Populist Constitutionalism: A Contradiction in Terms?

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Populism has proven a notoriously difficult concept to define. Despite the great divergence of approaches to capture this political phenomenon, it is striking that many observers converge on one point: namely that, whatever else it is, populism is inherently hostile to mechanisms and, ultimately, values, commonly associated with constitutionalism: constraints on the will of the majority, checks and balances, protections for minorities or, for that matter, fundamental rights

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Populists are supposedly impatient with procedures and pre-structured political time; they are even said to be against ‘institutions’ as such, preferring a direct, unmediated relationship between the personal leader and the people. Related to this supposed anti-institutionalism is the charge that populists dislike ‘representation’ and opt for ‘direct democracy’ (as exemplified by referenda) instead. Hence also the impression – widespread both among political philosophers and social scientists – that populism, despite some serious flaws, might under some circumstances act as a ‘corrective’ to a liberal democracy which has become too remote ‘from the people’. Or, in conceptually more sophisticated language: there is at least a tension between liberalism and democracy and populism might somehow help the democratic side.

The tone of the previous paragraph might have given the (normative) game away already: I regard many of the claims made about (and, to some extent, for) populism skeptically. To the extent that there is a meaningful debate about populism and constitutionalism, it suffers from several unfortunate characteristics: first, the discussion becomes conflated with the normative controversy about the merits of majoritarianism (and, conversely, judicial review); second, there is no clear, or even just discernible, distinction between popular constitutionalism on the one hand, and populist constitutionalism, on the other; and, third and most important: ‘populism’ becomes a vague placeholder for ‘civic participation’ or ‘social mobilization’ (and, conversely, 

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weakening of the power of judges and other elites). Yet apart from the vagueness of the concepts used (or perhaps related to this vagueness), there’s the fact that debates about populism and constitutionalism – especially in the US – quickly turn emotional: accusations of elitism and ‘demophobia’ start to fly, theorists are suspected of having bad ‘attitudes toward the political energy of ordinary people’, or, accused of promoting ochlocracy or even crowd violence.

Yet without a proper understanding of populism no meaningful analysis of the relationship between populism and constitutionalism can proceed. The aim of this essay is to provide such an analysis. I shall first put forward a definition of populism as a distinctly discursive phenomenon (or, put differently: an ideology). In particular, I shall argue that populists are not just anti-elitists; they are also necessarily anti-pluralist and therefore advance what I call the core populist claim: that they and only they properly represent the authentic people (pace the view that populists are inherently against the principle of political representation). This definitional work is followed by a number of arguments about how populism can play out in practice as a distinct style of governance and as the imperative to build particular kinds of institutions (pace the view that populism is inherently anti-institutional). I shall then argue that populists might indeed write constitutions, but that such constitutions tend to violate certain core ideas of a normative understanding of constitutionalism (as well as

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5 Witness for instance Elizabeth Beaumont writing ‘I take the liberty of suing the terms civic and popular loosely and interchangeably as laymen’s terms meaning largely ordinary people, citizens, or nonofficials’ in *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy* (New York: Oxford UP, 20114), 4. Or see Tom Donnelly claiming that for all their differences, advocates of popular constitutionalism share a ‘populist sensibility’ – which comes down to nothing more than ‘a common belief that the American people (and their elected representatives) should play an ongoing role in shaping contemporary constitutional meaning.’ Tom Donnelly, ‘Making Popular Constitutionalism Work’, in: *Wisconsin Law Review* (2012), 159-94; here 161-2.

democracy). My particular (brief) examples will be the Hungarian constitution in force since the beginning of 2012 and the three most important instances of recent populist constitutionalism in Latin America (Venezuela, Ecuador, and Bolivia). I shall then try to distinguish a deeply problematic populist constitutionalism from a legitimate form of popular constitutionalism, before concluding that populist constitutionalism is un-democratic as such.

I should stress that my conclusion does not, I hope, depend on a highly particular notion of constitutionalism (or a highly particular democratic theory, for that matter). This conclusion will not yield absolutely clear-cut criteria of what should and should not be called a ‘populist constitution’. In practice, the lines can be very blurry, and it will take political judgement to decide whether a number of political actors and their constitution-making projects should be seen as populist.

What is Populism?

