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The complacency of legality: Constitutionalist
vulnerabilities to populist constituent power

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**THE COMPLACENCY OF LEGALITY: CONSTITUTIONALIST
VULNERABILITIES TO POPULIST CONSTITUENT POWER**

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Abstract

This essay explores the concept of constituent power in the light of recent constitutional developments in countries with populist governments. It attempts to outline and contrast conceptions of constituent power as inherent in constitutionalist and populist thinking, respectively. While constitutionalists draw heavily upon Kelsenian normativism in framing the way political power is generated, populists juxtapose this with a concept of constituent power that is inspired by Carl Schmitt's 'decisionist' view. While constitutionalists stress the self-contained nature of the law, populists challenge this by drawing attention to the necessity for the social embeddedness of any legal order. In doing so, populists expose a core tension inherent in constitutionalism: *How do constitutionalists reconcile their democratic aspirations with the simultaneous preclusion of certain political choices from the democratic realm?* Populists, it will be argued, can attack constitutionalism because of the deficient conception of constituent power that underlies the latter. Where public law is being challenged by populists, it can at some point no longer rely on its own force to defend itself. Its authority needs to be re-established from an extra-legal, pre-positive perspective. In an era of political populism, the role of constitutionalist public law is thus to function as a discourse that can challenge populism by means of the powerful reasons that inhere in the former.

Keywords

populism, constitutionalism, constituent power

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Introduction

Political populism appears to be omnipresent nowadays. From Viktor Orbán's pledge to 'build an illiberal state' in Europe¹ and Geert Wilders' and Marine Le Pen's aspirations to dismantle the European Union, to Narendra Modi in India and Rodrigo Duterte in the Philippines, everywhere populists are challenging constitutional democracy. While the bulk of academic discussion of populism has taken place in political science, the legal sciences, and especially constitutional theory, have important contributions to make to the issue.

This essay will attempt to provide such a contribution, in inquiring about the role that public law, as liberal constitutionalism², has in an era of political populism. While populism, as noted above, is a global phenomenon, this essay will focus on populism in Europe, utilising Hungary and Poland (and, to some extent, Turkey) as examples.

In a recent side note, Martin Loughlin identified "three main strands" of public law, namely, the laws concerning "the acquisition and generation of political power [...] the institutionalisation of political power, and [...] the exercise of political power".³ This essay will implicitly structure itself along these three strands, albeit in reverse order. Part 2 will unfold a definition of political populism in Europe and shortly address the 'third strand' of public law, the exercise of political power. Part 3 will illustrate how populists are more generally challenging the authority of public law and address the institutionalisation of political power. However, the answers found in either section will be found to fall short of the question. Populism, it will be concluded, attacks public law at its root, at its conception of constituent power and thus of the acquisition and generation of political power. Part 4 will address this by contrasting the normativist and decisionist conceptions of constituent power implicit in constitutionalism and populism respectively. Populists, it will be argued, can attack constitutionalism because of the deficient conception of constituent power that underlies the latter. Part 5 will develop the final thrust of the argument: It will be concluded that where public law is being challenged by populists, it can at some point no longer rely on its own force to defend itself. Its authority needs to be re-established from an extra-legal, pre-positive perspective. In an era of political populism, the role of public law is thus to function as a discourse that can challenge populism by means of the powerful reasons that inhere in the former.

Populist politics in Europe

Populism is a political concept and thus must be defined politically. A prominent definition characterises populism as

a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, 'the pure people' versus 'the corrupt elite', and [...] argues that politics should be an expression of the *volonté générale* [...] of the people.⁴

¹ Honor Mahony, 'Orban wants to build "illiberal state"' (28 July 2014) *euobserver.com*, retrieved from <https://euobserver.com/political/125128>.

² Some might criticise this hasty equation as prejudiced and oversimplifying. However, I have decided to work with this normative conception of public law. A different approach would have amounted to an explication of public law from a populist perspective – a task that I would rather leave to the populists themselves.

³ Martin Loughlin, 'On Constituent Power' in Michael W. Dowdle & Michael A. Wilkinson, *Constitutionalism beyond Liberalism* (Cambridge University Press 2016), at 156.

⁴ Cas Mudde & Cristóbal Rovira Kaltwasser, *Populism in Europe and the Americas: Threat or Corrective to Democracy?* (OUP 2012) 8.

Populism is "thin-centered" in that it applies a very skeletal conceptual framework and usually attaches itself to thicker "host ideologies", such as nationalism or socialism.⁵ It is thus not necessarily a right-wing ideology as is mostly prominent in European politics, but takes various forms and political leanings around the world. What unites most populists, though, is that they lay an exclusive moral claim to representation of 'the people' and neatly frame all criticism directed against it as elitist.⁶ This "claim to represent the real or common people and to know their true interests"⁷ is arguably the central tenet of populism.

