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Identity Politics and the Militarisation of Constitutional Law

GIUSEPPE MARTINICO

Full Professor of Comparative Public Law, Sant'Anna School of Advanced Studies (Italy)

✉ **giuseppe.martinico@santannapisa.it**

https://orcid.org/0000-0002-2003-3745

ABSTRACT

In this article, I shall focus on the legal consequences of one of the most obvious features of populisms: identity politics. In particular, I shall explore how populists in power use constitutional law to identify and fight the alleged enemy, thus confirming their Schmittian flavour. In Schmitt, public law becomes part of a constitutional narrative that represents the people as forged by a static identity that goes back to the mythological origin of the legal system. This reconstruction is based on an organicistic reading of the concept of the people. This identitarian public law makes instrumental use of the moral argument, the historical argument and the religious argument. Populists in government tend to militarise constitutional law in many ways and in this article I will focus on two strategies: one that looks *backwards*, consisting of the instrumentalisation of the argument of constituent power; and one that looks *forward* and leverages the use of constitutional amendment.

Keywords: populisms, constitutional law, identity, militarisation of constitutional law, constituent power

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1. Plan of the Article

In this article, I shall focus on the legal consequences of one of the most obvious features of populisms: identity politics. In particular, I shall explore how populists in power use constitutional law to identify and fight the alleged enemy (Antal, 2022), thus confirming their Schmittian flavour. In Schmitt, public law becomes part of a constitutional narrative that represents the people as forged by a static identity that goes back to the mythological origin of the legal system. This reconstruction is based on an organicistic reading of the concept of the people. This identitarian public law makes instrumental use of the moral argument, the historical argument, and the religious argument. As Corrias - relying on the works by Rosenfeld (Rosenfeld, 2010) - suggested that "the typical populist reading of identity in terms of sameness comes with (dubious) normative connotations, like the alleged purity of a national identity and the appointment of elements which are (supposedly) hostile to and thus a threat to this purity" (Corrias, 2016, 23). Populists in government tend to militarise constitutional law in many ways and in this article I will focus on two strategies: one that looks *backward*, consisting of the instrumentalisation of the argument of constituent power; and one that looks *forward* and leverages the use of constitutional amendment.

2. On the Genetic Violence and the Instrumentalisation of the Constituent Past

Constitutions are traditionally described as sacred documents produced by the genetic unity represented by the constituent power. In my view constituent power can be seen as a fiction with a normative claim. Describing the constitution as the product of a monolithic will of the nation serves to explain why we should obey it since here obedience is linked to a kind of mythical past located, ideally, outside of history. However, some years ago, Elster

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reflected upon the importance of fear and violence in constitution making, starting from the premise that: "contrary to a traditional view, constitutions are rarely written in calm and reflective moments. Rather, because they tend to be written in period of social unrest, constituent moments induce strong emotions and, frequently, violence" (Elster, 2012, 7)[1]. In that essay, Elster analysed the cases of the American and French revolutions, but these are considerations that can also be applied to other experiences that are very rich in provision aimed to dispel the fear of the past, for instance, to what Mortati called the constitutions "born from the Resistance" (Mortati, 1973, 222)[2]. The social unrest characterising many constituent moments cannot be captured by the fiction of constituent power that claims that behind the genetic moment lies the unity of the nation or people. So, in reality, constituent power also operates a work of removing historical truth, because constitutions often tend to codify the worldview of the faction that won the conflict. What the fiction of the constituent power *de facto* does is to legitimise not only the constitution that arises, but also the violence of the conflict that gave rise to it, as if it were a mat under which to hide the dust.

If we are lucky, the victorious side will be the democratic one that agrees to include, with the procedures described by the new constitution, former enemies, making them citizens for all intents and purposes as long as the fundamental values set out in the constitution are respected. This is, for instance, the paradigm followed by post-World War II constitutionalism, which feeds on eternity clauses and, in some cases, discovers the weapon of militant democracy to avert a return to the totalitarian past. Another

[1] Choudhry argued that: "Theorists who explain and justify constitutional practice through historical examples deploy an account of a pristine past. Bruce Ackerman's theory of 'constitutional moments,' which is a leading account of the phenomenology of extra-legal constitutional change in the United States, is an illuminating illustration…we should revisit Ackerman's historical account. Ackerman claims that the Civil War amendments were produced through this special, and peaceful, constitutional process. But entirely absent from his analysis is that these amendments were adopted in the immediate aftermath of what remains the bloodiest war in American history" (Choudhry, 2012, 1908).

