

# Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity

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Populism – Constitutional Theory – Paradox of Constituent Power – Popular Sovereignty – Representation – Constitutional Identity – Democracy

*On veut toujours son bien, mais on ne le voit pas toujours: jamais on ne corrompt le peuple, mais souvent on le trompe, et c'est alors seulement qu'il paraît vouloir ce qui est mal.*

Jean-Jacques Rousseau, *Du Contrat Social*, Livre II.3

## INTRODUCTION

Populism seems to be more alive than ever. In Europe, populist parties have been on the rise since the end of the Cold War. The 2014 elections for the European Parliament also brought many populists to Brussels. But populism is not restricted to Europe only. One scholar even calls it a 'global menace'.<sup>1</sup> Populist parties are active from Bolivia to Russia and from the United States to The Netherlands. In such circumstances, it comes as no surprise that populism is a well-studied topic. The vast amount of literature on the subject may roughly be divided into two groups.

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<sup>1</sup>C. Mudde, *Are Populists Friends or Foes of Constitutionalism?*, The Social and Political Foundations of Constitutions Policy Brief, The Foundation for Law, Justice and Society, <[www.fljs.org/sites/www.fljs.org/files/publications/Mudde\\_0.pdf](http://www.fljs.org/sites/www.fljs.org/files/publications/Mudde_0.pdf)>, visited 9 February 2016.

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On the one hand, we find empirical work, mostly conducted by political and social scientists, aiming at the description of the phenomenon of populism through case studies of particular countries or populist groups.<sup>2</sup> On the other hand, political theorists and philosophers have tried to come up with a theory of populism and its success, and specifically focus on the relationship between populism and democracy.<sup>3</sup>

Constitutional theorists have not devoted a lot of attention to the phenomenon of populism (some notable exceptions notwithstanding).<sup>4</sup> There may be two interpretations of this silence. Either constitutional theory has nothing to say about populism, in which case the silence is justified, or constitutional theory does have something to say, in which case the silence is unjustified and (potentially) problematic. The aim of this article is to show that constitutional theory does indeed have a role to play in the debate on populism. Hence, its silence on the issue is unwarranted. It seems as if constitutional theory has not taken the (often implicit) constitutional tenets of populism seriously. This article is a first attempt at filling this lacuna. Drawing on constitutional theory and its philosophical sources, it reconstructs populism as a specific and internally coherent constitutional discourse. Once the constitutional underpinnings of populist doctrines are made explicit and brought into the limelight, they will be confronted with contemporary constitutional theory and tested for their merits.

The well-defined perspective of constitutional theory will not suffice to grasp every aspect of populist politics: e.g., political style is something that falls outside of this analysis. So, while I do not wish to replace a constitutional approach with one of the other approaches, I do believe that the constitutional point of view may add a perspective to the study of populism which remains underdeveloped in

<sup>2</sup> See for instance: H.-G. Betz, *Radical Right-Wing Populism in Western Europe* (Palgrave Macmillan 1994); C. Mudde, *Populist Radical Right Parties in Europe* (Cambridge University Press 2007); C. Mudde and C. R. Kaltwasser (eds.), *Populism in Europe and the Americas: Threat Or Corrective for Democracy?* (Cambridge University Press 2012).

<sup>3</sup> Examples include: N. Urbinati, 'Democracy and Populism', 5 *Constellations* (1998) p. 110; M. Canovan, 'Trust the People! Populism and the Two Faces of Democracy', 47 *Political Studies* (1999) p. 2; E. Laclau, *On Populist Reason* (Verso 2005); F. Panizza (ed.), *Populism and the Mirror of Democracy* (Verso 2005); S. Žižek, 'Against the Populist Temptation' 32 *Critical Inquiry* (2006) p. 551; K. Abts and S. Rummens, 'Populism versus Democracy', 55 *Political Studies* (2007), p. 405.

<sup>4</sup> For two recent articles on populism from a constitutional point of view, see C. Pinelli, 'The Populist Challenge to Constitutional Democracy', 7 *EuConst* (2011) p. 5 and E. Hirsch Ballin, 'Henk, Ingrid en de rechtsstaat' [*Henk, Ingrid and the Rechtsstaat*], in J. Thomassen et al., *Populisme: Verrijking of bedreiging van de democratie?* [*Populism: Enrichment of or Threat to Democracy?*] (Koninklijke Nederlandse Akademie van Wetenschappen 2011) p. 13. Note that both 'Henk' and 'Ingrid' are typical Dutch names, which the Dutch politician Geert Wilders uses to refer to 'the common people'. A tradition to which I am not referring is that of so-called popular constitutionalism, see e.g. L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004).

present approaches. Adopting this perspective allows one to grasp different aspects of populist discourse as part of one and the same constitutional framework. Furthermore, a constitutional approach can unveil the way in which populism rejects certain pillars of *constitutional* democracy, understood as democracy under the rule of law.<sup>5</sup> In theory, ‘populism has a problematic relationship with constitutionalism’, as one scholar writes.<sup>6</sup> At the same time, however, populists are obliged to adopt constitutional vocabulary (even if sometimes implicitly) in order to be heard in the political arena and credibly claim a minimum of legitimacy. This explains how, from a constitutional perspective, populism and democracy are related. This contribution’s second aim is thus to spell out what exactly makes populism problematic for constitutionalism, or democracy under the rule of law.<sup>7</sup>

It is my hypothesis that populism contains a (largely implicit) constitutional theory consisting of three separate, albeit interrelated, claims. One claim concerns the nature of constituent power, a second one regards the scope of popular sovereignty and a third claim relates to what constitutional identity entails. The confrontation with contemporary constitutional theory will prove these three claims, however convincing as they may appear at first sight, to be questionable. The structure of this paper is as follows. In the next section, I unveil the three pillars of populism’s constitutional theory. I will illustrate my theoretical points with examples: these aim to show how populism, in rejecting liberal constitutionalism, defends a constitutional theory of its own. I will subsequently address the three elements of populist constitutional theory and critically assess them against the background of contemporary constitutional theory. Then I will argue that populism, in order to make sense of the dynamic relationship between law and politics, should take into account the so-called paradox of constituent power. Thereafter, I will show the necessary connection between popular sovereignty and representation. Finally, I will sketch the framework to understand constitutional identity in terms of selfhood.

## POPULISM AS A CONSTITUTIONAL THEORY

In this section, I will disclose the underlying constitutional theory of the typical populist argument. For that purpose, I discern three elements of populist discourse and recast them in the terms of constitutional theory, namely: constituent power, popular sovereignty and constitutional identity. Populist groups typically combine these three interrelated but separate elements. In other words, I believe that these

<sup>5</sup> Pinelli, *supra* n. 4, p. 6.

<sup>6</sup> Mudde, *supra* n. 1, p. 4.

<sup>7</sup> This is also the aim of Hirsch Ballin, *supra* n. 4.

are cumulative aspects in populist constitutional discourse. I will illustrate each element with some historical and contemporary examples.