Even a cursory glance at contemporary political commentary on populism reveals widely divergent understandings of what populism might be. At least in Europe, populism is today generally associated with ‘irresponsible policies’ or some form of ‘political pandering’ (sometimes demagoguery and populism are used interchangeably). However, populism is also frequently identified with a particular class, especially the petty bourgeoisie and, until peasants disappeared from the European political imagination (ca. 1979), those engaged in cultivating the
land. This can seem like a sociologically robust theory (classes are constructs, of course, but they can be empirically specified in fairly plausible ways). This class diagnosis often comes with a much more speculative account of social psychology: those espousing populist claims publicly and, in particular, those casting their ballot for populist parties, are said to be driven by ‘anxiety’ or ‘fears’ (of modernization, globalization, etc.) or – the feeling most frequently invoked in talking about populists – ‘resentment’.

None of these seemingly straightforward criteria is helpful for clearly identifying populism. The focus on particular socio-economic groups is empirically dubious, as has been shown in a number of studies; less obviously, it often results from a largely discredited set of assumptions from modernization theory. The concentration on political psychology is not necessarily misguided, but it is hard to see that certain emotions could only be found among populist politicians and their followers; and, once more, some of the psychological approaches are intimately tied to modernization theory (after all, people are said to experience resentment in reaction to modernization and then long to retain or return to a ‘pre-modern’ world).

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7 Such a focus on class does not have to anti-populist, so to speak. It can link with a progressive historical account of populism and become part of a prescriptive political theory. See as an example John P. McCormick, *Machiavellian Democracy* (New York: Cambridge UP, 2011).

8 The very notion of resentment tends to import a legacy of cultural pessimism and questionable assumptions about mass psychology into contemporary public discourse. Elites, Nietzsche argued, are almost by definition not resentful.


What, finally, about the notion of populism as a matter of false political promises? It is, of course, difficult to deny that some policies really can turn out to have been irresponsible: those deciding on such policies did not think hard enough; they failed to gather all the relevant information; or, most plausibly, their knowledge of the likely long-term consequences should have made them refrain from policies with only short-term electoral benefits for themselves. Such concerns are not just the products of some neoliberal fantasy world. But they do not serve to delimit anything like a definition (or ideal type) of populism. There is in most cases no clear, uncontested line between responsibility and irresponsibility. Often enough, charges of ‘irresponsible populism’ are themselves highly partisan, and it just so happens that the ‘irresponsible policies’ denounced almost always benefit the worst-off.

So if all these perspectives and possible criteria are problematic, the question remains: what is populism? I suggest that populism is a particular moralistic imagination of politics, a way of perceiving the political world which opposes a morally pure and fully unified – but, I shall argue, ultimately fictional – people to small minorities, elites in particular, who are put outside the authentic people. Apart from this criticism of elites, there is an additional element of populist discourse, however: populists necessarily claim that they -- and only they -- properly represent the authentic, proper, and morally pure people.

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11 As I shall argue further below, populists are not against representation – hence I disagree with analyses that pit ‘populist democracy’ against ‘representative democracy’, for example the otherwise excellent article by Koen Abts and Stefan Rummens, ‘Populism versus Democracy’, in: Political Studies, vol. 55 (2007), 405-24.

12 Populism arises, I would say, with the introduction of representative democracy; it is its shadow. It hankers after what Nancy Rosenblum has called ‘holism’ – the notion that the polity should no longer be split at all, but that the people – all of them – could have one true representative. See Nancy L. Rosenblum, On the Side of the Angels: An Appreciation of Parties and Partisanship (Princeton: Princeton UP, 2008).
Populists, then, are not just anti-elitists – criticism of elites (when populists are in opposition) is a necessary, but not a sufficient condition for populism. They also need to be anti-pluralists.\textsuperscript{13} Thus, the claim to exclusive moral representation is at the core of populism. Political actors not committed to this claim, according to my understanding, are not populists. Put differently: no populism without a \textit{pars-pro-toto} argument and a claim to exclusive representation, with both being primarily of a \textit{moral}, as opposed to empirical, nature.\textsuperscript{14}

Most commonly, but not necessarily, ‘morality’ is specified by populists with languages of work and corruption (which has led some observers to associate populism with an ideology of ‘producerism’).\textsuperscript{15} Populists pit the pure, innocent, always hard-working people against a corrupt elite who do not really work (other than to further their self-interest), and, in right-wing populism, also against the very bottom of society (those who also do not really work and live off others). Moreover, right-wing populists typically construe an ‘unhealthy coalition’ between the elite that does not really belong and marginal groups that do not really belong either.

