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COMMENT

# Constitutional Democracy in the Age of Populisms: A Commentary to Mark Tushnet's Populist Constitutional Law

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**Abstract**
This contribution aims at discussing constitutional democracy in the age of populisms, by explaining how populist movements oppose liberal-democratic constitutionalism and by presenting the thesis of a so-called 'populist constitutionalism', as proposed by Mark Tushnet. In the first section, a general and analytic exploration of populist phenomena will be drawn, by focusing on the so-called thesis of a 'populist' constitutionalism. In the second part, Tushnet's arguments for a populist constitutionalism will be presented, through the analysis of his two main contributions: *Taking the Constitution Away from the Courts*, in which Tushnet develops his critique of legal constitutionalism and judicial review as an undemocratic power by unelected justices, and *Authoritarian Constitutionalism*, a recent article in which Tushnet distinguishes between 'authoritarian' and 'populist' definitions of constitutionalism. In conclusion, such arguments will be discussed, by proposing a critical response to Tushnet's position and presenting some risks of a majoritarian and populist constitutional democracy.

**Keywords** Populism · Constitutionalism · Democracy · Authoritarianism · Rule of law · Mark Tushnet

## Introduction

Populism is one of the most controversial and vexed issues in contemporary political theory. This paper addresses populism from a constitutional perspective, especially in the vein of Mark Tushnet's model of constitutional democracy. Accordingly, the

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constitution represents a product of a purely political process, which deems the people as the real 'owner' of constituent power. Therefore, any independent and unelected institution which aims at limiting the rule and the influence of the majority over the Constitution (such as the Supreme Court, for instance) is to be considered as allegedly undemocratic and illegitimate constraints on the majoritarian will.

In a broader sense, populism is often considered as a consequence of political as well as socio-economic crisis, such as the one occurred in Germany during the 20s and the early 30s, or also the current immigration emergency occurring in South Europe. Anti-immigrant, anti-pluralist and anti-multicultural sentiments then represent the key arguments in populist discourses, together with a strong exclusionist tendency against minorities and opposition groups. Many authors such as Albena Azmanova (2018) and Jan-Werner Müller (2016) use the term 'new populism' to define a transnational and transpolitical movement which is characterised by three main features: a radical critique to the elites; an anti-pluralist attitude; the conviction of having a 'moral' legitimacy to represent the 'real' people.

Populists are tendentially inclined to find an enemy; they create antagonism on different aspects of life, especially on moral, ethical and social grounds; populists also separate between the interests of small oligarchic groups and the 'general will' and between the 'national people' and the 'invading immigrants'.[1]

These 'new' or 'contemporary' forms of populism (Bilgrami 2018) seem to emerge from two specific circumstances: (1) the economic and financial crisis which impoverished the middle class and widened social inequalities; (2) the failure of the Left throughout the world and its inadequacy to respond to such a crisis. The Left seems to be far from defending popular needs and too much prone to elitist positions. As Bilgrami correctly points out, the failure of the Left is also provoked by its embracing a neo-liberal approach to the economy; obviously, it has led to several problematic issues:

> Its inability to create sufficient employment; its generating acute and seemingly irreversible inequalities; its systematic destruction of the bargaining power of labour; its undermining of national sovereignties over their own economies; its making immigration, which could be a source of strength for national economies, into a deep source of anxiety and complaint among working people. (Bilgrami 2018, p. 455)

In this paper, two main issues will be addressed: a discussion about contemporary populism broadly considered, and an analysis of Tushnet's populist constitutionalism, which has never been subject to an exhaustive critical analysis so far.

[1] On this line, see the various appeals for a nationalistic and ethnic defence of the 'people': 'America first' or 'make America great again' by President Trump and 'Britain first' by Farage's UKIP and Brexit supporters; '*prima gli italiani*' (*Italians first*) claimed by the Italian political leader Matteo Salvini; or the most recent Lepenist motto '*Choisir la France*', which replaced the previous slogan '*Remettre la France in ordre*'.

## What is 'Populist' Constitutionalism?

Generally speaking, populism is a difficult issue to be spelt out. More specifically, within right-wing populism, different but complementary tendencies can be emphasised: 'sovereignism'; 'xenophobia'; 'anti-pluralism'; 'nationalism' (such as Marine Le Pen's *National Front* in France; the AFD Party in Germany; UKIP in Great Britain; the Italian new political course of Matteo Salvini's *League*). Moreover, an 'authoritarian' sort of populism can be individuated: Erdogan's leadership in Turkey or Orbán's one in Hungary are paradigmatic examples.

Populism should also be distinguished from the classical anti-parliamentary theories since populism does not reject representative democracy as such. As Alessandro Ferrara notes, 'often populist movements do accept elections and representative institutions in their effort to wring them from the corrupt elite' (Ferrara 2018, p. 466). Thus, populism is not anti-democratic, but rather it holds an anti-liberal connotation. It is—first of all—a radical form of majoritarianism.

