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What does populism mean for democracy? Populist practice, democracy and constitutionalism

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ABSTRACT
Over the last 30 years, scholarship has produced countless books, essays, and articles on populism by investigating it from various perspectives and angles. This article seeks to contribute to this ongoing debate by offering a political-philosophical reconstruction of populism to define such a phenomenon from a multilateral perspective. The essay will proceed as follows: The first section will investigate populism from a purely political-philosophical position, while the second will discuss the constitutional effects of such a phenomenon, to define it mainly as a form of anti-liberal and anti-judicial redefinition of democracy. Moreover, the first section will expose the dichotomy between the so-called left- and right-forms of the populist model and the populist threat to democracy, where the second will address populist constitutionalism and its antithetic relation to liberal constitutionalism.[1]

Introduction

In current times, the general interest and the philosophical-political literature on populism have been growing and flourishing. Over the last 30 years, scholarship has produced countless books, essays, and articles on populist phenomenon to investigate it from various perspectives and angles. In recent years, within the vast literature on populism, many influential contributions have appeared, namely Canovan's (1981); Laclau's (2005); Müller's (2016); Brubaker' (2017) and Mouffe's (2018), to name a few. Despite this vast literature, populism remains uneasy to systematize. Unlike other classical political-philosophical doctrines, be they republicanism, liberalism, socialism, communitarianism, or libertarianism, populism cannot be properly defined under the canons of a specific political-philosophical scholarship; it is more a movement and a political project to change society than an exercise of political theory.

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The intent here is to engage populism in contemporary liberal-democratic society as a political practice to influence and to some extent manipulate both democratic and the constitutional assets of society. This article will proceed as follows. First, the article will investigate populism from its theoretical and empirical position, considering it as an ideology and as a political idea of society in practice. The second section will present populism from a constitutional perspective, to define it as a form of hyper-formalist and majoritarian, as well as anti-judicial constitutionalism that inherently clashes with the classic model of liberal legal constitutionalism. Here, it will be argued that populist constitutionalism manifests an evident prejudice against every intermediary body placed between the 'people' and political power.

Likewise popular and political constitutionalism, but much more radically, populist constitutionalism proposes a strong critique of the liberal model of democratic constitutionalism, principally rejecting the main notions of liberal democracy such as pluralism, multiculturalism, and minority rights. At the same time, any judicial guardianship of the democratic order is rejected because of its supposed anti-democratic character that would violate and contradict the will of the majority and the power of the *real* people here and now. Hence, populist constitutionalism is essentially incompatible with the liberal, normative, and universal conception of individual rights, as well as it expresses a clear refusal of judicial review, considered to be an illegitimate and iniquitous constraint on the people.[2]

Populism and the populists. Between theory and practice

Populism is quite commonly described as a complex phenomenon and a multifaceted concept. The first step here is to provide a twofold definition of such a phenomenon: on the one hand, we deal with populism as a general and theoretical political concept, as well as, on the other hand, we should depict those political actors and leaders that act and decide *populistically* on the practical empirical stage. Thus, the proposal here is to describe populism as a two-faced Janus: a thin and basic political theory with a not particularly structured idea of society, and a dimension of politics, a political practice that aims at transforming, or even worse manipulating, liberal-democratic society by introducing and affirming radical ideas of society (Michelsen 2022, 69–70).

This reflexion partially echoes Michael Freeden's distinction between *thinking about politics* and *thinking politically*, where the former – even labelled as 'political theorizing' – represents the theoretical standpoint that gives normative benchmarks that address «the central issues and challenges that societies encounter collectively» (Fiorespino 2022, 2; Freeden 2007, 2). The latter is also defined as 'political thinking' and epitomizes the practical side of the coin, as the project of a society that is politically implemented through empirical choices to make collective decisions. Whilst, on the one hand, populism may be defined as a thin-centred political theorizing that provides a normatively limited benchmark, on the other hand, when political leaders that proclaimed themselves as *populist* come to power, populism turns itself into

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[2]Concerning the main objections against judicial review, Samuel Freeman's essay 'Constitutional Democracy and the Legitimation of Judicial Review' (1990–1991) remains a masterpiece to be inspired from (Freeman 1990-1991)

a practice of political thinking that try to implement the only two normative guidelines through which populism theoretically thinks about politics.