Now, the moralist conception of politics advanced by populists clearly depends on some criterion for distinguishing the moral and the immoral, the pure and the corrupt. But it does not have to be work. If ‘work’ turns out to be indeterminate, ethnic markers can readily come to the rescue. But it’s a mistake to think that populism will always turn out to be a form of nationalism. In fact, critics of populism today make it too easy for themselves, if they assume that populism is just nationalism or even some form of ethnic chauvinism. One should give populists the benefit

\textsuperscript{13} I am indebted to Cristóbal Rovira Kaltwasser for discussions on this point. Rovira Kaltwasser also stresses the anti-pluralism of populists, but locates it mainly in the image of a homogeneous people; my argument is that populists promote such an image and, furthermore, oppose a pluralism of representative claims.

\textsuperscript{14} Andrew Arato, ‘Political Theology and Populism’, in: \textit{Social Research}, vol. 80 (2013),

\textsuperscript{15} Producerism cannot be purely economic – it is a moral concept valorizing the producers. Think of Georges Sorel.
of the doubt and concede that in many cases they even operate with an understanding of the common good that is close to epistemic conceptions of democracy, as opposed to defaulting into using ethnic markers of difference. Populists can and often do rely on the notion that there is a distinct common good, that the people can discern and will it, and that a politician or a party (or, less plausibly, a movement) could unambiguously implement such a conception of the common good as policy – in other words, they conjure up something like an imperative mandate, based on a monist conception of the people and what the people supposedly say.\textsuperscript{16} Moreover, this emphasis on one common good, clearly comprehensible to common sense, and capable of being articulated as one correct policy which then can be collectively willed at least partly explains why populism is so often associated with the idea of an over-simplification of policy challenges.\textsuperscript{17}

The specifically moral conception of politics which populists espouse has two important implications. First of all, populists do not have to be against the idea of representation as such; rather, they can positively endorse a particular version of it. Put simply: populists are fine with representation, as long as the right representatives represent the right people who are making the right judgment and consequently willing the right thing, so to speak. Some populists demand more referenda, to be sure – but only as a means to confirm what they already take the morally pure people to think; not because they wish for the people to participate continuously in politics, or because they want at least some ordinary people to have a say in government (as proposals for selecting representatives by lot, for instance, would suggest). Populists view the people as


\textsuperscript{17} Witness, for instance, Ralf Dahrendorf claiming that ‘populism is simple, democracy is complex’, ‘Acht Anmerkungen zum Populismus’, in: \textit{Transit: Europäische Revue}, no. 25 (2003), 156-63.
essentially passive, once the proper popular will aimed at the proper common good has been ascertained; and, in theory – and in practice -- that particular will could be ascertained without any popular participation whatsoever.

Now, how can the claim to exclusive moral representation go together with the reality of populists actually being in opposition, or, even if in power, not obtaining 100 per cent of the vote? Populists exhibit a clear discursive pattern of how to deal with this problem. One strategy is to deny that the people in their empirical totality as voting citizens actually are the real people, and that an election outcome on the basis of regular procedures is the closest approximation we have to the ‘popular will’. Rather, as Claude Lefort once put it, for populists, first ‘the people must be extracted from within the people’ and the populist has unique insight into what the popular will truly is. Here the ‘the people’ become a fictional entity outside existing democratic procedures, a homogeneous body the invocation of which can be played off against actual election results in democracies. It is not an accident that Richard Nixon’s famous (or infamous) notion of a ‘silent majority’ has had such a career among populists: if the majority were not silent, it would already have a government that truly represents the people. If the populist politician fails at the polls, it is not because he in fact doesn’t represent the majority at all, but because the majority has not yet dared to speak. In other words, populists are not necessarily against political institutions, as some accounts of the phenomenon have suggested, but at least as long they are in opposition, they will always invoke an un-institutionalized people

19 As Jill Lepore has pointed out, the term used to be a euphemism for the dead, until Nixon used it to refer the a supposed majority supporting the Vietnam War. Jill Lepore, The Whites of their Eyes: The Tea Party’s Revolution and the Battle over American History (Princeton: Princeton UP, 2010), 4-5.
‘out there’ – in existential opposition to the popular will as it has manifested itself in actual voting, or even opinion polls.

