

POPULISM, AUTHORITARIANISM AND CONSTITUTIONALISM

The paper deals with the relationship of different types of populism to authoritarianism and constitutionalism. In the first part I try to define various approaches (Left and Right-Wing, ‘good’ or ‘bad’) to populism, especially from the point of view, whether they aim at changing the liberal democratic constitutional system to an authoritarian one. The following part discusses the rhetoric of authoritarian populists, which makes this type of populism distinct from non-populist authoritarians. The paper also explores the question, whom to blame for the success of both authoritarian populisms, and the final part investigates, whether the use of legal tools by authoritarian populist to dismantle liberal constitutional democracies means that we can speak about a special populist constitutionalism.

1. Is There a Single Formula to Define Populism?

‘To Define Populism’ was the title of a conference held at the London School of Economics and Political Science (LSE) in London on 20-21 May 1967 with the participation of Richard Hofstadter, Ernest Gellner and Isaiah Berlin, among others. Regarding a definition Isaiah Berlin warned the participants “that a single formula to cover all populism everywhere will not be very helpful”, and also “that we must not suffer from a Cinderella complex, by which I mean the following: that there exists a shoe – the word ‘populism’ – for which somewhere there must exist a foot.”¹ At the same time, he was convinced that the word ‘populism’ isn’t simply a homonym, meaning that totally different items sharing the same name, and therefore nothing but confusion can be sown by using a general description.² As a general description,

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¹ *To Define Populism*, The Isaiah Berlin Virtual Library, Isaiah Berlin 1968, The Isaiah Berlin Literary Trust 2013. Posted 14 October 2013. 6. <http://berlin.wolf.ox.ac.uk/lists/bibliography/bib1111bLSE.pdf>

² *Ibid*, 7. In a recent op-ed piece, Roger Cohen, the opinion columnist of The New York Times suggested to retire the word ‘populism’ altogether, because the ‘overused epithet for multiple manifestations of political anger became sloppy to the point of meaninglessness’. R. Cohen, ‘It’s Time to Depopularize „Populist”’, *The New York Times*, July 13, 2018.

Berlin uses the same attributes as experts do nowadays, saying that populism “stands for the majority of men who have somehow been damaged...by an elite, either economic, political or racial, some kind of secret or open enemy – capitalism, Jews and the rest of it.”³

From the current political science literature I refer to a similar definition of populism, provided by Mudde and Kaltwasser, who define populism as a ‘thin-centered ideology that considers society to be ultimately separated in two homogeneous and antagonistic camps, ‘the pure people’ and the ‘corrupt elite,’ and which argues that politics should be an expression of the ‘volonté générale’ (general will) of the people.⁴ Mudde and Kaltwasser also observe that some forms of populism has been combined with authoritarianism and nativism, “whereas the former refers to the belief in a strictly ordered society, and is expressed in an emphasis on ‘law and order’ issues, the latter alludes to the notion that states should be inhabited exclusively by members of the native group (‘the nation’) and that non-native (‘alien’) elements are fundamentally threatening to the homogeneous nation-state.”⁵

Similarly, Pippa Norris differentiates between populism and authoritarianism, and argues that not all populists pose threats to liberal constitutional democracy. He lists Bernie Sanders’ Democrats, Spain’s Podemos and Italy’s Five Star Movement to the non-autocratic, and Recep Tayyip Erdogan in Turkey, Viktor Orbán in Hungary, Rodrigo Duterte, the late Hugo Chávez and Nicolás Maduro in Venezuela to the authoritarian populists.⁶ Also, Robert Howse, using almost the same examples distinguishes between ‘good’ and ‘bad’ populism, characterising the claims of the first as pluralist, while that of the second as anti-pluralist.⁷ In another writing, Howse referring to Bernie Sanders, claims that this kind of anti-establishment

³ Berlin, *ibid*, 10.

⁴ C. Mudde - R. C. Kaltwasser, *Populism: A Very Short Introduction*. Oxford: Oxford University Press, 2017. 6. Berlin also refers to Rousseau, pointing out that the doctrine begins in the 18th century. *Ibid*, 18.

⁵ Mudde-Kaltwasser, *ibid*, 34.

⁶ P. Norris, ‘Is Western Democracy Backsliding?, Diagnosing the Risks’, HKS Working Paper No. RWP17-012 (March 2017). Today one should certainly add Jaroslaw Kaczynski from Poland to the list of authoritarian populists.

⁷ R. Howse, ‘Populism and Its Enemies’, Workshop on Public Law and the New Populism, Jean Monnet Center, NYU Law School, 15-16 September 2017. 3

grassroots political movement of national significance is not the enemy of liberal democratic constitutionalism.⁸

Dani Rodrik introduces a similar binary by differentiating between economic and political populism. Political populists abhor restraints on the political executive, which Rodrik calls as a dangerous approach that allows a majority to ride roughshod over the rights of minorities. These political autocrats, such as Erdogan detest separation of powers, an independent judiciary, or free media, and they see limits on their exercise of power as necessarily undermining the popular will.⁹ In economics, populists reject restraints on the conduct of economic policy, which is in Rodrik's view not necessarily bad. For instance, he claims that Franklin D. Roosevelt's New Deal, FDR explained, was needed not only to serve people better, but also for the 'survival of democracy.'¹⁰ Rodrik also uses the terms right-wing and left-wing populism, in the case of the first the 'enemies of the people' being minorities and populist, while in the case of the latter the financial elites. Even though I think that for certain left-wing populists, like those in Venezuela, Bolivia or Ecuador, also minorities can be called as 'enemies of the people', but these minorities neither as targets of right or left-wing autocrats belong to the elite, hence their 'populism' isn't anti-elitist, hence not real in this respect either.

