

## The nature of populist power through the lens of constitutional lawyers\*

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### *1. State of the art and proposals*

Why are constitutional lawyers primarily interested at populism? Are they interested at it because of its theoretical credentials, or as a regime that worldwide rivals constitutional democracy? Although the latter alternative should *prima facie* prevail, in current literature attempts of drawing a populist constitutional theory go hand in hand with efforts of giving the ultimate definition of populism, and even of anti-populism. Once internalized within the scholarly community, a tension as such risks to convert into self-referential analysis, if not to confirm the 'Babelian confusion of voices'<sup>1</sup> on the issue.

While reacting to this trend, I will first give a brief account of the increasing diffusion of 'hybrid regimes' in the past decades, and of

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<sup>1</sup> Editorial, 'What is Populism? Who is the Populist?', *Democratic Theory*, Vol 5, Issue 2, Winter 2018, VI.

the main symptoms of the malaise meanwhile affecting constitutional democracies. It is against such background, I contend, that the question should be analyzed of whether the populist emphasis on popular sovereignty reflects a constitutional theory. On the other hand, the legitimacy recognised to populist parties and governments in a constitutional democracy should be confronted with the former's tendency to establish a regime where adversaries are instead delegitimized as such. This asymmetry could be overcome through a recovery of democratic politics aimed at addressing the systemic difficulties that put the premises for the populist rise, and are still with us.

## *2. Constitutional retrogressions*

A useful distinction has recently been made between 'authoritarian regressions' and 'constitutional retrogressions'<sup>2</sup>. Contrary to the former, that 'are characterized by an abrupt change in regime from democratic to authoritarian' due to military coups, or the use of legal states of emergency<sup>3</sup>, constitutional retrogression is rather a 'slow, incremental and endogenous decay', affecting simultaneously 'three institutional predicates of democracy: the quality of elections, speech and associational rights, and the rule of law.'<sup>4</sup> Exactly because of these characters, 'there will be no crisp focal point that can supply diffuse social and political actors with a coordinating signal that democratic norms are imperiled. The absence of a focal point will render popular and oppositional resistance to the antidemocratic consolidation of political power more costly and less effective. In short, it is precisely because it does not come dressed as a wolf that the threat of constitutional retrogression is so grave.'<sup>5</sup>

Before dwelling into the US case, which is their main concern, the authors include Hungary, Poland, Russia, Thailand, Turkey,

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<sup>2</sup> A.Huq and T.Ginsburg, 'How to Lose a Constitutional Democracy', 65 *UCLA L.REV.* 78 (2018), 83.

<sup>3</sup> A.Huq and T.Ginsburg, 'How to Lose a Constitutional Democracy', 101.

<sup>4</sup> A.Huq and T.Ginsburg, 'How to Lose a Constitutional Democracy', 117.

<sup>5</sup> A.Huq and T.Ginsburg, 'How to Lose a Constitutional Democracy', 119.

Ukraine, and Venezuela, among the countries recently affected by constitutional retrogression.<sup>6</sup>

It is worth noting that such concept differs from the fortunate formula of ‘illiberal democracy’, that was tentatively proposed twenty years ago to designate regimes which could be said to stand at some point between constitutional democracy and totalitarianism. Many countries, it was then noted, ‘are settling into a form of government that mixes a substantial degree of democracy with a substantial degree of illiberalism’, with the implication that ‘Illiberal democracies gain legitimacy, and thus strength, from the fact that they are reasonably democratic’.<sup>7</sup> While presupposing that the holding of elections is sufficient to qualify a certain system as democratic, that formula suggests that the regimes it designates are substantially democratic, although illiberal.

‘Constitutional retrogression’ is instead referred, as we have seen, to constitutional democracy as a regime where the quality of elections, speech and associational rights, and the rule of law are mutually connected to the point that a backsliding of one of these elements affects the others, and is therefore likely to engender a constitutional retrogression. I share this premise. Constitutional democracies were founded and flourished on the understanding that free elections tie in with the rule of law and the safeguard of fundamental rights. I would add that, outside the perimeter of what has traditionally been labelled as ‘violation of civil liberties’ lie further threats to constitutional democracy. Phenomena such as the virtual monopoly of the media by governing parties through patronage deals or proxy arrangements, or the disparity of resources between incumbents and the opposition created by state/party/business ties, are likely not to be framed as civil liberties violations (as the closure of newspapers would be for example). And yet such uses of political power constitute an infringement of citizens’ political rights, the exercise of which is necessary for free elections.<sup>8</sup>

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<sup>6</sup> *Ibidem*

<sup>7</sup> F. Zakaria, ‘The Rise of Illiberal Democracy’ (1997) *Foreign Affairs* 16, 22.