Under a populist point of view, democracy implies a continuous recall to the 'will of the majority' in every aspect of political life, including the constitutional framework. Therefore, populist constitutionalists tend to reject the Ackermanian dualist model of democracy, by embracing a pure monist understanding of politics in which there is no differentiation or separation between the constitutional and the legislative stages.

By being deeply majoritarian, populist constitutionalists reject check and balances and refuse to recognize the role of constitutional or supreme courts. By assuming Ferrara's definition of populism as a form of 'majoritarian post-liberalism', we should note that—under a populist banner—'the electorate is the people's current incarnation and the constitution is, thus, in the electorate's hands' (Ferrara 2018, p. 468).

Mark Tushnet defines populist constitutionalism as the way in which people can directly and equally participate in the constitutional decision-making process. In such a view, populist constitutionalism assumes the Declaration of Independence and the Preamble as the unique source of constitutional legitimacy, by recalling Lincoln's axiom for which the Constitution 'belongs to the People, and only by the People it can be exercised' (Tushnet 1999, p. 194).

Furthermore, populist constitutionalism holds that judicial institutions such as courts, in delivering constitutional decisions, should always follow electoral and majoritarian orientations, especially concerning moral, ethical or social issues. To corroborate such a thesis, Ferrara presents the case of *Obergefell* versus *Hodges* Supreme Court sentence (2015), by recalling the dissenting opinion addressed by Justices Roberts, Scalia and Thomas. In such an opinion, they argued that a strict majority of five lawyers could not decide about hard cases, by depriving the American people of its 'democratic' power to decide about the Constitution; at the same time, the dissenting justices blame those 'five justices' for having imposed their own vision on moral issues (same-sex marriage, in particular) as a matter of constitutional law (Ferrara 2018, p. 7).

Many influential theorists have tried to define populism from a constitutional perspective and, consequently, many different accounts emerge: Paul Blokker emphasizes that one of the distinctive aspects in contemporary populism concerns its rejection of legal constraints or limits over majoritarian power. In this sense, populist constitutionalism does not reject democratic constitutionalism as such, but it manifests an undeniable *legal scepticism* (Blokker 2017, p. 2).

As we said, populist constitutionalism defends a majoritarian and plebiscitarian approach to constitutional law, by considering the role of non-political or counter-majoritarian institutions as an illegitimate violation of the democratic majoritarian principle. Thus, the first claim for populist constitutionalism is to refuse legal constraints over majority rule. This populist tendency actually represents a rejection of liberal-democratic constitutionalism, especially in its 'legal' definition. As Blokker shows 'populists are seen as impatient with procedures and institutions, and as a loath of intermediary bodies, as they prefer unmediated relations between the populist ruler and the people. Populists prefer direct, *natural* or *pure* forms of politics, in contrast to indirect and artificial ones' (Blokker 2017, p. 3).

Moreover, from a populist perspective, a radical anti-elitist approach can be individuated. Populism consideres the popular will as the unique source of constitutional legitimation and authority; thus, people are seen as opposed to any 'elitist' groups (constitutional justices, politicians, economic and financial actors and so forth).

Accordingly, Blokker argues that 'populists endorse […] a distinctive interpretation of what the popular will entails. Populism is based on the conviction of populist forces to be representing the genuine will of the "pure" and "ordinary" people, against their *enemies*' (Blokker 2017, p. 5). In this view, Nadia Urbinati shows that populism is actually the negation of Rawlsian reasonable pluralism, since it assumes the defence of the political will of 'the *real* people' as its fundamental aim, by ignoring any value or ethical pluralism of groups. As Urbinati clarifies, populists reject the liberal democratic representative principle of the separation between political and social interests, between political society and civil society, in order to unify rulers and ruled under the common banner of *the People* (Blokker 2017, p. 5).

As we have seen, populism assumes different connotations, like, for instance, the distinction between a left-wing and a right-wing tendency. Down one path, right-wing populists devote great attention to nationalistic and ethnical definitions of the People; they tend to exclude cultural minorities from political discourse, by emphasising the defence of the dominant majority rights against the "invasion" of ethical minorities which do not integrate themselves within the majoritarian group but claim their rights.

Right-wing populists often develop a radical critique to the political, economic, financial and also cultural elitism, especially when incarnated by judicial institutions; in this sense, populists endorse 'the participation of ordinary citizens in constitutional politics' (Blokker 2017, p. 6). Michael Sandel (2018), for his part, asserts that right-wing populism grows in parallel with the failure of progressive political forces; thus, the ongoing crisis of the Left is one of the main reasons for the success of right-wing, nationalist and often racist populism. Left-wing populists refuse to separate between majoritarian groups and ethnic or cultural minorities; therefore, Left populists defend individual human and social rights as the cornerstone of their

political action. In addition, left-wing populism is totally free from nationalistic and racial arguments, by carrying on a much more internationalist and communitarian perspective.