However, first something needs to be said about what is meant by populism in this article. Indeed, one of the first questions scholars of populism have struggled with is how to define the phenomenon. This is such a difficult question because of the many different guises of populism. For example, whereas we tend to associate populism in Europe with the (extreme) right, in (South) America populism has recently been something of the political left (Evo Morales and the late Hugo Chávez come to mind). Margaret Canovan, one of the experts in the field, dubs populism ‘a notoriously vague term’.<sup>8</sup> Cas Mudde speaks of populism as a ‘notoriously slippery concept’.<sup>9</sup> Yves Mény and Yves Surel emphasise the ambiguity of the notion and its emptiness.<sup>10</sup>

As one can already see, the discussion about the definition of populism among philosophers and political scientists remains unfinished. Given this observation, I would like to stress that it is not my principal aim to contribute to this discussion. Hence, I will restrict myself to giving a definition of populism *as a constitutional theory*: populism can be seen as a constitutional theory which combines specific readings of the theories of constituent power, popular sovereignty and constitutional identity.

The first element of populism’s implicit constitutional theory is a particular reading of the theory of *constituent power*. The notion of constituent power has gained momentum in constitutional theory, especially after the end of the Cold War and the wish of countries in Eastern Europe to promulgate new and democratic constitutions. The notion of constituent power refers to the authority to make the constitution and thus to institute the legal order.<sup>11</sup> It belongs to the people. As constituent power, the people is understood to already exist prior to and independent of a constitutional order. Most importantly, populists implicitly claim that there is an absolute primacy of constituent power vis-à-vis the constitution and the rules and powers derived from it. The people as constituent power is ultimately not bound by constitutional constraints because it is the source from which the constitution receives its legitimacy.<sup>12</sup> This does not necessarily

<sup>8</sup> Canovan, *supra* n. 3, p. 3.

<sup>9</sup> Mudde, *supra* n. 1, p. 2.

<sup>10</sup> Y. Mény and Y. Surel, ‘The Constitutive Ambiguity of Populism’, in Y. Mény and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave 2002) p. 1 at p. 6.

<sup>11</sup> For a conceptual and historical introduction to the notion see A. Kalyvas, ‘Popular Sovereignty, Democracy, and the Constituent Power’, 12 *Constellations* (2005) p. 223 and M. Loughlin, ‘The concept of constituent power’, 12 *European Journal of Political Theory* (2013) p. 218.

<sup>12</sup> Although he uses the (related) notion of popular sovereignty instead of constituent power, this view comes clearly to the fore in a speech of Bruno Mégret of 1999 (then delegate-general of the Front National): ‘Of the people, by the people, for the people; in France, the people are sovereign.’

mean that populist politicians revolt against the present constitution and do not abide by any rules. In practice, they are actually opportunistic.<sup>13</sup> It does, however, entail that, in terms of constitutional theory, the populist will always value 'the will of the people' above constitutional rules and procedures and will actively search for ways to overcome or avoid these.<sup>14</sup> In short, the populist reading of constituent power displays a strong preference of the rule of men over the rule of law and, as a consequence, a general distrust of law and procedures.

An example of this attitude is to be found in the way in which the Dutch Freedom Party (PVV) and its leader Geert Wilders regard international treaties. These are seen as ultimately dependent on the actual support of the people at a given moment in time and hence revocable. Now it is surely the right of a political party to seek to change international treaties through the appropriate procedure. However, the Freedom Party goes substantially further with its repeated calls to resign Dutch membership from the Schengen agreement unilaterally and immediately.<sup>15</sup> This element can also be discerned in a critical stance towards the 'undemocratic' judiciary. Think of the way in which the constitutional court of Hungary has been criticised for overstepping its mandate by the ruling Fidesz party. Subsequently, the Court's competences have been systematically diminished, the number of judges has been increased and several outgoing judges have been replaced with government-friendly substitutes. As a result, the ability of the Court to act as a counter-power to the government has been substantially reduced.<sup>16</sup>

It is from them that power proceeds, they decide their destiny, and it is for them that our rulers act. That is at any rate the principle of sovereignty in our nation, that is the deep meaning of the Republican institution, those are the foundations of democracy in France. Far from being a mere constitutional mechanism defined by holding elections, it is, over and above this legal implementation, the well-nigh sacred expression of the legitimacy that comes from the people'. See Y. Surel, 'Populism in the French Party System', in Y. Meny and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave 2002) p. 139 at p. 147.

<sup>13</sup> Mudde, *supra* n. 1, p. 4.

<sup>14</sup> See W. T. Eijssbouts, 'Wir Sind das Volk: Notes About the Notion of "The People" as Occasioned by the *Lissabon-Urteil*', 6 *EuConst* (2010) p. 199 at p. 214-215: 'Populism harkens to the original people, unfettered and unspoilt by the institutions, more direct and more real. It is an attempt directly to mobilise the powers, the authority and the properties of the original people inside the electoral situation. (...) In form, populism will seek the more immediate forms of expression of popular emotions through direct democracy, notably referendum, including the strong leader who will implement the people's will'.

<sup>15</sup> Most recently in the debate in the Dutch Parliament after the Charlie Hebdo terrorist attacks, see 'De clash tussen Wilders en Samsom' [*The Clash between Wilders and Samson*] *De Volkskrant*, 15 January 2015, <[www.volkskrant.nl/dossier-aanslag-op-charlie-hebdo/de-clash-tussen-wilders-en-samsom-a3830319](http://www.volkskrant.nl/dossier-aanslag-op-charlie-hebdo/de-clash-tussen-wilders-en-samsom-a3830319)>, visited 9 February 2016.

<sup>16</sup> For an overview of the situation in Hungary, see the work of K. L. Scheppele, 'Hungary and the End of Politics. How Victor Orbán launched a constitutional coup and created a one-party state', *The Nation*, 26 May 2014, <[www.thenation.com/article/179710/hungary-and-end-politics](http://www.thenation.com/article/179710/hungary-and-end-politics)>.

The second aspect of populist discourse which actually expresses a constitutional claim is a specific interpretation of the theory of *popular sovereignty*. This aspect is, of course, related to the populist reading of constituent power since both hark back to the supreme popular will. However, also for historical reasons, the language of popular sovereignty is much more than that of constituent power suited to develop a specific interpretation of democracy and the role representation plays in this regard. It is for this reason that I believe that it forms a separate part of the populist constitutional discourse. Just like other political parties in a democracy, populists claim to speak on behalf of the people. Populists, however, differentiate themselves from other parties and politicians by claiming that these form ‘the elite’ and are not really interested in what the ordinary people want. The elite has its own interests, separate from and often contrary to those of the people. Populists are different in that they claim to represent the real or common people and to know their true interests.<sup>17</sup> Thus, they argue that the people (in the singular) is an existing entity present as a political unity.<sup>18</sup> So, this element of a populist constitutional theory consists of two claims. First, the people is present in the polity, unmediated. Second, the mode of the people’s presence is that of a unity. In short, the people is present as one, with one (common) interest, and one will.<sup>19</sup>

The consequences of this reading of the doctrine of popular sovereignty come to the fore in the way in which populist parties tend to proclaim a general distrust of

visited 9 February 2016. More specifically on the role of the Constitutional Court, see O. W. Lembcke and C. Boulanger, ‘Between Revolution and Constitution: The Role(s) of the Hungarian Constitutional Court’, in G. A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (Central European University Press 2012) p. 269.