As a kind of political theorizing, populism stimulates an analysis of two main aspects: 1. An intrinsic and irreducible opposition between the *elite* and the *people*, with the former seen as the most radical form of the latter; 2. A general suspicion against liberalism. Famously, Mudde and Rovira Kaltwasser defined populism as a 'thin-centred ideology', which bases its meaning on an agonistic and conflicting opposition between the 'real' people and the 'corrupted elites', to justify democratic institutions merely as the megaphone of the general will in the current incarnation of the people (Mudde and Rovira Kaltvasser 2017, 7).

The idea suggested here is that populism as a theory should be distinguished by its application in the political arena. As we have said few lines above, populism revolves around two main assumptions: the antithetical distinction between the people and the elite and a general scepticism against the liberal conception of democracy. These are the only two normative premises on which populism is based, since, broadly speaking, the populist practice of populist leaders tends to reflect the will, the desires and the claim of 'the people' it wants to represent *here and now*. (Müller 2014)

In this sense, populism *in itself* develops a very basic idea of society that does not underpin a well-defined theory of the state and democracy. Rather, populism anchors its two main assumptions and leaves its defenders enough room to elaborate their political thinking, something Mouffe and Laclau called a 'strategy for hegemony' or 'political logic' (Laclau 2005; Moffitt and Tormey 2014). Generally, populists use populism to affirm their own idea of society, which often misconceives or even manipulates the principles of liberal democracy. It allows them to elaborate and promote a rhetorical style of politics that puts together the worst sentiments of the people to nourish impatience, resentment, and distrust towards liberal democratic institutions or the 'elitist' *status quo* (McKibben 2020).

In political practice, populism provides the ground for constructing a multifaceted rhetoric idea of society, that is carried out by populist leaders: the claim to represent the 'real people' against an alleged enemy, whether they be elites, immigrants, supranational institutions, technocratic or scientific organizations together with a sort of protectionism, conservatism and scepticism towards the assets of liberal democracy, firstly judicial independence and the legal guardianship of the constitution;

Defining populist practice as intrinsically rhetoric is not by chance. For what concerns populist politics, *rhetoric* is preferred to 'discourse', because the latter implies a deliberative moment that places all parts on the same stage, to pursue a neutral result or a common decision. In contrast, rhetoric is a partisan construction of an often-fictional truth that tends to delegitimise the opposite side by manipulating facts to achieve a dominant position. Populist rhetoric polarizes between 'us' and 'them'; 'the good and the bad'; between who is part of the majority and who is out (Fournier 2019, 365–366).

Populism as such is not completely at odds with democracy, and populists accept its main features – representation, majoritarianism, elections – as a tool to validate and sanction their proposals through an electoral consensus that they confuse with the will of *the people* themselves. The theoretical starting point of populism is then acquired and dressed up with other controversial ideas of society that formally stay within the

boundaries of democracy but practically design what it can be called a *pseudo* democratic politics that does not jump into totalitarianism, but stays in an apparently and strictly formally democratic arena in which power is managed by a strong majoritarianism that is based on a fideistic and messianic idea of leadership that conflates the will of the majority understood as the constituted owner of ordinary power with the will of *We, the People* taken as the real source of the supreme constituent power.

Therefore, populist practice can be seen as a form of 'para-democratic' or 'pseudo-democratic' politics that is not completely incompatible with democracy and representation but represents an intrinsic decline in the *liberal* conception of democracy itself. In this sense, populism does not ignore the constitutional assets of democracy, but interprets them in a parochial and illiberal sense, even by manipulating them to affirm and maintain an alleged 'general will' of *pure* or *real* people and their leader in power (Canovan 2013, 243).

> The label 'populist' is sometimes applied to certain styles of politics that draw on the ambiguous resonances of 'the people'- to politicians who claim to speak for the whole people rather than for any faction; to 'catch-all people's parties' short on ideology, eclectic in their policies, and prepared to accept all comers; to broad, amorphous, reformist coalitions crossing classes and interest groups (Canovan 1981, 269–261).