In Europe, many iterations of populism are "exclusionary"⁸ in that they are attached to nationalist, far-right host ideologies. The central tenet of this 'exclusionary' populism is that 'the people' are under attack from a global elite that allegedly attempts to undermine their national and cultural identity through immigration, Europeanisation and globalisation. They accordingly advocate political platforms pursuing the curtailment of rights, such as freedom of religion, the right to asylum, or minority rights.

One might already stop here to give what is ultimately a shallow answer to the question at hand: Where populists attempt to erode rights, the role of public law is to exercise one of its 'normal functions', namely constraining the exercise of political power. Constitutionalist public law scrutinises political power through the exercise of practical reasoning and checks political action for conformity with constitutionally entrenched rights. To stop here, however, would ultimately mean to forgo the question, since the question would then not be answered with respect to populism, as defined above, but with respect to the 'host ideology'. Neither should the question of populism be conflated with questions concerning judicial review and its merits.⁹ There is a much deeper sense in which populism stands fundamentally at odds with constitutionalist public law.

Populism and the eroding authority of public law

Not only are populist platforms often at odds with constitutionally entrenched rights, populists also reject the constraints on political power that emanate from these rights: Populism rejects constitutionalism. Populism "deems that nothing supersedes the general will of the people".¹⁰ Especially the power of courts is a thorn in the side of many populists. They brand courts as "enemies of the people"¹¹ and lash out against "unelected judges" who "[overstep] their authority".¹² The populist conception of 'popular sovereignty' favours a "politics of immediacy"¹³ unmediated by institutions that might interfere with the

⁵ *ibid* at 3.

⁶ See Jan-Werner Müller, "Populist Constitutionalism: A Contradiction in Terms?" (2016, unpublished manuscript), retrieved from: www.law.nyu.edu/sites/default/files/upload_documents/JWMueller%20-NYULaw-Populist%20Constitutionalism.pdf.

⁷ Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (2016) 12 *EUConst* 6, at 11.

⁸ See Cas Mudde & Cristóbal Rovira Kaltwasser, 'Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America' (2013) 48 *Government and Opposition* 147-174.

⁹ Müller, at 2.

¹⁰ Cas Mudde, 'Are Populists Friends or Foes of Constitutionalism?' (2013) *Foundation for Law, Justice and Society Policy Brief*. Retrieved from www.fljs.org/sites/www.fljs.org/files/publications/Mudde_0.pdf.

¹¹ James Slack, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' (3 November 2016) *Daily Mail Online*. Retrieved from <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>

¹² James Chapman, 'Day we stood up to Europe: In an unprecedented move, MPs reject European court's ruling that prisoners must get the vote' (11 February 2011) *Daily Mail Online*. Retrieved from <http://www.dailymail.co.uk/news/article-1355640/Prisoners-vote-MPs-reject-European-courts-ruling.html>.

¹³ Corrias (n 7) at 19.

popular will. Parliamentary representation is deemed legitimate only insofar as it corresponds with what is deemed the *volonté générale*.¹⁴ While it has been noted that, in practice, populists "have an opportunistic approach towards constitutionalism"¹⁵, selectively endorsing and rejecting aspects of constitutionalism, such a reading makes only little sense from a legal perspective. From a legal perspective, the only conclusion can be that populists do not accept the authority of law.

Recalling Raz' conception of authority, authority can be deemed legitimate under two conditions. The first condition (the *normal justification condition*) is that "the subject would better conform to reasons that apply to him anyway [...] if he intends to be guided by the authority's directives than if he does not".¹⁶ The second condition (the *independence condition*), in short, states that "authority is legitimate only where acting by oneself is less important than conforming to reason".¹⁷

One can see how populists would reject these conditions with respect to public institutions. Where these institutions' directives are at odds with the general will, they would maintain that 'acting by oneself' supersedes the reason at hand – in this case, constitutional legality. Constitutional legality, then, is neither a 'reason that applies anyway' since the 'general will', in the view of populists, takes precedence. Populists do not deem the authority of public law legitimate, because in their view, the popular will is prior to everything, even the constitution. In this sense, populism is not politics for the people as the constituted power, but in an unmediated relationship with the *pouvoir constituant*.¹⁸ The result is that the constitution is being politicised, becoming a political topic almost like any other. Where public law used to be the frame for political action, it is now part of the canvas.