Also, Mark Tushnet compares left- and right-wing populism, describing left-wing populism as supporting restrictions on capital movement, and right-wing populism as restrictions on the movement of the people rather than capital, using anti-cosmopolitan, ethnonationalist 'we-they' rhetoric.¹¹ But again, the latter is more importantly authoritarianism than populism.

⁸ See R. Howse, 'Thirteen Theses on Trump and Liberal Democracy', *verfassungsblog.de*, 10 November 2016.

⁹ D. Rodrik, 'Is Populism Necessarily Bad Economics?', *AEA Papers and Proceedings*, 2018, 108: 196-199.

¹⁰ F. D. Roosevelt, 'Acceptance Speech for the Renomination for the Presidency, Philadelphia, Pennsylvania, June 27, 1936. Cited by Rodrik, *ibid*, 199.

¹¹ See M. Tushnet, 'Comparing Right-Wing and Left-Wing Populism', in M. A. Graber, S. Levinson, and M. Tushnet (eds.), *Constitutional Democracy in Crisis?* Oxford University Press, 2018.

Pierre Rosenvallon, who as well differentiates between rightist and leftist populism, states that rightist populists are nationalists, who attack non-nationals, such as migrants, and violate principles of constitutionalism¹². Leftists, like Syriza in Greece or Podemos in Spain, or Bernie Sander's 'left-wing egalitarianism' in the US for that matter, care more about poverty. Consequently, their enemies are the wealthy, the banks, the bourgeoisie, and they pose no threat to constitutionalism. Again, this does not necessarily apply to all forms of leftist populism, such as the one in Venezuela both under President Chávez and Maduro, who are also following an authoritarian agenda, for instance not to tolerate opposition parties. That is the reason that referring to Venezuela, Bolivia, Ecuador, but also to Hungary and Poland, Samuel Issacharoff speaks about an authoritarian streak to both left and right populism.¹³ But, perhaps because of the authoritarian tendency of left and left and right-wing populism, Kim Scheppele's argument that the left/right political spectrum is now overwritten by a cosmopolitan/globalist vs. nationalist/localist dichotomy,¹⁴ applies to the concept of populism as well.

Based on Mudde-Kaltwasser, Norris and Howse terminology, we can conclude that only the 'good' sort of populism can be considered as real, as Mudde and Kaltwasser, Norris or Howse use the term. On the other hand, the anti-pluralist, anti-democratic 'bad' populism, which cannot comply with the requirements of constitutionalism is not a real one. This corresponds with Berlin's terminology of 'false populism', used by him during the mentioned conference in 1967. Berlin defines the term as "the employment of populist ideas for the ends other than those which the populist desired. That is to say – Berlin argues -, their employment by Bonapartists or McCarthyists, or the 'Friends of the Russian people,' or Fascist and so on. This is simply the mobilisation of certain popular sentiments – say hostility to capitalism or to foreigners or Jews, or hatred of economic organisation or of the market society, or of anything

¹² See P. Rosenvallon, *Penser Le Populisme*, Leçon Inaugurale A Collège de France, 18. 2011. Thanks to Théo Fournier, my PhD researcher at EUI, for drawing my attention to this.

¹³ S. Issacharoff, 'Populism versus Democratic Governance', in M. A. Graber, S. Levinson, and M. Tushnet (eds.), *Constitutional Democracy in Crisis?* Oxford University Press, 2018.

¹⁴ K.L. Scheppele, 'The Party's Over', in M. A. Graber, S. Levinson, and M. Tushnet (eds.), *Constitutional Democracy in Crisis?* Oxford University Press, 2018.

you like – for undemocratic ends’.¹⁵ This type of authoritarianism uses, or rather misuses or abuses populism in its rhetoric.

2. Authoritarian Populist Rhetoric

Authoritarian populists often use anti-representation and pro-direct democracy arguments¹⁶. But in reality this is only a rhetoric, which does not necessarily correspond with their practice. For instance, Viktor Orbán’s FIDESZ party tried to undermine the legitimacy of representation after losing the 2002 parliamentary elections. He refused to concede defeat, declaring that ‘the nation cannot be in opposition, only the government can be in opposition against its own people’. After the 2010 electoral victory, he claimed that through the ‘revolution at the voting booths’, the majority has delegated its power to the government representing it. This means that the populist government tried to interpret the result of the elections as the will of the people, viewed as a homogenous unit. Also, the Orbán government, which after in 2010 overthrowing its predecessor as a result of a popular referendum made it more difficult to initiate a valid referendum for its own opposition. While the previous law required only 25 percent of the voters to cast a vote, the new law requires at least 50 percent of those eligible to vote to take part, otherwise the referendum is invalid¹⁷. The ambivalence of authoritarian populists towards representation and referenda in government and in opposition applies to their attitude regarding established institutions. While they readily attack the ‘establishment’, while in opposition, they very much protect their own governmental institutions. The situation is different with transnational institutions, like the EU, which are also attacked by these autocratic populist governments as threats to their countries’ sovereignty. A good example is again the Hungarian Parliament’s reaction to the European Parliament’s critical report from July 2013 on the constitutional situation in

¹⁵ Berlin, *ibid*, 12-13.

¹⁶ Wojciech Sadurski goes as far as calling the new Polish system of Jaroslaw Kaczynski ‘plebiscitary autocracy.’ See W. Sadurski, ‘Populist Challenges to Liberal Constitutionalism: A Case of Poland,’ in M. A. Graber, S. Levinson, and M. Tushnet (eds.), *Constitutional Democracy in Crisis?* Oxford University Press, 2018.

¹⁷ It is the irony of fate that due to these more stringent conditions, the only referendum that the Orbán government initiated – one against the EU’s migration policy - failed. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: “Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?”. Although 92 % of those who casted votes and 98 of all the valid votes agreed with the government, answering ‘no’ (6 % were spoiled ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.