Contemporary populist practice emerges as a form of post-ideological and post-party politics which assumes the defence of *the people* as a primary goal. At the same time, populist leaders always need to identify an enemy, mainly economic or financial elites, minority groups, or international institutions. Furthermore, the populist upsurge is often associated with deep social and economic crises that contribute to nourishing a tense and potentially conflictual atmosphere that populists know how to interpret and manipulate. Populists draw strength from crises, both economic and political; they ride them instead of offering resolutions. Furthermore, they feed the conflict by identifying an enemy to fight – a social, political, or often ethnic group – instead of promoting peace and the common good (Moffitt and Tormey 2014, 391–392).

Populist exponents, as well as their supporters and voters, tend to polarize the good and the bad, without critical analysis or objective arguments, by offering a simplistic view of facts and events, without any critical analysis of society, by often conforming to a common sense narrative, sometimes conspiracy theories, and negationism (see no-vax and no-mask movements during the COVID-19 pandemic), and delegating a leader to represent the 'counter-truth', often presented as the 'real truth'. As Rovira Kaltwasser and Taggart underline, the COVID-19 pandemic represents a turning point in the populist narrative of contemporary society, since, in the pandemic, some of the main enemies of populists, namely scientists and technocratic *elites*, have earned a prominent and authoritative role. This implies that, for populists, the power to make political decisions has been unlawfully delegated to technocratic entities that have been enabled to dictate, according to this scheme, anti-democratic measures that deprived people of their fundamental rights such as lockdown policies, mandatory masks, massive vaccination campaign and so forth (Rovira Kaltvasser and Taggart 2022, 4–5).

Populist leaders also advance the idea that public opinion is constantly deceived by elites, economic, political, cultural and scientific, who want to control gullible people. Populists are inclined to accuse these people of being servants of such

élites, while defending the true and free people that are not to be deceived. Populists also declare to valorize and empower the common sense of common people by spreading the idea that competence is no longer a value but only a form of elitism. This idea of truth and public opinion is openly antiscientific; it blames science and research for being prone to political, economic, and financial powers; scientific truth is rejected and replaced by a fictional unmediated and common-sense truth. To recall Urbinati, we might then define this populist attitude as a form of anti-intellectualism (Urbinati 2014, 131–132 and 150; Urbinati 2019, 75–76).

Populist practice accepts democracy, despite not engaging democracy at its best. From the populist side, the undertaking of democratic procedures is instrumental in establishing certain ideas of society that are *de facto* contradictory to democracy. Although accepting democratic procedures and practices, populists are impatient with the main liberal principles such as checks and balances, separation of powers, and minority rights. In his seminal book, written with Rovira Kaltwasser, Mudde maintains that populism is essentially democratic but not in the *liberal* sense. It rejects the liberal 'golden rule' according to which popular sovereignty can never be unlimited, claiming that nothing can restrict the will of 'pure' people (Mudde and Rovira Kaltvasser 2017, 81; Tushnet 2019).

Mudde and Rovira Kaltwasser connect the democratic character of populist forces to what they call 'host ideologies', which are combined with populism and then influence the whole idea of society they advance (socialism for the left-wing, nationalism, and conservatism for the right-wing). Here, Mudde and Rovira Kaltwasser note that the combination of basic populism with a much more structured host ideology is essential for populist actors to provide their own idea of society and to construct the narrative of the conflict between the people and the elite in a convincing way. They also warn that populism arises in democracy and that from democracy it takes its lifeblood (Mudde and Rovira Kaltwasser 2017, 40–41). It implies that populism does not intrinsically oppose representative democracy, but uses democratic institutions as the megaphone of 'the people', whose claims and wills are supposed to be supported by institutionalized populist voices (Mudde and Rovira Kaltwasser 2017, 51–52).