Such a notion of ‘the people’ is not without precedent in the history of political thought. Theorists like Baldus held a conception, analogous to the theory of the king’s two bodies, according to which there was the empirical, ever-changing people as a group of individuals on the one hand – and, on the other, the eternal *populus* as a *corpus mysticum*. Just as there was always a possibility of distinguishing the king body politic from the king body natural, so the people body politic (what Baldus called *hominum collection in unum corpus mysticum*) and the people as represented and mediated via institutions could be separated. And just as it was not a paradox, then, for the opponents of Charles I. to ‘fight the king to defend the king’, populists can fight legitimately elected elites to defend the true people. 21

More recently, the people as an existential reality was played off by Carl Schmitt against merely liberal representation of voters in parliament. This distinction infamously served as a bridge from democracy to non-democracy: Mussolini, so Schmitt held, was a genuine incarnation of democracy, and philosophers like Giovanni Gentile also claimed that fascism could be a more faithful realization of democratic ideals. 22 Conversely, an opponent of Schmitt such as Hans Kelsen would insist that the will of parliament is not the popular will – and that the popular will is in fact impossible to discern: all we can ever verify are election outcomes;

20 Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (1957;Princeton: Princeton UP, 1997), 209: * The *corpus mysticum* had corporational character signifying a fictitious or juristic (collective) person; hence it was used synonymously with *corpus fictum*, *corpus imaginatum*, *corpus repraesentatum*.
21 Ibid., 21-3.
everything else, according to Kelsen, (in particular an organic unity of the people from which some interest above parties could be inferred) amounts to a ‘metapolitical illusion’. Put differently: Schmitt thought that a political body (individual or collective) could make the body of the people as a whole visible. Kelsen thought the latter would always remain invisible and hence unknowable.

Let me summarize: populism is a distinctly moral way to imagine the political world and necessarily involves a claim to exclusive moral representation. Of course, virtually all political actors make what Michael Saward has called ‘the representative claim’. What distinguishes democratic politicians from populists is that the former make them like hypotheses – claims to be representative, in Saward’s words -- which can be empirically disproven on the basis of the empirical results of regular procedures and institutions like elections. Populists, on the other hand, will persist with their representative claim no matter what; since their claim is of a moral, not an empirical nature, it cannot be disproven. Moreover, when in opposition, populists are bound to cast doubt on the institutions which produce the ‘morally wrong’ outcomes: Es kann nicht sein, was nicht sein darf. Hence they might indeed be seen as the ‘enemies of institutions’ – but not institutions in general; rather, they become the enemies of mechanisms of representation which fail to vindicate their claim to exclusive moral representation.

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23 Hans Kelsen, *Vom Wesen und Wert der Demokratie* (1929: Aalen: Scientia, 1981), 22. Kelsen also concluded that modern democracy inevitably had to be party democracy. I have benefitted from discussions with Carlo Invernizzi on this point.


Conventional wisdom has it that populist parties are primarily protest parties and that protest cannot govern, since one cannot protest against oneself (and, once political actors have become an elite in power, it becomes impossible for them to perpetuate an anti-elitist stance). While populist parties do indeed in one sense necessarily protest against elites, this does not mean that populism in government will become self-contradictory. First of all, all failures of populists in government can still be blamed on elites acting behind the scenes, whether at home or abroad. Many populist victors continue to behave like victims. Second, populists in power are likely to govern according to the populist logic which holds that populists are the only morally legitimate representatives of the people and that, furthermore, only some of the people are actually the real, authentic people – and hence deserving of support and, ultimately, good government. This logic can manifest itself in three distinct ways: colonization of the state; mass clientelism as well as discriminatory legalism; and, finally, repression of civil society.

First, populists tend to colonize or ‘occupy’ the state. Such a strategy to consolidate or even perpetuate power is not exclusive to populists, of course. What is particular about populists is that they can undertake such colonization openly and with the back-up of their core moral representative claim. Why, populists might ask indignantly, should the people not take possession of their state through their only rightful representatives? Why should those who obstruct the genuine popular will in the name of civil service neutrality, for instance, not be purged?
Second, populists tend to engage in what political scientists call mass clientelism: the exchange of material and immaterial favors by elites for mass political support. Again, such conduct is not exclusive to populists: many parties reward their clientele for turning up at the voting booths; some observers might even say that, from a realist perspective, mass clientelism and democracy are more or less the same thing.\textsuperscript{26} What – once more – makes populists distinctive is that they can engage in such practices openly and with public moral justifications: after all, for them, only some people are really the people and hence deserving of the support of what is rightfully their state. In the same vein, only some of the people will enjoy the full protection of the laws; others who do not belong to the people or even actively work against the people, should be treated appropriately. This is what political scientists call ‘discriminatory legalism’ (put simply: the idea of ‘everything for my friends; for my enemies, the law’).\textsuperscript{27}