[2] By "constitutions born from the Resistance," Mortati also referred to other documents, for instance, the French (IV Republic) and the German Constitutions (Mortati, 1973).

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consequence of this way of proceeding, which makes constitutions descend from an original political, cultural and value unity, is that constitutions are often depicted as characterised by an absence of contradictions. This, too, is a fiction: constitutions, as the literature on "constitutional dilemmas" (Zucca, 2007) reminds us, may well have contradictions within them. Moreover, as Luciani said, even if they perceive themselves as eternal and outside of history (Luciani, 2013), constitutions are human creations and therefore fallible. Beyond its being fiction, constituent power should not be taken too seriously, not least because it lends itself to dangerous instrumentalisation, as the Schmittian twist on the phenomenon demonstrates. Moreover, comparative law shows that the constituent moment rarely presents itself in the form pictured by Schmitt. A particularly symbolic historical example is the federal Constitution of the United States, often described as emblematic of the popular role in the constitutional genesis. As Morgan explained very well, that "We the People" opening the US Constitution did not crystallise an already existing (federal) people, but was the premise that was used for the invention of popular sovereignty (Morgan, 1988). It is no coincidence that, for example, the so-called anti-federalists opposed the formula that opens the preamble to the federal Constitution. For them, only the peoples of the states existed as argued among others, by Patrick Henry[3] and, later, John Calhoun, the champion of the Compact theory. For these authors and politicians, the

[3] "I have the highest veneration for those gentlemen; but, sir, give me leave to demand, What right had they to say, We, the people? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of, We, the people, instead of, We, the states? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states. I have the highest respect for those gentlemen who formed the Convention, and, were some of them not here, I would express some testimonial of esteem for them. America had, on a former occasion, put the utmost confidence in them – a confidence which was well placed; and I am sure, sir, I would give up any thing to them; I would cheerfully confide in them as my representatives. But, sir, on this great occasion, I would demand the cause of their conduct. Even from that illustrious man who saved us by his valor [George Washington], I would have a reason for his conduct: that liberty which he has given us by his valor, tells me to ask this reason; and sure I am, were he here, he would give us that reason. But there are other gentlemen here, who can give us this information. The people gave them no power to use their name. That they exceeded their power is perfectly clear. It is not mere curiosity that actuates me" (Henry, 1788).

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origin of the constitutional compact was the will of the states as confirmed by the letter of Article VII of the US Constitution, which refers to the agreement "Constitution between the states so ratifying the same"[4].

As a matter of fact, the decision to include the formula "We the People" in the federal constitutional preamble was made by the Committee of Style to avoid inserting the names of the states before they ratified the Constitution (Bassani, 2011, 48). Since there was - until the 14th Amendment, at least - no federal citizenship and since, according to the proponents of the Compact theory, only the people of the states existed, the states themselves were seen as the defenders of their rights (since the federal Bill of Rights was seen as only applicable to the federal level). The states were, in some cases, endowed with older constitutions than the federal one and in the protection of rights in general were seen as more mature actors than the federal level.

The American experience, then, shows us very clearly that constitutions seldom reflect the existence of a pre-existing people characterised by cultural, linguistic and value homogeneity, as supporters of the constituent power theory suggest. More frequently, instead, constitutions participate in the formation of the identity of the constitutional subject, shaping it through the inclusive procedures outlined in the fundamental charter. This reveals the inclusive potential of constitutional procedures and constitutionalism. The latter is often reduced to a set of limits that insist on political power, but this representation also forgets the importance of constitutional forms (Cartabia, 2019), which facilitate the transition from the multitude to the people understood as a political subject characterised by the same constitutional values and principles.

