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From Rhetoric to Action – a Constitutional
Analysis of Populism

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OF POPULISM**

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Abstract

Through this article, I analyse populism through the scope of constitutional law. It allows me first to underline the using, by populist parties, of a specific rhetoric which targets directly the two pillars of constitutional democracies: the rule of the majority and the rule-of-law. Populist rhetoric is, in my opinion, the much smaller common denominator to all populist parties. It consists in a fictional discourse aiming at convincing a fictional majority that constitutional democracy is at the origin of a tyranny of the minorities. Then I demonstrate how populist rhetoric – which is a strategy of political opposition – evolves into concrete constitutional amendments once populist parties are in power. For this I analyse, first, Ms. le Pen constitutional program drafted at the occasion of the 2016 French elections and, second, Mr. Orban constitutional amendments since Fidesz party came in power in 2010. The two cases underline a thorough understanding of the specific constitutional contexts the two populist parties are evolving in – far from a spread assumption that populism does not play by the “constitutional rules”. It is where the paradox of populism lays down: while through their rhetoric they reject any sort of rule of law, one in power, populists still respect constitutional rules to implement reforms which threaten the rule of law. I conclude my study by asking whether or not populism and constitutionalism can be reconciled. My answer is no, the so-called ‘populist constitutionalism’ is an oxymoron simply because values carried on by constitutionalism are incompatible with populists’ agenda.

Keywords

Populism, constitutional strategy, populist rhetoric, Hungary, France

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Part I - Introduction

What is the common denominator between Hungary, the Philippines, the United States of America (USA), France, Poland, Austria, Germany, Czech Republic? The answer is simple. In each of these countries, either a populist party or a populist program won a national election, was close to win it or imposed itself as a major political force representing a large part of the electorate. *Why* did populism become a common characteristic of these (so) different countries?

Is it, first of all, a contextual common denominator? Numerous studies in political sciences suggested that populism took root in specific socio-political settings. Pierre Rosanvallon argues that socio-economic inequalities and political disenchantment could explain the rise of populism.¹ Claus Offe rather analyses populism as a consequence of institutional flaws,² embodied in European technocracy, whereas Christopher Bickerton and Carlo Invernizzi Accetti put forward party democracy to explain populism.³ However, considering the variety of cultures and contexts in which populism emerged, it is hard to find one socio-political reason common to all the countries.

Is there, second of all, a legal/constitutional common denominator? Based on the mentioned countries, no conclusion can be drawn from a type of political regime which would favour populism. The USA and the Philippines are both presidential regimes, Austria, Hungary, Germany, Poland and the Czech Republic are parliamentary republics, the United-Kingdom is a parliamentary monarchy and France is a semi-presidential regime. The organization of the state does not give more hints since the different countries are split between federalism (USA, Germany, Austria) or unitary state (France, Poland, Hungary, Czech Republic, the Philippines).

Yet, there is still something which ties the different countries together: they are all constitutional democracies. This paper aims at investigating this common characteristic in more details. To do so, I propose the following analogy: the relation between populism and constitutional democracy is comparable to a process of parasitism where constitutional democracy would be the host and populism the parasite. As a result, populism could not appear without the specific features of constitutional democracy and could not prosper if constitutional democracy itself does not develop. Building on this analogy, I develop three main hypotheses. First of all, that populism, at least its contemporary version, needs constitutional democracy to appear. Second, that populism gains inspiration from constitutional democracy to build up a populist rhetoric. Finally, and once the rhetoric is strongly anchored in the political scheme, the aim of populism is to destroy the constitutional system in which it evolves.

I would like to make some preliminary remarks before developing these points. First, I do not pretend to take a neutral stand in this paper since I consider that constitutional democracy is a preferable political system than populism, and its constitutional expression, direct democracy.⁴ Second, I propose an analysis of populism through the lens of constitutional theory and this methodology is per se limited. I do not aim to explain the phenomenon in its entirety, as only an interdisciplinary approach can do so. Understanding populism must be thought as a conceptualization, a construction of a new concept with the help of political, social and economic sciences.⁵ In this process of conceptualization, constitutional theory has a legitimate word to say. To that end I propose a theoretical framework to explain why and

¹ Pierre Rosanvallon, 'Penser Le Populisme' (2011) 18 Leçon inaugurale au Collège de France
<<http://www.laviedesidees.fr/Penser-le-populisme.html>> accessed 5 December 2016.

² Claus Offe, 'Europe Entrapped' (2013) 19 European Law Journal 595.

³ *ibid.*

⁴ For a defense of direct democracy see Íñigo Errejón and Chantal Mouffe, *Podemos : In the Name of the People* (Lawrence & Wishart Limited 2016).

⁵ I distinguish interdisciplinary approach from a transdisciplinary one or a multidisciplinary one. The difference between the three is well explained by Boris Barraud, *La Recherche Juridique : Sciences et Pensées Du Droit* (L'Harmattan 2016).

how populism develops in constitutional democracy, which I then test against the cases of France and Hungary. France is often considered as being an old democracy with institutions solid enough to resist populist assaults and a well-spread constitutional culture which would impeach populism to take roots. I argue the contrary, that despite its constitutional history, France has been, and is still, deeply affected by populism. The choice of Hungary is justified by the fact that it is the European country where populism has been in power for the longest period (seven years). It means that the Fidesz party has won for the second time national elections, underlying perhaps a confirmation of the populist tendency, or a resignation from the population to stand against the populist government. In addition, Mr. Orbán's reign has had concrete constitutional and legal implications and has modified deeply the Hungarian constitutional system.

The paper is structured as follows. Building upon the parasite analogy, I study, in Part II, the preliminary phase of the contamination with a brief description of the characteristics of both the host, constitutional democracy, and the parasite, populism. From this relation emerges the populist rhetoric often divided between populism of opposition and populism of government. In Part III, I move from rhetoric to political consequences. I study the contamination process with the concrete means of action developed by populism to actually kill constitutional democracy. This process is twofold: populism destroys the rule-of-law pillar of constitutional democracy but also the majoritarian pillar. There is therefore no reconciliation possible between populism and constitutionalism.

Part II - The Place of Populism in Constitutional Democracies – Theoretical Framework

Synthesis to Dichotomy, the Populist Rhetoric

Constitutional democracy is a synthesis between the rule of majority and the rule-of-law.⁶ The majoritarian pillar is based on a procedural vision of democracy: a majority elected by free and fair elections represents the population and therefore decides the general political orientations of the state.⁷ These choices are, however, limited by the rule-of-law pillar which ensures that the rights of the individuals composing the political regime are preserved.⁸ The democracy is said constitutional because these two cardinal principals are reflected in the constitution. The constitution's goal is not reduced to the organization of the popular representative⁹ but has a specific moral objective which is avoiding a coercion of the minority by the majority.¹⁰ The constitutional instruments include a specific bill of rights which is a "legal limitation of state powers"¹¹ and a specific constitutional review, a constitutional court being the ideal-type.¹² From these two characteristics of the host, the populist parasite uses a specific rhetoric to modify the ecosystem of constitutional democracy.