State colonization, mass clientelism and discriminatory legalism are phenomena that can be found in many historical situations.\textsuperscript{28} In populist regimes, however, we can find all three – and a kind of moral surplus: such practices can at least potentially be avowed and justified. It is state colonization, mass clientelism, and discriminatory legalism with, so to speak, a clean moral conscience.

There is one further element of populist statecraft that is worth mentioning. Populists in power tend to be harsh (to say the least) with non-governmental organizations that criticize them.

\textsuperscript{26} For the argument that mass clientelism was an early form of democracy, see Francis Fukuyama, \textit{Political Order and Political Decay} (New York: FSG, 2014).


Again, harassing or even suppressing civil society is not a practice exclusive to populists. But for them opposition from within civil society creates a particular moral and symbolic problem: it potentially undermines their right to exclusive moral representation. Hence it becomes crucial to claim (and supposedly ‘prove’) that civil society isn’t civil society at all, and that what can seem like popular opposition has nothing to do with the proper people. This explains why rulers like Vladimir Putin in Russia and Viktor Orbán in Hungary have gone out of their way to try to discredit NGO’s as being controlled by outside powers (and declare them as ‘foreign agents’). In a sense, they try to make the unified (and passive) people in whose name they had been speaking all along a reality on the ground, so to speak: by silencing or discrediting those who refuse Putin and Orbán’s representative claim (and, sometimes, by giving them every incentive to leave the country and thereby to separate themselves from the pure, true people).

Above all, then, populism in power will mean the dominance of political actors who, even in the face of persistent opposition, speak in the name of the whole (and essentially claim: \textit{l’état, c’est nous}, with the proviso that ‘nous’ constitutes the only legitimate representative of the people) – with the consequence that opposition will be not just a matter being a particular, partisan part of the people, but literally being apart -- from the people.\footnote{Andrew Arato, ‘Political Theology and Populism’, in: \textit{Social Research}, vol. 80 (2013), 150.} And this is a great irony, because populism in power always brings about or at least reinforces, or offers another variety of, what it most opposes and of what it habitually tends to accuse established elites: exclusion and the usurpation of the state.\footnote{Priester, \textit{Rechter und linker Populismus}, 20.} What \textit{la casta} supposedly does, populists will also end up doing, only with a clear justification and a clean conscience.
I have spent some time on the characteristics of populist regimes in order to make a point plausible which perhaps should have been obvious all along: populists are not generally ‘against institutions’ (in fact, there is no politics without institutions for anyone available anyway). They are ‘against institutions’ which, in their view, fail to produce the morally (as opposed to empirically) correct political outcomes. But that happens only when they are in opposition. Populists in power will be fine with institutions – which is to say: their institutions.

Those populists who have enough power will seek to establish a new, populist constitution – both in the sense of a new socio-political settlement and a new set of rules for the political game (what some scholars of constitutionalism have called the ‘operating manual’). It is tempting to think that with the latter, they will seek a system that allows for the expression of an unconstrained popular will, or somehow reinforce the direct, institutionally unmediated relationship between a leader and the proper pueblo. Populists are, after all, often deemed to be heirs of the Jacobins (and, consciously or un-consciously, students of Rousseau).

Yet, here again, things are not so simple. The claim for an unconstrained popular will is plausible for populists when they are in opposition – after all, they want to play an authentic expression of the populus as un-institutionalized, non-proceduralized corpus mysticum off against the actual results of an existing political system. In such circumstances, it is also plausible for them to say that the vox populi is one -- and that checks and balances, divisions of
power, etc. cannot allow the singular, homogeneous will of the singular, homogeneous people to emerge clearly.