Hungary. The Hungarian parliamentary resolution on equal treatment reads: “We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.” These words very much reflect the Orbán government’s view of ‘national freedom’, the liberty of the state (or the nation) to determine its own laws: “This is why we are writing our own constitution...And we don’t want any unconsolidated help from strangers who are keen to guide us...Hungary must turn on its own axis”.¹⁸

If autocrats’ populism is false and they only use populist rhetoric, but their decisive characteristics is authoritarianism, what makes them distinct from non-populist autocrats? First of all the democratic elections through which they come to power. But being in government they often change the electoral law to keep their power. Remember Latin-American presidents’ various efforts to get rid of the limits of presidential terms. But also, Viktor Orbán’ Fidesz party, which received more than 50 percent of the actual votes, and due to the disproportional election system, got two-thirds of the seats in the 2010 parliamentary elections, before the next election – according to OSCE’s independent election observers - made “undue advantages” for the governing party provided by the amendment to the electoral system, securing again a two-thirds majority both in the 2014 and the 2018 parliamentary elections.¹⁹

But despite the tricks with the electoral law, it is true that Orbán, and other populist autocrats have a substantial and growing support in the electorate, which raises the question, whom to blame for the backsliding to authoritarianism: the authoritarian populists, the elite, which is unable to provide convincing alternatives to populism, for the people, or ‘the people’ themselves. Obviously autocrats always have their responsibility for authoritarian regimes, also if they use populist rhetoric to keep the power. The elite, including the lawyers are also

¹⁸ The English-language translation of excerpts from Orbán’s speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012.

¹⁹ In December 2011 the Parliament enacted a controversial election law with its gerrymandered electoral districts, making the electoral system even more disproportional, which favored the governing party in the elections to come. The main changes in the system were as follows: shift to the majoritarian principle, by increasing the proportion of single-member constituency mandates, eliminating the second round, introducing a relative majority system instead of the absolute majority, and introducing “winner-compensation.”

responsible to convince the majority about the advantages of a liberal democratic system. According to some authors, the prospects for democracy in the newly independent states of Central and Eastern Europe following the 1989–1990 transition were diminished by a technocratic, judicial control of politics, which blunted the development of civic constitutionalism, civil society, and participatory democratic government as necessary counterpoints to the technocratic machinery of legal constitutionalism.²⁰ Adherents to this viewpoint argue that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardizes the development of participatory democracy.²¹ In other words, legal constitutionalism falls short, reducing the Constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government²². Critics of this approach say that it does not sufficiently take into account the the lack of civic interest in constitutional matters, and the lack of constitutional culture in new democracies.²³

Knowing this lack of civic interest and constitutional culture, the most challenging question is, how much we can blame the people for the success of populist authoritarians. Kim Scheppele argues that politics has failed ‘the people’, who were only choosing an option that they were offered, and not the other way around²⁴. On the other hand, Ronald Inglehart and Pippa Norris, trying to explain the attitudes of voters who support authoritarian, populist

²⁰ See this argument by Paul Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a ‘negative effect’ in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See W. Sadurski “Transitional Constitutionalism: Simplistic and Fancy Theories.” in A. Czarnota, M. Krygier and W. Sadurski (eds.), *Rethinking the Rule of Law After Communism*, CEU Press.2005.

²¹ See R. Albert “Counterconstitutionalism”, *Dalhousie Law Journal*, 31 (1).2008.

²² See Sadurski 2005, *ibid*, 23.

²³ See the reviews on Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* 2013. by Jiri Priban and Bogusia Puchalska in ICONnect. <www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism>

²⁴ See Scheppele, *ibid*, 495.

leaders, such as Orbán, suggests that it would be a mistake to attribute the rise of populism directly to economic inequality alone, as psychological factors seem to play an even more important role. Older and less-educated people tend to support populist parties and leaders that defend traditional cultural values and emphasize nationalistic and xenophobia agendas, reject outsiders, and uphold old-fashioned gender roles²⁵. We should not go as far as Daniel Goldhagen in his book, *Hitler's Willing Executioners* on the responsibility of ordinary Germans in the Holocaust²⁶, or Sándor Márai, who in 1945, before emigrating from Horthy's Hungary wrote in his diary²⁷ that the 'Nazi-Friendly' Hungarian Christian middle class will never change to observe that many voters of the right-wing authoritarian populist parties are aware of those parties' exclusionary, nationalistic, homophobic, autocratic ideas and aims, and they still support them.

Populists, including authoritarian ones like to refer to the popular sovereignty. But as we saw populist authoritarians are as anti-pluralist as their non-populist counterparts. The difference is again rather rhetorical. The first refers to 'pure people', the second to the *aria Volk*, as the German Nazis, or to the 'proletarian working class' as the Communists, but both have in mind the exclusion of minorities in the societies, being it religious, ethnic and others, like migrants in the case of populist authoritarians.

3. Can Populist Authoritarianism Be Constitutionalist?

Another difference between populist and non-populist authoritarians is that the former extensively rely on legal tools²⁸. Some of them violate their own old constitution with this legislative act, like the Polish PiS party's government, which was unable to gain a constitution-making majority in the Sejm, but those, like the Hungarian Fidesz government, which enjoys a two-thirds majority, need not necessarily set aside its 'illiberal' constitution,

²⁵ R. Inglehart and P. Norris, 'Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash,' *Faculty Research Working Paper Series*, August, 2016.

²⁶ D. Goldhagen, *Hitler's Willing Executioners. Ordinary Germans and the Holocaust*, Alfred A. Knopf, 1996.

²⁷ S. Márai, *Memoir of Hungary 1944-1948*, CEU Press, 1996.

²⁸ See the various legal toolkits of populist autocrats K. Scheppelle, 'Autocratic Legalism', 85 *University of Chicago Law Review*, 545, 2018.

the Fundamental Law of 2011. But can authoritarian populism and illiberalism be reconcilable with constitutionalism at all.