<sup>8</sup> S. Levitsky and L. A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (Cambridge, Cambridge University Press, 2010) 6.

Similarly, manipulations of the information environment such as those practiced by the government in Russia, Turkey and Poland, extend existing arrangements of power to the point of undermining ‘the very basis on which an open society operates’<sup>9</sup>. Dismantlements of interbranch checks, as those perpetrated in Poland and Hungary through court-packing operations and modifications of the competences or of the financial independence of the constitutional courts, do provoke an erosion of the rule of law notwithstanding the observance of formal legality<sup>10</sup>. In the same direction goes the increasing use of constitutional amendment or replacement aimed at making ‘a state significantly less democratic than it was before’, namely a regime with ‘a relative absence of accountability and a lack of rights protection’<sup>11</sup>.

The novelty does not consist in the fact that observance of legal procedures may not guarantee the maintenance of constitutional principles, since the same occurred with the emergence of the totalitarian State. What is new is rather that violations of those principles do not necessarily prelude to totalitarianism. On the contrary, constitutional retrogression coexists with the holding of at least formally free elections. It is this feature that qualifies these regimes as ‘hybrid’, or as standing in-between constitutional democracy and the totalitarian state. Fundamental rights may be there seriously restricted, and independence may vanish of the judiciary and of the non-majoritarian authorities. But elections have to be taken, whichever their democratic quality might be: ‘These regimes generally satisfy international actors in that they are sufficiently democratic to avoid sanctions and other consequences — elections are held, and they are not mere shams. There is enough electoral competition for opposition forces to compete and occasionally win. But at the same time, the deck is systematically stacked against those trying to unseat incumbents through a variety of means’<sup>12</sup>.

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<sup>9</sup> A.Huq -T.Ginsburg, ‘How to Lose a Constitutional Democracy’, 135.

<sup>10</sup> G.A.Tóth, ‘Constitutional Markers of Authoritarianism’, *Hague Journal on the Rule of Law*, Published online: 10 September 2018, 17.

<sup>11</sup> D.Landau, ‘Abusive Constitutionalism’, *University of California, Davis*, [Vol. 47: 189], 2013, 195 and 200 respectively.

<sup>12</sup> D.Landau, ‘Abusive Constitutionalism’, 199. See also M.-S.Kuo, ‘Against instantaneous democracy’, *I•CON*17 (2019), 557.

The point is that, being concentrated in the hands of the majority, the new power needs not only to rely on the people's will, but first and foremost to control that will's formation. There is ground for speaking of 'democracy disfigured'<sup>13</sup>. But was it disfigured by an invasion of aliens? Or was its internal corrosion that put the premises for such disfigurement<sup>14</sup>?

### *3. Symptoms of constitutional democracy's corrosion*

Symptoms of democracy's corrosion were already discernible at the beginning of the new century, when most populist parties and governments were far from the centrestage. The crisis of political representation, the impact on politics of the new communicative systems, and the unchecked expansion of global finance should be mentioned among these symptoms.

The crisis of political representation is itself a multi-faceted phenomenon, comprehending inter alia the decline of traditional parties, the growing complexity of political issues, and the mismatch between parliamentary deliberation and mediatically structured public debates. These contradictory elements tend to deny the good reasons for a long-sighted perspective of politics, and to reduce political representation to the resemblance between the representative to the elector. It is in this sense that the current crisis of political representation differs radically from those that periodically characterized its bicentennial life. As it has been noted, '[t]he question has always been posed in terms not of *why*, but of who and how? Whom shall we entrust to represent us? How do we ensure that they remain true to their mission? How do we protect ourselves from those who lead or govern? This has for two hundred years or so been the stock in trade of thinking about politics [.....] But what is becoming clearer is that the growing alienation from representative

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<sup>13</sup> N.Urbinati, *Democracy Disfigured. Opinion, Truth, and the People*, Harvard University Press, 2014.