⁶ Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Johns Hopkins University Press 2007) 5–12.

⁷ Following this vision, a political regime is democratic in the presence of "institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote", Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Taylor and Francis 2010) 241.

⁸ David Held, *Models of Democracy* (Third edition, Polity 2006) 56–95.

⁹ In such a vision, expression of popular sovereignty such as a representative parliament, can be limited only by the elections, see R Carré de Malberg, *Contribution à La Théorie Générale de l'Etat Spécialement d'après Les Données Fournies Par Le Droit Constitutionnel Français* (CNRS 1920).

¹⁰ John Dewey and Jo Ann Boydston, *The Early Works, 1882-1898*. (Southern Illinois U P 1972) 233.

¹¹ Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 117.

¹² Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (2012) 817. There is an empirical tendency to concentrate constitutional review into constitutional

Populist rhetoric can be defined as the political discourse aiming to convince a fictional majority that constitutional democracy gives rise to the tyranny of minorities. The choice of ‘rhetoric’ instead of ‘discourse’ is intentional. One definition of rhetoric is the following: “language designed to have a persuasive or impressive effect, but which is often regarded as lacking in sincerity or meaningful content.”¹³ ‘Discourse’ implies a fiction, a twist of reality and this characteristic reflects, in my opinion, populist arguments. Populist argumentation is rhetorical; it is a fictional argumentation which does not reflect political reality. Populist rhetoric is composed of two main arguments.

The first argument is about the manipulation of the majority. Populist rhetoric creates a unitary and uncompromising majority. Majority is first considered as unitary and homogenous because it cannot be divided or differentiated. It is a fiction because the majority in a democracy is an aggregation of different minority expectations. The people, the nation or the citizens are never homogenous categories. Democracy brings together political dialogue and political pluralism to create a consensus which is accepted by a majority of the citizenry.¹⁴ The second manipulation of the majoritarian pillar is the uncompromised character of the majority. This fiction is closely connected to the electoral process and democratic representation. With the populist rhetoric, democracy is defined numerically which means that a majority of the votes, even if not absolute, is considered as the expression of a non-negotiable political truth. This rhetoric is, of course, only valid if elections lead to the success of a populist party. This victory erases any dissident vote and so any particularity among the citizenry. According to populist rhetoric, it is the people as a whole who expressed its preferences which leaves no room for minorities, considered as “non-people”.¹⁵

The second argument manipulates the rule-of-law pillar. This manipulation is also articulated in two times, following the electoral process. Before the election, populist rhetoric argues that the rule-of-law is used for a specific agenda by non-elected (and so non-representative) bodies. Populism turns the original equilibrium of constitutional democracy into a balance of power in which the majority no longer sits alongside the rule of law, but rather is constrained by it. It transforms the institutional reality into a political myth arguing that the original objective of constitutional democracy (the protection of minorities from the tyranny of the majority) has been pursued to the extent that the situation has been reversed: there is now a need to protect the majority from ‘the tyranny of minorities’. And this protection can only be achieved if the will of the majority takes precedence over the rule of law. After the election, and the hypothetical victory of a populist party, the rhetoric is still the same but is reinforced by a numerical definition of democracy. Since the majority is always right and represents the entire citizenry, there is no need to constrain its will, because no one among the people would disagree with choices made by the people. The rule of law becomes useless in such a fiction, and the constitution is seen as an accommodation tool of the majoritarian expression and no longer as safeguard against majoritarian abuses.

1. The Populist Rhetoric

	Rhetoric before the elections	Rhetoric after the elections
Majority	Unitary and homogenous “Call for the Nation to gather”	Uncompromised “The Nation expressed its preference”
Rule-of-law	Constitution accommodates the tyranny of the minorities	Constitution must accommodate the majoritarian choice

courts, see T Ginsburg and M Versteeg, ‘Why Do Countries Adopt Constitutional Review?’ (2014) 30 *Journal of Law, Economics, and Organization* 587.

¹³ ‘Rhetoric - Definition of Rhetoric in English from the Oxford Dictionary’ <<https://premium-oxforddictionaries-com.ezproxy.eui.eu/definition/english/rhetoric>> accessed 10 November 2017.

¹⁴ Dewey and Boydston (n 10) 234.

¹⁵ Populism is anti-pluralistic as illustrated by Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016).

The populist rhetoric is used by both right-wing and leftist populisms. They create a fictional majority and accuse constitutional democracy to be at the origin of tyranny of minorities. Traditionally however, their rhetoric differs which explain why, despite sharing the same strategy, they are often presented at the two opposite sides of the political scheme, if not built against each other. Right-wing populism is, for P. Rosanvallon, a simplification of the social reality which considers that what makes a majority is its identity.¹⁶ The political objective here would therefore be to save a specific identity (often assimilated as ‘the Nation’) from the tyranny of the non-identity, most of the time represented by a cultural difference (result of immigration or religious belief). Accommodation of minority rights, integration instead of assimilation, right to asylum are all characteristics of a constitutional democracy used by right-wing populism to denounce the rule-of-law. On the other hand, leftist populism is a simplification of the economic reality. In accordance with its aim of redistribution and social justice, leftist populisms consider as the majority everything which is not connected with the production of wealth and is oppressed by wealthy minorities (banks, finances, upper classes, bourgeoisie...).¹⁷ For leftist populism, constitutional democracy is assimilated to economic liberalism and some rights are specifically used to safeguard the financial interests of the most powerful.¹⁸

The relation between majority and rule of law are both at the core of constitutional democracy and populist rhetoric. However, when the former considers the relation as a synthesis, the latter argues in favour of a dichotomy. According to populist rhetoric, the political regime is no longer about majority *and* rule of law but majority *or* rule of law. As a parasite needs a host to gain roots, populism needs the characteristics of constitutional democracy to develop a specific rhetoric. And as the growth of a host contributes to strengthen the parasite, the dynamism of constitutional democracy feeds populist rhetoric and the populist parasite changes its rhetoric according to the electoral moment.

Populism of Opposition and Populism of Government

Regardless of its political colour, populist rhetoric seems to distinguish between populism of opposition and populism of government articulated around the electoral moment. This distinction was also put forward by politicians or even some scholars to minimize the effects of populist rhetoric. They indeed considered populism as a force of opposition without the capacity to influence on the everyday politics. During election campaigns, populist political parties cause a stir, occupy media coverage, manage to influence political debates but without any concrete electoral results. Some might suggest that this ‘glass ceiling’ was apparent in Austria in December, or even in France during the last presidential elections. In other words, the fiction of the populist rhetoric would not have any impact on political reality.