Accordingly, populists have, where able, pursued aggressive constitutional politics. When *FIDESZ* came to power in Hungary in 2010, they immediately started drafting a new constitution that was adopted only one year later. Shortly afterwards, the Hungarian parliament passed an amendment to the constitution barring the Constitutional Court from substantially reviewing constitutional amendments. As long as *FIDESZ* had a parliamentary supermajority, they could enact any law simply by amending the constitution, which they repeatedly did.¹⁹

The Polish *PiS* government, albeit lacking the constitutional majority *FIDESZ* had until 2014, has nonetheless "embarked on a constitutional revolution under the cloak of statutory revision and piecemeal tinkering".²⁰ In 2015, *PiS* unconstitutionally replaced three judges on the Polish Constitutional Tribunal by 'overwriting' the appointments taken by the Sejm prior to the election. Even though the President of the Constitutional Tribunal has refused to admit these "anti-judges"²¹ to sit with the Chamber, the President has since been replaced and the three have subsequently taken to the bench. The government

¹⁴ Müller (n 6) at 11.

¹⁵ Cristóbal Rovira Kaltwasser, 'Populism vs. Constitutionalism? Comparative Perspectives on Contemporary Western Europe, Latin America, and the United States' (2013) *Foundation for Law, Justice and Society Policy Brief*. Retrieved from www.fljs.org/sites/www.fljs.org/files/publications/Kaltwasser.pdf, at 1.

¹⁶ Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2005) 90 *Minn. L. Rev.* 1003, at 1014.

¹⁷ *ibid* at 1015.

¹⁸ Corrias (n 7) at 9-10. See also Mudde & Rovira Kaltwasser, who write: "[P]opulist actors see 'the people' as an active entity, or [...] the *constituent power*, that is, the main actor of a democratic regime when it comes to (re)founding and updating the higher legal norms and rules that regulate the exercise of power", n 4 at 208.

¹⁹ For an overview, see Kriszta Kovács & Gábor Attila Toth, 'Hungary's Constitutional Transformation' (2011) 7 *EuConst* 183-203.

²⁰ Tomas Tadasz Koncewicz, 'Constitutional Capture in Poland 2016 and Beyond: What is next?' (19 December 2016) *VerfBlog*, retrieved from <http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/>.

²¹ Marcin Matczak, 'An Eye for an Eye: Law as an Instrument of Revenge in Poland' (8 March 2017) *VerfBlog*, retrieved from <http://verfassungsblog.de/an-eye-for-an-eye-law-as-an-instrument-of-revenge-in-poland/>.

furthermore refuses to publish judgments that it deems "vitiating by procedural errors and lack[ing] legal basis".²²

Populists do not deem the authority of public law legitimate because they believe that the mandate of the 'general will' should supersede considerations of constitutional legality. Accordingly, public law, which is supposed to regulate the exercise of political action, is drawn into the political sphere through aggressive constitutional politics, as illustrated by the examples of Hungary and Poland. The question that arises, then, is: Can public law somehow maintain its authority so that it may continue to exercise what we coined its 'normal function'?

A note on Turkey and constitutional eternity

It seems impossible for constitutionalism to simply 'assert itself' where there are no institutions committed to it, or, more generally speaking: where there is too big a rift between constitutional text and constitutional subject. Countries like Germany and (ironically) Turkey have attempted to fortify their constitutional order against those who wish to undermine it from within through constitutional eternity clauses²³ as well as doctrines of 'militant democracy'²⁴, restricting freedom of speech and banning parties that wish to undermine this order. But, as the recent referendum in Turkey has shown, the promise of the eternal constitution is one that might be in vain. Eternity clauses may protect text, but they cannot protect social and political reality. The idea that public law can constrain politics can only work if politics is willing to be thus constrained. What differentiates Germany from Turkey in this respect is that Germany has a 'constitutional culture', a *Verfassungspatriotismus*²⁵, which anchors constitutional principles in society, while Turkish constitutionalism had to be lifted from its own grave in almost every decade of its history.²⁶ The current Turkish Constitution of 1982 has arguably been in a legitimacy crisis from soon after its inception.²⁷ The precariousness of the Turkish constitutional trajectory, in combination with Tayyip Erdoğan's increasingly black-and-white post-coup populist rhetoric, are arguably central factors that opened the gap for the introduction of the new 'presidential' system. Where public law has been politicised, as in Turkey, but also as in Poland and Hungary, it has been removed from the safe of constitutional entrenchment, and there is no simple 'constitutional fiat' it could rely on in order to assert itself.

This is problematic for lawyers, because lawyers love thinking in terms of legality. They take comfort in the "legal [myth] that an answer to any issue can be found in the law".²⁸ Accordingly, they take the law as a given and presume the existence of the constitution as the most natural thing in the world. However, as the previous section has shown, constitutions cannot be taken for granted. Where populism

²² Konzewicz, n 20.