<sup>17</sup> See in this regard M. Tarchi, ‘Populism Italian Style’ in Y. Meny and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave 2002) p. 120 at p. 122 where this is exemplified by the Italian movement of Guglielmo Giannini, ‘Fronte dell’Uomo Qualunque’ (The Common Man’s Front, UQ): “Qualunquismo” presented itself as the voice of ordinary people, those excluded from the division of power, fed up with greedy and corrupt politicians, indifferent to ideologies they saw as a mere cover for elite ambitions for domination, sceptical of any programme and mistrustful of electoral promises they expected to be systematically broken by those elected. Declaring its aversion to both fascism and anti-fascism, to the monarchist, clerical or conservative Right and to the Republican, Socialist or Communist Left, the UQ focused on the unbridgeable gap between the people on the one hand – united in their desire to be “left in peace”, and to get on with life in the wake of the bloody passions that had for years divided the peninsula – and the professional politicians on the other’.

<sup>18</sup> Wherever in this article I am using the notion of the people as a political *unity*, I will refer to it in the singular.

<sup>19</sup> M. Canovan, ‘Taking Politics to the People: Populism as the Ideology of Democracy’, in Y. Meny and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave 2002) p. 25 at p. 34: ‘As sovereign and rightful rulers, “the people” must be understood as an entity, a corporate body with a continuous existence over time, capable of having common interests and a common will. Furthermore that body must be capable of action, able to express its will and to take decisions’.

politics and politicians. This distrust is rooted in a more fundamental ambiguity towards the institution of political representation.<sup>20</sup> While (other) politicians might claim to represent the people, they are actually pursuing their own interests, or so populists claim.<sup>21</sup> Instead of this, populists practice what one might call a 'politics of immediacy'. They often advocate the use of referenda (direct democracy) because in this way the voice of the people is directly heard.<sup>22</sup> This might also explain why some populist parties want to help the people directly, i.e. in the streets. For example, the Greek Golden Dawn Party very practically operates in the streets where it helps people to solve their problems: doing grocery shopping for the elderly but also exercising a form of vigilante justice, of which immigrants are the main victims.<sup>23</sup>

The third element of populism that is interesting for constitutional theory concerns *constitutional identity*. This notion is often, but not necessarily and not only,

<sup>20</sup> P. Taggart, *Populism* (Open University Press 2000) p. 86: 'At heart, new populism is an attack on the nature of political parties, and therefore on the form that representative politics has come to take in the countries in which it arises. In both the form that they take and in the positions they adopt, new populists embody a radical critique of existing parties'.

<sup>21</sup> See the Populist Party Platform of 1892, July 4, 1892, Preamble: 'The conditions which surround us best justify our co-operation; we meet in the midst of a nation brought to the verge of moral, political, and material ruin. Corruption dominates the ballot-box, the Legislatures, the Congress, and touches even the ermine of the bench. The people are demoralized; most of the States have been compelled to isolate the voters at the polling places to prevent universal intimidation and bribery. The newspapers are largely subsidized or muzzled, public opinion silenced, business prostrated, homes covered with mortgages, labor impoverished, and the land concentrating in the hands of capitalists. The urban workmen are denied the right to organize for self-protection; imported pauperized labor beats down their wages, a hireling standing army, unrecognized by our laws, is established to shoot them down, and they are rapidly degenerating into European conditions. The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind; and the possessors of these, in turn despise the Republic and endanger liberty. From the same prolific womb of governmental injustice we breed the two great classes – tramps and millionaires'. Quoted in Taggart, *supra* n. 20, p. 28.

<sup>22</sup> Of course, not all parties advocating more referenda are immediately populist. Yet, as Canovan argues, the argument in favour of the use of referenda may indeed be conceived as part of the populist ideology: 'But in order to grasp the potential political significance of referenda we need to take account of the way they may appear when seen through the spectacles of the democratic ideology analysed above. (...) Take, for example, the promised British referendum on whether or not to adopt the Euro in place of sterling. (...) [T]he use of a referendum to resolve such a major political issue seems certain to endorse and emphasise the populist ideology of democracy'. See Canovan, *supra* n. 19, p. 36. See also P. Taggart, 'Populism and the Pathology of Representative Politics' in Y. Meny and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave 2002), p. 62 at p. 72: 'We can view constitutional politics as setting the rules of the game in which representative politics take place. The ambivalence of populism to representative politics can be perceived not only in what populists advocate, but in the way that they mobilise. (...) In the mechanisms advocated by populists we often find a predilection for referenda and the tools of direct democracy such as citizen initiatives and recall devices'.

<sup>23</sup> See for example: M. Margaritis, 'Fear and loathing in Athens: the rise of Golden Dawn and the far right', *The Guardian*, 26 October 2012 <[www.theguardian.com/world/2012/oct/26/golden-dawn-greece-far-right](http://www.theguardian.com/world/2012/oct/26/golden-dawn-greece-far-right)>, visited 9 February 2016.

connected to the perhaps more familiar notion of national identity. The populist reading of constitutional identity posits that since the people is present as one, its identity is a given. Its core values are available to anyone who is willing to see them. The characteristics of a people are often backed by (mythical) historical narratives of ancestral greatness. Here, one can think of, for instance, the way in which Hungary's Viktor Orbán (as Prime Minister) tried to trace back the creation of the Hungarian state to the coronation of King (later Saint) Stephen at Christmas 1000 or New Year 1001 and the commemoration of this event during 2000 and 2001.<sup>24</sup>

Since, for a populist, the constitutional identity of a people is something fixed, the task of politics is simply to guard the underlying values of this identity by way of legislation. Here, the Italian party Lega Nord provides a good example with its defence of 'forgotten values' and a 'local identity'.<sup>25</sup> Another example of a typical populist way of grasping identity is provided by Jean-Marie Le Pen, the former leader of the Front National: 'To belong to the French people meant above all being part of "a chain, a line," which connects the present to the past and to the future (...). Citizenship had to "be solicited and merited, if one is not born of French parents" (...). Or, as the party put it, "être Français cela s'hérite ou cela se mérite"'.<sup>26</sup> In general, one could say that populists reject what they perceive as threats to a solid constitutional identity. This is also how I interpret the critical stance of populist parties regarding immigrants, refugees and minorities. Examples include the Flemish party Vlaams Blok with its slogan 'Eigen volk eerst' ('The own people first'),<sup>27</sup> and the Austrian FPÖ with its '*Recht auf Heimat*',<sup>28</sup> among many others.