Political constitutionalism Has Nothing to Do with Populism

First of all, it is important to note that despite some academics' efforts to apply the concept of political constitutionalism in defense of illiberalism, I do not consider political constitutionalism, or all of the concepts rejecting strong judicial review, or judicial review altogether, as populist²⁹. Political constitutionalists, like Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson, and Mark Tushnet, who themselves differ from each other significantly, emphasize the role of elected bodies instead of courts in implementing and protecting the constitution, but none of them reject the main principles of constitutional democracy, as populist do. Even Richard D. Parker, who announced a 'constitutional populist manifesto' wanted only to challenge the basic idea, central to conventional law, 'that constitutional constraints on public power in a democracy are meant to contain or tame the exertion of popular political energy rather than to nurture, galvanize, and release it'³⁰. Similarly, those who describe a new model of constitutionalism, based on deliberation between courts and the legislator, with the latter retaining the final word, have nothing to do with autocratic populist constitutionalism³¹. Those scholars realize that parliamentary

²⁹ See the opposite view L. Corso, 'What Does Populism Have to Do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions', *Rivista di filosofia del Diritto*, 2014, 443-469.

³⁰ Analysing Thomas Mann's novel *Mario and the Magician*, written in 1929, Parker draws the conclusion for today that 'the point is to get out and take part in politics ourselves, not looking down from a 'higher' pedestal, but on the same level with all of the other ordinary people.' See R. D. Parker, "'Here, the People Rule": A Constitutional Populist Manifesto.' 27 *Valparaiso University Law Review* 3. 1993, 531-584, at 583. A similar message can be detected in the interview with Mark Lilla, a conservative liberal professor of the humanities at Columbia, who on the day after Donald Trumps presidential victory declared: 'One of the many lessons of the recent presidential election and its repugnant outcome is that the age of identity liberalism must be brought to an end'. See M. Lilla, 'The End of Identity Liberalism', *The New York Times*, November 18, 2016. Later, in an interview on the topic of the most effective tools against the President's populism, he emphasized the importance that opponents find a way to unify: 'we have to abandon the rhetoric of difference, in order to appeal to what we share'. Remnick, David. 2017. "A Conversation with Mark Lilla on His Critique of Identity Politics." *The New Yorker*, 25 August.

³¹ S. Gardbaum, *The Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge University Press, 2013 about the new model. This model has also come to be known by several other names: 1) 'weak-form of judicial review' (M. Tushnet, 'Alternative Forms of Judicial Review', 101 *Michigan Law Review*, 2003, 2781.) or just 'weak judicial review' (J. Waldron, 'The Core of the Case Against Judicial Review', 115 *Yale Law Journal*, 2006, 1354.), 2) 'the parliamentary bill of rights model' (J. Hiebert, 'Parliamentary Bill of Rights. An Alternative Model?', 69 *Modern Law Review* 7, 2006, 3.) 'the dialogue model', 'the model of democratic

sovereignty tends to be increasingly restrained, either legally or politically, and that the last decades have witnessed less and less scope for the exercise of traditional *pouvoir constituant*, conceived as the unrestrained ‘will of the people’, even in cases of regime change or the establishment of substantially and formally new constitutional arrangement³². In contrast to these new trends, in the Hungarian constitutional system, the parliamentary majority not only decides every single issue without any dialogue, but there is practically no partner for such a dialogue, as the independence of both the ordinary judiciary and the Constitutional Court has been silenced.

As Bojan Bugarcic argues, populist constitutionalism must also be distinguished from popular constitutionalism, ‘which seeks to preserve the primary role of the people in interpretation and administration of constitutional law and is compatible with liberal democracy.’³³ Other scholars argue that populism rejects the basic principles of constitutional democracy,³⁴ understood as limited government, governed by the rule of law, and protecting fundamental rights³⁵.

dialogue’ (A.L. Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), Oxford: Hart Publishing, ch. 5.), or ‘dialogic judicial review’ (K. Roach, ‘Dialogic Judicial Review and its Critics’), 23 *Supreme Court Law Review*, second series, 2004, 49.)

³² C. Fusaro & D. Oliver, ‘Towards a Theory of Constitutional Change’, in C. Fusaro, & D. Oliver, *How Constitutions Change – A Comparative Study*. Hart Publishing, 2011.

³³ See B. Bugarcic, ‘The Populist at the Gates: Constitutional Democracy Under Siege?’ *Public Law and the New Populism*. New York University School of Law, Jean Monnet Center for International and Regional Economic Law and Justice, 2017. Unfortunately, Bugarcic does not define popular constitutionalism. Jan-Werner Müller, who also differentiates between populist and popular constitutionalism, admits that we do not know exactly what popular constitutionalism is. See J-W. Müller, J.-W., ‘The People Must be Extracted from Within the People: Reflections on Populism’. 21 *Constellations*, 2014, 483-493. Without exact guidelines one can think about the Swiss direct democracy, or the (more or less failed) Irish and Icelandic constitutional reform experiences with strong people’s participation. About these latter attempts see J. Suiter, D.M. Farrell and C. Harris, ‘Ireland’s Evolving Constitution’, in P. Blokker (ed.), *Constitutional Acceleration Within the European Union and Beyond*, Routledge, 2018. 142-154, and respectively B.T. Bergsson, ‘The Constitution As a Political Tool in Iceland: From the Periphery to the Center in the Political Debate’, in P. Blokker (ed.), *Constitutional Acceleration Within the European Union and Beyond*, Routledge, 2018. 155-174.

³⁴ See for instance C. Pinelli, ‘The Populist Challenge to Constitutional Democracy.’ 7 *European Constitutional Law Review*, 2016, (01): 5-16.

³⁵ See these ‘essential characteristics’ of constitutional democracy in M. Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy.’ 74 *Southern California Law Review*, 2001, 1307-1352, at 1307.