[4] Art. VII US Constitution

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3. The Schmittian Idea of the Constituent Power and its Current Forms

Probably the concept, so widespread in the relevant literature, of the constituent power as pure power operating in a legally empty space is due to Carl Schmitt (Schmitt, 2008 [1928], 126), who famously distorted and manipulated Sieyès' thought (Rubinelli, 2020, 23), but this view, actually, does not correspond to Sieyès' idea that natural law was "prior to the nation and above the nation" (Sieyès, 1789; Dogliani, 1996), understood as the bearer of constituent power. In this context, natural law ideally represented a constraint (or an external limit) on the will of the nation. Nowadays, constituent power rarely appears in its revolutionary forms; in this, as has been argued, constituent power has been replaced by the constituent process (Häberle, 1987), a set of procedures that guarantee a gradual, incremental, and inclusive transition to the new constitution. The classic example is provided by the 1996 South African constitution. Indeed, the South African case demonstrates that constituent authority can then operate within a horizon of legality (Jacobsohn and Roznai, 2020).

Today, as stated at the beginning of this article, constituent power should be conceptualised as a legal-historical fiction behind which there is a normative claim. Indeed, behind the correspondence between the constitution and the constituent power there is the necessity to conceive the constitution as the product of the will of a pre-existing political entity (the people) which "serves" as a source of legitimacy for the constitution itself, helping us conceive the constitution – product and then limit to the constituent power – as "democratic"[5].

[5] "When the discourse moves from the descriptive to the normative, it changes and becomes the claim that the constituent power in modern societies should be the people, for democracy is tied to the people and the legitimacy of legal authority depends on a democratic foundation" (Galligan, 2008, 353).

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The fiction of the constituent power is seen as necessary in order to justify and legitimate the rupture with the past and the new constitutional design present in the fundamental charter:

> We attribute this power to the people. We behave as if the constitution is a product of the popular will. The fiction helps to bring the act in line with the requirements of democratic legitimacy. However, the term "fiction" should not be misunderstood as a mere imagination. It makes a difference whether the constituent power is or is not attributed to the people. If the fiction is taken seriously it establishes a relationship of accountability between the government and the people which in spite of its fictitious basis has real consequences (Grimm, 2016, 1).

Another confirmation of the fact that we are describing a historical-legal fiction is given by a historical argument: frequently, the constitutions and the revolutions behind them – understood in a technical sense, as a break in the chain of validity *à la* Kelsen (Kelsen, 1945, 115) – have been a product of the action of the *élite*. Indeed, as Mortati highlighted, there are forms of constituent power that can have elitist features (Mortati, 1945 [2020], 110).

The obsession with the constituent power and with a constitutional moment has led to the description of the United Kingdom as the only example of an evolutionary (i.e. non-revolutionary) constitutionalism in Europe, but actually many other experiences, provided with written constitutions, are in a problematic relationship with the "constituent power". The German and French case (1958) are two other examples of this problematic trend (Möllers, 2007). Many other EU Member States, then, do not have a document formally termed as a constitution (Sweden, the Netherlands).

Another example is represented by the Eastern European countries characterised by constituent processes that are atypical because they were influenced by the international community.

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These are well-known reflections that have led scholars to wondering about the possible exhaustion of constituent power (Dogliani, 1996), its redundancy or the possible passage from the idea of constituent power to that of constituent process.

On this subject, there are different theoretical positions, but they share the idea that the constitution does not always and necessarily presuppose a pre-existing cultural and political identity; on the contrary, legal norms (particularly constitutional norms) often contribute to creating homogeneity by preparing procedures and favouring inclusion. In other words, as has been effectively said, "inclusiveness is the contemporary mechanism for ensuring that a constitution actually is an exercise of the constituent power" (Tushnet, 2018, 26). One could therefore ask if it is not necessary to abandon, rather than rehabilitate, the concept of constituent power in order to achieve a complete democratisation of post-totalitarian constitutionalism (Verdugo, 2023).

Constituent power only makes sense if it is seen as a fiction that serves to legitimise the constitution and pivots on an ideal unitary moment at the origin of this document. Constitutionalism seeks to legitimise the constitution by favouring inclusiveness.