On the same line, Jan-Werner Müller warns against misunderstanding the very essence of the populist phenomenon. According to him, populists do not reject the idea of representation as such, but they endorse a particular version that reflects their distorted view of the people. To be acceptable, representation in a populist vein should entail that «the right representatives represent the right people to make the right judgement and consequently do the right thing» (Müller 2016, 25). The argument here is that populism can be seen as a form of 'pseudo' or 'para democracy' characterized by 'hyper' or 'radical' majoritarianism that confuses the social, political, ethnic or religious majoritarian group with the people themselves and distorts constitutional democratic rules. In this sense, Alessandro Ferrara has eloquently defined populism as a 'majoritarian post-liberalism' (Ferrara 2018, 468), arguing that it is naïve and inappropriate to identify populism as a mere antidemocratic pathology; in contrast, populists do not contest democracy as a method, but are openly against liberalism (Landau 2020, 297).

The populist idea of society often implies the rejection of pluralism. Populists, especially on the right-wing side, are sceptical towards ethnic, cultural, or social minorities in the belief of defending the *real* people and their interests against those who are not part of such a fiction. Furthermore, populists associate the common good with the good of the 'pure and authentic people'; thus, the common good is the good of those considered full members of the national people (*the Italians*, *the Hungarians*, *the Americans*, the *British*, the *French*, etc.). For those who are excluded from this conception of the people (whether they are migrants, foreign citizens, or second or third generation citizens in contexts such as Italy), there is no inclusion within the people themselves.

Ernesto Laclau undoubtedly constructed one of the most complex theories of contemporary populism, both as a political movement and as a political-philosophical concept. Laclau constructs a leftist notion of populism that conceives it as a 'multiclass movement'. This entails the idea that the people should not be constructed on the basis of stratified and standardized social classes. Partially departing from the classic Marxist paradigm, Laclau asserts that populist movement cannot be classified into a schematic left vs. right discourse, as well as it does not emerge from a specific social class, not even the proletarian one.

The populist project takes its strength and validity from melting together different elements from different sides of politics and society. From this it derives that for Laclau, populism is a multivariate political project that includes contrasting components and claims from both the left and the right, such as claim for social justice and equality of political and civil rights, nationalism, the demand for even greater participation and inclusiveness, but also authoritarian tendencies or charismatic leadership and plebiscitarian ways of government (Laclau 2005, 4). Furthermore, Laclau's populist and 'non-liberal' idea of democracy contains within it both the Gramscian concept of hegemony and also the Schmitt's dichotomy between friends and enemies, between 'us' and 'them', between those who share the same idea of politics and those who instead defend a different view of society, between *people* and the elite.[3]

All this project undoubtedly overlaps with agonistic accounts of democracy defended by Chantal Mouffe and James Tully, but it also takes inspiration from the figure of the Argentine leader and President, Juan Domingo Peron, whose example is taken by Laclau in order to illustrate how populism works in certain contexts. Populism then accepts and uses democratic procedures only to change and transform deliberation into an agonistic confrontation of people and their enemies. Hence, against the liberal interpretation of democracy as a limit to powers, populists assume it as a way to obtain, but also maintain, the hegemonic power of the people.

As Laclau poses, the experience of Peronism teaches us that social and political crises might always lead to institutional breakdowns that may finally step into authoritarianism. As in the case of Peron, this potential authoritarian change would emerge from a phase of popular and social confrontation that would progressively evolve to culminate in a popular movement that Laclau calls an 'organised community' (Laclau 2005, 214; Panizza 2005, 46).

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[3]Further reflections about the Schmittian narrative of 'friends' against 'enemies' and its implications for contemporary populism are developed in Webber (2023): 7.

Left and right populism

Contemporary theories of populism tend to distinguish between two forms of populist politics, a left-wing and a right-wing approach. Gabor Halmai and Mark Tushnet describe this distinction in terms of economics and social rights: both underline that left populism assumes an egalitarian position to defend the weakest social groups, while rightist populists devalue some sets of rights, especially minority rights and civil rights. Left-wing populism embraces a kind of social constitutionalism that claims to expand rather than restrict the list of rights and their beneficiaries. Right-wing populists embrace an exclusivist foreclosure for which rights are granted only for ethnic and culturally majoritarian reasons.[4]