Luigi Corrias argues that populism's mostly implicit constitutional theory contains three main claims: one concerns the nature of constituent power, the second involves the scope of popular sovereignty, and the third relates to its approach to constitutional identity³⁶.

Regarding constituent power, populists claim not only that it belongs to the people, but also that it is almost absolute, and is potentially being exercised directly in the polity. The absolute primacy of the constituent power of the people applies also vis-à-vis the constitution, which is in contradiction with the concept of the constitution being a 'higher law'. Unlike liberal constitutionalism, populists claim not only that the power to create a constitution belongs to the people alone, that is, that the people have a monopoly over the original or primary *pouvoir constituant*; but also the derivative or secondary constitutional amending power, which, for them, means that the power of the people to amend it is unlimited. This also means an absolute primacy of politics over law. By not accepting the authority of the law, populists reject the dualism of law and politics, the common characteristic of both the American and French revolutions, and the German and British evolutionary approaches to constituent power³⁷.

For popular sovereignty, as Corrias argues, populism holds the belief that 'the people' is a unit, and that, as such, it is present in the polity often only through the means of direct democracy, such as referenda. Representation merely serves as a tool to give voice to the unity³⁸. But as Pinelli rightly points out, contemporary populists do not necessarily reject representation, nor do they necessarily favour the use of referenda,³⁹ as we have shown in the case of Viktor Orbán's Fidesz party.

³⁶ L. Corrias, 'Populism in Constitutional Key: Constituent Power, Popular Power, Popular Sovereignty and Constitutional Identity', *European Constitutional Law Review*, 2016. 12.

³⁷ *Ibid*, 16.

³⁸ *Ibid*, 18-19.

³⁹ See Pinelli, *ibid*, 11.

The third element of populist constitutional theory, according to Corrias, is constitutional identity as collective selfhood. Here populists have the tendency to reject what they perceive as threats to the constitutional identity of the people by immigrants, refugees and minorities⁴⁰ This is the reason why the Hungarian government, after the above-mentioned failed referendum, introduced the Seventh Amendment to defend Hungary's constitutional identity and politically legitimise non-compliance with EU law in this area. Since the proposed amendment fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law, the Constitutional Court, loyal to the government, came to the rescue of Orbán's constitutional identity defence of its policies on migration. The Court revived an abandoned petition of the also loyal Commissioner for Fundamental Rights (hereinafter: Commissioner), filed a year earlier, before the referendum was initiated, and ruled that "the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty". Therefore, the Court argued, "the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State". Because sovereignty and constitutional identity are in contact with each other in many points, "their control should be performed with due regard to each other in specific cases"⁴¹. Finally, after Fidesz regained its constitution-making two-thirds majority on 20 June 2018 they enacted the previously failed Seventh Amendment to the with the provisions on national constitutional identity.

The Instrumental Role of Religion in National Legitimation

This Amendment contains another provision, which is about the Christian culture, also an element of the national identity, but serves the populist aim of the governing party to instrumentalise religion in legitimating nationalism. "The protection of Hungary's self-identity and its Christian culture is the duty of all state organizations" says the new provision. The purpose of the proposed provision was questioned at the preparatory meeting of the judicial committee by members of opposition parties. The only explanation MPs of the

⁴⁰ See Corrias, *ibid*, 13.

⁴¹ For a detailed analysis of the decision see G. Halmai, The Abuse of Constitutional Identity The Hungarian Constitutional Court on the Interpretation of Article E) (2) of the Fundamental Law., *Review of Central and East European Law*, 43, 2018, 23-42.

governing Fidesz party, who initiated the new text were able to provide was a paraphrase of an alleged sentence by Robert Schuman, founding father of the European Union: “Without Christian culture there is neither Europe nor Hungary.” The major points of the recent constitutional amendment, namely the criminalization of any civil assistance to refugees and the declaration of homelessness as an unlawful behaviour are deeply contradictory to the very idea of Christian culture. (Most probably the same intention to legitimate his anti-European idea lead Prime Minister Orbán recently to reframe his concept of ‘illiberal democracy’ as a fulfilment of ‘Christian democracy.’) But this reasoning does not reveal the compensatory message sent to the European People’s Party, the party family of Fidesz in the European Parliament, and to its most powerful member, the German CDU-CSU: even if we may have strange views on European values, but we are good Christians, like you are. Besides the political message of the amendment towards Europe, there will be clear internal constitutional law consequences of the new provision, as it can be used as a basis of reference to annul any legal norm allegedly violating Christian culture, a tool that can be useful for the packed Constitutional Court or any court in Hungary.

Not that the text of the Fundamental Law would have been ideologically neutral so far. This new constitution, which was passed by the Parliament in April 2011, shows the role of religion in national legitimation through characterizing the nation referred to as the subject of the constitution not only as the community of ethnic Hungarians, but also as a Christian community, narrowing even the range of people who can recognize themselves as belonging to it. The preamble to the Fundamental Law, which is compulsory to take into consideration when interpreting the main text, commits itself to a branch of Christianity, the Hungarian Roman Catholic tradition. According to the text of the preamble, “We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe”, the members of the Hungarian nation recognise Christianity’s “role in preserving nationhood”, and honours the fact that the Holy Crown “embodies” the constitutional continuity of Hungary’s statehood. Besides the sacral symbols, this choice of ideology is reflected—inter alia—in the Fundamental Law’s concept of community and its preferred family model, and its provision regarding the protection of embryonic and foetal life from the moment of conception.

The preamble, while giving preference to the thousand-year-old Christian tradition, states, that “we value the various religious traditions of our county”. The choice of words displays its model of tolerance, under which the various worldviews do not have equal status, although following them is not impeded by prohibition and persecution. It is however significant that the tolerance thus declared only extends to the various “religious traditions”, but does not apply to the more recently established branches of religion, or to those that are new to Hungary, or to non-religious convictions of conscience.