<sup>14</sup> That question is crucial for J.Zelonka, *Counter-revolution. Liberal Europe in retreat*, Oxford University Press, Oxford, 2018, arguing that liberals have proved more able in criticising populism than in reflecting on themselves.



practices and processes is moving us beyond the ‘who’ and ‘how’ questions towards the ‘why’.<sup>15</sup>

The emergence of the ‘why question’ is likely to challenge the twofold idea that political representation requires a distance between the representative and the represented, and that it consists in a partial, and therefore political, interpretation of the will of the people, that needs to be confronted in parliament with further political interpretations.

The impact on politics of the new communicative systems is multi-faceted as well. These systems structure the public debate in terms of singular events rather than of policies or principles<sup>16</sup>. Far from favouring awareness of a common future, and a reflexive attitude with respect to external events, they tend to obscure the previous perception of time. From a reasoned confrontation between programs concerning the future of the country and policies needing time to take shape and then to be evaluated by the voters, politics has thus to comply with the imperatives of an ‘instantaneous democracy’<sup>17</sup>. Websites also afford the opportunity of direct popular decisions alternative to those of Parliament, to the point of promoting the ideal of a digital self-government. While rejecting an apocalyptic approach to the issue, I share the assumption that, for the moment, these decision-making processes are still deprived of sufficient democratic credentials, to the extent that citizens are entitled to vote online without knowing, discussing, projecting and checking the issue at stake<sup>18</sup>.

So far, constitutional democracy’s corrosion has been referred to how, in the above mentioned conditions, the intimate connection between fundamental rights and democracy loses its meaning. The same occurs to political equality vis-à-vis the global finance’s oligarchical assessments. Although the economic debate is still centered on a conflict between states and markets, ‘giant firms’ are reputed to be ‘so dominant in their markets and so close to governments that they break most of the rules of what economists

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<sup>15</sup> S. Tormey, *The End of Representative Politics*, Cambridge, Polity, 2015, 58.

<sup>16</sup> See J. M. Guéhenno, *La fin de la démocratie*, Paris, Flammarion, 1993.

<sup>17</sup> M.-S.Kuo, ‘Against instantaneous democracy’, 560.

<sup>18</sup> S.Rodotà, *Tecnopolitica. La democrazia e le nuove tecnologie della comunicazione*, Bari-Roma, Laterza, 2004, VI.

understand by the free market.’<sup>19</sup> Furthermore, de-regulation of financial markets brought the political and the economic spheres to coalescence, thus weakening ‘the form of stability and restraint imposed by public regulation *vis-à-vis* economic processes’<sup>20</sup>. Accordingly, states were prevented from correcting social and economic inequalities, whose growth, in turn, paralysed social mobility. And the more the latter was paralysed, the less could political equality be trusted as a condition of social improvement, with the ‘one man, one vote’ principle reduced to a formality. Significantly, populism has been viewed as a symptom of ‘the failure of constitutional democracies to be consistent with its promises of guaranteeing that all citizens enjoy an equal political power and public equality is the norm leading institutions, politicians, and citizens’.<sup>21</sup>

#### 4. *The advent of populist regimes*

While conditioning the behaviour of representatives and electors irrespective of their political opinions, these elements affect the sense of constitutional democracy. Relieved from the burden of being evaluated according to their policies, and obsessed by daily opinion polls, representatives and political parties adapt themselves to the media-driven scenario of politics for maintaining their power, and tend to concentrate on the construction of a successful image before their electors and to mirror their current preferences<sup>22</sup>. Conversely, electors are likely to raise the question of ‘why should we be represented’, both because the very act of voting is no more meant to choose between interpretations of the public interest competing over time, and because the possibility of political and social change

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<sup>19</sup> C. Crouch, *The Strange Non-Death of Neo-Liberalism*, Cambridge, Polity, 2011, 75.

<sup>20</sup> P.F. Kjaer, ‘Law and Order Within and Beyond National Configurations’, *The Financial Crisis in Constitutional Perspective*, Oxford and Portland: Hart., 2011, 418.