Against their nationalist background, right-wing populists aim to defend the 'people' and their ethnic, conservative, and traditional values. This distinctive feature is exemplified by slogans promoted by right-wing parties and their leaders in Europe and the United States, such as *Make America Great Again* launched by Donald Trump for his victorious presidential campaign in 2016, or, again in 2016, *Britain First* used by former UKIP leader Nigel Farage during the Brexit campaign. In the same vein, we should consider *Italy First*, promoted by the right-wing leaders Matteo Salvini and Giorgia Meloni, and *Choisir la France*, the motto chosen by Marine Le Pen in 2017 to replace the previous, *Remettre la France in ordre*, as the landmark of her new movement *Rassemblement National*, risen from the ashes of her father's far right party *Front National*. All these slogans fall into a nationalist and anti-globalist narrative that tries to bring back the idea of the nation-state in the realm of politics. The idea is that global and international organizations fail in representing the political community of a nation, and thus this opens room for nationalist populists to speak for the people *and* for the nation itself (Schmidtke 2023, 3).

Right-wing populism is the most radically anti-liberal version of the phenomenon. It is generally identified for its rejection of multiculturalism and pluralism and the promotion of differentiation, discrimination, and exclusion. Right-wing populists find their main foes in minorities, migrants, or 'special' categories (LGBT groups; political opponents; non-political and international institutions). At the same time, the state, its leader, and the 'people' are considered one, a nation with its traditions and laws that must be respected and protected.

Paradigmatically, this tendency transpires in the figure of Viktor Orban and his way of governing Hungary. In a well-known speech delivered in 2018, he celebrated his re-election as the Hungarian president by saying: «Hungary won. The Hungarian people won. We created the opportunity to defend Hungary. A great battle is behind us. We have achieved a decisive victory».[5] In congratulating Orban for his victory, Marine Le Pen celebrated this result as the decisive rejection of «the inversion of values and mass immigration promoted by the EU».[6] Furthermore, in Orban's 2018 victory speech, the

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[4]This initial differentiation is well illustrated by Gábor Halmai, who moves from Mark Tushnet's and Pierre Rosanvallon's analysis to point out the *status quaestionis* of left and rights wings populism. See (Halmai 2019), (Sandel 2018) and (Tushnet 2018).

[5]This passage of Orban's speech is reported in an article appeared on *The Guardian* on April 9, 2018, https://www.theguardian.com/world/live/2018/apr/08/hungary-election-victor-orban-expected-to-win-third-term-live-updates?page=with:block-5aca88d6e4b0131dfe31d53e

[6]This statement appeared on Maine Le Pen's *Twitter* account and reported on *Le Monde* on April 9, 2018, https://www.france24.com/en/20180409-eu-far-right-hails-hungary-anti-migrant-pm-victory

confusion between politics and religion emerged powerfully when he expressed his gratitude to «all the people who prayed for us and prayed for me personally.» Then Orban reaffirmed the nationalistic meaning of his victory, considering it as the first step «to be able to defend our mother country».[7]

On the other hand, the leftist definition is less than clear. Basically, leftist populists do not invoke a nationalist defence of the people or a quite mythical homeland to be protected. Left populists prefer a social and political definition of the 'people', justifying the fight against their enemies (first of all financial and economic elites) in terms of denouncing social inequalities and redistribution of resources and wealth. Left-wing populists do not find enemies in weaker or minoritarian groups; conversely, they aim to defend such groups against large concentrations of power and wealth. They give great importance to fundamental human rights and articulate the conflict between 'us' and 'they', between 'friend and enemy' to recall Carl Schmitt's lexicon, not in terms of racial differences, but of social and economic inequalities. Leftist populists protest against austerity, lack of solidarity, imperialism and lobby power (the example here is Bernie Sanders' primary U.S. presidential campaign in 2016).