<sup>24</sup> For an analysis of the heated parliamentary debates on this issue, see B. Fowler, 'Nation, State, Europe and national revival in Hungarian party politics: the case of the millennial commemorations', 56 *Europe-Asia Studies* (2004) p. 57.

<sup>25</sup> See Tarchi, *supra* n. 17, p. 126: 'When the *Lega* did enter the political arena it did so because it had been pushed to enter by the desire to assert those values believed to be rooted in the collective historical memory, but which were neglected or even ridiculed by the political elite. The message expressed in the first *Lega* manifestos and documents was summary, basic and aimed at the man in the street; it appealed to local identity as the basis for reconstructing homogeneous, solid, secure communities free of class discrimination, and with clear, undisputed acknowledgement of a number of interests (and values) common to all their members'.

<sup>26</sup> Betz, *supra* n. 2, p. 130. The quotation is taken from the Front's 1988 election pamphlet 'Pourquoi feraient-ils demain ce qu'ils n'ont pas su faire hier?'.

<sup>27</sup> Betz, *supra* n. 2, p. 137: 'Like the Front National, the Vlaams Blok charged that the threat to national identity was twofold. One stemmed from the growing number of legal and illegal immigrants, the other from the precipitous drop in the birthrate of the Flemish population. Its main slogan "Eigen volk eerst" (The own people first) and the title of the party's 1991 electoral program "Out of Self-Defense" summed up how the party sought to counter these threat. Self-defense meant above all a quick solution to the question of immigration'.

<sup>28</sup> See W. C. Müller, 'Evil or the "Engine of Democracy"? Populism and Party Competition in Austria', in Y. Meny and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave 2002), p. 155 at p. 166: 'The FPÖ stresses the potential conflict between different cultures and claims that



## THE PARADOX OF CONSTITUENT POWER

In the previous section, I have argued that populism implicitly takes up the theory of constituent power. According to this theory, only the people as the bearer of constituent power can give legitimacy to the constitutional order set up by law. This theory of constituent power advocates the primacy of politics over law. Yet not all theories of constituent power are populist. Populism adds a second element: starting from a revolutionary interpretation of this theory, it rejects constraints resulting from the order constituted.

In this section, I will confront this understanding of constituent power with contemporary constitutional theory. I will argue that constitutional theory has convincingly shown that constituent and constitutional power depend on one another, resulting in the paradox of constituent power. In order to grasp the theory of the paradox of constituent power, it is important to keep in mind that this theory rejects two traditional ways of explaining how a constitution is established. Following Hannah Arendt's important work,<sup>29</sup> the German constitutional scholar Christoph Möllers draws a distinction between two constitutional traditions.<sup>30</sup> The two traditions of constitution-making differ fundamentally in what they believe a constitution should do, and what its functions and purposes are. Cutting across the divide between common law and civil law, one may distinguish between a revolutionary and an evolutionary approach. Before discussing their differences, I would like to point out what makes both traditions 'constitutional': both aim to provide a theoretical framework through which the making of a constitution or basic law may be grasped. So each, in its own way, gives us the conceptual tools to understand, explain, predict and normatively value the making of a constitution (including the important question of constitutional authorship). It is these conceptual tools that still form part and parcel of what we call constitutional discourse and constitutional theory.

The revolutionary model, originating in the American and French revolution, takes the founding of a new order as its paradigm and combines this with a radically democratic appeal. As the very beginning of a new order, the constitution also serves as an 'immanent justification': signalling a radical break with what

too many foreigners constitute a danger to Austrian culture. In the most drastic formulation, Andreas Mölzer, currently Mr Haider's cultural adviser, declared that Austria runs the risk of "*Umvolkung*" – that is, the impairment of its ethnic stock, and the FPÖ claims that Austria has gone too far in this direction and has called for a "*Recht auf Heimat*" for Austrian nationals. The party links the foreigner question to issues such as the abuse of welfare provisions and crime'.

<sup>29</sup> H. Arendt, *On Revolution* (Penguin 1963).

<sup>30</sup> C. Möllers, 'Pouvoir Constituant-Constitution-Constitutionalisation', in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Hart, CH Beck, Nomos 2009) p. 169 at p. 170 and further.

preceded it, the constitution contains the principles with which to decide whether something is a constitution in the first place.<sup>31</sup> Casting aside the old regime, the revolutionary model opens up the possibility to the future with the constitution as the supreme law of the new polity.<sup>32</sup>

The revolutionary tradition has always been associated with the notion of constituent power. The notion of *pouvoir constituant* is usually traced back to the works of one of the most eminent figures of the French revolution: Emmanuel Joseph Sieyès, the theoretical mastermind of the law-making potential of the revolution. In his famous pamphlet *What is the Third Estate?*, Sieyès holds that the nation is the supreme source of authority: 'The national will (...) simply needs the reality of its existence to be legal. It is the origin of all legality'.<sup>33</sup> While the nature of constituent power is creative and political, the institutions of the constituted power only have legal power, or competence. So, on the one hand, there is the nation, the subject of constituent power, which itself is not being constituted by law.<sup>34</sup> On the other hand, the powers called into being by the constitution, legislature, executive and judiciary, ultimately derive their power from the nation.<sup>35</sup> By designating the nation as the subject (or bearer) of constituent power, the revolutionary tradition stresses its democratic character. As the supreme law, the constitution, according to the revolutionary tradition, has a higher normativity and needs to be a written and therefore objective document.<sup>36</sup>

The other tradition of conceptualising constitution-making, the evolutionary approach, has its roots in Germany and Great Britain. Its principal aim is to tame politics through law. In other words, this tradition redefines politics as limited government.<sup>37</sup> Hence, its point of view on the constitution is more formal, in the sense that it regards the constitution as a convention on the

<sup>31</sup> Möllers, *supra* n. 30, p. 171: '[C]onstitution becomes an exclusive concept: certain forms of order are now no longer labelled as faulty or wrong constitutions; rather, their claim to be constitutions at all is denied.'

<sup>32</sup> Möllers, *supra* n. 30, p. 172.

<sup>33</sup> E. J. Sieyès, 'What is the Third Estate?' in M. Sonenscher (ed.), *Sieyès: Political Writings* (Hackett 2003) p. 92 at p. 137.

<sup>34</sup> Carl Schmitt famously speaks of the nation's 'formless formative capacity', see C. Schmitt, *Constitutional Theory* (Duke University Press 2008) p. 129.

<sup>35</sup> Sieyès, *supra* n. 33, p. 136.

<sup>36</sup> Möllers, *supra* n. 30, p. 173.