The refugee crisis of 2015 has demonstrated the intolerance of the Hungarian governmental majority, which styled itself as the defender of Europe’s ‘Christian civilization’ against an Islamic invasion. In the beginning of the crisis, Prime Minister Viktor Orbán claimed that “Christian culture is the unifying force of the nation... [and] Hungary will either be Christian or not at all.”⁴² In another speech held in early September, Orbán went further by stating that: “The Christian-national idea and mentality will regain its dominance not just in Hungary but in the whole of Europe.” This new era should follow ‘the age of liberal blah blah,’ because the origin of the mass migration and the consequent refugee crisis is ‘the crisis of liberal identity’: “For years we have told them that 'the world is a global village' ... we have talked about universal human rights to which everybody is entitled to. We forced our ideology on them: freedom is the most important thing, we said. We bombed the hell out of those who didn't accept our ideology.... We created the Internet, we declared the freedom of information, and we told them that every human being should have access to it. We sent them our soap operas. They watch what we do.... We sent our TV stars into their homes.... they now think that our virtual space is also their space and that in this virtual space everybody can meet anybody else. ... These people, partly because of our culture lent to them or forced upon them, are no longer tied to their own land and to their past.”⁴³

But should the alleged defense of Christianity from the ‘Muslim hordes’ be taken seriously? In a speech on 26 July 2012 Orbán explains why authoritarianism is needed to treat

⁴² Orbán’s speech in Debrecen on 18 May 2015.

http://index.hu/belfold/2015/05/18/orban_magyarország_kereszteny_lesz_vagy_nem_lesz/#

⁴³ Speech in Kötcsé on 5 September 2015. <https://vastagbor.atlatszo.hu/2015/09/17/a-vagatlan-kotcsei-beszed/>

Hungarians: ‘*Joining forces is not a matter of intentions, but of sheer force. With a half-Asian lot such as ours, there is no other way* [than compulsion or force – G.H.]’⁴⁴ This assessment is very similar to that of the late Imre Kertész, the Nobel laureate in literature, who argued that Hungary's ill-fate stemmed from its inability to choose between Asia and Western Europe.⁴⁵ Historically in Hungary, the bloody conflicts of the Reformation meant that until the Horthy era no church could fully identify itself with the Hungarian nation. Although the Catholic Church dominated the Protestants, both numerically and politically, the Catholic Church still played little historical role in preserving national consciousness, so that Catholicism has never become equated with Hungarian patriotism. Under communism, the Roman Catholic church neither served as a symbol of national independence, nor as a source of protection for the opposition, as it happened in Poland.⁴⁶

Christianity and religion serve as reference points that Orbán’s authoritarian populism uses opportunistically. Fidesz that used to be a liberal party with a militantly anti-clerical views, has started to become conservative from the mid-90s, turning to an openly positive stance towards religion, still, religion has never been taken as significant part of its identity, rather played a purely instrumental, opportunistic role in the party’s political strategy (even after joining the European People’s Party (EPP), the center-right party family of the European Parliament).⁴⁷ Fidesz uses religious symbols in an eclectic way in which references to Christianity are often mentioned together with the pre-Christian pagan traditions. This refers to the idea of ‘two Hungarys’: the Western Christian, and the Eastern pagan, tribal one.⁴⁸ Orbán once voiced his conviction that the Turul bird, a symbol of ancient pre-Christian

⁴⁴ See B. Szabó, 'Félázsiai származékoknál, mint mi, csak így megy' [*With a half-Asian lot such as ours, there is no other way*], *Népszabadság*, 27 July 2012.

⁴⁵ 'La Hongrie est une fatalité', *Le Monde*, 10 February 2012.

⁴⁶ A. Grzymala-Busse, *Whither Eastern Europe? Changing Political Science Perspectives on the Region*. Studying Religion and Politics in East Central Europe, University of Michigan, 5 December 2013, <http://users.clas.ufl.edu/bernhard/whitherpapers/Florida%20workshop%20ECE.pdf>

⁴⁷ Only 22% of Fidesz voters are followers of churches, and the same percentage of them consider themselves as explicitly non-religious. Political Capital Institute’s research, Budapest, 2012.

⁴⁸ See A. Bozóki and Z. Ádám, *State and Faith: Right-wing Populism and Nationalized Religion in Hungary*, *East European Journal of Society and Politics*, 2016/1.

Hungarians, ‘the symbol of national identity of living,’⁴⁹ what is the image Hungarians are born in. Fidesz interprets this pre-Christianity within the framework of nationalism, and this ethno-nationalism provides sufficient basis of political identification as a type of surrogate-religion. In this respect Fidesz follows the authoritarian traditions of the Horthy regime between the two World Wars, in which the nation-religion (‘nemzetvallás’) played a crucial role. Another example of Christianity being instrumental for Orbán is the fact that when he listed the illiberal regimes he admires from Singapore through China, Turkey, India, Singapore, and Russia all of them are either non-Christian or Orthodox.

The newly adopted amendment to the Fundamental Law of Hungary with the state’s obligation to protect Christian culture – besides its potential to limit fundamental rights – strengthens the role of religion to constitutionally legitimize the concept of ethnic nation. In this concept the nation, as subject of the Fundamental Law isn’t just the community of ethnic Hungarians, but is also a Christian community, which means that those who do not associate themselves with Christianity, can feel themselves excluded from the nation as well. In this constitutional order the state is not necessarily obliged to tolerate all religions, and the representatives of the Christian religion can feel themselves entitled to be intolerant towards the representatives of other religions.

Critique of Liberal Constitutionalism?