Yet, when in power, populists will in all likelihood be much less skeptical about constitutionalism as a means of creating constraints on what they interpret to be the popular will – except that the popular will (never given empirically, but to be construed morally) has first to be ascertained by populists, then constitutionalized, and then constrained constitutionally. Or, picking up a distinction recently elaborated by Martin Loughlin: positive constitutionalism is followed by negative constitutionalism.31 Populists will seek to perpetuate what they regard as the proper image of the morally pure people (the proper constitutional identity, if you will) and, if possible, constitutionalize policies which they find to conform to that image of the people.32 Hence, populist constitutionalism will not necessarily privilege popular participation or allow for more avenues to express whatever might be construed as a general will; and nor will they try somehow to ‘constitutionalize the charisma’ of a popular leader, in the way Bruce Ackerman has recently suggested.33

Apart from these features – which are explained yet again by the underlying moral claims of populism – there is a more mundane goal that constitutions might achieve for populists: they can help to keep populists in power. Of course, one might say that even this goal still has a moral dimension related to the underlying populist imagination: as the only legitimate representatives of the people, populists should perpetually be in office. And if the perpetuation of power becomes the aim, then there’s also the possibility that populists treat the constitution as

a mere façade, while operating quite differently behind the façade.\textsuperscript{34} They might even openly sacrifice their own constitution, if it no longer serves that purpose. Here the Jacobins really are an appropriate example. As Dan Edelstein has argued, their concern was much less with a faithful expression of the general will than historians have tended to assume.\textsuperscript{35} They worried about corruptions of the general will and put their hope in the realization of a form of natural right independent of people’s actual wills (and attendant frailties) altogether. When their own constitution – and the elections it enabled – threatened to remove the Jacobins from power, they did not hesitate effectively to suspend the constitution and unleash terror against those deemed \textit{hors la loi}.

Not all examples of populist constitutionalism are as dramatic (let alone terroristic) as this. A recent example is the constitution – officially named ‘Fundamental Law’ – of Hungary, which came into effect at the beginning of 2012. The constitution had been preceded by a non-binding ‘national consultation’ to which, according to the government, about 920 000 citizens responded.\textsuperscript{36} The outcomes of that consultation could be freely interpreted by the constitution-makers so as to fit their general conception that the 2010 parliamentary elections had resulted in a ‘revolution at the voting booths’, because the winning party had received a two-thirds majority in parliament. This ‘revolution’ had supposedly yielded an imperative mandate to establish what

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\textsuperscript{34} For the notion of a façade constitution, see Giovanni Sartori, ‘Constitutionalism: a preliminary discussion’, in: \textit{American Political Science Review}, vol. 56 (1962), 853-64.
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the government termed a new ‘national system of cooperation’ – and to write a new constitution. The preamble of the document, or ‘National Avowal’, ended up constitutionalizing a very particular image of the Hungarian people as a nation committed to survival in a hostile world, as good Christians, and as an ethnic group that can be clearly distinguished from minorities living with the proper Hungarians. In some of the institutional provisions – especially in the Amendments and the Transitional Provisions (which de facto had constitutional status) – the perpetuation of populists in power was clearly the goal. Age limitations and qualifications for judges were introduced so as to remove professionals not in line with the governing populist party (discriminatory constitutionalism, one might say); the competences and structure of the constitutional court (the crucial check on government power before the introduction of the ‘Fundamental Law’) were re-engineered; and the terms of office-holders chosen by the governing party were made unusually long (9 years in many cases), with a view, it seems, to constrain future governments in line with a supposed popular will. As Renáta Uitz has put it, the constitution-drafters displayed ‘open political discretion in selecting veto players for the new constitutional regime’. 38

The Hungarian Fundamental Law, while supposedly inspired by the views expressed in the national consultation, was never put to a referendum. By contrast, a number of new constitutions in Latin America have been created by elected constituent assemblies and were eventually made subject to a popular vote: Venezuela, Ecuador, and Bolivia are the well-known examples (while the earlier case of Colombia is less obviously a case of what sympathetic

37 Ibid. Uitz also underlines what she calls the ‘constitutional parochialism’ of the Fundamental Law
38 Ibid., 292.
observers have called *nuevo constitucionalismo latinoamericano*).\(^{39}\) Older constitutions were effectively bypassed in the process of forming a constituent assembly, and then replaced by documents which were supposed to perpetuate the founding popular will (or ‘constituting will’, *la voluntad constituyente*). That founding ‘popular will’ was decisively shaped by populists, though: Hugo Chávez, for instance, controlled the way ‘his’ constituent assembly was elected, and ensured that a majority of sixty per cent for his party at the polls translated into more than ninety per cent of the seats in the constituent assembly.\(^{40}\)

Effectively, this ideal translated into strengthening the executive and weakening of horizontal accountability (diminishing the power of the judiciary and/or staffing judicial offices with partisan actors).\(^{41}\) The new constitutions thus helped decisively in the populist project of ‘occupying the state’, as the shift to a new constitution justified the replacement of existing office holders.\(^{42}\) In general, elections were made less free and fair, and the media more easily controlled by executives. As in the case of Hungary, then, the *nuevo constitucionalismo* used constitutions potentially to perpetuate the power of populists, all in the name of the idea that they and only they represented *la voluntad constituyente*.

