity. The liberal rule of law erodes unity, because it divides the polity (in its emphasis on political competition, different interests to be safeguarded, and individual rights), it weakens its decision-making powers (through a hierarchy of legal rules and constraints), and through its opening up of the polity to international influence (e.g. through its universalistic rationality and design, and its disregard for local mores). Liberal individualism promotes a view of the demos as the basis of the democratic polity, which is rejected by populists, in order to be replaced by a collectivist view which emphasises the belonging of the individual to a larger community, the ethnos. The function of the law changes in this perspective from one emphasising constraints and rights, to one underlining duties and a distinctive cultural and sometimes religious ethos. Constraints and rights become in some ways superfluous, as the law, as an expression of the populist rulers, is always already promoting the best interests of those belonging to the nation. The liberal idea of the law can, in this, be understood as an obstacle to achieve collective goals. In the Polish context, this has been labelled 'legal impossibilism', so as to indicate the obstructing nature of the liberal, legal system.<sup>66</sup>

In sum, populists argue in Schmittian terms that the understanding of the rule of law as a neutral, universalistic framework of the decision-making process undermines a polity's potential to promote the 'national interest' and to thrive in international competition (as strongly emphasised in Orbán's illiberal democracy idea). The law cannot in and by itself constitute the legitimacy and strong basis for a political community, it is rather the other way around: the law needs to be the expression of the political will of such a community. What is more, mere legality is too fragile to contribute to the resoluteness that is necessary to deal with political conflicts and crises that affect the collectivity.<sup>67</sup>

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<sup>66</sup> See Bucholc and Komornik, *supra* note 45.

<sup>67</sup> See Bragagnolo, *supra* note 65, at 61.



### **Concluding remarks: populism and democratic constitutionalism**

Populism, at least in part, criticizes liberal or legal constitutionalism on similar grounds as (radical-)democratic approaches to constitutionalism, but its alternative constitutional solution is highly different from a *democratizing* approach to constitutional politics and reform, which *de facto* endorses civic engagement and inclusion in constitutional matters.<sup>68</sup> In cases of ‘really existing’ populist constitutionalism, such as those of Poland and Hungary,<sup>69</sup> a thrust towards equality and emancipation is not at all of the universalistic and inclusionary kind as in democratic constitutionalism. Rather, the emancipatory claim of populists is made on the basis of the mobilization of a united People against a main enemy or set of enemies that allegedly undermine the common good, while the People at large is equated with the victims or the marginalized.

The four dimensions of populist critique on liberal constitutionalism and the rule of law discussed in the article show a distorted approach to democracy. The main justificatory claim of populists, based on popular sovereignty, is ultimately grounded in an understanding of the People in pre-political and closed terms, indicating a political-theological move towards a transcendental notion, which is used in turn to ‘regenerate’ the ‘empirical people’ into an ‘ideal people’, as a ‘People-as-One’.<sup>70</sup> In this move, any division within society is denied and with it the human diversity that is at the basis of democracy. The mode of government, majority rule, is one of extreme majoritarianism.<sup>71</sup> The image of the People-as-One is imposed on the majority as well as minorities, and the former becomes understood as a permanent, eternal majority to be protected by

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<sup>68</sup> Paul Blokker, *Constitutional reform in Europe and recourse to the people*, in PARTICIPATORY CONSTITUTIONAL CHANGE. THE PEOPLE AS AMENDERS OF THE CONSTITUTION 31-51 (Xenophon Contiades and Alkmene Fotiadou eds., 2016).

<sup>69</sup> There are clear differences between Hungary and Poland, in that Fidesz has been able to directly touch and replace the Hungarian 1989 constitution since 2010, whereas in Poland, PiS has resorted to a practice of unconstitutionality, ignoring constitutional rules or strongly distorting them. A further difference is a strong element of instrumentalism in Hungary, and a more explicit religious conservatism in Poland. That said, Poland has clearly learned from the Hungarian experience of ‘counter-constitutionalism’, see Kim L. Scheppele, *Autocratic Legalism*, 85 (2018) UNIVERSITY OF CHICAGO LAW REVIEW 545.

<sup>70</sup> CLAUDE LEFORT, *THE POLITICAL FORMS OF MODERN SOCIETY* (1986).

<sup>71</sup> See Urbinati, *supra* note 2.

(constitutional) politics. The distinction between constitutional and ordinary politics collapses, as politics become singularly a matter of promoting the interests of the 'real people'. The practical populist approach towards constitutional politics is one of instrumentalism, emphasizing a view of (public) law as an instrument in realizing the higher ends of the majority, in contrast to the idea of the law as an independent force in democratic politics and as a vehicle for participation and emancipation. This means frequent, in-transparent, executive-driven engagement with constitutional change, often justified in terms of reclaiming the law for the majority. The main populist attitude towards public law displays a legal resentment against liberal-democratic constitutional regimes, in that it is sceptical towards the idea of a non-political, neutral rule of law that transcends politics, the idea that political sovereignty needs (self-)limitation, and the idea that the law stands at the basis of both individual and collective autonomy.

One important lesson we may draw from understanding populism as a constitutional project is the insight that the critical dimension of populism exposes various problematic dimensions of contemporary liberal-constitutional democratic regimes. These dimensions include, for instance, the difficulties abstract, universalist, and internationalist legal narratives face in engaging citizens and in serving as freestanding justifications for constitutional orders; the ultimately unconvincing or at least fragile narrative of the neutrality and apolitical nature of the rule of law; the widespread lack of possibilities for meaningful civic engagement; and the incapacity of liberal democratic regimes to convincingly and consistently promote the common good. Populist constitutionalism poses in this a real challenge for liberal, representative democracy in that it claims to preserve (or even deepen) the democratic nature of institutions, while simultaneously revolutionizing the same institutions in order to correspond to the needs and wishes of ordinary people. This challenge, I believe, is to be taken seriously in the contemporary context in which liberal, representative democracy appears to be hampering on a whole range of dimensions (including representation, governing capacity, social equality, and citizen participation). But populism equally 'tests' constitutional democracy in a broader sense. It both challenges the idea of 'transferring' liberal democratic institutions to post-authoritarian societies by means of conditionality (as in the EU enlargement process) and it questions the idea of organizing a transnational

community of constitutional-democratic states, predominantly ‘embedded’ in the economic and legal, or ‘rule-of-law’ constitutions (both inspired by the orderly intuition of the modernist imaginary), while displaying much weaker forms of political and democratic constitutions.<sup>72</sup> As I have argued elsewhere,<sup>73</sup> one important lesson that needs to be learned urgently from the Hungarian and Polish experiences is that a formalistic and legalistic approach to the rule of law fails to take into account the necessary societal ‘embeddedness’ of constitutionalism (in solidarity as well as participatory terms) and the deeply contested nature of distinctive elements of the liberal constitutional programme.

As becomes abundantly clear from the article, the populist alternative to constitutional democracy does, however, little to nothing to address the complexities of constitutional democracy in the contemporary European context and rather paves the way for what could be called a democratic dictatorship,<sup>74</sup> a political project representing and promoting democracy for the populists’ own majority, while using violent oppression vis-à-vis others.

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<sup>72</sup> Hauke Brunkhorst, *Constituent power and constitutionalization in Europe* 14.3 (2016) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 680-696.

<sup>73</sup> See Blokker, *supra* note 45.

<sup>74</sup> See ARATO, *supra* note 27.