<sup>37</sup> See for instance J. Elster, 'Introduction' in J. Elster and R. Slagstad, *Constitutionalism and Democracy* (Cambridge University Press 1988) p. 1 at p. 2: 'Constitutionalism refers to limits on majority decisions; more specifically, to limits that are in some sense self-imposed'. Or, more recently: Y. Hasebe and C. Pinelli, 'Constitutions' in M. Tushnet et al., *Routledge Handbook of Constitutional Law* (Routledge 2013) p. 9 at p. 12: 'Broadly defined, "constitutionalism" is the practice and method whereby limits on governmental powers are established and maintained. Constitutionalism promotes the rule of law over the rule of men'.

limitation of state power. Hence, the evolutionary approach did not develop parallel to a democratic theory but rather was coupled with the ideas of the rule of law (Britain) and *Rechtsstaat* (Germany).<sup>38</sup> Because the constitution is not seen as the document marking a rupture with the previous order, it only possesses a limited normativity: in the evolutionary approach the constitution becomes identical with ‘society as a whole’ (Germany), or, because of the lack of a single written document, with the ongoing political practice (Britain).<sup>39</sup>

Although Möllers points out that the two traditions do not principally contradict one another, in academic literature attempts have been made to resolve the tensions between the two approaches in favour of one of the two.<sup>40</sup> Populists, as I have argued, can be understood as defending a specific version of the revolutionary approach in which the constituent power of the people is (almost) absolute and can be exercised directly in the polity.

Now, while both traditions seem, at first sight, to be in tension with each other, their differences are only possible because they share a more fundamental underlying presupposition: a strict separation of politics and law. This separation is the result of a dualistic understanding of constituted power and constituent power. It exists in taking law and politics to be two completely separate domains. The traditions part ways at the question of which domain has primacy. In the answer to this question, the evolutionary and the revolutionary traditions mirror each other. While the former takes its starting point from law and thus from the pole of constituted power, the latter passionately defends the primacy of politics and thus constituent power. In either case, one domain is subordinated to the other. As a result, one can argue that both approaches share the same basic model of a dualism of law and politics.<sup>41</sup>

Contemporary constitutional theory takes issue with both approaches by questioning whether the dualist understanding of law and politics is actually tenable in the first place. The dualist understanding cannot make adequate sense of the dynamic relationship between law and politics in constitutional politics. One cannot be reduced to the other. Rather, constituent and constitutional power relate to each other in a paradoxical way. This paradox lies at the very heart of the tensions within the idea of democracy under the rule of law. Emiliós Christodoulidis frames this dispute as the question concerning the relationship between constitutional reason and democratic will: ‘how can we justify our commitment to democracy and thus to the right of a sovereign citizenry to

<sup>38</sup> Möllers, *supra* n. 30, p. 174

<sup>39</sup> Möllers, *supra* n. 30, p. 175.

<sup>40</sup> Möllers, *supra* n. 30, p. 177.

<sup>41</sup> For more on this dualist theory, see L. Corrias, *The Passivity of Law: Competence and Constitution in the European Court of Justice* (Springer 2011), especially Chapter 2.

determine the terms of public life and at the same time curtail the right in the name of constitutional rights?’<sup>42</sup> While it is certainly true that this paradox is most pertinently visible in moments of revolutionary founding, it persists as a constant tension in the polity because the will of the people must ‘be expressed *within* the confines of that [i.e. constitutional] reason’.<sup>43</sup>

In short, the paradox says that both constituent and constitutional power depend on each other. Any constitutional power (e.g. a judge passing a judgment) ultimately acts ‘on behalf’ of the people in the sense that it draws its authority from the people as constituent power. This entails that constitutional power is always dependent on constituent power for its legitimacy. So far, a populist would agree. Thinking through the paradox means taking the next step. The constitutional order is dependent on the constitution and thus requires the act of constitution-making – the act of constituent power – to be legitimate. However, this act, necessarily prior to the constitutional order, cannot claim legitimacy in the terms of the order it founds. Hence, the constitutional order rests on an act which is not constitutional: the founding act falls outside the order founded.

In an intricate reading of the paradox Hans Lindahl has revealed its true dimensions. On the one hand, an act of the people as a constituent power is an act of a collective subject, a ‘We’. However, the people as a collective subject or a unity does not exist prior to this act. Lindahl argues that this ‘invocation of a “We” reveals a fundamental passivity at the heart of political unity: instead of initiating, the collective is initiated by a constituent power’.<sup>44</sup>

On the other hand, in saying ‘We’ the act of constituent power is also an act ‘on behalf of the people, so: ‘whoever exercises constituent power must claim to act in the name of the collective, that is, must claim to act as a *constituted* power’.<sup>45</sup> Only in retrospect, if and only if this act will be taken up and followed by other acts that recognise it as the foundation of a new legal order will it truly count as a constituent (i.e. founding or constituting) act by the people.<sup>46</sup> So, an act of constituent power (e.g. the revolutionary founding of a new legal order) can only

<sup>42</sup> E. Christodoulidis, ‘The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse’, 12 *The King’s College Law Journal* (2001), p. 111.

<sup>43</sup> Christodoulidis, *supra* n. 42, p. 115.

<sup>44</sup> H. Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’, in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008), p. 9 at p. 18

<sup>45</sup> Lindahl, *supra* n. 44, p. 18.

<sup>46</sup> Lindahl, *supra* n. 44, p. 19: ‘if the activity of constituent power discloses an irreducible passivity in political unity, a no less irreducible passivity is embedded in constituent power’s activity. This insofar as this activity only constitutes a polity if taken up again and carried forward by further acts. Thus, an act of constitution-making can only be viewed retroactively – and provisionally – as an act *by* the collective’.

appear authoritative if it manages to successfully link up with what is already considered an authority (i.e. constituted).<sup>47</sup> The paradox is that constitutional power needs constituent power and vice versa. Assigning primacy to one of the two poles is far too simple a picture.

One of the aspects that has been pointed out by several scholars is the temporal dimension of the paradox. Hannah Arendt and Jacques Derrida have, each in their own way, already referred to the strange temporalities and aporias the paradox gives rise to. Arendt has shown how Machiavelli already struggled with the temporal conundrum of foundation and was forced to appeal to a higher, even godly authority in order to legitimise the founding of a new polity. In this regard, she points to the Roman tradition to understand every constitution as a re-constitution.<sup>48</sup> Derrida, in a famous article, has shown how signing a founding document on behalf of a 'We' simultaneously calls this 'We' into being, thus denying that the existence of the people actually precedes its representation.<sup>49</sup> Even if Arendt and Derrida do not explicitly use this terminology, contemporary constitutional theory has shown how these temporal loops are part and parcel of the paradox of constituent power.

Furthermore, the paradox also explains why constituent and constitutional power cannot ever fully coincide. The absorption of the dualism into a monism would suck all life out of the polity. The hiatus between law and politics makes it clear why a perfect polity cannot exist. It gives room for the dynamic interplay between law and politics. In this interplay the notion of the people plays a crucial role, albeit in a different way than populists seem to think. I will address this issue in the next section.