<sup>21</sup> R. Bellamy and W. Merkel (coords), ‘Challenges of Inequality to Democracy’, *Rethinking Society for the 21st Century*, Vol 2 Chapter 14 (Cambridge, Cambridge University Press, 2018) 68.

<sup>22</sup> Y. Mény – Y. Surel, *Par le peuple, pour le peuple* (Paris, Fayard, 2000) 75 ss.

traditionally attached to the exertion of that right is seriously hampered by the deep reassessment of the realm of power we have assisted at in the last decades.

However, contrary to traditional parties, populists are in the condition of exploiting the main features of the new scenario, with which their feelings and actions naturally merge. Claiming to mirror the people's will, populists do not need to give an interpretation of it, which would amount to sustain a partial view. What populists firstly deny is 'any kind of pluralism or social division: in the populist imagination there is *only* the people on the one hand and, on the other hand, the illegitimate intruders into our politics'.<sup>23</sup>

Moreover, the populist claim of instantiating the people's will presupposes 'appeals to authenticity' that social media can now diffuse without intermediations: 'With the pervasive simultaneity of political communications, politics has been more or less demystified and become transparent. As a result, current populist movements in established democracies seem to benefit more from their successes in popular resonance than from their appeals to the mysterious character of political charisma'.<sup>24</sup> In addition, social media are currently articulated in a way that dispenses politicians and parties from a reasoned confrontation on programs vis-à-vis the electors. And populists abhor political debates: their truth must reach directly the electors, eventually after having attacked the morality of their adversaries, but not through discussion with them. Justice Holmes's metaphor of a 'free marketplace of ideas' from which truth could emerge appears here a relic of the past.

Finally, with the rise of global financial oligarchies and the correspondent waning of political equality as a condition of social improvement, democracy is disfigured also in the sense that popular trust decays in legislative reforms aimed at enhancing social mobility. Protests have indeed arisen against the global corporate power and policies of deregulation, such as those organised by Occupy Wall Street or by similar movements in Europe and elsewhere. However,

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<sup>23</sup> J.-W. Müller, 'The people must be extracted from within the people': Reflections on Populism' (2014) *Constellations* 11, 13.

<sup>24</sup> M.-S.Kuo, 'Against instantaneous democracy', 560.



contrary to some assumptions<sup>25</sup>, these protest's affinity with the populist surge doesn't go beyond the fact that they mobilize masses of people against an elite. For the rest, movements against the global finance are far from enduring, nor do they claim to be the sole interpreters of the people's will or challenge traditional parties at the elections.

It should rather be noted that social mobility's paralysis and the dramatic increase of inequalities lead huge amounts of people to think that things can only get worse. Populists confirm this perception, by denouncing those external forces, be it migrants or EU technocracies, that further threaten welfare or security<sup>26</sup>. While identifying these targets, a politics of fear tends to divert popular attention from the crucial role of global financial oligarchies in increasing the inequalities.

On the other hand, 'While worrying incessantly about the menace of populism, elitist liberal democrats don't see large concentrations of private power in the hands, for example, of Big Tech (Google, Facebook) or Big Finance as threats to freedom, or as narrowing or even manipulating human choices. Big Tech platforms only become a problem when they are perceived to assist the populists (Brexit; Russia & Trump vs. Hillary Clinton)'.<sup>27</sup>

I have already noted the coalescence of traditional or elitist politics with the global corporate power. But this does not prevent me from adding that the latter has little to be worried of populist governments as well. A simplistic opposition between populists and anti-populists, or 'elitist liberal democrats', might pave the way to imagine 'anti-populists conjurors'<sup>28</sup>, or at least to assume that that

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<sup>25</sup> See e.g. C.Mouffe, *For a Left Populism*, London, Verso, 2018, R.Howse, 'Epilogue: In defense of disruptive democracy – A critique of anti-populism', *I•CON* (2019), 645, and M.Walsh, 'Freedom from Democracy. Progressive Populism and the Rise of Global Corporate Power', *Democratic Theory*, Vol. 5, Issue 2, Winter 2018, 51 ff.

<sup>26</sup> According to N.W.Barber, 'Populist leaders and political parties', *German Law Journal* (2019), 20, 131, 'Frequently, the discourse of populism is framed in existential terms that seek to inspire fear and panic'.