Mouffe's agonistic democracy constitutes the basis for justifying the contraposition between *us* and *them*. Therefore, what defines democracy in Mouffe's view is the social and political struggles between *us* and *them*, *friends* and *enemies*. Populism is then the way people defend themselves against these 'enemies' and impose their hegemony on dominant classes. Mouffe called the limit between 'the people' and 'the elites' the *political frontier* (Mouffe 1993, 5–6 and 111). In *For a Left Populism*, Mouffe eloquently draws her distinction between right-wing and left-wing approaches by defending the leftist version as the most reasonable way to defend the people against elites and ruling powers. The main difference between right-wing and left-wing lies in the concept of sovereignty they propose, where, for rightist populists, sovereignty implies nationalism and ethnicity. Right-wing populists, Mouffe asserts, «do not address the demand for equality and build a 'people' that excludes numerous categories, usually immigrants, seen as a threat to the identity and prosperity of the nation» (Mouffe 2018, 18). On the contrary, left-wing populism defends a concept of sovereignty that we might call 'democratic' or 'participatory', in which there is a tendency to include and not exclude anyone.

However, Mouffe's left populism involves an agonist rather than a liberal or deliberative account of democracy, as it implies defining an adversary, rather than pursuing a compromise between contrasting political forces, as the liberal and deliberative theorists claim. Mouffe justifies left populism as a radical and hegemonic approach to democratic politics that aims at a collective will, a 'people' apt to bring about a new hegemonic formation that will restate the articulation between liberalism and democracy that has been disavowed by neoliberalism, placing democratic values in the leading role (Michelsen 2022, 73–74; Mouffe 2018, 27).

With this in mind, a question arises: Why is left populism actually *populism*? In a nutshell, my thesis is that the border between left populism and socialism is very labile. Leftist exponents do not construct a populist idea of society, although contesting

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[7]See *The Guardian* https://www.theguardian.com/world/live/2018/apr/08/hungary-election-victor-orban-expected-to-win-third-term-live-updates?page=with:block-5aca92dbe4b010a6e308b939

the increasingly pervasive predominance of financial elites over constitutional-democratic institutions. Certainly, leftist politics lacks many of the issues developed by right-wing populists, such as impatience towards liberal democracy, the negation of pluralism and egalitarianism, nationalism, plebiscitarianism, anti-scientific and trivial attitude towards culture and knowledge, and so forth. Jean L. Cohen interprets the lack of difference between left and right populism by underlining that both pose problems to democracy, rather than offering solutions to improve it. Cohen's thesis is that populism is a two-faced Janus and that leftism and rightism are its two sides. Therefore, they share a common tendency to authoritarianism; what is different is the alleged presuppose of the two: egalitarian and socially engaged agonism for the leftists, a nationalist and ethnic protectionism for the right-wing (Cohen 2019, 392).

What we indicate as 'left populism' resembles more closely social democracy and social constitutionalism, which privilege the expansion of rights, especially social rights, and the defence of the poorer and disadvantaged classes of society. Therefore, left-wing 'populism' is more based on an agonistic conception of democracy and an anti-elitist ideal of society than on a majoritarian ethnocentric idea of the people. This confusion in depicting populism as a leftist account of politics is well epitomized by the common error in addressing political exponents such as Jean-Luc Mélenchon, Jeremy Corbyn, or Bernie Sanders as *populists*. They are undoubtedly classifiable as agonists or antagonists, politicians fighting against financial, upper-class elitism; however, they do not share almost anything with real populist actors such as Marine Le Pen, Nigel Farage, or Donald Trump, who led their campaigns by appealing to the worst sentiment of the people.

The formers defend a social justice-based account of society to the extent that the latter is disengaged from social rights and distributive justice. Undoubtedly, also right-wing populists affirm to combat financial elites and global markets, but from a nationalistic, self-interested, autarchic position, while, even in their most radical approaches, leftist exponents do not pursue such instances, preferring egalitarian and globalist demands for justice. Leftist politics does not doubt democracy and liberal institutions, whilst right populism often indulges in authoritarian drives and a general scepticism towards limitations to their leadership.

Populist practice and constitutionalism

In the light of what we have illustrated earlier, my analysis of populism assumes that this phenomenon should be addressed taking into account its two characters: the thin-centred ideology that corresponds to normative thinking *about politics* and its practical implementation in the political arena. Likewise, populist practice does not act only politically but also constitutionally. On the one hand, populist forces act politically by affirming a hegemonic and even distorted notion of the people, especially through the contraposition of alleged 'enemies'. On the other hand, from the constitutional point of view, populists are not anti-constitutional, they do not want to abolish constitutions. Populists in power reform the constitution to transform it into *their own constitution*.