²³ Art. 79(3) of the *Grundgesetz* bars all constitutional amendments that would alter the federal structure of the German state, the entrenchment of the principle of human dignity (Art. 1), and the democratic and social nature of the German state as defined in Art. 20. Similarly, Art. 4 of the Turkish Constitution protects the republican nature of the Turkish state and its characteristics as a "democratic, social, and secular state governed by the rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble" (Art. 2) as well as the territory, flag, language, and capital of the state (Art. 3).

²⁴ For an overview over the concept, see Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld and Andrés Sájo, *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1253-1268. See also Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 3 *The American Political Science Review* 417-432.

²⁵ For a general overview of the concept, see Jürgen Habermas, 'Appendix II: Citizenship and National Identity' in *Between Facts and Norms* (MIT Press 1996) 491-515.

²⁶ For a history of military coups in Turkey from a constitutional law perspective, see Ozan O. Varol, 'The Turkish 'model' of civil-military relations' (2013) 11 *ICON* 727.

²⁷ See Aslı Bâli, 'Shifting into Reverse: Turkish Constitutionalism under the AKP' (2016) 19 *Theory & Event* (Issue 1 Supplement), retrieved from <https://muse.jhu.edu/article/610221>.

²⁸ Martin Loughlin, *The Idea of Public Law* (OUP 2004) 50.

erodes their authority, they often fail to bridge the gap between validity and effectiveness, between normativity and facticity. Constitutions –as constitutional text – thus do not seem to be a sufficient scope for investigating the question at hand. It appears one must move beyond (or *before*) the constitution to the concept of constituent power.

The politics of constituent power: Schmitt and Kelsen in Budapest

Constituent power is what makes the constitution. Because there is no unified conception of constituent power, two implicit assumptions that were made throughout the previous sections need to be explicated and discarded: Firstly, the equivalence between 'constitutionalism' and 'public law' that was made is void outside the specific constitutional frame. Secondly, the assumption that there is a neat separation between the 'legal' and the 'political' is equally void where there is no constitution to delimit the two from one another.

The constitutionalist and the populist conceptions of constituent power are fundamentally different from one another. And, as I will argue, the reason constitutionalism is so vulnerable to populism lies in its conception of constituent power and the real implications it had on the development of constitutional law in Europe. Public law (in our prior definition as constitutionalism) can only fulfil its 'normal function' and (re)establish authority if it recognises the weaknesses in its conception of constituent power.

Normativism, constitutionalisation, and the complacency of legality

Probably the best starting point from which to understand *normativism*, the constitutionalist conception of constituent power, is Kelsen's *Pure Theory of Law*. For Kelsen, "legal science is a science of norms".²⁹ As such, the law is strictly confined to the sphere of *Sollen* ("ought"), because, in keeping with David Hume, no *ought* can be logically derived from an *is*. The law thus presents itself as a self-contained system of norms deriving their authority from a higher norm, thus constructing a hierarchy.³⁰ The ending point of the hierarchy, where "the chain of authorization runs out"³¹ is where Kelsen locates the *Grundnorm* (basic norm): the fundamental norm from which all other norms are derived, but which itself is not derived from any other norm. The *Grundnorm* is the "hypothetical foundation" of the legal system upon which the validity of all subsidiary law depends.³² The existence of the *Grundnorm* is simply presupposed, because "it does not make sense to ask when it was created, or by whom, or how. These categories simply do not apply to it".³³ The question of its origin is one that goes beyond the ambit of the legal sciences: "Constituent power, the will that makes the constitution, is for Kelsen a political and not a legal issue".³⁴

This leads us to the *normativist* conception³⁵ of constituent power: Once an order is constituted, once a basic norm is established, the question of constituent power vanishes. Norms derive their validity from

²⁹ Riccardo Guastini, 'Normativism or the Normative Theory of Legal Science: Some Epistemological Problems' in Stanley L. Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon 1999), at 317.

³⁰ Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the *Reine Rechtslehre* or *Pure Theory of Law** (Clarendon 1997), at 63-66.

³¹ Martin Loughlin, 'The concept of constituent power' (2013) 13 *European Journal of Political Theory* 218, at 222.

³² Kelsen (n 30) at 57.

³³ Joseph Raz, 'Kelsen's Theory of the Basic Norm' in Paulson (n 29) at 50-51.

³⁴ Martin Loughlin, 'On Constituent Power' in Dowdle/Wilkinson (n 3) at 157.