Conversely, right-wing populists pursue a politics of closure; it is conservative; sometimes racist; anti-European. Left-wing populism, instead, is characterized by openness; it proposes a progressive political approach; its main purpose is to protect fundamental rights—both civil and social rights—and not to defend 'the People' against the risk of an 'invasion' by immigrants (as the case of the Hungarian Prime Minister Orbán). As regards constitutional law, left-wing populism '[…] emphasises a public claim to bring constitutionalism closer to the people by means of rights and participatory instruments' (Blokker 2017, p. 8). By contrast, right-wing populists draw their political program through an 'ethno-national construct of the People' (Blokker 2017, p. 8).

Rogers Brubaker has recently pointed out that left-wing populists base their political program on social and economic terms, by accusing international financial elites (such as the European Union) of ignoring the basic needs of disadvantaged people in order to favour financial markets. By contrast, right-wing populists focus their arguments on ethnic and racial reasons, by condemning any overlap among different racial groups or any entry of ethnic minority group within the dominant one. An example of this approach is provided by Orbàn's recent re-election discourse to his supporters, in which the Hungarian Prime Minister affirmed that 'this victory is the victory of the Hungarian people. We created the opportunity to defend Hungary […] against multicultural or cosmopolitan projects' (Brubaker 2017, pp. 369–370).

Blokker and Ferrara share the idea that populism is aimed at transforming—but not abolishing—democracy; populist movements tend to transform representative democracy into a direct democracy, by accusing political elites of manipulating the will of the electorate, in order to maintain the institutional *status quo*. This is the case of the Italian Five Stars Movement, for instance, which has inaugurated a new course of political life by implementing a new decision-making process: the so-called 'web democracy'.

Populist constitutionalism raises several issues: firstly, it states that the liberal-democratic rule of law deprives ordinary citizens of their power to decide about their own constitution. Secondly, liberal and pluralist representative democracy are accused of separating ruled (namely, the citizens) from rulers, by imposing the domination of the latter over the former. Furthermore, constitutionalist populism rejects some liberal-democratic procedures such as judicial review and the principle of the parliamentary supremacy over the executive power, since these measures are seen as constraints over the true will of the People. Thirdly, politics is considered as a collective rather than individual issue; eventually, every supranational or international institution which imposes an external control over domestic politics is assumed as democratically illegitimate.

Larry Kramer, in his article 'Popular Constitutionalism' (2004), connects political constitutionalism with 'popular' constitutionalism by opposing it with the traditional model of legal constitutionalism. In his view, popular constitutionalism does not limit people's constitutional power to particular and relatively rare constitutional moment as Ackerman proposes, but it consists in an ongoing and active control by

people over the interpretation and the enforcement of constitutional law (Chemerinsky 2004).

Then, what about the difference between 'populist' and 'popular' constitutionalism? Firstly, popular constitutionalism is not count-democratic or counter-representative as populism. Popular constitutionalism does not reject representative democracy as such, but rather it aims at weakening constitutional limitations by courts and it criticizes judicial review as an allegedly counter-democratic instrument to limit popular will. Populism, for its part, refuses the model of representation, by proposing a return to a direct approach to democracy which would give the people the opportunity to influence and change the constitution without passing through parliamentary representatives.

Popular constitutionalism does not encourage a mere 'anti-judicial' approach, as it does not propose to take the Constitution 'outside the Court' (Kramer 2004, p. 967). By contrast, it aims at 'reconstituting the great American tradition of constitutional democracy' in which the Court was not seen as an elitist institution, but rather as a way to reflect the popular will into the Constitution. Furthermore, it is to say that Kramer does not suggest to completely eliminate judicial review from the context of constitutional democracy. Differently from Tushnet's, project to abolish judicial review to reinforce democracy, Kramer admits that constitutional review by judges may lead to many positive implications for the democratic system:

> Judicial decisions can shape the political agenda by addressing issues that elected officials do not or will not face, by offering a means for weak or excluded groups to enter the public debate, by providing one side or another with leverage in ongoing political bargaining, by creating constraints or disincentives that affect how or which parties proceed, by stimulating counter-mobilization. (Kramer 2004, p. 971)

In this vein, popular constitutionalism, unlike populist one, encourages deep cooperation between judicial and political institutions, by convincing courts not to consider popular influence as a threat for the constitution, but rather as a 'source of political strength and an opportunity for constructive engagement' (Kramer 2004, p. 983)

In defending popular constitutionalism, Kramer notes that legal constitutionalists tend to suspect political participation by considering people as merely emotional, politically and culturally ignorant. For Kramer, populist people are accused of being 'foolish and irresponsible when coming to politics; self-interested rather than public-spirited, arbitrary rather than principled, impulsive and close-minded rather than deliberate or logical. Ordinary people are like children. And being like children, ordinary people are insecure and easily manipulated' (Kramer 2004, p. 1002).

Along this line, Kramer reiterates that legal constitutionalists depict a distorted image of popular constitutionalism, by being inclined to condemn popular politics as arbitrary and dangerous for constitutional order; at the same time, they argue that the constitution 'by people' inevitably leads to a sort of tyranny of the majority that consequently implies to put the constitution under a strong judicial control in order to be prevented.