Paul Blokker understands popular constitutionalism as a form of constitutional critique and ‘counter-constitutionalism’ rather than an outright denial of liberal constitutionalism and the rule of law. Similar to Ernesto Laclau’s argument that the rise of populism is a consequence of the denigration of the masses⁵⁰, Blokker claims that the populist critique of liberal constitutionalism does invoke relevant critical dimensions of the current democratic malaise, and populists claim to represent and give voice to the ‘pure’ people⁵¹. According to Blokker,

⁴⁹ ‘Minden magyar a turulba születik’ [All Hungarian Are Born Into the Turul Bird], *Népszabadság*, Sept. 29, 2012.

⁵⁰ E. Laclau, *On Populist Reason*. Verso, 2005.

⁵¹ P. Blokker, ‘Populist Constitutionalism’. in Carlos de la Torre (ed.), *Routledge Handbook on Global Populism*. Routledge. 2018.

this critical stance towards liberal constitutionalism is 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. As is well-known, the constitution in Schmitt's view is an expression of 'the substantial homogeneity of the identity and the will of the people', and guarantee of the state's existence, and ultimately any constitutional arrangement is grounded in, or originates from, an arbitrary act of political power. In other words, in Schmitt's view the basis of the constitution is 'a political decision concerning the type and form of its own being', made by the people as a 'political unity', based on their own free will. This political will 'remains alongside and above the constitution.'⁵² Schmitt also portrays the people as an existential reality as opposed to mere liberal representation of voters in parliament, holding therefore that Mussolini was a genuine incarnation of democracy.

According to Mudde and Kaltwasser, populists critique elitist, judicial constitutionalism and endorse the participation of ordinary citizens in constitutional politics⁵³. In a more recent work they argue that populism, by holding that nothing should constrain the 'the will of the (pure) people', is democratic⁵⁴, but at odds with liberal democracy, and with the notion of pluralism⁵⁵. Although they admit that populism can develop into illiberal democracy, they also claim that it is not populism but rather nativism that is the basis for excluding those who they contend are not the 'real people'⁵⁶. This understanding of populism presupposes that

⁵² See C. Schmitt, *Constitutional Theory*, Duke University Press, 2008, 125-126. This idea is also shared by a part of the, otherwise not populist, French constitutional doctrine, influenced by Rousseau's general will. This is the reason that the representatives of this doctrine hold that during a constitutional transition a referendum is sufficient to legitimate a new constitution. See the French Constitutional Council's approval of De Gaulle's 1962 amendment to the 1958 Constitution, ignoring the Constitution's amendment provisions. Thanks to Théo Fournier, who called my attention to this.

⁵³ C. Mudde & C. R. Kaltwasser, 'Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America', *Government and Opposition*, 2013. 147-174.

⁵⁴ Also Ruth Gavison calls to celebrate populism as the 'core of democracy rather than condemn it as anti-democratic'. She refers to Michael Kazin's book on *The Populist Persuasion* (Cornell University Press, 2017.) as a persuasive analysis of populism as an authentic political movement. See R. Gavison, 'What Is the State of Democracy? How to Defend It?' *ICONnectblog*. 26 August, 2017.

⁵⁵ C. Mudde and C. R. Kaltwasser, *Populism: A Very Short Introduction*. Oxford: Oxford University Press, 2017, 81.

⁵⁶ *Ibid*, 83. Similarly, Tjitske Akkerman argues that not populism, but authoritarian nationalism, is the real threat to democracy. See T. Akkerman, 'Authoritarian Nationalism, Not Populism Is Real Threat to Democracy' *Social Europe*. 9 August, 2017.

democracy can be liberal or illiberal (electoral), the latter having a number of institutional deficits that hinder respect for the rule of law and exhibit weaknesses in terms of independent institutions seeking the protection of fundamental rights⁵⁷. In fact, Carl Schmitt went so far as to claim the incompatibility of liberalism and democracy, and argued that plebiscitary democracy based on the homogeneity of the nation was the only true form of democracy.

By contrast, in my view, liberalism is not merely a limit on the public power of the majority, but also a constitutive precondition for democracy, which provides for the rule of law, checks and balances, and guaranteed fundamental rights. In this respect, there is no such a thing as an ‘illiberal democracy’⁵⁸ or for that matter anti-liberal or non-liberal democracy. Those who perceive democracy as liberal by definition also claim that authoritarian populism is inherently hostile to values associated with constitutionalism: checks and balances, constraints on the will of the majority, fundamental rights, and protections for minorities. Those sceptical about authoritarian populist constitutionalism have a different understanding of populism, as a distinctly moral way to understand the political world, which necessarily involves a claim to exclusive moral representation. This means, as Jan-Werner Müller argues, that this moralistic vision of politics is not just anti-elitist, but it also and foremost anti-pluralist⁵⁹. But, as Müller also claims, since democracy, which must be pluralist, is an institutionalized uncertainty, populists destroy democracy itself by promising certainty through the use of their own constitutions to make their image of the people and what they regard as the morally right policies as certain as possible⁶⁰. Another consequence of the exclusionary moral and ideological position of authoritarian populism is that it rests on an essentialist concept of citizenship, which classifies people as citizens who are members of the political community on the basis of their political and social views or their ideological

⁵⁷ C. Mudde and C. R. Kaltwasser, *Populism: A Very Short Introduction*. Oxford: Oxford University Press, 2017, 88.

⁵⁸ J-W. Müller, ‘The Problem with ‘Illiberal Democracy’.’ *Project Syndicate*. 21 January. 2016.

⁵⁹ J-W. Müller, *What Is Populism?* Philadelphia: University of Pennsylvania Press, 2016.

⁶⁰ J.-W. Müller, *The People Must be Extracted from Within the People: Reflections on Populism 2014*. Müller distinguishes the deeply problematic populist constitutionalism from a legitimate form of popular constitutionalism. Regarding the distinction he refers to C. Brettschneider, ‘Popular Constitutionalism contra populism’. *Constitutional Commentary*, 2015.

commitments, as opposed to the traditional pluralist liberal concept of citizenship that rests on the place of birth, residence, or the citizenship of parents⁶¹.