<sup>27</sup> R.Howse, 'Epilogue: in defense of disruptive democracy', at 649.

<sup>28</sup> Z.Oclopčic, 'Imagined ideologies: Populist figures, liberalist projections, and the horizon of constitutionalism', *German Law Journal* (2019), 20, 209.

opposition reflects ‘radically different conceptions of how democracy should operate in the contemporary Western European political landscape—both valid, but very much at odds with one another.’<sup>29</sup> It is as if we were debating within an ideal forum, disconnected from the constitutional implications of political action. While considering these, the contention can instead be made that the fierce adversaries of the moment have concurred, albeit to a different extent and for different reasons, in jeopardising the basic principles of constitutional democracy.

### *5. Is there a populist constitutionalism?*

In the same vein, I will examine the thesis that the populist emphasis on the principle of popular sovereignty reflects a constitutional theory. While claiming to restore the people’s will, and projecting constitutional reforms aimed at asserting its primacy over different sources of legitimacy, populists are reputed to follow the continental Europe’s revolutionary legacy, relying on the constituent power’s absolute sovereignty, identified with the people’s will, and on the related suspicion for the rule of law.<sup>30</sup>

Some object that it is mainstream theories of constituent power that ‘provide intellectual support for the peripheral theories of populist constitutionalism and—by extension—for populist argumentation in quotidian politics. Treating the constituent power as a fictive entity that persists through time leads us into a conceptual morass that obscures the character of the people and the role they play in a popular constitutional democracy. There is no constituent power with a fixed diachronic identity that is a continuing source of constitutional authority. Constituent power is not an entity, but a

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<sup>29</sup> B.Moffitt, ‘The Populism/Anti-Populism Divide in Western Europe’, *Democratic Theory*, Vol 5, Issue 2, Winter 2018, 2.

<sup>30</sup> L Corrias, ‘Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity’ *EuConst*, 2016/18, 24 and P Blokker, ‘Populist Constitutionalism’ (May 2017) *Verfassungsblog.de*.

capacity: the ability unlawfully to replace one constitutional system with another.<sup>31</sup>

Such objection relies however on the correctness as such of current theories of constituent power. Attention should rather be driven on what ‘populist constitutionalism’ has in common with the categories forged by the European revolutionary legacy. The point is that the latter reflects an artificial paradigm: even the idea that the collectivity comes prior to the individual lies on the presumption that the former is a social construction, not a natural element. For contemporary populism it is instead a seemingly natural community, ‘the people’, that takes center stage. Some resonance can be caught with the organicism that permeated the European cultural mainstream at the end of the 19<sup>th</sup> century and, first and foremost, with Carl Schmitt’s fixed and concrete idea of the people as a unity, that can be mirrored but not politically interpreted through representation. However, the Schmittian theory of the people is unlikely to be compared to the populist narrative, the latter being provided with a rather thin ideology<sup>32</sup>.

Nor does a constitutional theory emerge from the populists’ engagement in constitutional reform. Unlike constitutional texts reflecting the revolutionary tradition, whose declared purpose was to build an entirely new world, those approved by populist majorities tend to insert references to the country’s national, or ethnic, or religious identity in the frame of the previous constitutions<sup>33</sup>. Their

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<sup>31</sup> O.Doyle, ‘Populist constitutionalism and constituent power’, *German Law Journal* (2019), 20, 180.

<sup>32</sup> See particularly B.Stanley, ‘The thin ideology of populism’, *Journal of Political Ideologies* (February 2008), 13 (1), 95 ff.

<sup>33</sup> As particularly demonstrated from the Hungarian case: significantly, for Orbán ‘[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.’ (See

approach to the liberal pillar of constitutional democracy is pragmatic as well. The authors of these texts do not need to abolish the constitutional courts, or alter the provisions regarding the rule of law and fundamental rights; they prefer to undermine by other means (e.g. court-packing plans, *ad hoc* changes of the judges' age of retirement) the counter-majoritarian function of constitutional courts and the independence of the judiciary. Such constitutional retrogressions reflect an oversimplification of the democratic process, and a pragmatic approach to national contexts that are unlikely to bridge the gap with commonly known constitutional theory's categories.