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\(^{39}\) See the works of Roberto Viciano Pastor and Rubén Martínez Dalmau.


\(^{41}\) To be fair, there was also the attempt in formulating a ‘committed constitution’ (as part of a *constitucionalismo comprometido*) to include new fundamental rights (such as a ‘right to the good life’ and environmental rights), and to strengthen the role of civil society actors in constitutional politics (though both remained more at the level of aspiration).

... and Popular Constitutionalism

It might seem that the implications of the analysis so far must be profoundly conservative: politics should be confined to an interaction of official political institutions; whatever these institutions produce by way of empirical outcomes must be legitimate; and claims about, for, let alone by the people are prohibited. But this would be a misunderstanding. In a democracy, anybody can launch a representative claim and see whether a particular constituency is responsive to the claim; any group of what Ackerman has called ‘mobilized outsiders’ can seek to transform a constitution. In fact, one might even say that democracy is precisely designed to multiply such claims: the conduct of official representatives should be contestable; and the contestation may involve the argument that the representatives fail to represent – which may mean that they fail to act for their constituents, or that, more symbolically, they become unfaithful to them.\(^{43}\) However, such contestation is different from attempts to speak in the name of the people as a whole – and efforts to morally de-legitimate all those who in turn contest that claim (which is to say: those who contest their involuntary inclusion in a ‘We the People’ – such resisters to populism are effectively saying: ‘not in our name’). Street protest, online petitions, etc. – these all have genuinely democratic meaning, but they lack proper democratic form.\(^{44}\)


\(^{44}\) Christoph Möllers, Demokratie: Zumutungen und Versprechen (Berlin: Wagenbach, 2008), 33-4.
And yet: what about those struggling in the name of ‘people power’ in various parts of the world? To take a recent example: the demonstrators against the Mubarak regime on Tahrir Square used expressions such as ‘One hand’, ‘One society’ and ‘One demand’. Should they be lectured at and be told that, unfortunately, they had failed properly to understand democracy and were fated to misconstrue constitutionalism?

The analysis presented here does not in any way exclude claims about exclusions, so to speak. Anyone can criticize existing procedures, fault them for moral blind spots, and propose criteria and means for further inclusion. What is problematic is not the criticism that present arrangements have failed, but that the critic and only the critic can counterfactually speak for ‘the people’. What is problematic is also the assumption – prevalent, but neither empirically nor normatively justified – by many radical democrats that only the pars-pro-toto claim can achieve anything truly worthwhile for the previously excluded, and that everything else will amount to mere administration or incorporation into existing systems. It is almost a cliché to point out that many constitutions have evolved because of struggles for inclusion and because ‘citizen interpreters’ of the constitution have sought to redeem previously unrealized moral claims contained in the constitution. The not so trivial point is that those fighting for inclusion have

45 There were also more creative demands, such as ‘The people want a president who does not dye his hair!’ See Gilbert Achcar, The People Want: A Radical Exploration of the Arab Uprising (Berkeley: University of California Press, 2013), 1.


rarely claimed ‘We and only we are the people’; on the contrary, they have usually claimed ‘We are also the people’ (with attendant claims of ‘we also represent the people’). Constitutions with democratic principles allow for an open-ended contestation of what those principles might mean in any given period; as said above, democracy is designed to multiply, but also in the end empirically to test, claims to representation. Of course, there is no guarantee that such contestation will actually happen, or that struggles for inclusion will be successful (or that struggles will be about inclusion in the first place – as opposed to struggles against the constitutional order as such; and, of course, struggles might also happen for exclusion).