David Pozen elucidates that the core aim for popular constitutionalists is not to refuse constitutionalism as such, but rather 'renouncing the elitism and the court

centrism of traditional constitutional theory' (Pozen 2010, p. 2048) in order to emphasise the central role of 'the people themselves' in higher lawmaking. Therefore, Pozen shares with Kramer the idea that popular constitutionalism is very different from populism: popular constitutionalists are not intrinsically 'anti-court'; they do not reject judicial review as such. Their purpose is to reduce or limit judicial supremacy, in order to leave constitutional initiative power in majoritarian and representative institutions.

> In Pozen's words:
> We ought to rectify judicial supremacy by empowering the people, in their corporate capacity and as individuals, to reclaim the Constitution. Formal amendments to the document are well and good, but they cannot ensure "active and ongoing popular control over the interpretation and enforcement of constitutional law. Ordinary citizens must feel the Constitution to be *their* Constitution in an everyday sense. They must have the ability to create, modify and apply constitutional norms continually and efficaciously, through an accessible political process. (Pozen 2010, pp. 2057–2058)

Thus, Pozen emphasizes that popular constitutionalism cannot be compared with populist constitutional law for the main reason that, if constitutional democracy were exercised under 'unconstrained populism', it would lose any claim to authority. As a consequence, Pozen states 'the whole enterprise of adjudication would collapse' (Pozen 2010, p. 2101).

Hence, popular constitutionalism accepts the idea that the law should limit popular will when contrasting with the constitutional essentials; therefore, Pozen concedes that courts should determine such constraints, but nevertheless, justices should also be representative of the popular will, by being directly elected *by the people themselves*.

Eventually, popular constitutionalism is a majoritarian, though strongly representative, form of constitutional democracy, whilst populist constitutionalism is more than majoritarian: it is counter-representative, somehow illiberal, clearly counter-judicial form of democratic approach; basically, it refuses to put any (political/representative or judicial) interpreter between *the People* and the Constitution. In Tushnet's analysis, under popular constitutionalism social movements offer people the opportunity to influence political actors, as well as justices, in order to produce new constitutional law. A popular version of constitutionalism requires that the courts have no primacy about constitutional matters: justices' opinion has no 'normative' or 'moral' authority over representative institutions.

## Mark Tushnet's Proposal: Between Populism and Authoritarianism

### Populist Constitutional Law

In the opening section of his *Taking the Constitution Away from the Courts* (1999), Mark Tushnet draws his argument against judicial supremacy to defend populist constitutionalism, by introducing the distinction between the *thick* and *thin* Constitution.

On the one hand, the *thick C*onstitution entails detailed provisions regarding the organization of government and institutions. On the other hand, the *thin* Constitution focuses its core in enshrining fundamental principles and guarantees, such as equality, freedom of expression, liberty and so forth. The first difference between these two models of constitutions states that '[…] referring only to fundamental guarantees and not specific constitutional provisions is to avoid the suggestion that the thin Constitution consists of, or is the same as, what the Supreme Court has said about those provisions' (Tushnet 1999, p. 11).

In Tushnet's perspective, the *thin* Constitution defends the original spirit of the U.S. Constitution, by founding its legitimacy on what *the People* want, not on what the Court says about it. Accordingly, Tushnet defines the *thin* Constitution in truly Lincolnian terms, as 'the vindication of the Declaration's principles: the principle that all people were created equal, the principle that all had inalienable rights' (Tushnet 1999, p. 11).

Populist constitutionalism admits the *thin* Constitution as the only legitimate one since it is supposed to protect rights and liberties better than a *thick* one. As Tushnet reiterates, 'nation's commitment to the *thin* Constitution constitutes us as the people of the United States, and constituting a people is a morally worthy project' (Tushnet 1999, p. 12). Tushnet's populist understanding of democracy implies that the Constitution should be amendable as quickly as possible, through political means and without being influenced by counter-majoritarian institutions.

In disputing a so-called 'sceptic argument' against populist constitutionalism, Tushnet poses that anti-populists would affirm that people are not able to directly influence constitutional decisions firstly because only an independent institution composed of 'legal experts'—such as Supreme Court justices—can interpret the constitutional text in equal terms. By contrast, Tushnet remarks that people are not committed to constitutional principles 'for what the Court says about them', but to the Constitution itself 'as the cornerstone of representative democracy'. Thus, 'the sceptical rejection of populist constitutional law is powerfully undemocratic' (Tushnet 1999, p. 71).