> Contemporary constitution-making processes must be inclusive in some general sense. Satisfying that requirement at both the drafting and the adoption stages raises some interesting general questions (Tushnet, 2018, 26).

Against this background, inclusiveness serves a multiple purpose: to make the transition peaceful, to give voice to the pluralism of values present in a society, to prevent only one dominant view of society from prevailing. Moreover, in a context characterised by the growing importance of the international community, constituent processes under constitutionalism often cannot deviate from those values and rights that respond to a kind of general international consensus.

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This brings me to those approaches that have sought to understand constituent power in a procedural or discursive manner (Fichera, 2021; Ferrara, 2023), as a phenomenon that does not end only in the genetic moment of the system but runs through the entire life of the constitutional system. This approach has the merit of linking the democratic nature of the constitutional system to the ability to include those minorities that were, for example, excluded from the foundation of the constitutional order. If seen from this point of view, in fact, even the constitution of the country we now consider the most democratic par excellence, the United States, is deficient from a democratic point of view, as it was written by white men as emphasised by legal and constitutional historians (Hirshman, 2022; Blackhawk, 2023).

A good example of this inclusive and discursive approach was in my view the one behind the 2023 Australian Indigenous Voice referendum in Australia, an initiative which aimed at recognising Indigenous Australians in the constitutional document by setting up the Aboriginal and Torres Strait Islander Voice. This body was conceived to "make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples"[6]. As we know this attempt did not work and the proposal was rejected on 14 October 2023.

But how do populists use constituent power? Arato explained this point very well and emphasised the rediscovery of his Schmittian version. Their approach characterised by extreme majoritarianism makes the populists see constitutions as obstacles, as straitjackets, because of their radical or extreme majoritarianism.

As scholars have pointed out, populists do not normally acknowledge the distinction between constitutional and non-constitutional politics, since they do not conceive the constitution as neutral. This is consistent with that particular constitutional tradition that is Jacobin, as Corrias pointed out

[6] Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7019

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(Corrias, 2016). This approach reveals a sort of legal scepticism that can be traced back to what Blokker calls "legal resentment"[7]. This element is connected to what Arato calls the "regeneration of the people" (Arato, 2013, 143) and to populism's tendency "to occupy the space of the constituent power" (Arato, 2017). This also explains why populists tend to perceive limits and procedures as obstacles in the path of establishing the democratic principle. The recourse of constituent power is used as a vehicle for legal resentment and mobilisation to challenge the limits of constitutional procedures seen as undemocratic. Moreover, populists depict courts and independent agencies as biased and non-neutral since "independent judges and courts are understood as an illegitimate constraint on majority rule, and hence legal means are to be employed to counter this situation" (Blokker, 2019, 547). In conclusion, since populists are allergic to counter-majoritarian dynamics, for them the only possible form of constitutionalism is a "weak" one, i.e. a type of constitutionalism that abandons eternity clauses and super-majorities and recognises the virtues of permanent constituent power.

Colón-Ríos (partly echoing one of Negri's well-known theses – Negri, 1999 – returned to the subject, laying the groundwork for what Arato, not surprisingly, called "the best attempt I know to redeem a strong, populist notion of the constituent power"[8] (Arato, 2012, V).

For Colón-Ríos, a truly democratic constitutionalism should renounce placing limits on constituent power, since "only a conception of constituent power according to which its exercise can be triggered at any moment in the

[7] "Legal resentment, so I argue, is a crucial dimension of the populist constitutional programme, and comes forth out of a distinctive populist reading of liberal constitutionalism. The populist approach regards liberal constitutionalism as both a mindset and a practice. The latter could be aptly described as the post–Second World War 'default design choice for political systems across Europe and North America', in the form of a constitutionalism that 'typically hinges on a written constitution that includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law'. In this, the populist criticisms are not unlike those that have emerged in academic debates on 'new constitutionalism' and judicial review. Populists tend to be critical about the strong and independent nature of apex courts, the role and form of judicial review, and the extensive and entrenched nature of individual rights" (Blokker, 2019, 549).

[8] See the *endorsement* by Andrew Arato of the book by Colón-Ríos, 2012, V.