Interestingly enough, in another of Paul Blokker's works, he argues that, 'while populism can be situated within a modern democratic tradition of constitutionalism, it produces a distorted version, which leads to an undoing of its democratic potential and pushes the populist project towards democratic dictatorship'⁶². According to Blokker, the 'really existing' populist authoritarian constitutionalism, such as those of Poland and Hungary, is not at all universalistic and inclusionary, and stands in stark contrast to democratic constitutionalism. In other words, Blokker acknowledges that the distorted Hungarian and Polish populism can lead to 'democratic dictatorship', but it is still considered as a form of constitutionalism, because its key instrument is the constitution⁶³.

In my view, the populist understanding of the constitution opposes limits on the unity of power, adherence to the rule of law, and the protection of fundamental rights, as the main components of constitutionalism. The term 'populist constitutionalism' in its authoritarian form seems to me to be an oxymoron altogether. The same applies to 'authoritarian' or 'illiberal' constitutionalism. If the main characteristic of constitutionalism is the legally limited power of the government, neither authoritarian nor illiberal polities can fulfil the requirements of constitutionalism.⁶⁴ As Mattias Kumm argues, Carl Schmitt's interpretation

⁶¹ Alon Harel argues that in Israel, populism rests on the essentialist characterization of citizenship. See A. Harel, 'The Triumph of Israeli Populism.' *ICONnectblog*. 22 August, 2017.

⁶² P. Blokker, 'Populism as a Constitutional Project.' *Public law and New Populism*, Workshop. NYU School of Law, 2017.

⁶³ P. Blokker, *ibid*. Besides the proposition that a dictatorship can be democratic, also the claim that the use of the constitution as an instrument is a sufficient condition of constitutionalism is highly contested. While most of the 'really existed' communist regimes used constitutions to legitimise their systems, the current Polish populist regime, which does not have a two-thirds majority in parliament, uses extra-constitutional tools to dismantle constitutional democracy.

⁶⁴ See e.g. the following definition of constitutionalism in the Stanford Encyclopaedia of Philosophy: "Constitutionalism is the idea ... that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations." (<https://plato.stanford.edu/entries/constitutionalism/>). In the legal scholarship, Stephen Holmes asserts that the minimalist vision of constitutionalism is achieved if the following requirements are met: the constitution emanates from a political decision and is a set of legal norms; the purpose is 'to regulate the establishment and the exercise of public power'; comprehensive regulation; constitutional is higher law;

of democracy, inspired by Rousseau, and used by authoritarian populist nationalists as ‘illiberal democracy’, becomes an anti-constitutional topos⁶⁵. Consequently, I equate constitutionalism with liberal democratic constitutionalism⁶⁶. This does not mean, however, that constitutions cannot be illiberal or authoritarian. Therefore, it is legitimate to talk about constitutions in authoritarian regimes, as Tom Ginsburg and Alberto Simpser do in their book⁶⁷, but I do not agree with the use of the term ‘authoritarian constitutionalism’⁶⁸ or ‘constitutional authoritarianism’⁶⁹. Besides the constitutions in the Communist countries, both current theocratic and communitarian constitutions are considered as illiberal.⁷⁰ Theocratic constitutions, in contrast to modern constitutionalism, reject secular authority⁷¹. In communitarian constitutions, like the ones in South Korea, Singapore and Taiwan, the well-being of the nation, the community and society receive utilitarian priority rather than the individual freedom principle of liberalism. But in these illiberal polities, there is no constitutionalism.

Conclusion

constitutional law finds its origin in the people. S. Holmes, ‘Constitutions and Constitutionalism,’ in M. Rosenfeld and A. Sajó (eds.) *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, 189-216.

⁶⁵ M. Kumm, ‘Demokratie als verfassungsfeindlicher Topos’ *Verfassungsblog On Matters Constitutional*. September 6, 2017.

⁶⁶ In contrast, others also regard other models of constitutionalism, in which the government, although committed to acting under a constitution, is not committed to pursuing liberal democratic values. See for instance M. Tushnet, ‘Varieties of Constitutionalism’, 14 *ICON* 2016, 1-5. Similarly, Gila Stopler defines the state of the current Israeli constitutional system as ‘semi-liberal constitutionalism’. Cf. G. Stopler, ‘Constitutional Capture in Israel.’ *ICONnect*. 21 August, 2017.

⁶⁷ T. Ginsburg & A. Simpser, *Constitutions in Authoritarian Regimes*. Cambridge University Press, 2014.

⁶⁸ M. Tushnet, ‘Authoritarian Constitutionalism’, *Harvard Public Law Working Paper* 2013. no. 13-47.

⁶⁹ S. Levitsky & L. A. Way, ‘The Rise of Competitive Authoritarianism’ 13 *Journal of Democracy*, 2. 2002.

⁷⁰ L. Thio, (2012). Constitutionalism in Illiberal Polities. In M. Rosenfeld, & A. Sajó, *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012. 133-152. Contrary to my understanding, Thio also talks about ‘constitutionalism’ in illiberal polities.

⁷¹ There are two subcategories distinguished here: the Iranian, where Islam is granted an authoritative central role within the bounds of a constitution; and the Saudi Arabian, where Islam is present, without the formal authority of modern constitutionalism.

In this paper, I tried answer the question, whether there is one single formula of populism, and after discussing different binaries, such as right/left, bad/good, political/economic approaches, came to the conclusion that from the point of view of constitutionalism, the authoritarian steak of populism is a not a real one. This 'false populism' (Isaiah Berlin) uses populism as a rhetoric, but most of the common characteristics of the real populism, such as anti-elitism, anti-representation, anti-establishment are only hide the authoritarian aim of those autocratic populists. Consequently, as I argue this type of authoritarian populism cannot be in compliance with the traditional idea of liberal democratic constitutionalism.