But a realistic overlook at recent European constitutional history reveals how narrow the gap is between populism of opposition and populism of government and how easy it is for populist ideas to be put into action. Indeed, there is a disturbing tendency for European policies to be influenced by populism of

¹⁶ Rosanvallon (n 1) 7.

¹⁷ See the description of Raphael Correa’s regime in Equator in Carlos de la Torre, ‘Populism in Latin America’ in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo, and Pierre Ostiguy (ed), *The Oxford Handbook of Populism* (2017) <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198803560.001.0001/oxfordhb-9780198803560-e-8>> accessed 22 January 2018.

¹⁸ This vision corresponds of course to the Marxist vision of law which considers that the legal system only reflects a society where production means are based on private property. See the introduction of K Stoyanovitch, *La Philosophie Du Droit En URSS (1917-1953)* (LGDJ 1965). More recently and in relation to the Eastern European democratic transitions, Sunstein has argued for example that: “the most fundamental point about the relationship between property and democracy is that a right to own private property has an important and salutary effect on the citizens’ relationship with the state and – equally important – on their understanding of that relationship” Cass R Sunstein, ‘On Property and Constitutionalism’ (1992) 14 *Cardozo L. Rev.* 907, 914. On the other hand, Holmes considers that the Fourteenth Amendment was originally adopted to protect the black minority in the South but was then twisted to protect corporations, Stephen Holmes, ‘Constitutions and Constitutionalism’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 214.

opposition. And even more concerning, major constitutional policies have been proposed, and sometimes implemented, as a result of the rise of populism. Two examples illustrate this claim. The first one is the Brexit referendum organized by David Cameron pressured by the growing influence of the United-Kingdom Independence Party (UKIP).¹⁹ The second example is the constitutional debate in the French *Assemblée Nationale* in 2016. Just after the terrorist attacks, the executive power wanted to amend the constitution to constitutionalize the state of emergency but also to incorporate a disposition central to *Front National's* (FN) political program: the deprivation of nationality for French-born dual nationals for the perpetration of the most serious crimes.²⁰ In both cases, the political weight of the populist parties was insignificant. UKIP occupied one seat at the House of Commons and the FN only two at the *Assemblée Nationale*. It was as forces of oppositions and not as forces of government that they imposed their political agenda.

Let us assume now that a populist party win general elections, can this party govern in a political system in which institutions and the equilibrium of power are in opposition with its populist rhetoric? Elections are, of course, the first step in the process of governance. Governing is much more complicated and some have predicted that, even if populist parties are elected, they will be constrained by binding institutional and political structures and, therefore, will not be able to put their promises into practice. According to this view, long-established liberal democracies, thanks to their mechanisms of checks and balances and division of power, would be per se resilient to any populist form of government. However, this way of reasoning is dangerous and does not prevent a non-democratic obverse.

Populist parties have an excellent knowledge of the constitutional system they are evolving in. When they are in the opposition, they do not ignore the constitutional system, they play with its essential characteristics. Populist rhetoric does not say constitutional rights are not existing – which would be ignorance, they argue that constitutional rights are oppressing the majority – which is actually manipulation. It is why the analogy with parasite contamination is relevant because a parasite cannot ignore its own ecosystem. The passage from populism of opposition to populism of government is however characterized by a modification of the strategy. The rhetoric is not sufficient to govern and to stay in power. The rhetoric does not disappear and it is still used to convince the citizenry but it is completed by a manipulation of the constitutional rules. Populism play with the rules to first entrenches the rhetoric and second progressively destroys constitutional democracy, so as a parasite utilizes the resources of its host to slowly kill it.

Populism in Action

Populism of government's strategy is well illustrated by Ms. le Pen's constitutional program and Mr. Orban's progressive destruction of the Hungarian constitutional democracy. The two leaders are both right-wing populists but the similarities go further than ideology. They also share a comparable strategy for killing constitutional democracy which is based on a manipulation of the constitutional system.

¹⁹ “The elected presence of the party enabled UKIP to force the mainstream parties together in their apparent sameness on the referendum issue and to outflank them by offering a simple and clear choice. It was this perceived threat to vulnerable Conservative backbenchers that forced both Major and Later Cameron into referendum promises they would surely rather have avoided if they possibly could have do so” in William Outhwaite, *Brexit: Sociological Responses* (Anthem Press 2017) 13.

²⁰ Interviewed at the margin of the debates, Florian Philipot, then second of the Front National, declared that this measure had been advocated by Marine le Pen directly to François Hollande just after the November attacks ‘Florian Philippot Sur I>Télé’ (*FN - Front National*) <<http://www.frontnational.com/videos/florian-philippot-sur-itele-90/>> accessed 10 November 2017.

*Marine le Pen's Strategy: A Comprehensive Constitutional Amendment by the Rules*²¹

Political and Constitutional Context

During the presidential campaign, Ms. le Pen published two programs: her presidential program with her traditional anti-immigration rhetoric followed by many comments from the media, specialists and policy, and a twelve-page constitutional program. The last document, called the 'constitutional reform that I propose to the French people by referendum', is a detailed agenda of all the constitutional amendments proposed by the then-candidate in order to give 'greatness' back to the 1958 constitution.²² No publicity of this program was made during the campaign and no constitutional analysis had troubled the classical triptych of the presidential campaign: security, immigration and unemployment. Nothing surprising since the political timeline is always a short one and depends on everyday reactions. The constitution is, on the contrary, a long-term process inspiring only some lawyers and political scientists. Ms. Le Pen's ambition was not only reduced to leaving the European Union, as it was the case with UKIP. With this constitutional program, her goal was to deeply reform the organization of the French state and its institutions. It is an unnamed constitutional revolution since this program modifies the most fundamental constitutional dispositions and strikes down French *État de droit*.

In order to get her constitutional program passed, Ms. Le Pen did not intend to use article 89 and the classical procedure of constitutional amendment. Article 89 foresees two procedures for amending the constitution.²³ In both cases, the right to initiate the constitutional amendment is shared between the President of the Republic and Members of Parliament (*Sénat* and *Assemblée Nationale*). The first option for the adoption is the vote of the amendment, in identical terms, by the two Houses which must be followed by a referendum. The second option is the adoption by a three-fifth majority of the two Houses gathered in Congress. In this case, the amendment is directly adopted and does not have to be approved by referendum. In the French amendment procedure, the referendum is then only accidental and is in practice rarely used by the governments which prefer the more secure convocation of the Congress.