## SOVEREIGNTY AND REPRESENTATION

This brings me to the second part of the implicit constitutional theory of populism: its interpretation of the sovereignty of the people. Populism defends its own version of this doctrine. It holds, as I have shown in a previous section, that the people is a given *unity* and that it is as such *present* in the polity. In this way,

<sup>47</sup> For revolution, see L. Corrias, 'Revolution, Authority and the Institution of Legal Order: Phenomenological Reflections', 100 *Archiv für Rechts- und Sozialphilosophie* p. 295.

<sup>48</sup> Arendt, *supra* n. 29, p. 202.

<sup>49</sup> J. Derrida, 'Declarations of Independence', 15 *New Political Science* (1986) p. 7 at p. 10: "The 'we' of the declaration speaks 'in the name of the people.'" But this people does not exist. They do *not* exist as an entity, it does *not* exist, *before* this declaration, *not as such*. If it gives birth to itself, as free and independent subject, as possible signer, this can hold only in the act of signature. The signature invents the signer. This signer can only authorize him- or herself to sign once he or she has come to the end [*parvenu au vout*], if one can say this, of his or her own signature, in a sort of fabulous retroactivity'.

populism defends a very specific view on political representation in a democracy. Given the presence of the people as a unity, representation merely serves as a tool to give voice to this unity. What I have called a ‘politics of immediacy’ often shows itself in a plea for the means of direct democracy (e.g. referenda): these serve to get confirmation from ‘the people’ for what is, according to the populist, *a fortiori* the only morally right political position.<sup>50</sup> Again, I argue that this aspect of the constitutional theory of populism is not in accordance with contemporary constitutional theory. It fails to take into account the constitutive role of representation in a democracy. Indeed, constitutional theory has convincingly shown that the ideal of the sovereign people goes hand in hand with its representation in the polity and that representation may thus not be reduced to merely a means to give voice to an already present people.

Over the last years, sovereignty has become one of the most discussed themes in legal theory and political philosophy. Especially when it comes to the question of what the concept of sovereignty still means under conditions of increasing globalisation and (in this part of the world) ever deepening European integration, there is a vast amount of literature.<sup>51</sup> For our purposes, we can restrict ourselves to what is known as *internal sovereignty*. This entails that under sovereignty, we understand the highest source of authority within a state, or in the famous definition of Jean Bodin: ‘Sovereignty is the absolute and perpetual power of a commonwealth (...) that is, the highest power of command’.<sup>52</sup> Importantly, already with Bodin, sovereignty appears in a representative structure: the sovereign princes are the greatest on earth ‘after God’.<sup>53</sup> They remain subject to God’s laws.<sup>54</sup> Ever since the works of Hobbes and Rousseau this theological conception of sovereignty has been replaced by a secularised one. Their social contract theories laid the foundations of the modern concept of sovereignty in a democratic society. In a democracy, it is the people that is sovereign.

<sup>50</sup> In this respect, see also J. W. Müller, ‘“The People Must Be Extracted from Within the People”: Reflections on Populism’, 21 *Constellations* (2014) p. 483 at p. 486: ‘populists do not have to be against the principle of representation. In fact, they can positively endorse it, 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’. I am grateful to one of the reviewers of this journal for pointing this out to me.

<sup>51</sup> To name just a few examples: N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999); N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003); R. Rawlings, P. Leyland and A. L. Young (eds.), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013).

<sup>52</sup> J. Bodin, *On Sovereignty* (Cambridge University Press 1992) p. 1.

<sup>53</sup> Bodin, *supra* n. 52, p. 46. See also H. Lindahl, ‘Vorst, op God na. Politieke macht en de symbolisering van soevereiniteit’ [*King, after God. Political Power and the Symbolization of Sovereignty*], 26 *Nederlands tijdschrift voor rechtsfilosofie en rechtstheorie* (1997) p. 122.

<sup>54</sup> Bodin, *supra* n. 52, p. 13 and 76.

Interestingly, the intellectual father of the idea of constituent power, Sieyès, already struggled with the question of how the sovereign nation could appear in the legal order. Contrary to populists, Sieyès did not assume the unproblematic presence of the people or nation. Recall that in his view, the nation is the origin of the legal order: ‘The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law’.<sup>55</sup> Positive laws should be understood as ‘all emanating solely from the nation’s will’.<sup>56</sup> The nation is the source of the legal order.<sup>57</sup> Indeed, precisely because the nation is the origin of the legal order, ‘[e]very nation on earth has to be taken as if it is like an isolated individual outside all social ties or, as it is said, in a state of nature’.<sup>58</sup> This entails that representation performs another function than populists seem to think: the nation as a singular entity, as the sovereign origin of the legal order, cannot itself appear nor act within the polity and thus needs to be represented. These representatives should thus be understood as placeholders acting on behalf and in the name of the nation.<sup>59</sup>

Yet, what about elections? According to a common view, in elections the people itself emerges on the political scene in order to choose its representatives. Universal suffrage is, then, the most eminent way in which popular sovereignty is manifested. While in everyday politics the people is represented, this is surely not the case at those moments when representatives are chosen, so it is argued. In other words, in elections, one would expect the people to appear in all its unity, in all its sovereignty. Elections, or, for that matter, referenda become the democratic moment *par excellence*. Indeed, as one scholar remarks, ‘Popular sovereignty and elections become the new principles that legitimize authority’.<sup>60</sup> In elections, the people, normally absent, becomes present.

But is this really the case? Claude Lefort has pointed to the paradoxical relationship at the heart of elections in modern democracy. He argues that elections do not make the people present at all, at least not as a unity. Lefort holds that something else happens at elections, something that is telling for the very nature of modern democracy: ‘It is at the very moment when popular sovereignty is assumed to manifest itself, when the people is assumed to actualize itself by

<sup>55</sup> Sieyès, *supra* n. 33, p. 136.

<sup>56</sup> Sieyès, *supra* n. 33, p. 136.

<sup>57</sup> As nicely put by Gerhard Hoogers: ‘Where the nation is, the constitution is not; and where the constitution is, where the laws are, the state and all its organs and functionaries, there the nation is not. In other words: the nation transcends the legal order and all it stands for, because the legal order originates in and from the nation’. See G. Hoogers, ‘The Paradox of Politics from a Constitutional Perspective. The Constituent Power of the People and the Representation of the General Will’, 38 *Netherlands Journal of Legal Philosophy* (2008) p. 163 at p. 170.

<sup>58</sup> Sieyès, *supra* n. 33, p. 137.

<sup>59</sup> Sieyès, *supra* n. 33, p. 142. See also Hoogers, *supra* n. 57, p. 170.