Finally, even scholars who use terms as 'populist constitutionalism' admit that in these regimes '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'<sup>34</sup> Why, then, should we use terms as 'populist constitutionalism' or 'populist constitutional theory'? Isn't there the risk of legitimizing populist regimes by characterising them with the normative terms hitherto attached to constitutional democracy?<sup>35</sup>

#### *6. The structural asymmetry between constitutional democracies and populist regimes*

So far, I have treated the question of how constitutional lawyers should not react to populism. But how should they react to it?

Even here it is crucial 'to distinguish between the discourse of populists in opposition – where they indeed see the authentic popular will as being obstructed – and populists in power crafting constitutions that are intended to reflect their image of the people (and seek to perpetuate populists in power). In particular, such constitutions might put constraints in place that will preserve the

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

<sup>34</sup> P. Blokker, 'Populism as a constitutional project', *I•CON* 17 (2019), 540.

<sup>35</sup> Similarly G.A. Tóth, 'Constitutional Markers of Authoritarianism', 14.

product of a highly partisan constitution-making process, all in the name of remaining faithful to a supposed authentic “founding will.”<sup>36</sup>

Undeniably, ‘One of the ways in which contemporary fascination with populism threatens to distort

is by seducing us into thinking that populist approaches, and populist versions of constitutionalism, are somehow bound to prevail. That is not the case. Populism is inherently fragile and unstable. The limited circuits of authoritarian power to which it attaches itself—military, dynastic, vanguard party or movement—are precarious resources. And where there is a more pluralist constitutional backdrop, even these resources may hardly be available. Additionally, populism may become trapped by its own contradictions. The repeated invocation of the people as a sacralized source of authority (the “real” people) may disempower the people as a profane reality—the *real* “real” people) in a way that comes to undermine the legitimacy of the populist leadership.’<sup>37</sup>

I would add that, with the establishment of a populist regime, the dichotomy ‘people v. elite’, which populists have successfully introduced at the center stage of politics and of the academic debate, is likely to meet difficulties also with respect to the elite. While the latter comprehends the traditional political class, EU and global technocracies, banks and corporations, and intellectuals, populists in power become themselves part of the political class, nor do they prove to threaten, as we have seen, the global corporate power. Their sole attack is focused on the cultural elite, disseminating resources of knowledge and expertise, and therefore a critical approach to reality that endangers the populist imaginary construction.

Notwithstanding these fragilities, it is difficult to venture whether populism will be a contingent phenomenon. The point is that the full legitimacy which constitutional democracies recognize to populist parties and governments contradicts the latter’s tendency to create a regime of their own.

In a constitutional democracy populism should not be legally contrasted, and this is usually the case. Even in Germany, whose

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<sup>36</sup> J.-W. Müller, ‘Populist Constitutions – A Contradiction in Terms?’, *Verfassungsblog*, 23 Apr 2017.

<sup>37</sup> N. Walker, ‘Populism and constitutional tension’, *I•CON* 17 (2019), 528.



Basic Law allows the Federal Constitutional Court to declare the dissolution of any political party that seeks to undermine or abolish the free and democratic order or to endanger its existence (Article 21 BL), the Court has refrained from adopting such measure against an ultranationalist party as the NPD<sup>38</sup>, thus declining ‘to provide further fodder for the populists’ familiar narrative that the establishment systematically suppresses the voice of ‘the people’.<sup>39</sup> As significantly affirmed by the FCC’s President, reactions to the populist challenge should derive primarily from the political process itself.<sup>40</sup>

A response to populism might indirectly be caught in Article 7 TEU, which entrusts the European Council with the powers of ascertaining the existence of systemic violations by a Member State of the ‘common values’ enumerated in Article 2 TEU, including ‘the rule of law and respect for human rights’, and of adopting a series of related measures that can go to the point of suspending the voting rights of the representative of that Member State. These measures are not meant to outlaw populist governments as such. Rather, they aim at sanctioning systemic breaches of the EU ‘common values’ that might recur within a Member State, irrespective of the contingent political colour of its government. Their nature is thus legal, not political, although the enforcement of Article 7 TEU’s mechanisms rests entirely in the hands of national governments. And the European Council’s inertia vis-a-vis what has been called ‘the purposeful destruction of the rule of law inside EU member states’<sup>41</sup>, departing from Hungary and Poland, reflects partisan tactics that vanishes the credibility of the ‘common values’.