³⁵ It is worth mentioning that normativism is not limited of positivist conceptions of law. David Dyzenhaus, for instance, legitimises the authority of law with its inherent rationality, based upon the natural force of the principle of legality, rather than presupposing the existence of a *Grundnorm*. See generally, David Dyzenhaus, 'The Politics of the Question of Constituent Power' in Martin Loughlin & Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007).

other norms, and anything that stands outside the system of norms is incapable of affecting this system. Normativism "fashions itself on the autonomy of legal and constitutional ordering".³⁶ Constituent power, for normativists, is not much more than a myth³⁷; it is akin to the unmoved mover or the big bang³⁸ of a legal system. It must have been there, but that is all there is to it. What matters is what it set in motion.

Within this conception of constituent power, even new constitutions are always founded on and derive their legality from prior constitutions. The German *Grundgesetz* and its intrinsically Kelsenian conception of constituent power illustrate this well: Article 146, the final Article of the *Grundgesetz*, states that the *Grundgesetz* will lose its validity on the day the German people decide on a new constitution. Constituent power is thus 'captured' within constituted power. A prevalent interpretation goes even further in arguing that the German people's constitution-making power under Article 146 GG must be subject to the constraints of the eternity clause under Art. 79(3) GG. Essential elements of a future constitution are thus already 'constituted' within the existing order.³⁹

The normativist conception of constituent power links up with post-war European constitutionalism in that the latter strived to 'lock away' certain parts of public life from the political sphere by framing them as constitutional. The necessary precondition for this was to prevent the constituent power from "[reasserting] itself from within the constitutional order".⁴⁰ This required eroding the concept of constituent power as far as possible in order to replace "a constitutionalism based on constituent power with one founded on *legality*".⁴¹

Normativism can be regarded as the basis of the processes of constitutionalisation⁴² that have taken place over the past decades. The positivisation of rights and the establishment of the European transnational order are the two most eminent examples of these processes. The positivisation of rights in national constitutional orders after World War II, a reaction to the horrors of totalitarianism, was part of the project to remove from the political sphere those parts of public life that were deemed 'untouchable'. What Loughlin coins the "rights revolution"⁴³ is the judicial unravelling of these rights as abstract norms into concrete legal rules which 'constitutionalise' ever larger parts of the public sphere.⁴⁴ Similarly, the Europeanisation of the public sphere has taken place by judicial rather than democratic or political means; by means of the rights jurisprudence of the European Court of Human Rights, on the one hand, and through the 'constitutionalisation' of the European Communities by the European Court of Justice on the other hand. Especially the latter provides a vivid example of how far judicial law-making constitutionalised the European order, through the development of the doctrines of supremacy and direct effect, and the Court's self-empowerment through the back door to conduct *de facto* judicial review of national legislation.⁴⁵

Normativism is the conceptual foundation for these developments. By framing issues as regulated by constitutionally sanctioned rules, they could be safely and justifiably withdrawn from the ambit of

³⁶ Loughlin, 'On Constituent Power' n 3 at 152.

³⁷ *ibid* at 157.

³⁸ See also Tony Honoré, 'The Basic Norm of a Society' in Paulson (n 29) who makes the same comparison at 101-102.

³⁹ See generally, Christoph Möllers, 'We are (afraid of) the people: Constituent Power in German Constitutionalism' in Martin Loughlin & Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007) 87-107.

⁴⁰ David Dyzenhaus, 'The Politics of the Question of Constituent Power' *ibid* at 129.

⁴¹ Michael A. Wilkinson, 'The Reconstruction of Post-War Europe: Liberal Excesses, Democratic Deficiencies', in Dowdle/Wilkinson (n 3) at 43.

⁴² Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner & Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010).

⁴³ Loughlin, *Idea of Public Law* (n 28) at 125-128.

⁴⁴ *ibid* at 127.

⁴⁵ For an account of the court-driven constitutionalisation of the EU, see G. Federico Mancini, 'The Making of a Constitution for Europe' (1989) 29 CMLRev 595-614.

democratic decision-making. Where constituent power has vanished, there is nothing but the authoritative legal order and the rules that emanate from it. Where the authority of law was presumed based on the legal system's intrinsic *ought* qualities, liberal constitutionalist tenets could be "presented as a meta-theory which establishes the authoritative standards of legitimacy for the exercise of public power wherever it is located".⁴⁶ Constitutionalist norms have legitimacy "not because they have been authorised by a people but because of the self-evident rationality of their claims".⁴⁷