Tushnet's defence of populist constitutionalism goes hand in hand with a radical critique of judicial review, which is incompatible with the constitutional model he defends. As Tushnet emphasizes, constitutional values would not be threatened by eliminating judicial review. Accordingly, he defines populist constitutional law as resting 'on the idea that we all ought to participate in creating constitutional law through our actions in politics' (Tushnet 1999, p. 157). Nonetheless, populist constitutionalism, in Tushnet's understanding, implies three preconditions:

(1) The first concerns the rights to vote. As Tushnet reiterates, people should be allowed to vote for affirming their power to directly influence constitutional law; (2) the second precondition concerns the right to express criticism of the government. Without the right to contest executive power, people cannot aspire to change such politics or to influence legislative choices. (3) The third precondition involves the right to form and share independent views about politics. Here, people should vindicate their right to develop their own views about constitutional law, even when contrasting with the judicial interpretation of it. Finally, populist constitutionalism aims at withdrawing constitutional law from justices' hands to *the People*. In Tushnet's

words, 'constitutional law creates the people of the United States *as a people* by providing a narrative that connects us to everyone who preceded us' (Tushnet 1999, p. 182).

Populist constitutional law falls into the *thin* Constitution by rejecting the classical elements of the *thick* one—check and balances, institutional principles, judicial review etc.—to include only two elements: The Declaration of Independence and the Preamble. In this vein, populist constitutionalism refuses the so-called 'elitist constitutional law' exercised by courts, since it would prevent *the people* from exercising full control over the Constitution. Against the background of John Hart Ely's account of constitutional law, Tushnet argues that, under populist constitutionalism, judicial review is democratically justified when justices determine the unconstitutionality of statutes that prevent the people from imposing their authority over the constitution. In Tushnet words 'judges should find statutes unconstitutional when their enforcement would make it more difficult for democratically constituted majorities to overturn policies of which they disapprove or to replace representatives of whom they have come to disapprove, at least when those statutes cannot be justified by showing that they do a rather good job of advancing quite important public policies' (Tushnet 2009, p. 11).

Moreover, Tushnet's populist constitutionalism requires the notion of a 'national community' rather than a 'universal' one; in this sense, populists concede that promoting their own nationality means rejecting cosmopolitanism and universalism of citizenship and human rights and favouring a national and 'domestic' dimension of political being.

Tushnet justifies his defence of a populist constitutional law by emphasizing that it aims at 'offering an attractive narrative of the complex history of the People of the United States. We are who we are because we are committed to the project of realizing the Declaration's principles' (Tushnet 1999, p. 191). The question raised by populist constitutionalists—especially within the U.S. context—wonders why should we today be bound by decisions made a long time ago when, after serious deliberation, we think that those decisions lead us to undesirable policies today? (Tushnet 1999, p. 192). For populists, we should reject such decisions whenever they do not respect the will of *the People* against the elites. To sum up, we are not actually bound by such decisions, due to the fact that these decisions represent a heritage by our Founding Fathers. Therefore, any change or amendment of our Constitution should take these decisions into account, by rejecting the idea the Constitution reflects what *the People* want in current times.

## Authoritarian Constitutionalism

The second thesis addressed here concerns a so-called 'authoritarian' model of constitutionalism. In his essay entitled *Authoritarian Constitutionalism* (2015) Tushnet proposes an authoritarian conception of constitutionalism—exemplified by Singapore's experience—as a radical alternative to populist constitutional law. In this perspective, authoritarianism should be distinguished from liberal normative accounts of constitutional democracy, which assume human rights and

self-government as the cornerstone of any democratic order. Conversely, authoritarian constitutionalists—as Tushnet claims—conceive constitutional framework as 'rejecting human rights entirely and governed by unconstrained power holders' (Tushnet 2015, p. 394). Nonetheless, Tushnet shows that authoritarianism is just one of the several—at least three—alternative forms of constitutional law:

1. An *absolutist* version of constitutional democracy, within which there is a single decision-maker, who acts to defend national interests and popular will by following people's sentiment and by refusing checks and balances which 'tie people's hands' when constitutional essentials are at stake. This is, in my opinion, the closest form to populist constitutionalism, because it mainly focuses on 'what people want' without being constrained by any other institutions.
2. The *rule-of-law* constitutionalism implies 'general procedural requirements and implements decisions through (…) independent courts' (Tushnet 2015, p. 396). This model accepts the role of court within the constitutional process, but, at the same time, it leaves the decision-makers free from constraints or substantive rules imposed by other institutions.
3. The *authoritarian* model, exemplified by Singapore, which cannot be described as a liberal-democratic system as such, since—in this context—government exercises an authoritarian control over the constitution and judicial independence is sensibly curtailed.

*Absolutist* constitutionalism reflects a condition in which the ruler is empowered with authoritative supremacy over any other branches of government. Within this system, the sovereign legislates after having consulted ministers and after received endorsement by citizens. Under absolutist constitutionalism, the Sovereign may allow ministers to deliver an opinion about relevant issues, though keeping the last say about the final decision. Nonetheless, criticisms and suggestions might rarely lead the Sovereign to modify—at least partially—its decisions. In Tushnet's words, '(such) decisions are typically motivated by a combination of concerns: that the decisions not undermine and perhaps actually enhance the (…) stability (…) and that the decisions promote the welfare of the (…) citizens' (Tushnet 2015, p. 416).