<sup>60</sup> L. J. Wintgens, ‘Sovereignty and Representation’, 14 *Ratio Juris* (2001) p. 272 at p. 274.

expressing its will, that social interdependence breaks down and that the citizen is abstracted from all the networks in which his social life develops and becomes a mere statistic. Number replaces substance'.<sup>61</sup>

The analysis of Lefort shows how in modern democracy, unity and disunity, presence and absence are interrelated. In the 'most democratic moment', the people falls apart into a plurality of individuals. Unity dissolves into the aggregation of separate votes; presence and substance give way to anonymity. In short, the people itself remains absent. This absence is a constitutive feature of the people in a democracy. It is characteristic of the way in which power relations are structured, argues Lefort. It is of the greatest importance to understand how democracy does this in a radically different way than the 'ancien régime'. In the latter, the King incorporated power. The King's body unified society and society was understood as a body.<sup>62</sup> Democracy breaks with this configuration. Rejecting the divine legitimation of the 'ancien régime', in a democracy the people holds sovereignty. It entails that, in Lefort's felicitous turn of phrase, 'the place of power is an empty place'.<sup>63</sup> It is symbolically open in the sense that in a democracy power belongs to the people and thus to no one in particular. Unity is thus not a given, as the populist would have it. Rather, it is constituted in the constant interplay of institutions claiming to act on behalf of and thus to represent the people.

Representation plays a crucial role in democratic politics because it denotes the constitutive gap between the distribution of power at any given moment in time and the ideal of popular sovereignty. Democratic politics can only exist because of this gap, because of this symbolically empty place. Populism, on the other hand, can then be understood as an attempt to reoccupy the place of power. Starting from the coincidence of the people with itself, it denies the constitutive role of conflict and the representative character of power claims in a democracy.<sup>64</sup> Repudiating this gap and exercising a politics of immediacy, populism seeks to reincorporate power. Constitutional theory convincingly shows that the unity of the people is nothing more or less than a represented unity. This implies both that representation is constitutive for politics and that every claim to unity is necessarily a political claim, and as such remains contestable.

<sup>61</sup> C. Lefort, *Democracy and Political Theory*, transl. David Macey (Polity Press 1988) p. 18-19.

<sup>62</sup> For an overview of this medieval doctrine, the *locus classicus* remains E. H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press 1998).

<sup>63</sup> Lefort, *supra* n. 61, p. 17.

<sup>64</sup> In this sense, populism is not unlike totalitarianism in its discourse, as Rummens and Abt argue on the basis of the work of Lefort: Abts and Rummens, *supra* n. 3. See also Müller, *supra* n. 50, p. 487: 'while populism does not oppose the principles of representation and the practices of election, it necessarily has to deny any kind of pluralism or social division: in the populist imagination there is only the people on the one hand and, on the other hand, the illegitimate intruders into our politics, from both above and from below, so to speak'.



## CONSTITUTIONAL IDENTITY AS COLLECTIVE SELFHOOD

The third element of a populist constitutional theory is its understanding of constitutional identity. By this notion, I refer to the identity of a collective which understands itself as a political unity. Populism usually depicts constitutional identity as something fixed once and for all, pre-determined before the enactment of a legal order and stored away, untouchable by the ravages of time. To grasp that the populist logic relies upon a very limited understanding of constitutional identity, I would like to turn to the work of constitutional scholar Michael Rosenfeld. Making an analogy with personal identity, he explains how one can understand constitutional identity in two distinct ways: 'Self-identity can either connote sameness or selfhood. I can recognize myself either because I look the same as I did yesterday or because in spite of all the changes which I have experienced since childhood – I no longer look the same, think the same, feel the same, etc. – I have endured as a single self that is distinct from all other selves. Or, in other words, I have remained myself as against all others. Analogously constitutional identity can be constructed on the basis of sameness or of selfhood, or more precisely, based on dynamic interaction between projections of sameness and images of selfhood'.<sup>65</sup>

With the help of the example of constitutional interpretation, Rosenfeld explains how sameness and selfhood can sometimes completely coincide, whereas they may contradict each other on other occasions.<sup>66</sup> Although I do not apply the concept of constitutional identity to a text but rather to a group or collective, the example may still be illuminating in order to grasp the dialectic between sameness and selfhood. The text of a constitution often remains the *same*, yet interpretations of this text may differ. When an interpretation remains very close to the literal text and its standard reading (as in the case with originalism), the interpretation has not changed the *selfhood* of the constitution. In other cases where the interpretation is creative, giving a new meaning to the constitution, it is still an interpretation of the same text but one which has changed the constitution's identity in the sense of selfhood. Of course, this is not a question of either/or but rather a continuum.

In order to grasp what this distinction can bring us in terms of a better understanding of constitutional identity and populism, one ought to go back to the work of Jean-Jacques Rousseau. He gives us the blueprint of political legitimacy in modernity by formulating the basic principle of democracy under

<sup>65</sup> M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) p. 27. The distinction between selfhood and sameness was introduced by the French philosopher Paul Ricoeur, see P. Ricoeur, *Oneself as Another* (University of Chicago Press 1994) p. 117 and further.

<sup>66</sup> Rosenfeld, *supra* n. 65, pp. 27-28.

the rule of law.<sup>67</sup> As he phrases it, laws are only laws ‘when the whole people decrees for the whole people’.<sup>68</sup> As Bert van Roermund has argued, there are at least two different ways in which one can understand Rousseau’s phrase: in terms of sameness and in terms of selfhood. The most common reading of Rousseau takes identity as sameness. It says that when the whole people rules the whole people, *the same* people are both ruling and being ruled.

Populists, too, understand constitutional identity in the sense of sameness. However, they do not only claim that both authors and addressees of the constitution should be understood as one and the same (which is something most democrats also do). Instead, the populist understanding of the identity of the people is reductive in the sense that it tends to narrow down identity to sameness and radicalise this notion. Character is the paradigm case of identity in terms of sameness: it points to a ‘set of lasting dispositions by which a person is recognized’.<sup>69</sup> Now, populists speak of character in a very specific way. In their vocabulary, constitutional identity becomes the national character of a people, formed of dispositions which are not only lasting but which also *ought* to last because of the normative force populists attach to a certain religion, history, culture etc. One should thus understand the sameness of the people as a substantial identity which must be protected from change. Indeed, the typical populist reading of identity in terms of sameness comes with (dubious) normative connotations, like the alleged purity of a national identity and the appointment of elements which are (supposedly) hostile to and thus a threat to this purity.

An alternative view may again take its cue from Rousseau. Van Roermund argues that reading Rousseau’s phrase through an understanding of identity as sameness makes no sense, mainly because

this reading frustrates the very point that the idea of popular sovereignty is attempting to make: to give an account of freedom in society. For what constitutes freedom, first and foremost, is the possibility, for a people P, to act in pursuit of what it determines as its *own* interests, not the condition that the interests of its rulers are *the same* as the interests of its ruled subjects.<sup>70</sup>

The notion of something which is my ‘own’ refers to the other sense of identity: selfhood. Indeed, Rousseau’s phrase can also be read in a different way: ‘We, the people, rule ourselves’.<sup>71</sup> In this regard, one may speak of constitutional identity as

<sup>67</sup> B. van Roermund, ‘First-Plural Plural Legislature: Political Reflexivity and Representation’, 6 *Philosophical Explorations* (2003) p. 235 at p. 236.