One can see how the normativist conception would run into problems when confronted with claims of democracy or 'popular sovereignty'. Normativism diminishes the need for constituted order to be somehow democratically founded. Democracy cannot step outside the frame of the law and exercise constituent power, because constituent power, through the normativist lens, has vanished once an order is constituted. The process of constitutionalisation, enabled by a normativist conception of constituent power, further exacerbates this tension. In fact, one cannot help but think that constitutionalisation is the result of a somehow harboured fear of democracy revolting against the flourishing of liberal constitutionalism. Lon Fuller notes, concerning some of the provisions included in post-war constitutions, that "one suspects that the reason for their inclusion is [...] a fear that they would not be able to survive the vicissitudes of an ordinary exercise of parliamentary power".⁴⁸ Similarly, European integration through law might have simply been a comfortable way to circumvent democratic procedure and "a masterly and opportune substitute for a real constitution [...] a convenient expedient for politics".⁴⁹

There is a complacency in the legality-based normativist axiomatic that can be easily exploited. If previously political issues could be constitutionalised, who is to say that the reverse is impossible? The idea that, by framing certain parts of public life as constitutional, they could be entirely locked away from the reach of politics is naive and formalistic. To use the words of Martin Loughlin, the consequence of constitutionalisation is that "political critique of law can no longer come mainly from the outside; the moralization of law means that political critique must also come from within".⁵⁰ Populists can exploit this complacency of normativism by juxtaposing a Schmittian, *decisionist* conception of constituent power.

Populism, Schmitt, and the second coming of constituent power

For Carl Schmitt, Kelsen's ideological adversary, constituent power could never be based on a norm nor could it vanish. The basis of the constitution, in Schmitt's view, is "a political decision concerning the type and form of its own being".⁵¹ The decision, the will, is where *is* and *ought* coincide, so Hume's problem does not posit.⁵² This decision is made by the people as a "political unity".⁵³ Accordingly, constituent power is exercised "according to the principle of democratic legitimacy through the free will of the people".⁵⁴ Democracy, for Schmitt, is the basis of the constitution, as opposed to the constitution being the frame for democracy.

⁴⁶ Loughlin, 'What is Constitutionalisation?' (n 42) at 61.

⁴⁷ *ibid.*

⁴⁸ Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 HLR 630, at 643.

⁴⁹ Antonin Cohen, 'Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s-1960s)' (2007) 32 *Law and Social Inquiry* 109, at 112.

⁵⁰ Loughlin, *Idea of Public Law* (n 28) at 128.

⁵¹ Carl Schmitt, *Constitutional Theory* (Duke University Press 2008), at 125.

⁵² *ibid.*, at 64. See also Sylvie Delacroix, 'Schmitt's Critique of Kelsenian Normativism' (2005) 18 *Ratio Juris* 30, at 34.

⁵³ Schmitt, *Constitutional Theory* (n 51) at 138.

⁵⁴ *ibid.* Schmitt actually mentions a second type of legitimacy, 'dynastic legitimacy', in his work, which is however of limited relevance here.

This leads Schmitt to conclude that constituent power does not recede once an order has been constituted. It remains tangible within the constituted order. Schmitt argues that constituent power "is not thereby expended and eliminated, because it was exercised once. The political decision [...] cannot have a reciprocal effect on its subject and eliminate its political existence. This political will remains alongside and above the constitution".⁵⁵ For Schmitt, the belief that the transformation of constituent power into constituted power signifies any kind of entropic, irreversible change is a fiction. A constitution is simply an expression of the political will at a certain point in time. The people "can change its forms and give itself continually new forms of political existence".⁵⁶ What it never does, however, is to "[subordinate] itself, its political existence, to a conclusive formation".⁵⁷

Populism is, albeit implicitly, founded on this *decisionist* conception of constituent power. Where democracy is not constituted within an order, but stands outside the order, an order it founded and may re-found, populists can present the deconstruction of a constitution as a democratic exercise in its purest form. Populists, in claiming to be the voice of 'the people', consider themselves "ultimately not bound by constitutional constraints because it [the people] is the source from which the constitution derives its legitimacy".⁵⁸

Because decisionist constituent power is a "formless formative capacity"⁵⁹, it is not bound by any legal principles which emanate from a prior constitution. Accordingly, even the most fundamental principles of a constitution, such as the principle of legality, can be undermined by popular decision. Ignoring court orders, as in the Polish example, can be presented not as a constitutional transgression, but an exercise of sovereignty – a democratically legitimate decision partially re-founding the constitutional order. Similarly, there is no need for new constitution to connect to previous ones. The preamble of the new Hungarian Constitution explicitly declares the Constitution of 1949, in force until 2011 (albeit in a highly amended form), to be "invalid"⁶⁰, potentially leading to *ex tunc* nullity of all previous laws and Constitutional Court case law based on it.⁶¹ Populists, in their own view, are not 'politicising the constitution' – they are simply exercising the constituent power that was naturally vested in the people in the first place. For populists, then, the role of public law is merely instrumental. Public law is not an end in itself and does not institutionalise any objective moral or rational principles. Its role is to serve the popular will.