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life of a constitutional regime can be made consistent with the basic thrust of the democratic ideal" [9] (Colón-Ríos, 2012, 8).

These approaches, perhaps not consciously, end up being perversely fascinated by the "Schmittian ghost" (Dogliani, 1996, 270) of constituent power, understood as unlimited and loose, and see in it the full expression of democracy.

4. The Use of the Constitutional Amendment

When dealing with populism in power, scholars have mainly focused on the phenomenon of unconstitutional constitutional amendments (Roznai, 2017) or the abuse of emergency powers (Gardiner, 2022). These are important phenomena, but they are only the tip of the iceberg. Particularly in established democracies, the erosion of the counter-majoritarian chains of constitutionalism often occurs in a more subtle manner as I tried to explain elsewhere (Martinico, 2021).

The relationship between constitutional reform and populism is complex and does not always follow a clear logic. Constitutional amendment is one of the tools of constitutional law used by populists, but it is not the only one. Faraguna explains it well in an essay:

> Populists in power usually stay away from constitutional amendment and tend to prefer constitutional replacement, or unilateral major constitutional changes, as in the cases of Venezuela, Ecuador and Turkey (Landau, 2018: 527). Constitutional replacement may be preceded by specific amendments, removing any possible constitutional hurdles to the populist project of constitutional replacement. This was the case in Hungary. However, constitutional

[9] Colón-Ríos himself, perhaps aware of the consequences of his theoretical proposals, clarified, in a footnote, that the concept of populism used in his book should not be understood as referring to "dictatorships covered by a thick layer of democratic rhetoric", but "as a way of describing a regime based on democratic self-rule" (Colón-Ríos, 2012, 52).

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> amendment is not always available as a constitutional tool (in the sense used by Blokker's 'instrumentalism'; see Blokker, 2019) serving populists' projects of constitution-making (Faraguna, 2020, 105).

However, these considerations do not mean that populists in government do not use constitutional amendments. In Hungary, for example, once a very large majority was achieved, the Fundamental Law was amended. Faraguna explains this with the populists' pragmatic preference for constitutional substitution, which is perfectly in line with the theoretical framework I have mentioned in the previous section.

Constitutional law, in this context, becomes a tool through which to petrify the image of the enemy (Antal, 2022), according to a dynamic of weaponisation of constitutional law.

> The defining characteristic of the Hungarian Fundamental Law is its strong constitutional identity: the political identity of the supermajority has become constitutionalized. This identity image has a number of positive elements (i.e., elements that have been defined as desirable, a kind of fundamental characteristic of the public law system). These include Christianity, active memory politics, national cohesion, various aspects of sustainability… in addition to the explicitly strong positive constitutional identity elements, the constitutional power intended that negative identity elements should be at least as strong as the positive ones (in many ways even stronger and more important in the daily political struggles relying constitutional identity) …the negative constitutional identity has been presented in the original constitutional conception, which started to unfold in 2010, but also since 2015 (embedded in the amendments to the Fundamental Law) the constitutional enemy formation pervades public law and political debates. Three basic strands of Constitutionalised Image of Enemy (CIE) have emerged (and this reflects the constitution-power's view

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> of history and the past): (1) antiCommunism framed in actual political framework; (2) anti-immigration; (3) anti-gender as the opposition to non-heterosexual forms of coexistence (Antal, 2022).

This occurs through the instrumentalisation of the (moral, religious, historical) argument of tradition. In this context, the constitution becomes, above all, an instrument of government that loses its counter-majoritarian flavour and constitutionalism is perceived as a device of depoliticisation that places obstacles in the way of the sovereign will of the people. Rights - and this brings us to anti-individualism, one of the key features of illiberal populisms - are perceived as factors of fragmentation that undermine solidarity and community values. The result of these considerations can be labelled identitarian public law in light of the importance that identity politics and homogeneity have in it. Identitarian public has a clear Schmittian flavour and has led to the weaponisation of constitutional law and, indeed, in Schmitt public law became part of a constitutional narrative that represents the people as forged by a static and homogeneous identity that goes back to the mythological origin of the legal system (Schmitt, 1988 [1923]). As recalled at the beginning of the article, identitarian public law makes instrumental use of the argument of tradition to identify the values that can be opposed to the enemies, i.e. those who cannot be traced back to the "real" people.