At first sight then, Ms. le Pen's strategy seems illegal and could confirm the general idea that populism does not feel constrained by constitutionalism. Her wish to call for a referendum may also match with her apparent willingness of giving the floor back to the people. But the real reason is more strategic because with a referendum, she would not have to go through the parliamentary procedure – a reinforced majority – but could have her program adopted on the basis of the result of the referendum – a simple majority. However, can direct popular referendum be used to amend the French constitution? The only reference in the constitution to direct popular referendum is article 11. A referendum can be initiated either by the President of the Republic (article 11§1) or, since 2008, one fifth of the Members of Parliament representing one tenth of the voters enrolled on the electoral lists (article 11§3). Whatever the initiator of the procedure, the object of the referendum is restricted to a government bill and is limited to six domains.²⁴ Consequently, Ms. Le Pen could only amend the constitution by applying the classical procedure of article 89 and seek for the approval of the Parliament. However, constitutional practice has

²¹ This part was originally published on the blog of the Constitutionalism and Politics Working Group at the EUI: 'Le Programme Constitutionnel de Marine Le Pen Ou La Remise En Cause Du Modèle Constitutionnel Français / Marine Le Pen: A Constitutional Program Threatening the French Constitutional Regime' (*Constitutionalism and Politics*, 2 March 2017) <<https://blogs.eui.eu/constitutionalism-politics-working-group/le-programme-constitutionnel-de-marine-le-pen-ou-la-remise-en-cause-du-modele-constitutionnel-francais-marine-le-pen-constitutional-program-threatening-french-constitutional-regime/>> accessed 10 November 2017.

²² 'La Révision Constitutionnelle Que Je Propose Aux Français Par Référendum' <https://www.marine2017.fr/wp-content/uploads/2017/02/a4_institutions-hd.pdf> accessed 10 November 2017.

²³ Constitution of October 4, 1958, Art. 89.

²⁴ Namely: the organization of the public authorities; reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto; authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions, Constitution of October 4, 1958, Art. 11§3.

already validated the use of article 11§1 to amend the constitution since this option was taken by President De Gaulle in 1962 to modify the presidential election. Referred by sixty members of Parliament who contested this practice, the *Conseil Constitutionnel* preferred to declare itself not competent considering that, because the referendum was already adopted, it could not rule upon a “direct expression of national sovereignty”.²⁵ Since then, there is a common understanding within the institutions and the constitutional doctrine that the president can modify the constitution through popular referendum. This custom has even been transformed into positive law with the adoption of the organic law of the 6th December 2013 which specifies the role of the *Conseil Constitutionnel* in the application of article 11 of the constitution. This organic law explicitly excludes the possibility of any judicial review of a constitutional amendment adopted on the basis of article 11§1 of the constitution.²⁶ Ms. Le Pen can therefore justify her strategy by putting forward this constitutional precedent and there is no legal ground to contest the constitutionality of her strategy.

The Content of the Constitutional Program

Ms. le Pen’s constitutional program is a transposition of FN’s populist rhetoric in three domains: the fundamental constitutional principles, the political system and the referendum.

The first two points of the program reflect the nationalist and xenophobic vision carried by FN since its creation and the fictional majority of the rhetoric. The first point of the program foresees the inscription of new fundamental constitutional principles namely the "defence of our identity of people", the "national priority" and the "fight against communitarianism". Doing so, FN would negate French history, which is based on the diversity of peoples and not on a mythological vision of one people. Such a reform would also go against French constitutional identity, which, as article 1 of the constitution states, is grounded on an "equality of all citizens before the law without distinction of origin, race or religion (and a respect of) all beliefs".²⁷ The second point of the program corresponds to FN’s fictional tyranny of minorities since it directly concerns the process of European integration. Ms. Le Pen wanted to use the referendum in order to "restore the superiority of national law" with the deletion of Title XV of the Constitution, which organizes the relations between the French State and the EU institutions. Article 55 would also be abolished in order to re-establish the authority of national laws on international treaties as well as the superiority of national judicial institutions over supra-state courts.²⁸

The shift from populism of opposition to populism of government is clear in FN’s program. There is a willingness to go beyond ideology and to deeply transform the French semi-presidential system. Despite a façade that intends to be representative and plural, FN is based on a strong figure, Ms. le Pen, and on a hyper-centralized territorial organization. FN wants to transpose this authoritarian vision of making politics into the French institutional model. In this program, the powers of the President of the Republic are strengthened to the detriment of the legislative counter-power.

In the French political system, the political majority of the *Assemblée Nationale* must be reflected in the composition of the government even though the latter is appointed by the President. Since a constitutional reform of 2000, the President of the Republic is assured of governing with a government

²⁵ *Loi relative à l’élection du Président de la République au suffrage universel direct, adoptée par le référendum du 28 octobre 1962* [1962], Conseil Constitutionnel, Décision n° 62-20 [2].

²⁶ See Loi organique n° 2013-1114 du 6 décembre 2013 portant application de l’article 11 de la Constitution (1), 2017, Art 1.

²⁷ Constitution of October 4, 1958, Art. 1.

²⁸ Article 55 is not included in Title XV of the Constitution because of its general scope of application: “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party”, *ibid*.

from the same political edge.²⁹ Its role has hence been considerably reinforced even if Ms. Le Pen argues the contrary by the concluding remark of her constitutional program. On the basis of the authoritative argument that “because of the five-year term, the President has found himself weakened”,³⁰ she proposes to change again the presidential mandate into a non-renewable seven-year term, which would re-open the door to periods of cohabitation. It might seem paradoxical since cohabitation is a period where the President is weakened by a strong Prime Minister coming from a different political edge and which usually takes full charge of the internal policies. In reality, Ms. Le Pen’s strategy is to strengthen the power of the President, mainly by drastically weakening the legislative power. Point number 3 of the constitutional program proposes indeed a reduction by half of the total number of members of parliament (from 577 to 300 for the *Assemblée Nationale*, and from 348 to 200 for the *Sénat*). This would not result in an augmentation of representativeness as claimed by Ms. le Pen but would, on the contrary, tremendously reduce the Parliament’s legitimacy towards the population.