Decisionism presents a radical inversion of the constitutionalist aspiration to contain democracy in law. In doing so, it exposes a core weakness of its normativist conception of constituent power: *How do constitutionalists reconcile their democratic aspirations with the simultaneous preclusion of certain political choices from the democratic realm? How can the people be the sovereign, but at the same time not exercise their sovereignty?*⁶² Normativism does not have an explanation for this. It simply "marginalises the significance of democratic foundation"⁶³ since it forms part of its assumptions that the order is constituted and there is no escaping it.

⁵⁵ *ibid*, at 125-126.

⁵⁶ *ibid*, at 129.

⁵⁷ *ibid*, at 128.

⁵⁸ Corrias (n 7) at 9.

⁵⁹ Schmitt, *Constitutional Theory* (n 51), at 129

⁶⁰ The Fundamental Law of Hungary (25 April 2011), National Avowal.

⁶¹ European Commission for Democracy through Law, 'Opinion No. 618/2011 on the New Constitution of Hungary' (2011), retrieved from <http://lapa.princeton.edu/hosteddocs/hungary/venice%20commission%20hungarian%20constitution.pdf>, para 35.

⁶² Joseph De Maistre, 'Study on Sovereignty' (1794), retrieved from <http://maistre.uni.cx/sovereignty.html>.

⁶³ Loughlin in Dowdle/Wilkinson (n 3) at 153.

If the assumption normativism made was a strong one, one that was manifestly evident, there would be less of a problem. But the strict separation of legal and sociological reality that normativism posits on the back of the is-ought problem is something that can hardly be rationally defended. The law is not automatic; it requires people who believe in its authority to execute it faithfully. The constitution is not a self-executing simulation with fixed parameters, but a loosely-meshed, highly permeable structure. The human condition of indeterminacy is one that not even the purest of theories of law could eliminate. The plasticity of values and identities produces ever-changing iterations of law that may be homogeneous in text, but are ultimately heterogeneous in effectiveness.⁶⁴ What is not written in a constitution is often just as important as what is written⁶⁵ because constitutional *practice* is just as, if not even more important than, constitutional text. The assumption that constitutionalism uses to elide the above-stated problem is thus in itself problematic; the problem remains. Populists can use this deficiency of normativism to exploit the human condition of indeterminacy in its most radical legal form: as the people's constituent power.

***Verfassungsvoraussetzungen* and public law as discourse**

The above conundrum inherent in constitutional democracy is a prominent theme discussed in one form or another in modern constitutional theory – Loughlin and Walker call it "the paradox of constitutionalism"⁶⁶; Christodoulidis, with some variation, refers to it as "the aporia of sovereignty".⁶⁷ It seems to be the key to our question posited above concerning the authority of constitutionalism, and thus to the question of the role of public law in an era of political populism. Within constitutional democracy inheres a tension between constituted and constituent power, between people and institutions, between democracy and law.

Constitutionalists must ultimately accept that this tension is nothing that can be resolved through legal means. Populism creates a political discourse that extends beyond its legal frame, but the legal frame is unable to contain this discourse. The political realm extends into constitutional matters, despite all efforts of constitutionalists to shield them from it.⁶⁸ To believe that constitutional rigidity would be able to contain the tension inherent in modern constitutionalism is illusory. At worst, it only exacerbates the tension. "Nothing human is immortal", James Bryce writes, "and constitution-makers would do well to remember that the less they presume on the long life of their work the more likely it is to survive".⁶⁹ Constitutionalists must accept "the political space [as] incorporating an unresolved dialectic of determinacy and indeterminacy, of closure and openness".⁷⁰

Ultimately, any constitution rests on conditions that it cannot establish of itself, as famously pointed out by Ernst-Wolfgang Böckenförde, whose dictum is worth being recited at length:

The liberal secularized state lives by prerequisites which it cannot guarantee itself. This is the great adventure it has undertaken for freedom's sake. As a liberal state it can only endure if the freedom it bestows on its citizens takes some regulation from the interior, both from a moral substance of the individuals and a certain homogeneity of society at large. On the other hand, it cannot by itself

⁶⁴ Vaguely based on statements made by Hans Lindahl in 'The Purposiveness of Law: Two Concepts of Representation in the European Union' (1998) 17 *Law and Philosophy* 481, at 498-499.

⁶⁵ See Michael Foley, *The Silence of Constitutions. Gaps, abeyances, and 'political' temperament in the maintenance of government* (Routledge 1989).

⁶⁶ Martin Loughlin & Neil Walker, 'Introduction' in Loughlin & Walker (n 35) 1-8.