A striking example is provided by certain provisions of the Russian Constitution of 1993, last amended in 2020. Article 67.1 (2) and (3), introduced in 2020, provides that "the Russian Federation, united by thousand-year history…The Russian Federation honors *the memory of defenders of the Fatherland*, provides protection of the *historical truth*. Diminution of the heroic deed of the people defending the Fatherland is precluded" (emphasis added).

Another example is Article R.4 of the Hungarian Basic Law according to which "the protection of the *constitutional identity and Christian culture of Hungary* shall be an obligation of every organ of the State" (emphasis added).

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To understand Orbán's view on Christian democracy and on the role of the EU, it is useful to analyse the text of a speech he gave in 2019:

> International interpretation can best be summed up in the claim that what must operate in the world are liberal democracies – especially in Europe. These must construct and implement a kind of liberal internationalism, from which a liberal empire must emerge. The European Union is none other than an embodiment of this […] liberal democracy was viable up until the point when it departed from its Christian foundations. For as long as it protected personal liberty and property it had a beneficial effect on humanity. But the content of liberal democracy changed radically when it began to break the bonds that bind people to real life: when it questioned the identity of a person's sex, devalued people's religious identity, and deemed people's national affiliation superfluous. And the truth is that in Europe over the past twenty or thirty years this has become the spirit of the age (Orbán, 2019).

From this perspective, liberalism is seen as undermining traditional values, in particular Christian ones, and the EU has become part of this threat. According to illiberal counter-narrative, Hungary must preserve its special nature and culture; in other words, its identity[10]. Against this background, the EU is seen as the source of a dangerous homogenisation that affects traditional values and national identity.

Legal intimations of these approaches can also be found in the case law of some national constitutional courts, for instance in some of the judgments of the Hungarian one based on the instrumentalisation of Article 4.2 Treaty on EU (TEU).

[10] "Populists, too, understand constitutional identity in the sense of sameness. However, they do not only claim that both authors and addressees of the constitution should be understood as one and the same (which is something most democrats also do). Instead, the populist understanding of the identity of the people is reductive in the sense that it tends to narrow down identity to sameness and radicalise this notion" (Corrias, 2016, 23).

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It is interesting to look at the Hungarian case law to see how the Hungarian Constitutional Court manipulated the concept of national identity stemming from Article 4 TEU by reading it as an isolated concept, and how it read it in light of its own concept of constitutional identity. This case is a perfect example of how instrumental the illiberal reading of the EU Treaties may be:

> According to Article 4 (2) TEU, 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. The protection of constitutional identity should be granted in the framework of an - informal cooperation with EUC based on the principles of equality and collegiality, with mutual respect to each other, similarly to the present practice followed by several other Member States' constitutional courts and supreme judicial bodies performing similar functions. *The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law* and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law. The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, *constitutional identity cannot be waived by way of an international treaty* – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. *Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity*

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> *have several common points, thus their control should be performed with due regard to each other in specific cases*"[11] (emphasis added).

Here, the Hungarian Constitutional Court first started with Article 4.2 TEU (which employs the concept of national identity). Second, it used the concept of constitutional identity, coupling it with the preservation of sovereignty (a term which is not used in Article 4.2. TEU). Third, it read the concept of constitutional identity in light of Article R.3, thus offering an alternative reading of the same concept.

In so doing, the Hungarian Constitutional Court completely disregarded the fact that in Article 4 TEU, national identity must be read in line with the concept of sincere cooperation stemming from its paragraph 3. In other words, the alternative reading of constitutional identity offered by the Hungarian Constitutional Court is in patent conflict with the meaning of Article 4.2 TUE invoked by the Hungarian judges. This example shows how instrumental and cherry picking the populist understanding of the relevant EU law provision is.