The transformation of French political system continues with the establishment of full proportional representation for all elections, starting with the legislative elections. In theory, a system of proportional representation does allow for a more democratic representation because every political party has a number of seats in parliament which corresponds to the number of votes it obtained. For example, a political party that obtained 50% of the votes would gain 50% of the seats. However, the FN vision of proportional representation is far from fulfilling this objective of representativeness. Thus, for the *Assemblée Nationale*’s election, a threshold of 5% is introduced, which means that only parties with more than 5% of the votes can access the chamber. Above all, the FN wants to set up a so-called majority prime for the winner, which corresponds to 30% of the *Assemblée Nationale*’s seats. This prime should not be understood as ‘bonus’ that would be added to the percentage resulting from the votes but more as a maximum limit. The majority prime means that, regardless of the score (20% or 50% of the votes), the winner of the legislative elections would be allocated 30% of the seats of the *Assemblée Nationale*. Hence, even a political party with a large majority of votes would have to form a political coalition to get a simple majority and pass laws. Moreover, the same compromise would have to be sought to form the government, which would decrease its capacity to rule as whole as well as its political and popular legitimacy.³¹ The constant quest for a coalition significantly decreases the legislative power especially within the French paradigm where the President is elected through a direct universal suffrage. Arguing for a better representativeness, Ms. Le Pen actually seeks to diminish the influence of the legislative power and in fine the government. FN does not intend to rule with the legislative power but wants to exclude it to the law-making process in order to justify a reinforcement of the presidential power.

This exclusion of the legislative power is also true regarding FN’s vision of the territorial organization of the state as illustrated by point number 6 of the program. It foresees an amendment of article 72 of the constitution in order to erase three of the six levels of decentralization. Consequently, the European,

²⁹ Before the reform, the President of the Republic was elected for 7 years and the members of the *Assemblée Nationale* for five years. Because of the semi-parliamentary characteristic of the French system, it could happen that the Prime Minister and the Government were not from the same political side than the President. The constitutional reform reduced the term of the President of the Republic and realigned it with the *Assemblée Nationale* term. In parallel, the Parliament adopted in 2001 an organic which slightly extended the term of the *Assemblée Nationale*. As a result, the parliamentary elections now take place one month after the presidential one which reduced the possibility of a *cohabitation*. see *Loi constitutionnelle n° 2000-964 du 2 octobre 2000 relative à la durée du mandat du Président de la République 2000 (JORF) 15582*.

³⁰ For a criticism of the reform see René Rémond, ‘Quinquennat : une réforme en trompe l’oeil’ (2000) 111 *Le Débat* 218. For a positive perspective, See Dominique Rousseau, ‘Points de Vue Sur La Réforme Constitutionnelle Du Quinquennat - Le Quinquennat, Une Opportunité à Saisir’ *La Revue Administrative* 589.

³¹ During the precedent governmental term, an internal scission of the socialist party resulted in several ministry crises which decreased the legitimacy of the Prime minister and the government. ‘Le Vote de Confiance Au Gouvernement Valls II’ (*LExpress.fr*, 14 September 2014) <www.lexpress.fr/actualite/politique/le-vote-de-confiance-au-gouvernement-valls-ii_1575709.html> accessed 12 November 2017.

the regional and the intercommunal³² levels would disappear whereas the State, the *départementale* and the communal levels would remain. The objective is first of all electoral since a suppression of the regions and the *intercommunalités* decreases the risk of elections likely to contest the central power. But this reform must also be put in perspective with the generalisation of the proportional representation as foreseen by point 3 of the constitutional program. At the level of the *département*, decentralized politics are managed by an elected body, the *conseil général* whereas deconcentrated politics are handled by the *préfet* which is appointed directly by the State. If the elected body is weakened by the need to form a coalition, then the appointed one, the *préfet*, could have the tendency to increase its powers. The territorial reform, pretexting saving public money and increasing political proximity, could in the end lead to an enforcement of the State tutelage over the decentralized powers.

This concentration of power and the creation of a direct chain of command between the population and the executive power is also the object of point number 4 of the constitutional program. In order to “give the floor back to the people”, Ms. le Pen intended to considerably increase the use of referendums. As mentioned above, the referendum is strictly framed in the French constitution by articles 11§1, 11§3 and article 89. Regarding article 11§3, the so-called popular initiative, Ms. le Pen wanted to decrease the popular threshold of support from one tenth of the electorate (around 4,46 million) to 500 000 electors. In addition, FN would like to extent the scope of the referendum to all the areas currently covered by the law.³³ Consequently, the act of making the law would no longer be the monopoly of the legislative power. This reform would on the contrary instore a plebiscite relation between the President and the citizenry at the expense of national representation and parliamentary debate, two key elements of the French democracy. The second aspect of point number 4 is even more worrying because it envisaged a suppression of article 89 and the current procedure of constitutional amendment. Through its constitutional program, FN wanted then to impose the referendum as the only possibility to amend the constitution. This vision is in the right line of the populist rhetoric which considers that the majority cannot be limited by any rule and that the right to amend the constitution cannot be constrain by a specific constitutional amendment majority. The constitution shall be at the disposal of the population and, above all, of the President of the Republic, the one and only true representative of the population.

One can be attracted by this mechanism which seems to put the constitution back in the hands of the population. However, this is just a façade of democracy. A referendum is not a constitutional debate, it is just a binary question drafted and decided on by a hierarchical power, or in FN’s vision, by the President. With the plebiscitary debate that Ms. le Pen wanted to implement, French citizens would not participate in the democratic life, they would just be temporarily consulted, and perhaps manipulated, to approve choices of the President. Ms. le Pen’s constitutional program echoes a current practice in some dictatorial regime, which consists in using the referendum in order to justify authoritarian backslidings. With such a practice, no constitutional disposition is safe from any authoritarian tendencies. Amending the constitution through referendum can allow Ms. le Pen to propose constitutional reforms which go beyond her original constitutional program such as the reestablishment of death penalty,³⁴ the modification of the electoral system if the *Assemblée Nationale* is too troublesome or the extension of the presidential mandate beyond the constitutional term.

Ms. le Pen’s strategy illustrates a deep knowledge of the peculiarities of the French constitutional system. Luckily, because of her defeat at the second round of the 2016 elections, this program remains hypothetical. In France, constitutional democracy is still safe because populism remains in opposition

³² The intercommunal level corresponds to a gathering of different communes in one decentralized entity.

³³ The domain of the law is precisely stated in article 34 of the constitution.

³⁴ During the campaign, Ms. le Pen said that the reestablishment of the death penalty should be decided by referendum. The fact that the constitution explicitly, in its article 66-1, explicitly states that “no one can be sentenced to death penalty” did not seem to be an obstacle. ‘FN : Marine Le Pen Retire La Peine de Mort de Son Projet Mais...’ (*leparisien.fr*, 2 February 2017) <<http://www.leparisien.fr/elections/presidentielle/fn-marine-le-pen-retire-la-peine-de-mort-de-son-projet-mais-01-02-2017-6646128.php>> accessed 13 November 2017.

but the elections should have been an early warning to reflect upon these constitutional weaknesses. There is however a spread scepticism among scholars and political leaders to conduct any form of self-reflection.