This approach is possible only by conceiving a hyper-formalist and proceduralist constitutional model for which amending the constitution is always legitimate when made respecting formal rules and procedures, regardless of the content of the

amendment itself, and in obedience to what the people want and claim. Thus, populist constitutionalism is a hyper-formalist and hyper-majoritarian project to amend the constitution at whim following the will of people here and now. For this, it is to say that populists are not properly against constitutionalism, at least formally. From this point of view, populist constitutional project to pass and legitimize unconstitutional changes seems to affirm that if you change the constitution by respecting the rules, this is not formally unconstitutional. In sum, populist constitutionalism uses an extremely formalist argument to defend manipulations of constitutional democracy that might be considered *formally* valid, though *substantially* unacceptable.

Surely, populist constitutionalism, although not oxymoronic, is not 'constitutional' from a liberal perspective. This is because populist constitutionalism contrasts any institution that defends the substance of democracy; from this it derives populist distrust and resentment towards constitutional courts or tribunals that are blamed for limiting and restricting the will of the 'pure' people and their leader. Therefore, populist 'hyper-majoritarian' constitutionalism refuses any limiting rule on what people can do with the constitution, especially when understood as 'matters of principle'.

Populist constitutionalism is a specific variety of anti-liberal democratic rule of law, which assumes constitutional rules merely as a procedural instrument to manipulate and corrupt democratic politics. The populist attitude does not only correspond to an 'anti-constitutionalism', by contrast, it advocates something we can call a 'pseudo-constitutional' form of democracy that appeals to constitutional assets to minimize restrictions on the will of the people (Blokker 2018a, 40; Corrias 2016). As Nadia Urbinati clarifies, for populists «it is the people directly – its majority – that legitimizes institutions with no other mediation than their actual will» (Urbinati 1998, 117). In this sense, pseudo-constitutionalism means using democratic procedures opportunistically to legitimize hegemonic power by using the rules of the game instrumentally. For these reasons, the populist approach has nothing in common with the classical definition of liberal constitutionalism, but it is an alternative.

Populist constitutionalism manifests aversion towards any institution that opposes solely formalist justification to decision-making. As Paul Blokker eloquently argues, this rejection of anti-majoritarian institutions such as constitutional or supreme courts falls under the banner of 'legal scepticism' or 'judicial resentment' (Blokker 2018a, 42–43; 2018b). This intolerance towards the judiciary and guardianship makes it clear that populist constitutionalism offers a nemesis of so-called legal constitutionalism that, in turn, defends substantial principles of democratic co-existence and pluralism.

Moreover, populist project and constitutionalism are not an oxymoron, but rather, populists know and use the rules, to affirm their power and to change the constitution modelling it in a populist shape. Populist rhetoric even embraces constitutionalism to contest it and denounce its weaknesses in representing and protecting the 'real' people, to accuse it of favouring multiculturalism and injustice in some sense. Populists in power then work to make the constitution say what they want and what they believe to be right and true. (Doyle 2019)

Against this background, populist constitutionalism epitomizes an illiberal model of democracy that follows a radical form of majoritarianism by which democracy is reduced to a continuous recall of the 'will of the majority', confused with the 'will of

the people', within every aspect of the social, political and constitutional system. Alessandro Ferrara has well illustrated this point when he defined populism as a form of 'post-liberal majoritarianism'; it is based, Ferrara contends, on the idea that «the electorate is the people's current incarnation and the constitution is, thus, in the electorate's hand» (Ferrara 2018, 468).

On the same line, Simone Chambers has suggested that, for populists, majority rule is the only legitimate means to make decisions most democratically, also when constitutional essentials and fundamental principles are at stake. Through majority rule, populists are often seen to propose and ratify unconstitutional constitutional amendments, aimed at altering the liberal-democratic fundamentals of the state, by appealing to an elusive 'will of the people' that is often equated with the will of the leader (Chambers 2019, 1117). This argument might seem very straightforward, but it is not unsubstantiated.