Conversely, in a 'rule-of-law constitutionalism', the government is intrinsically and structurally limited by law and by constitutional provisions; in this model, independent judicial institutions—such as courts—are an essential component to limit legislative majoritarian decision-making. However, Tushnet underlines that judicial independence is not the main characteristic of such a system. Indeed, the first aim for a rule-of-law model of constitutionalism is to conceive 'judicial independence coupled with accountability to law' (Tushnet 2015, p. 419).

Authoritarian constitutionalism rests on the assumption that having a constitution is not the unique condition for establishing a democratic regime: even an authoritarian regime can be constitutionally organized, so as many important democratic states do not actually present a written constitution (i.e. the UK and the Commonwealth members, or Israel). Authoritarian constitutionalism presupposes several points, that Tushnet lists as follows:

1. The regime (…) makes all relevant public policy decisions, and there is no basis in law for challenging whatever choices the regime makes;
2. The regime does not arrest political opponents arbitrarily, although it may impose a variety of sanctions on them, such as the risk of bankruptcy from libel judgments in Singapore;
3. Even as it employs such sanctions, the regime allows reasonably open discussion and criticism on its policies. The regime's critics find themselves able to disseminate their criticisms even after they have been sanctioned;
4. The regime operates reasonably free and fair elections, with close attention to such matters as the drawing of election districts and the creation of party lists to ensure as best it can that it will prevail (…) in such elections. Fraud and physical intimidation occur, if at all, only sporadically and unsystematically.
5. The dominant party is sensitive to public opinion and alters its policies at least on occasion in response to what it perceives to be public views. Its motivation for responsiveness may be mixed, though a desire to remain in power dominates other motivations such as judgements about what is in the nation's best interests.
6. It may develop mechanisms to ensure that the amount of dissent does not exceed the level it regards as desirable. In this sense, co-optation is better than exclusion because it allows the hegemonic party to achieve the massive victories it requires.
7. Courts are reasonably independent and enforce basic rule-of-law requirements reasonably well. Although judges, especially those on higher courts, are likely to be sensitive to the regime's interests because of the judges' training and the mechanisms of judicial selection and promotion, they rarely take direct instruction from the regime. Sometimes, indeed, they might reject important regime initiatives on rule-of-law or constitutional grounds. But, the system of constitutional review will necessarily be weak-form review, with the regime having the power to alter the constitution so that its initiatives conform to the courts' interpretations (Tushnet 2015, p. 449).

The peculiar aspect of Singapore's authoritarian constitutionalism entails that courts regularly uphold government action, in the sense of a radically reduced judicial resistance against government will, which leads to much more room for legislative decision-making and to a minor constitutional jurisdiction by courts. Nonetheless, Tushnet adds, judicial deference to government and legislative power is typical in nations whose political system is traditionally dominated by a party governing for an extended period.

Tushnet specifies that Singapore's constitutional system cannot be defined under liberal-democratic nature, but rather as an authoritarian exemplar of constitutional legislation. In recalling the Prime Minister of Singapore, Lee Hsien Loong, Tushnet notices that, in Singaporean terms, 'the worst possible outcome of an election is a society split based on race or religion (…) which would divide the society and that would be the end of Singapore' (Tushnet 2015, p. 414). Consequently, Singapore's institutional system is aimed at keeping cultural and ethnical tensions under control; in this vein, 'government appears to treat all forms of political opposition as sufficiently likely to lead to racial or religious division that is justified in restricting political opposition as such' (Tushnet 2015, p. 415).

As we know, constitutionalism implies separation of powers, check and balances and limitations on government; therefore, as Tushnet poses, if we identify authoritarianism with a regime in which government is unlimited, how can we define an authoritarian regime as a 'constitutional' regime? In responding to this question, Tushnet clarifies that, in authoritarian regimes, constitutionalism is a strategic instrument to maintain power. In this sense, authoritarian leaders tend to 'stabilize their regimes and (…) ensure that they remain in power by creating independent courts or (…) by trying their own hands through constitutional constraints' (Tushnet 2015, p. 422).

Authoritarian constitutionalism considers courts as functional for the preservation of power in many ways: generally speaking, constitutional courts might allow authoritarian rulers to justify their power as a commitment to the common good. More specifically, in authoritarian constitutionalism, courts are designed to '(1) establish social control and sideline political opponents; (2) endorse regime's claim to legal legitimacy of its authoritarian power; (3) reducing its authoritarian aspects to encourage trades and economic investments' (Tushnet 2015, p. 422).

Conventionally, constitutionalism under a liberal-democratic banner requires that certain basic norms are, implicitly or explicitly, entrenched; by contrast, authoritarian rulers have often sufficient power to alter or subvert the constitution whenever they want or need. Nonetheless, as Tushnet admits, violating a constitutional system for political reasons implies many sacrifices: first, structural entrenchment and constitutional rigidity imply that fundamental principles cannot be amended by ordinary legislation, but only through formal procedures; secondly, even when constitutional amendments are legitimate, the constitution cannot be subverted or overturned since it would implicate 'reputational costs' for government (Tushnet 2015, p. 423).