Viktor Orban's Strategy: A Constitutional Revolution Helped by the Former Constitutional System

Mr. Orban's strategy in Hungary is, in my opinion, strictly tied with the post-communist democratic transition. I would like to demonstrate in this part a continuity between the two constitutional transitions Hungary experienced since the fall of communism. The first constitutional transition started in 1989 and is characterized by a negotiation between the former authoritarian rulers and a political opposition. The second constitutional transition is the adoption of the 2011 fundamental law after the large victory of the Fidesz party at the 2010 parliamentary elections. In my opinion, the two constitutions should be studied together, the 2011 one being a consequence of the 1989 one. Of course, I do not insinuate that the current state of democracy in Hungary is explained exclusively by a specific constitutional context. What I argue is that the constitutional system which emerges from the 1989 constitutional transition – and was then the one under which the Fidesz party was elected – did not address basic constitutional and legal issues. This situation was well known by the Fidesz party which uses the system's deficiencies to implement its populist rhetoric and eventually destroy Hungarian constitutional democracy.

The Weaknesses of the Post-Communist Constitutional System

First of all, the adoption of the 2011 constitution can be hardly contested on legal grounds. The Fidesz party played by the rules and respected the constitutional amendment procedure of the previous constitution. The problem is then not about the legality of the amendment but about the rules surrounding the amendment which did not involve enough veto players. A veto player is defined as collective and individual actors who must give their agreement to change a status quo.³⁵ In constitutional law, veto players refer to the number of actors involved in the constitutional amendment procedure such as the President, the Parliament, the citizenry or the constitutional court. Players can intervene at different times in the amendment procedure. A constitutional court for example can control the substantial validity of the amendment but also the legality of the referendum adopting the amendment.³⁶ The impact of the veto players depends of course on a specific political and social context³⁷ but one thing is however certain: the less actors are implicated in the constitutional amendment procedure; the more illiberal constitutional amendments are likely to be adopted. Veto players must intervene during the three phases of the constitutional amendment: the initiative, the adoption and the control.

Sharing the initiative between different actors can allow the tenure of a genuine social debate about the constitutional amendment. This is particularly true if the initiative of the amendment is given to a share of the citizenry, supported by a parliamentary majority.³⁸ This popular activation of the amendment procedure was not possible under the Hungarian constitutional system. The initiative of the amendment was assimilated to the regular legislative process and article 25§1 divided it between the President of the Republic, the Government, every commission of the National Assembly and every depute. If in

³⁵ Bjorn Erik Rash, 'Foundations of Constitutional Stability, Veto Points, Qualified Majorities, and Agenda-Setting Rules in Amendment Procedures' [2008] ECPR Joint Sessions of Workshops 45, 8.

³⁶ Constitutional amendment procedures and the softness or rigidness of a constitution can then be recorded in terms of veto points. In this example, two veto players (the constitutional court and the population) gives three veto points. Bjorn Erik Rash and Roger D. Congleton, 'Amendment Procedure and Constitutional Stability' 546.

³⁷ "It less political institutions and constitutional procedures that drive amendments rates than contextual changes that occur with the passage of time" Andrew Roberts, 'The Politics of Constitutional Amendment in Postcommunist Europe' (2009) 20 Constitutional Political Economy 99, 114.

³⁸ For example, the Serbian constitution foresees a threshold of 150 000 voters, 'COMMISSION DE VENISE, Rapport Sur l'amendement Constitutionnel, CDL-AD(2010)001, 2010, 53 p. 9.

appearance, this power sharing might reflect an implication of numerous veto players, in practice it has to be tempered, because of the parliamentary system. The National Assembly, the government and the President of the Republic were indeed on the same political side after the 2010 elections.

The most important role of the veto players remains during the adoption of the amendment. Two specific mechanisms traditionally intervene at this moment of the procedure namely the qualified majority and the number of actors who have to adopt the amendment. Regarding the latter in Hungary, only the National Assembly was involved in the adoption in the amendment. The legislative power was indeed unicameral, result of a compromise during the post-communist negotiations, which minimizes considerably inter-institutional dialogue.³⁹ Nevertheless, a specific qualified majority of the two third was foreseen in article 24-3 of the former constitution. But this veto point has to be minimized because of the then-electoral law, legacy again of the democratic transition.⁴⁰ The voting system was based on a mix representation with a split among the regions between majoritarian and proportional lists.⁴¹ Theoretically proportional representation should facilitate pluralism at the Parliament⁴² which should then complicate the formation of political qualified majority, or at least require the dominant political party to negotiate and compromise. Political pluralism depends yet a lot on the threshold of representation needed to enter the Parliament. In the Hungarian constitution, even if this threshold was pretty low (4% in 1990 and 5% in 2010) only four political parties managed to get the amount of votes necessary to enter the Parliament during the last 2014 elections. Pluralism was also badly affected by a strong leverage effect due to the majoritarian facet of the voting system. Therefore, while representing only 52% of the votes, Mr. Orbán's party obtained 68% of the seats and so the qualified majority required to adopt a new constitution. Finally, the constitution treated each constitutional amendment equally, no matter their objective. Some constitutional systems envisage different a specific procedure according to the type of constitutional amendment. In South Africa for example, in case of a "simple" constitutional amendment, only a two-third majority of the National Assembly is required. An amendment which modifies the bill of rights must be approved by two-third of the National Assembly and six provinces out of nine. Finally, if an amendment targets article one – the fundamental values of the Republic – then it must be adopted by the three-quarters of the National Assembly and six provinces out of nine. None of these technics was foreseen in the previous Hungarian constitution.

Veto players can finally intervene to control the constitutional amendment. Generally, a distinction is made during the control of a constitutional law and the control of an ordinary law. In the former case, judicial review is limited to a formal control, or a really limited substantial control, because it is admitted that a constitutional amendment represents an expression of the constituent power. In the case of Hungary however, no distinction was made in the constitution between constitutional and ordinary law which signifies that the court was theoretically competent to control the constitutionality of the new constitution. This possibility was reinforced by the tremendous role of the court's jurisprudence in

³⁹ The communist rulers wanted a strong President figure in order to negotiate the presidency to keep a strategic position of power. The political opposition argued, on a contrary, for a weak President and a strong parliamentary power betting of a defeat of the communists during the next elections Jon Elster, 'Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea' (1993) 71 *Public administration* 169, 190. Lajos Lorincz, 'Réforme constitutionnelle et administrative en Hongrie' (1992) 23 *Revue d'études comparatives Est-Ouest* 49, 51.