The notion that responses to populism should come from politics rather than from law reflects a core principle of constitutional

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<sup>38</sup> Federal Constitutional Court, January 17, 2017, *Neue Juristische Wochenschrift* 611, on which see L. Schuldt, ‘Mixed Signals of Europeanization: Revisiting the NPD Decision in Light of the European Court of Human Rights’ Jurisprudence’ (2018) *German Law Journal* 810, 817.

<sup>39</sup> A. Pirang, ‘Renaissance of Militant Democracy?’, [www.lawfareblog.com](http://www.lawfareblog.com), March 27, 2017.

<sup>40</sup> A. Voßkuhle, ‘Demokratie und Populismus’ (2018) *Der Staat* 120, 134.

<sup>41</sup> J.-W. Müller, ‘Reflections on Europe’s ‘Rule of Law Crises’’, P.F.Kjaer-N.Olson (eds.), *Critical Theories of Crisis in Europe. From Weimar to the Euro* (London, Rowman & Littlefield, 2016) 162.

democracies such as pluralism, which they could not renounce without betraying themselves. It is respect for pluralism, together with the rule of law, that impedes whichever degeneration of majoritarianism into the winner-take-all rule, thus rendering inter alia unpredictable the electoral outcome. To the contrary, populist regimes deny the reversibility of political power: majoritarianism coincides there with the winner-take-all rule, with the majority in charge willing to rest in power beyond the legislature by all means, and pluralism is obstructed because it risks to hamper such possibility, not because it contrasts with an ideological tribute to the people's will. This structural asymmetry gives populists a competitive advantage on their adversaries in terms of power, which only a recovery of democratic politics could overcome. But does its current anemia simply reflect the poor performances of its leaders and parties?

### *7. Further systemic challenges to constitutional democracy*

As already mentioned, constitutional democracy's crisis predates the populist rise, and would be with us even without it. And the sense of vacuity affecting political representation, the fascination with instantaneous democracy, and a reassessment of the realm of power due to coalescence between politics and finance, not only erode the credibility of constitutional democracy's promises. They also pervert its artificial dimension, namely the construction of a constitutional time and space through which a 'We' can be invoked whose boundaries are not drawn once and for all, and whose identity is never fixed, since 'the self of self-legislation remains to be formed by and in the legislation it gives itself. The legal institutionalisation of sensitivity to this dialectic can be found in constitutional democracy's insistence on both majority rule and rights of minorities'.<sup>42</sup>

Constitutional democracy's artificial dimension has historically proved to pave the way to a pluralist dynamic over time, with which the populist fiction of a people's natural identity, with its obsession for a never ending past, is frequently reputed to be at odds. What it

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<sup>42</sup> L. Corrias, 'Populism in a Constitutional Key', at 24.

remains instead obscure is whether and how the virtual dimension that increasingly affects our lives, political communications included, can be reconciled with democracy. Technologies and algorithms seem to prepare a virtual world which, reproducing the human, differs per se from democracy's artificial paradigms.

Here comes a series a constitutional issues. Who exerts power over these processes? How can they be democratically controlled? Are new institutional devices and procedures likely to be projected with that aim, or are they going to fail vis-à-vis the opaqueness of the virtual world's mechanisms? Awareness is needed, at any rate, that these tend to neutralize democracy's artificial paradigms no less than, and sometimes together with, the claim of a return to the people's natural identity. Recovery of democratic politics requires such awareness, together with a thorough reinvention of its traditional mechanisms.

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**Abstract:** This essay firstly gives a brief account of the increasing diffusion of 'hybrid regimes' and of the main symptoms of the malaise affecting constitutional democracies. Then, the legitimacy recognised to populist parties and governments in a constitutional democracy should be confronted with the former's tendency to establish a regime where adversaries are instead delegitimized as such. The structural asymmetry between constitutional democracies and populist regimes could be overcome through a recovery of democratic politics aimed at addressing the systemic difficulties that put the premises for the rising of a "populist constitutionalism".

**Keywords:** constitutional democracies, populist regimes, hybrid regimes, constitutional retrogressions, populist constitutionalism

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