⁶⁷ Emiliós A. Christodoulidis, 'The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse' (2001) 12 *King's Law Journal* 111.

⁶⁸ Loughlin in Dowdle/Wilkinson (n 3), at 166.

⁶⁹ James Bryce, *Studies in History and Jurisprudence Vol. I* (OUP 1901), at 177.

⁷⁰ Loughlin in Dowdle/Wilkinson (n 3), at 166-167.

procure these interior forces of regulation, that is not with its own means such as legal compulsion and authoritative decree. Doing so, it would surrender its liberal character.⁷¹

The German term *Verfassungsvoraussetzungen* – constitutional prerequisites – encapsulates the essence of what Böckenförde was pointing at.⁷² The liberal constitution cannot guarantee its own existence, because it rests on prerequisites, conditions that are prior to it and thus out of its own reach. Within Böckenförde's statement lies an implicit acknowledgement that Schmitt had a point in arguing that the people continue to be present within the constituted order as a constituent power. If they do not embody the values and share the tenets of constitutional democracy, then constitutional democracy cannot survive. The 'paradox of constitutionalism' can thus only be alleviated, but never be resolved. It is alleviated when the people appreciate the value of constitutionalism and, to frame it in Razian terms, believe that the reasons behind democratic constraints apply to them. The emergence of populism as a political force does not create any new tensions, it merely highlights the tension that is inherent in constitutional democracy in the first place.

But this acknowledgement of Schmitt does not imply that constitutionalists must surrender to populists. Rather, they must abandon what we coined the 'complacency of legality' and embrace public law in public discourse. From an intrinsic perspective, there are strong reasons for restraining democracy within the constitutional order. But where populists gain enough power to reshape this order, we are drawn from a constituted into a constituent state where constitutional democracy is unable to defend itself by its own means. Legality can only operate within a positive frame. Where this frame is being rejected by participants in political discourse, constitutionalism must be justified by reasons that are prior to legality. Constitutionalists must stop believing that the reasons on which the authority of public law is supposed to rest are self-evident, and instead start embracing these reasons in political engagement. In an era of political populism, public law is a discourse. As such, it has a powerful role to fulfil in dismantling the populist threat to constitutionalism.

Conclusion: A call to arms

Some lawyers might not like the conclusion drawn in this essay, because it goes beyond the bubble of legality that the law depends on. Others still might criticise the approach and instead argue the principle of legality is a more fundamental rational posit that renders questions of constituent power redundant.⁷³

But the argument laid out above is, at the bottom of it, a relatively straightforward one: Legality is only an argument within the constitutional system that it structures. Populists question the system and erode the authority of public law. Where this authority is sufficiently eroded, as in Hungary, Poland, and Turkey, legality can no longer be an argument. Accordingly, public law, as constitutionalism, can no longer assert itself by way of the principle of legality. Rather, those who wish to defend public law must assert it in political discourse.

The normativist conception of constituent power takes legality for granted because it presupposes the existence of the frame. Because constitutions, according to normativists, can only arise based on prior constitutions, normativists believe that constituent power vanishes once an order is constituted. This is the fundamental weakness of normativism that makes it "a peculiarly inadequate conception of constitutional thought".⁷⁴ It denies that legal and sociological reality stand in a relation of mutual

⁷¹ Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates als Vorgang der Säkularisation', in: *Säkularisation und Utopie. Ebracher Studien, Ernst Forsthoff zum 65. Geburtstag* (Kohlhammer 1967), 75-94. Translation obtained from http://en.wikipedia.org/wiki/Böckenförde_dilemma.

⁷² See also Ulrich-Jan Schröder, 'Wovon der Staat lebt: Verfassungsvoraussetzungen vom Vormärz bis zum Grundgesetz' (2010) 65 *Juristen Zeitung* 869.

⁷³ See Dyzenhaus, n 35 above.

⁷⁴ Loughlin in Dowdle/Wilkinson (n 3), at 159.

interaction with one another. Populists can exploit this weakness by juxtaposing normativism with decisionism, which posits the primacy of constituent over constituted power, and thus of sociological over legal reality.

Rather than surrendering to populism once the bubble of legality has burst, constitutionalists should acknowledge that Schmitt had a point in arguing that where law and sociological reality are out of touch, the law becomes but a piece of paper. What remains is the decision. The conclusion that can be drawn rests in a single, overly lengthy, German word: *Verfassungsvoraussetzungen*. Constitutionalists must defend public law in political discourse in order to help create the *Verfassungsvoraussetzungen*, the 'constitutional prerequisites' that constitutional democracy on the one hand needs to survive, but on the other hand cannot guarantee by its own force. Public law, in this era of political populism, is a discourse. It is not defended in court, it is defended on the streets.