⁴⁰ This voting system was also a result of the negotiations during the democratic transition. A majoritarian representation was supported by the communists who wanted to personify the election in order to minimize the negative impact of the communist legacy. The opposition rather wanted a proportional representation in order to better represent political pluralism and to decrease the influence of the communist party, Ethan J Hollander, 'Democratic Transition and Electoral Choice: The Legacy of One-Party Rule in Hungary and Poland.' (2013) 16 *Journal of the Indiana Academy of the Social Sciences* 88-95-99.

⁴¹ A Visegrady, 'Transition to Democracy in Central and Eastern Europe: Experiences of a Model Country - Hungary' [1992] *William and Mary Law review* 245, 248.

⁴² 'COMMISSION DE VENISE, Rapport Sur l'amendement Constitutionnel, CDL-AD (2010)001, 2010, 53 p. 22.

supporting the democratic transition, especially under Mr. Solyóm presidency.⁴³ However, the court could only be seized by the President of the Republic who was appointed by the Fidesz majoritarian majority. The court, despite its progressive role, did not have a word to say on the constitutional amendment because the activation of the control was left to the discretion of one institution.

The post-communist Hungarian constitution was key in supporting a democratization process for more than twenty years. Nevertheless, the overall constitutional architecture did not match the standards which could have guaranteed a minimal protection against democratic backslidings. Ironically, the 1995 constitution, which was never adopted, corrected a lot of these flaws.⁴⁴ Mr. Orban and the Fidesz were fully aware of these weaknesses and the adoption of the 2011 constitution must not be seen as an isolated phenomenon. It was the peak of a strategy which implied the characteristics of former constitutional system and a number of votes to gain during the 2010 elections in order to amend the constitution. The Hungarian saga illustrates well how prepare a populist party can be to shift from populism of opposition to populism of government.

The Fidesz Constitutional Corpus: The 2011 Constitution, its Amendments and the New Legal System

The adoption of the 2011 constitution is a great illustration of the bridge built between populism of opposition and populism of government. The Fidesz played by the rules and the constitution was adopted with 262 votes in favour and 42 against. But above all, the constitution represents the second step in the populist parasitism. The rhetoric helped winning elections and contaminating constitutional democracy. The manipulation of the constitutional rules crystallizes the populist rhetoric, dismantles key components of the rule-of-law and even puts down democracy.

A first illustration of the crystallization of the populist rhetoric is Article U of the 2011 constitution. This article was initially a transitory law adopted in 2010 just before the new constitution came in power. It was only incorporated in the constitutional corpus with a constitutional amendment of 2013. Article U's objective is to damage the Hungarian Socialist Party which was the second political force of the country when the constitution was drafted. It is a clear illustration of Fidesz' willingness to lay down political opposition and to defeat political pluralism. This negation of political pluralism is a three-step strategy. First of all, Article U creates a fiction by asserting that the Hungarian democratic transition was the result of a revolution. The article indeed states that "the form of government based on the rule of law, established in accordance with the will of the nation through the first free elections held in 1990, and the previous communist dictatorship are incompatible". This is of course a historical manipulation because the communist regime negotiated the transition with the political opposition and the first free and fair elections took place thanks to these negotiations.⁴⁵ Second, after creating a clear breakdown from the past, article U creates a retroactive incrimination which accuses the Hungarian Socialist

⁴³ For an overview of the landmark decisions see László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press 2000). For a more analytical study see László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy With Special Reference to Hungary' (2003) 18 *International Sociology* 133. ; Gábor Halmi, 'The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court' in Wojciech Sadurski (ed), *Constitutional justice, East and West: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective* (Kluwer Law International 2003).

⁴⁴ The Venice Commission was asked to review the 1995 project. A specific recommendation foresees concrete measures to increase constitutional rigidity and to avoid that the "governmental majority reflects the constituent power". Among these reforms we can find the participation of the population in the adoption process through referendum but above all the competency of the court to control constitutional amendments, Commission de Venise, 'Avis Sur Les Principes Directeurs de La Nouvelle Constitution de La République de Hongrie' (1995) CDL-INF (96) 2 51. The constitution was never adopted despite a qualified majority for the socialist party, Martyn Rady, 'The 1994 Hungarian General Election' ><http://www.tandfonline.com/doi/abs/10.1080/00344899438439053>> accessed 6 October 2016.

⁴⁵ Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press, 2016).

Worker's Party – the then-communist political party – of more than nine chiefs of accusation.⁴⁶ It is a complete denial of non-retroactive criminal justice, a cardinal rule-of-law principle, which cannot be justified by any form of transitional justice mechanism. Finally, last paragraph of article U extends this historical responsibility to any “political organisations having gained legal recognition during the democratic transition as legal successors of the HSWP”, including then the Hungarian Socialist Party. It is clear with this amendment of the 2011 constitution that the Fidesz party wanted to target a main political opponent. And it is no coincidence that the amendment was adopted in 2013, a few months before the 2014 parliamentary elections.

Article U did not discourage the votes in favour of the Hungarian Socialist Party since it obtained 25% of the votes, 5% more compared to the 2010 elections.⁴⁷ However, this result must be read with the final distribution of the seats at the National Assembly. Even if Fidesz obtained only 45% of the votes, it still managed to get 66% of the whereas the Hungarian Socialist Party only obtained 19% of the seats. The reason is that the Fidesz party adopted a new electoral law on the 23rd of December 2013 which intensified the leverage effect of the parliamentary elections. This law reduced the number of seats from 386 to 199 and increased the threshold of representation required for accessing the Parliament – strangely the same strategy wished by Ms. le Pen's constitutional program. From 5% of the voters, Fidesz transformed it into a 10% threshold and even 15% in case of a coalition. In addition, the electoral districts were modified on subjective objective criteria that would ensure Fidesz' victory in majoritarian districts.⁴⁸ This new electoral law locked the electoral process at the strict benefit of the Fidesz and destroyed any form of representative democracy despite what is claimed by Mr. Orban's populist rhetoric.⁴⁹

The second infringement of constitutional democracy principles is the limitation of the media. Even if Mr. Orban controls directly or indirectly 80% of the Hungarian media,⁵⁰ its political party adopted on the first of January 2011 a law creating an administrative authority to restrict editorial freedom in case of attempt to morality or public order.⁵¹ Fortunately, the most liberticidal decisions were erased after a decision of the Hungarian constitutional court and pressure from the European institutions.⁵² However, the new constitution contains an article IX which is a clear restriction of the freedom of the press. The article reads as follow: “Hungary shall recognize and protect the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion”. First, freedom of press is no longer a guaranteed right, as it was the case with the former constitution, but becomes a state obligation. This is a tremendous modification since with the 2011 constitution, freedom of press depends on the State's good willingness and its desire to respect its obligations.⁵³ Above all, the constitution delayed to a cardinal act the task to lay down “the detailed rules relating to the freedom of the press and the organ supervising media services, press

⁴⁶ See paragraphs 1-a from 1-i.