Constitutions can ideally facilitate what one might call a chain of claim-making for inclusion. An initial ‘We the People’ neither entirely disappears inside the regular political process nor stays as an actual, empirical, unified agent – a kind of macro-subject -- outside the constituted order. Instead, who is ‘We the People’ remain an open question, one which is democracy is many ways is about. As Lefort put it, ‘democracy inaugurates the experience of an ungraspable, uncontrollable society in which the people will be said to be sovereign, of course, but whose identity will constantly be open to question, whose identity will remain forever latent’. It is actually populists who break off the chain of claim-making by asserting that ‘the people’ can now be firmly and conclusively identified -- and that the people is now actual, and no longer latent. It is a kind of final claim. In that sense, populists de facto want a kind of closure

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48 Garsten, ‘Representative government and popular sovereignty’.

49 To be sure, there is an important difference between inclusion as something like integration or incorporation in the sense of finding the missing part – as opposed to incorporation as transformation of the whole. I cannot go into a discussion here. See also Robert L. Tsai, *America’s Forgotten Constitutions: Defiant Visions of Power and Community* (Cambridge, Mass.: Harvard UP, 2014)

50 Of course, the firmness is not an empirical one. One can move hors du peuple by ceasing to be moral in the manner prescribed by populists. It is harder to see how one can join the people proper.
(including and especially constitutional closure), quite unlike those who, by arguing for inclusion, should be committed to the idea of further inclusion, or, put differently, a continuation of the chain of claim-making. Arguably, the American Tea Party is a prime example for advocating this kind of constitutional closure.

What about the shouts heard on Tahrir Square, or, going back a quarter century, the emphatic chanting of ‘We are the People’ on the streets of East Germany in the fall of 1989? This slogan is entirely legitimate in the face of a regime that claims exclusively to represent the people – but in fact shuts large parts of the people out politically. One could go further and argue that what prima facie might seem like an arch-populist slogan was in fact an anti-populist claim: the regime pretends exclusively to represent the people and their well-considered long-term interest (or so a standard justification of the ‘leading role’ of state socialist parties went) – but in fact das Volk are something else and want something else. In non-democracies ‘We are the People’ is a justified revolutionary claim, not a populist one. And in populist regimes that stretch the limits of representative democracy, but still retain some respect for procedure (and empirical reality), even a seemingly small contestation of the populist regime can have enormous repercussions. Think of the single ‘standing man’ on Taksim Square in the wake of the crackdown on the Gezi Park protesters (who was eventually joined by many standing men and women). A silent witness, a reminder of Atatürk’s values (he stood facing Atatürk’s statue) – but also a living, standing reproach against the government’s claim to represent all upright Turks without remainder.51

When a particular claim is democratic and when it is populist, will not always be a clear-cut, obvious matter. For instance, in Egypt, there was a period between the initial protests

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51 The standing man was the performance artist Erdem Gündüz.
on Tahrir Square and the fraught constitution-making process where it was not always easy to discern which was which – certainly one cannot tell simply by checking whether ‘the people’ are somehow being invoked. But certainly during 2012 and 2013 it became clear that the Muslim Brotherhood was trying to create a populist, partisan constitution which defined their image of the pure people and put in place constraints inspired by their particular understanding of what constitutes a good Egyptian.52

Conclusion

Are populism and constitutionalism necessarily in contradiction? I have argued that the picture is far more complicated than clichéd invocations of Rousseau and the general will, or simple schemas that put populism on the side of democracy and constitutionalism on the side of liberalism, would suggest. It is crucial to understand populism’s anti-pluralist core moral claim 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 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 product of a highly partisan constitution-making process, all in the name of remaining faithful to a supposed ‘founding will’.

Note that my analysis has not depended on taking a particular stance on the question whether there ever is such a thing as constituent power. However, it has depended on a notion

that democracy must be pluralist – without thereby committing to the view that pluralism is itself anything like a first-order value (along the lines of: more diversity is always better). Democracy has to be pluralist because, as Lefort argued most famously, in a democracy the people rule – and yet the place of power must remain empty. No political actor can claim fully and without remainder to represent or even incarnate the people -- instead, all we have is a shared political stage (as specified in a constitution) on which various actors can launch representative claims; and these claims always have to be understood as provisional, fallible and self-limiting. Democracy, as Lefort also never tired of emphasizing is institutionalized uncertainty (with the institutionalization being provided, once more, by a constitution). Populists, on the other hand, promise certainty and, as some of the examples discussed here show, will not hesitate to use constitutions to make their image of the people and what they regard as the morally right policies as certain as possible. What they destroy in the process, though, is democracy itself.