Mostly, ordinary law can be enacted through a simple majority, whilst constitution law requires a super-majority—at least a two-thirds majority vote—to be amended. In some contexts, such as Singapore, authoritarian rulers can express such a super-majority, by being able to amend the constitution in a relatively easy way, as it was ordinary legislation. Thus, in authoritarian regimes, constitutional norms, so as the courts, serve to support government decision-making and regime interests. Authoritarian constitutionalism provides that the government has no difficulties in making unconstitutional reforms since it does not find constraints in enacting illiberal statutes that potentially subvert fundamental principles, manipulate courts and so forth. Authoritarian constitutionalism also incorporates an alternative version called *abusive constitutionalism*, for which government and national leaders resort to their super-majority to modify the constitution in order to entrench their power and preserve it permanently.

As Tushnet shows,

> Abusive constitutionalism has several features. First, it involves the use of constitutionally permissible methods to modify an existing constitution. Second, it involves the adoption of numerous amendments to the existing constitution. Third (…) the amendments may not be inconsistent with normative constitutionalism. Finally, considered as a package, the amendments threaten normative constitutionalism. (Tushnet 2015, p. 433)

Nevertheless, abusive constitutionalism is different from the authoritarianism; this differentiation appears evident when analysing Hungary, Venezuela and Singapore. The first two cases, differently from Singapore, reflect an 'abusive' model of constitutional law which does not conceive constitutionalism as a 'constraint of power', but only as a way to impose anti-constitutional aims such as an undisputed and almost 'eternal' political leadership. By contrast, the Singaporean system is based on an authoritarian style that recognizes constitutional courts only as a piece of the legislation, namely as the source of legitimation for the government.

Nevertheless, constitutional order in Singapore holds a substantially *dual* structure: on the one hand, it presents a rule-of-law system to encourage foreign investors to participate in the economic and financial markets; on the other hand, Singapore maintains an authoritarian rule on institutional and constitutional order. In this sense, Tushnet elucidates that 'the line dividing nonarbitrary state from arbitrary one has to be drawn by the very people who administer both the arbitrary and the nonarbitrary state, and they can provide no guarantees that in doing so they will act pursuant to the rule of law rather than arbitrarily' (Tushnet 2015, p. 439).

Eventually, authoritarian constitutionalists use liberal-democratic instruments to control and manipulate democratic rules: the government may, in fact, use freedom of expression and free votes to reveal any kind of discontent or to influence public opinion to implement stronger regime policies. Likewise, elections can also serve as a way for co-opting and directing any possible opposition under majoritarian control.

By providing indications of popular discontent, elections allow rulers to highlight what went wrong in their political action and what kind of issues are mostly controversial or vexed among people. At the same time, elections help opposition forces and minorities to reaffirm their presence within the public sphere and to claim a more central role in the political field and most actively influence majoritarian politics. However, the authoritarian tones of such a regime imply that opposition forces, when exceeding the limit of what the regime finds tolerable as a criticism, might suffer from severe repressions. For authoritarian rulers, understanding elections as a co-opting strategy means being able to identify opposition forces and popular opinion leaders and to 'placate them by giving some say over policymaking' in order to discourage or weaken protest movements and to obtain support from public opinion and ordinary citizens.

## Conclusion

Social movements play a central role within contemporary populism, even from a constitutional point of view. Both Larry Kramer and Mark Tushnet stress that social movements allow people to influence constitutional decision-making, by claiming visions that often differ from the dominant conception of the law or from the vision that is endorsed by the courts. According to Tushnet, social movements affect the constitutional process in two ways: (1) people can influence the political sphere by leading to a radical transformation of the electoral framework; (2) popular claims for constitutional authorship may persuade justices in

the courts to change their view about the meaning of the Constitution. As Tushnet reiterates, 'the social movement model does not depend on a change in the Court's composition for there to be a change in constitutional interpretation' (Tushnet 2006, p. 999).

To conclude, two final considerations about populism should be presented. The first one states that populism is aimed at subverting or destabilizing the ordinary democratic order, often through a shift from the representative and parliamentary model of democracy to a pure direct form of democratic regime. We can refer to the idea of a 'web-form democracy' introduced by the Italian Five Stars Movement as an example of this tendency in recent years. To pursue their aims, populist forces follow different directions and propose alternative if not divergent political solutions, though they eventually come to a common standpoint: subverting the democratic order and challenging the current *status quo*.