⁴⁷ ‘Hungarian Parliamentary Election, 2010’, *Wikipedia* (2017) <https://en.wikipedia.org/w/index.php?title=Hungarian_parliamentary_election,_2010&oldid=786660989> accessed 17 November 2017.

⁴⁸ As noted by the joint rapport of the Venice Commission and the OSCE evaluating the new electoral law: “there is, however, a higher risk that a party winning a majority of seats in a single-member constituencies gets a majority of seats in parliament even if the party is not the largest one nationwide”, in OSCE and Venice Commission, ‘Joint Opinion on the Act on the Elections of Members of Parliament of Hungary’ (2012) Opinion No. 662 / 2012 10.

⁴⁹ Philippe Boulanger, ‘La seconde révolution hongroise’ (2012) Numéro 138 Commentaire 401, 403.

⁵⁰ Democracy Reporting International, ‘Hungary's State-Owned TV Shows Bias in EU-Refugee Referendum’ (2 October 2016) <<http://democracy-reporting.org/hungarys-state-owned-tv-shows-bias-in-eu-refugee-referendum/>> accessed 22 January 2018.

⁵¹ Boulanger (n 49) 402.

⁵² COMMISSION DE VENISE, ‘Opinion on The Fourth Amendment to the Fundamental Law’ (2013) CDL-AD (2013)012 10.

⁵³ COMMISSION DE VENISE, ‘Avis Sur La Nouvelle Constitution de La Hongrie’ (2011) CDL-AD (2011)016 16.

products and the communications market”.⁵⁴ The monitoring of the protection of the right is considerably decreased since the adoption of a cardinal act requires a two-third majority of the members of the National Assembly present and not of the total of the members. Finally, in the Fourth constitutional amendment adopted on the 11th of March 2013, Fidesz party limited any political advertisement outside political campaigns. As a result, the opposition cannot react to everyday-life politics and decisions taken by Mr. Orbán. This disposition is a serious breach of freedom of speech and it explained why similar dispositions presented in the 2011 electoral law was actually censored by the constitutional court. Nevertheless, here again, Fidesz played by the rules because nothing in the constitution forbids a parliament to bypass a constitutional court’s decision by adopting a constitutional amendment.⁵⁵

The Fourth amendment illustrates the few respect Fidesz had for the authority of the Hungarian constitutional court. Even more, Fidesz deployed a fair amount of energy in a legal strategy to slowly muzzle the court and render it ineffective. This strategy started even before the adoption of the 2011 constitution with an amendment of the former constitution adopted in November 2010. This amendment modified article 32 A and limited the competency of the court to specific domains whereas the former version of the article did not foresee any restriction.⁵⁶ The muzzling of the Court continued with the 2011 constitution with a first infringement related to the independence of the court. Whereas the President of the court was designated *inter pares* in the former constitutional regime, he/she has now to be elected by the National Assembly.⁵⁷ The second infringement is about the mandate of the court which illustrates once again a perfect knowledge of constitutional law. The preamble of the constitution affirms a clear breakdown with the former communist constitution when it states: “We do not recognize the communist constitution of 1949, since it was the basis for tyrannical rule; therefore, we proclaim it to be invalid”. As underlined by the Venice commission, this disposition could be used to reject all the progressive jurisprudence of the court which was tremendous in implementing the rule of law after the fall of communism.⁵⁸ This is precisely what happened with the Fourth amendment, the same which limits freedom of the press. It restrained judicial review to every decision taken after the entry into force of the 2011 constitution, that is to say after the 1st of January 2012. The constitutional court cannot then refer to none of its decision taken in application of the former constitution including the progressive jurisprudence on freedom of marriage, access to the media by political parties, freedom of expression or even death penalty.

Conclusion

The populist rhetoric is key to understand the relation between populism and constitutional democracy. It puts the light on the central place played by rule-of-law and majority in the rhetoric of populism of opposition which distorts the democratic ideal in order to gain power. The rhetoric also offers an analytical frame for studying the passage from populism of opposition to populism of government. The fiction created by the rhetoric is essential to win elections but the rhetoric itself contains germs for the post-election phase, when populism will be in power. The rhetoric does not only fulfil a pure electoral purpose and is not abandoned by populism in power. The uncompromised of the majority is often used to justify reforms which threaten democracy or oppress minority rights. These reforms do not yet take place in an illegal setting and this is where the complexity – some would say the paradox – of populism

⁵⁴ Article IX§6, ‘Constitute’ <https://www.constituteproject.org/constitution/Hungary_2013?lang=en> accessed 17 November 2017.

⁵⁵ It is even, according to some authors, what makes a constitutional court legitimate towards the political bodies, see Louis Favoreu, ‘La légitimité du juge constitutionnel’ (1994) 46 *Revue internationale de droit comparé* 557, 578–579.

⁵⁶ Commission de Venise, ‘Avis Sur La Nouvelle Constitution de La Hongrie’ (n 53) 20.

⁵⁷ Articles 1§2-a and 24§8, ‘Constitute’ (n 54).

⁵⁸ Commission de Venise, ‘Avis Sur La Nouvelle Constitution de La Hongrie’ (n 53) 8.

appears. While on the one hand populist rhetoric rejects any sort of rule of law, populists, once in power, still respect constitutional rules to implement reforms which threaten the rule of law.

To some extent, this is how constitutionalism and populism could be conciliated. If a procedural vision of constitutional democracy is adopted then populist constitutionalism is not an oxymoron. Both Ms. le Pen's and Mr. Orban's strategy had the clear intention to implement their popular rhetoric while respecting the constitutional order. The election of a populist party does not mean that the entire constitutional structure with the check and balances, the veto points and the human rights framework will be negated. The process is slower and more vicious because populist play by the rules to gradually change the rules. Populist constitutionalism is however limited in time and vanishes as soon as value is put in the conceptualization of constitutional democracy. Values such as political pluralism, transnational solidarity and protection of minorities renders constitutional democracy incompatible with populism. The ultimate goal of populism is the destruction of constitutional democracy, the negation of its spirit and the perpetuation of populist's power. The contamination is subtle and malicious but it is not cureless. The populist parasite would never disappear from constitutional democracy because populism is part of constitutional democracy. However, its contamination effect can be limited if we, scholars, stand up and rise against populist rhetoric, if we acknowledge that constitutional democracy is evident for our community but not for the majority of our compatriots. How to use institutions to spread a wide constitutional culture among a citizenry is an issue constitutional lawyers should address urgently.

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