As mentioned above, populist project implies assuming constitutionalism instrumentally to legitimize controversial, if not even unconstitutional, ideas of society. From this perspective, amendments to constitution may be legitimate *by rules* but not *by substance*. Therefore, a government may pass and enforce a change that is constitutional because of the procedures but unconstitutional for the implications and effect it may potentially have on society. In a liberal-democratic state, this improper use of constitutionalism is limited and avoided by guarantor institutions such as courts, but populist forces often blame and weaken courts under the pretence of defending sovereign power, but conversely defend the will of the leader.

The aversion towards judicial restraints is well exemplified by Mark Tushnet, who stresses that judicial review prevents citizens from actively participating in the democratic process. In drawing his 'populist constitutional law', Tushnet indicates that, in the democratic context of the United States, the Declaration of Independence and the Preamble to the American Constitution are the only two sources of democratic legitimacy. The tradition of populist constitutionalism in the U.S. so finds its roots in the Lincolnian statement according to which «the Constitution belongs to the People» and perhaps, Tushnet concludes «it is time for us to reclaim it from the courts» (Fabbrizi 2019, 144; Tushnet 1999, 194; Fabbrizi 2020).

Thus, as Tushnet advanced in his seminal book, *Taking the Constitution Away from the Courts*, a theory of populist constitutionalism would start from three preconditions:

(1) *People* have the right to directly determine what the Constitution says and how to interpret its fundamental principles through free voting.
(2) *People* must be able to address their criticisms of the government. Only when citizens are allowed to criticize the government can the *status* of democracy be improved; in this sense, the people must be able to decide about hard cases without having to wait for a Supreme Court verdict.
(3) People need a public and private space where they can develop and discuss their views and opinions on constitutional law. Judicial review is justified only if it is carried out to secure the requirements of populist constitutional law to protect the 'will of the People' from any illegitimate limitation. Judicial review is then

admitted only in its weak form, as a reflex of popular sovereignty, namely, as the institutional weapon through which the People can control the government (Tushnet 1999, 157-158).

In a more recent article entitled *Against judicial review* (2009), Tushnet recalled this point by reiterating that justices must take into great consideration popular will when they are called to deliver their sentences.

> (…) judges should find statutes unconstitutional when their enforcement would make it more difficult for democratically constituted majorities to overturn policies of which they disapprove or to replace representatives of whom they have come to disapprove, at least when those statutes cannot be justified by showing that they do a rather good job of advancing quite important public policies (Tushnet 2009, 11).

Tushnet's theory of populist constitutional law condenses the core issues of contemporary populist constitutionalism, notable impatience towards the limitations of popular sovereignty, and majoritarian decision-making. Populists reject judicial guardianship and show an evident scepticism towards the normative framework given by constitutional provisions and regulations. They do not consider democracy as a right-based constitutional regime, but as a mere instrument to define and protect the *people* meant as *ethnos* (Blokker 2018a, 43–44). However, Tushnet's conception of constitutional democracy has recently become closer to popular constitutionalism and the democratic critique of judicial supremacy rather than to judicial review or legal constitutionalism itself (Kramer 2004; Post and Siegel 2004; Pozen 2010). His most recent contributions (Tushnet 2008, 2020, 2021) raise greater attention to the popular character of constitutional democracy, which is seen not to be incompatible with a weak-form judicial review and a dualist liberal system.

Conclusions

The purpose of this article was to understand what populism represents in contemporary political theory and how the populist project reacts to democracy and constitutionalism. Here populism has been defined as a complex and multifaceted phenomenon that has several features and prerogatives. The first step was to distinguish populism as a thin normative ideology and its application in the political arena by leaders and politicians who call themselves *populists*. Second, rightist and leftist connotations of such a phenomenon have been illustrated to clarify the differences of arguments and tones between left-wing and right-wing political actors. Finally, the article has tried to elucidate why populist project is not incompatible with constitutionalism, but rather populist project represents a sort of pseudo-constitutionalism that holds the formalist side of the coin, radicalizing it, but refuses the substantial core of the matter, first of all the anti-majoritarian guarantee function of non-political institutions.

Disclosure statement

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