<sup>68</sup> J.-J. Rousseau, ‘The Social Contract’ in V. Gourevitch (ed.), *Rousseau: The Social Contract and other later political writings*, (Cambridge University Press 1997) p. 39 at p. 67.

<sup>69</sup> Ricoeur, *supra* n. 65, p. 121.

<sup>70</sup> Van Roermund, *supra* n. 67, p. 237.

<sup>71</sup> Van Roermund, *supra* n. 67, p. 237-238.

collective selfhood: a first-person plural of a 'We' in legal and political discourse.<sup>72</sup> In a democracy, this is a 'We, the People'. It is this 'We' that is central to politics: 'This process of setting the self of a first-person plural is at the bottom of politics. To exercise (any form of) power with an appeal to a first-person plural that is for itself a unity (under construction) is to exercise political power'.<sup>73</sup>

I would add that 'under construction' means here: formed in the dialectical (i.e. temporal) ongoing process of identity formation. This entails, as I mentioned before, that a complete account of collective or constitutional identity takes into account both sameness and selfhood. Thus, in populism's reading of constitutional identity lies some truth: one cannot make sense of identity without a set of lasting dispositions. However, populism makes use of a radicalised and reductive reading of constitutional identity. With their often extremely simplistic picture of what constitutes the identity of a people, populists reduce constitutional identity to a specific form of sameness. A complete account of collective identity would, on the other hand, take both sameness and selfhood and the dialectic – the 'dynamic interaction' of which Rosenfeld speaks – between the two forms of identity seriously.

The dynamics between sameness and selfhood come to the fore in the way in which the constitutional identity of the people is not a pre-given of democratic politics: it is exactly what is constantly at stake. Even in a democracy, inclusion and exclusion cannot be avoided because democratic politics also depends on the invocation of a *bounded* 'We'. However, the boundaries of the 'We' are not drawn once and for all, its identity is never fixed, the self of *self*-legislation remains to be formed by and in the legislation it gives itself. The legal institutionalisation of the sensitivity for this dialectic can be found in constitutional democracy's insistence on both majority rule and rights of minorities. The latter should not be understood as group rights but rather as the individual rights of a member of the minority to try to become the majority. Understood in this specific way, the rights of minorities are constitutive for the very idea of democracy, as Hans Kelsen has forcefully argued.<sup>74</sup> He has pointed out that since we are born in an order which was not made by ourselves, the majority principle forms the easiest way to change that order, and it can thus be understood as the closest approximation

<sup>72</sup>I draw here on the understanding of collective selfhood as developed by Bert van Roermund and Hans Lindahl, see e.g. H. Lindahl, *Fault Lines of Globalization: Legal Order and a Politics of A-Legality* (Oxford University Press 2013) and B. van Roermund, *Legal Thought and Philosophy: What Legal Scholarship is About* (Edward Elgar Publishing 2013).

<sup>73</sup>Van Roermund, *supra* n. 67, p. 248.

<sup>74</sup>For my reading of Kelsen I am indebted to Q. L. Hong, *The Legal Inclusion of Extremist Speech* (Wolf Legal Publishers 2005), which contains an incisive analysis of Kelsen's theory of democracy with special attention for the question of hate speech and the enemies of democracy.

of freedom.<sup>75</sup> However, where there is a majority, there is also necessarily a minority, and especially for the members of this group basic rights and freedoms were called to life.<sup>76</sup> Democracy under the rule of law, rejecting a transcendent claim to the truth and embracing a form of relativism, gives minorities the chance to become the majority.<sup>77</sup> In other words, through the protection of their rights, constitutional democracy also gives minorities the opportunity to voice their vision of the 'We', to formulate their counter-narratives of what binds us together as a political unity, to make evident what escapes a fixed and pre-given notion of identity. Understood in this specific way, as *political* rights, the rights of minorities thus appear as the primal legal expression of the way in which constitutional identity needs to be developed *over time*. While populists have the tendency to diminish the value of minority rights and reject the voice of minorities in the determination of the constitutional identity of the people by proposing another reading of democracy (one which relates to their understanding of popular sovereignty and constituent power discussed above), Kelsen has pointed out the important role of these rights in any democracy: their primal function is to grant minorities the opportunity to defer any fixation of the identity of the people. In contrast to what populists think, the rights of minorities are thus a crucial and necessary element of democracy. They form the institutionalised recognition of the fact that constitutional identity is not a truth on which a polity is built but rather a truth to be built by the polity in its legislation, a truth-to-be-made.<sup>78</sup>

<sup>75</sup> H. Kelsen, 'On the Essence and Value of Democracy', in A. J. Jacobson and B. Schlink (eds.), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) p. 84 at p. 86: 'Generally, one is born into a finished state order, in whose creation one did not take part, and which one therefore approaches from the start as an alien will. Only the *furtherance* and *modification* of this order is at issue. From this point of view, however, the principle of absolute (and not super) *majority* represents the *relatively closest approach to the idea of freedom*'.

<sup>76</sup> Kelsen, *supra* n. 75, p. 100: 'The *parliamentary majority principle* is perfectly suited to preventing class rule. It is telling that experience has shown it to be compatible with *protection of minorities*. For the concept of a majority assumes by definition the existence of a *minority*, and thus the *right of the majority* presupposes the *right* of a minority to exist. From this arises perhaps not the necessity, but certainly the possibility, of *protecting* the minority from the majority. This *protection of minorities* is the essential function of the so-called *basic rights* and *rights of freedom*, or *human and civil rights* guaranteed by all modern constitutions of parliamentary democracies'.

<sup>77</sup> Kelsen, *supra* n. 75, p. 108: 'The rule of the majority, so characteristic of democracy, is distinguished from every other sort of rule in that it not only – according to its innermost essence – conceptually requires an opposition, the minority, but also recognizes and protects it politically through basic rights and the principle of proportionality. (...) One who appeals only to earthly truth, whose social goals are steered only by human knowledge, *can hardly justify the coercion inevitable for implementing the social goals except through the agreement of at least the majority of those for whom this coercive order is supposed to be beneficial*. And this coercive order may be constituted only in such a way that the minority, which is not absolutely wrong, absolutely without rights, may at any time itself become a majority'.

<sup>78</sup> M. Merleau-Ponty, *Adventures of the Dialectic* (Northwestern University Press 1973) p. 200.

## CONCLUSION

With this article, I have taken a first step in opening up the concept and practice of populism as a research object for constitutional theorists. For this purpose, I have first reconceptualised populism as a constitutional theory consisting of three coherent claims concerning the nature of constituent power, the sovereignty of the people and constitutional identity. I have subsequently argued that on each of these three claims, contemporary constitutional theory takes issue with the claims of populists, showing that their understanding is limited, to say the least. As I have mentioned, this is only a first step. More research is necessary from the constitutional perspective sketched above, and taking into account both specific case studies and specific constitutional contexts (relevant legal documents and the unwritten practices of constitutional politics) of a polity. In this way, constitutional theorists and constitutional lawyers may sharpen their conceptual framework to understand and (when necessary) argue against populism.