After the judgment, the notion of constitutional identity was codified in the Hungarian Constitution in 2018 with the approval of the Seventh Amendment which led to the already mentioned Article R.4. This provision has been constantly invoked in the most recent case law of the Hungarian Constitutional Court in which the constitutional identity argument is used to justify the violation of the common values under Article 2 TEU[12]. In this way, the populists in power use the identity argument to distinguish the good citizen (belonging to the people-majority) and the enemy of the people, according to exclusionary dynamics that cannot be reconciled with the

[11] Hungarian Constitutional Court, Decision 22/2016 , https://hunconcourt.hu/dontes/decision-22-2016-on-joint-excercise-of-competences-with-the-eu/, par. 62-66.
[12] Hungarian Constitutional Court, Decisions 32/2021 and X/477/2021, https://api.alkotmanybirosag.hu/en/wp-content/uploads/sites/3/2021/12/32_2021_ab_eng.pdf and https://images.dirittounioneeuropea.eu/f/sentenze/documento_46Ilb_DUE.pdf

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pluralism of constitutionalism. Although I focused on the Hungarian case, similar evidence can be found in other experiences (Vanoni and Vimercati, 2021). Against this background, the constitution is not only reduced to a mere instrument of government, but also ends up being applied only to members of the majority, as revealed by former President Trump's instrumental use of the First Amendment in the US experience. Indeed, it is possible to find in his speeches evidence confirming that in his constitutional counter-narrative that enemies of the people should not be allowed to benefit from the First Amendment; for instance, Trump attacked free media by saying that:

> One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected[13].

At the same time, the First Amendment was recalled by his defence after the events on Capitol Hill. This argument is also present in the trial memorandum[14].

This reveals how instrumental and cherry picking Trump's approach to the Constitution is as these lines clearly reveal a sort of double standard according to which constitutional freedoms apply to those who belong to his political faction (the real people).

[13] https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 (last accessed on 8 December 2021).
[14] Trial Memorandum of Donald J. Trump, 45th President of the United States of America, 2021, available at https://context-cdn.washingtonpost.com/notes/prod/default/documents/9fc7df1f-2945-4be7-80bc-7e0f928c78b2/note/4430abec-b677-4bfd-9232-d45145aca1cb.#page=1

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5. Final Remarks

In this short article I have tried to highlight two ways in which the populists in power use the categories of constitutional law according to an identity-excluding vision.

This emphasis on identity politics mainly characterises right-wing populisms, but there are cases of left-wing populisms that actually take up this aspect by declining it in a non-ethnic manner. This is the case, for example, with Marco Rizzo, the post-communist leader of *Democrazia Sovrana e Popolare*[15] in Italy or Sahra Wagenknecht in Germany. Right-wing and left-wing populisms often coincide with the view of constitutionalism as a mere set of non-democratic constraints.

This demonstrates once again how, while failing to construct a true constitutional theory, populisms act by borrowing and exploiting concepts and instruments of constitutional law, giving rise to a true constitutional counter-narrative (Martinico, 2021).

In this article, I dealt with the abuse of the constituent power and of the constitutional amendment. While I focused on the description and conceptualisation of the challenges related to the use of the constitutional argument by populists, there are of course strategies that could be advanced in order to resist the abuses (Landau, 2013) committed by populists, by insisting for instance on the constitutional design in order to equip the system with some super-majoritarian tools, starting with the codification of some eternity clauses. At the same time, however, we should realise that the defence of the values of constitutionalism cannot be reduced to a conservative approach of the constitution or to the mere defence of the *status quo* (Arato and Cohen, 2021; Alterio, 2019). Without the support of civil society, counter-majoritarian actors risk being captured by the political power in the

[15] Rizzo defines himself as a "right-wing communist" and conceives himself as against the battles for civil rights (especially of LGBT couples), defined as "mass distraction". On other occasions he has also declared himself against immigration and in favour of a naval blockade. Rizzo is one of the best-known exponents of left-wing sovereigntism, which, not surprisingly, often uses similar arguments to right-wing sovereigntists (Barana 2023).

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long run, that is why it is necessary to engage with populist claims in order to adopt a critical approach (Martinico, 2021) and to transform "mounting distrust into an active democratic virtue" (Alemanno, 2017, 103).

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