The second characteristic of contemporary populism poses that, when applied to constitutionalism, it tends to represent a radical threat for liberal-democratic constitutionalism, since populists aim at removing or at least significantly reducing the constitutional boundaries to majoritarian hegemony, altering the classical model of checks and balances to give more and more power to the executive branch, by reducing—at the same time—the authority of the legislative and, overall, judicial power. Thus, three points in populists' proposals can be listed:

1. Populists reject the idea of the constitutional or supreme courts as a guarantee institution over majoritarian legislative and executive power.
2. Populist constitutionalism entails the idea that the Constitution should not be considered as a higher law outside majoritarian politics, but rather as a product of conflict and competition between political forces. In this sense, populism confuses 'the People' with 'the electorate' and fails in attributing constituent power to the second one. In addition, populists tend to subdue the Constitution and its essentials to the mutable and unstable orientation of the electorate itself.
3. Populists hold that that legislative power cannot be limited by a higher constitutional level since it is legitimate only on electoral grounds. One of the Italian populist parties, the Five Stars Movement, has often proposed to revise the Article 67 of the Italian Constitution, which establishes the imperative mandate for parliamentary representatives and the principle for which they represent 'the Nation and not the party which elected them', by abolishing such a principle in order to make representatives responsive to the will of their party.

This contribution has been aimed at providing an insight of populist constitutionalism, by proposing a critique of such a theory. My argument highlights that populism, in its constitutional significance, leads to several consequences, at least four:

1. By embracing a populist interpretation of constitutional law, we risk losing the idea of the constitution as the supreme guarantee of equality among all citizens.
2. Populism risks jeopardising fundamental principles by subjecting them to whatever *the People* want, even when driven by anger, fear or mere interest, without

there being an institution—such as constitutional or supreme court—to protect fundamental rights against such possible erosion.

3. A further issue concerns the stability of the law over time: accordingly, the Constitution cannot be conceived as a reflection of everything *the People* want in the short term, nor as all that a temporary majority thinks to be useful or convenient. By contrast, the Constitution should be conceived to last over time, as a generational good, free from any particular interest or majoritarian and hegemonic bias. Thus, the notion of 'populist' constitutionalism entails a strongly consensual and radically majoritarian and plebiscitary tendency which leads government and legislature towards an ongoing *referendum* campaign.

Evidently, authoritarianism is far from being liberal or properly democratic. Some contemporary 'authoritarian' or 'illiberal' states such as Venezuela, Turkey, Singapore, Hungary, Russia, Poland and all the Visegrád Group (I prefer to call them 'pseudo-democratic countries') shape a radical form of majoritarian democracy which dissolves the essential principles of liberal-democratic government: overall, these 'pseudo-democracies' enforce a strongly procedural definition of democratic system, in which—very simplistically—democracy is equated with voting. Thus, in 'pseudo-democratic' terms, elections are sufficient to define democracy, at least in a merely formalist way. Consequently, the majoritarian force which wins the elections and gains the office tends to claim a full mandate to speak for *the People*, though being interested in defending the interests of the strict majority which elected it. Authoritarian varieties of populism entail that government may turn into domination—or even oppression—when government party becomes hegemonic.

This cultural and political hegemony leads to a second implication within authoritarian or 'pseudo-democratic' countries: the majoritarian and dominant group assumes a cultural and superiority attitude against minorities, something similar to what Alessandro Ferrara calls 'indigenous unreasonability' (Ferrara 2018). Dominant groups defend a 'purity argument' that identify them with the *real* people, against all kind of minorities: socio-political and cultural oppositions; religious or racial minorities; all those who, for various reasons, are outside these dominant groups or are opposed to them. Moreover, national security becomes the primary task for the authoritarian government.

This 'obsession' for security openly recalls the Hobbesian thesis of the protection of individual lives as the priority of sovereign power; nevertheless, the idea that security represents the core of a legitimate political regime is truly dangerous and problematic for contemporary constitutional democracies. Within democratic-constitutional regimes, security should be just one of the cornerstones of government interests, alongside the respect of the priority of the right over the good, the respect for minority groups and fundamental human rights.

Eventually, the clash between 'pseudo-democratic' attitudes and an 'authentic' constitutional democracy involves a sceptical view about guarantee institutions such as constitutional or supreme courts, accused of being unelected and, for that, elitist and anti-democratic bodies. Populist regimes—especially in their authoritarian degeneration—consider courts as an undue obstacle to the power of the people to decide about the Constitution. In these terms, nobody can deprive

*the people* of their constituent power; similarly, the government can claim a full political mandate by *the people* to substantially modify the constitution in any direction, although its mandate is a partial mandate conceded by an electorate, not *the people*. It would be a 'pseudo-democratic' regime in which the tyranny of the majority would prevail over a just and fair society.

Tushnet's work helps us to understand the relationship between populist and authoritarian constitutionalism, by posing that authoritarianism is an extreme form of populism in which the majoritarian group becomes dominant and potentially undemocratic. If we consider populism as the first stage of undemocratic degeneration of the public sphere, authoritarianism covers the second stage of this pyramid, together with the so-called absolutist constitutional regime, that is typical of an absolutist monarchy, in which the monarch makes decisions on his own after having consulted his ministers.

The only step separating authoritarianism from totalitarianism is the abusive constitutionalism, through which government uses its large majority to change the Constitution to entrench its power permanently. Singularly, each amendment to the Constitution seems reasonable for adjusting the constitutional text to contemporary society, but, taken together, all the 'abusive' amendments threaten liberal-democracy since it allows the government to transform 'pseudo-democracy' or authoritarian democracy into a totalitarian regime.

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