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Reactive vs structural approach: A public law response to populism

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Abstract: Contemporary scholarship mainly focuses on the crisis of political representation as the key facilitator behind the emergence of populism. If so, populism urges public law to revisit and rethink institutional designs. This article addresses two possible responses to populism. On one hand, an intuitive response could be to hamper popular participation by avoiding plebiscites, referendums or any other kind of public consultation. Alternatively, it is possible to respond to populism from a structural point of view. In my opinion, to resist populism public law should take into account the lack of responsiveness and accountability of representative systems. The article puts forward a proposal in that direction; it advances a response to populism consisting of new institutional systems that generate strong participatory mechanisms to incorporate 'the popular'. In doing so, the article uses the new Latin American Constitutionalism as an example of both the potentialities and difficulties of designing institutional systems in public law. In the wake of rising populism, it contributes to the existing debate by criticising populism and its constitutional expression, as well as developing arguments in favour of popular constitutionalism.

Keywords: constitutional populism; new Latin American constitutionalism; political participation; popular constitutionalism; populism

I. Introduction

The rise of populism in national as well as international politics is a multifaceted phenomenon. However, contemporary scholarship mainly addresses the crisis of political representation as the key facilitator behind the emergence of populism.[1] Scholars who support this view argue that

[1] K Roberts, 'Populism, Political Mobilizations, and Crisis of Political Representation' in C de la Torre (ed), *The Promise and Perils of Populism: Global Perspectives* (University Press of Kentucky, Lexington, KY, 2015) 140–1.

the institutional system is blind to the claims, necessities, interests, and discontents of people. This crisis infects both Western countries with strong democratic institutions and those with weak democratic institutions. Nevertheless the root cause of this crisis varies from country to country. Different contexts and conditions give rise to different kinds of popular claims which traditional political parties are leaving unattended. In the European context, for instance, populist parties have put issues like national identity, immigration and multiculturalism at the centre of the public debate;[2] whereas in Latin America, they frequently allude to issues related to economic or other mismanagement that concern historically disadvantaged groups.[3] The commonality behind different root causes of the crisis is government's lack of responsiveness to citizens' demands and interests. This creates political space to mobilise anti-elite or anti-establishment popular sentiments.[4]

Some scholars refer to this as a dilemma of representative democracy that compromises the principles of liberty and equality, which are essential to democracy. As Zilla explains, representative democracy brings with it two differentiations. On the one hand, a vertical difference between rulers and constituencies that allows inequality in access to political power and the risk of tyranny by the ruling minority. The author calls this 'the dilemma of incongruity' that can be attenuated by introducing power control and power dispersion mechanisms.[5] On the other hand, a horizontal differentiation exists between preferences that are strongly represented (or considered in the decision-making process) and those that are only

[2] A good example is provided by Finland, which was not affected by the global economic crisis and despite it, the populist True Finns party obtained support while 'claiming that their generous welfare state was threatened by the EU bailout programs and by an invasion of immigrants, both permitted by the mainstream parties'. C Mudde and C Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press, Oxford, 2017) 106.

[3] Ibid, 2, 98–9.

[4] See R Barr, 'Populists, Outsiders and Anti-Establishment Politics' (2009) 15(1) *Party Politics* 29. Some scholars have described this phenomenon as 'post democracy', a condition according to which the extent to which governing elites can relate at all 'responsively' to popular interests is increasingly limited by the international political economy (globalisation). See C Offe, 'Referendum vs. Institutionalized Deliberation. What Democratic Theorists Can Learn from the 2016 Brexit Decision' (2017) 146(3) *Daedalus* 4. For the European context see also R Huber and S Ruth, 'Mind the Gap! Populism, Participation and Representation in Europe' (2017) 23(4) *Swiss Political Science Review* 462; D Halikiopoulou and S Vasilopoulou, 'Breaching the Social Contract: Crises of Democratic Representation and Patterns of Extreme Right Party Support' (2018) 53(1) *Government and Opposition* 26. Available at <https://doi.org/10.1017/gov.2015.43>.For a typology of representational crisis that allows populist mobilisation see Roberts (n 1) 147–50.

[5] C Zilla, 'Defining Inclusion from the Perspective of Democracy and Citizenship Theory' (2016) IPSA Congress, 9.

weakly represented (or not considered at all), with the risk of tyranny by majority will. In this last sense, 'from the perspective of those citizens whose preferences might not be included in the process of policy-making but who are nevertheless bound to or affected by political decisions, representative democracy might resemble heteronomy'.[6] Zilla calls this 'the dilemma of disparity', which can be reduced by protecting minorities, enhancing pluralism, diversifying representation, and fostering participation. Nevertheless, it can be the case that the more strongly represented preferences were not even the majoritarian ones.[7]

These dilemmas of representative democracy are rhetorically solved by populist discourse. The first dilemma in its problematic realisation (as when it generates a crisis for representative democracy) facilitates the populist discourse. Populists promise to rule in favour of 'the people', considering preferences that were ignored before, 'solving' in that way the second dilemma and, together with it, recovering the lost principles of liberty and equality for democracy.[8] In this sense, democratic deficit nourishes populism; the vague substance of populism tends to take advantage of the discursive potentialities of exclusion.[9] Populism therefore urges public law to revisit and rethink institutional designs.[10] In contemporary times, it is essential to discuss the roles of participatory systems and the institutional interfaces between political representatives and the people.

This is one of the tasks of public law. But how can it be accomplished? It is possible to identify two different approaches to this question, which are

[6] Ibid.

[7] This would be the case in contexts of stabilisation of 'cartel parties', in which 'colluding parties become agents of the state and employ the resources of the state to ensure their own collective survival'. RS Katz and P Mair, 'Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party' (1995) 1(1) *Party Politics* 5. In such contexts, party programmes become similar and the degree to which electoral outcomes can determine government actions is reduced. Ibid, 22. In this way, parties can appear to form a self-interested governing caste that is insulated from popular needs and concerns, and therefore, generates detachments from their constituents. See Roberts (n 1) 149.

[8] Of course, populism does not solve these problems in terms of concrete realisation of those democratic promises, but uses them as a discursive strategy to gain the support of people. As Jan Werner Müller puts it: 'Populism is not a corrective to liberal democracy … but it can be useful in making it clear that parts of the population really are unrepresented.' JW Müller, *What Is Populism* (University of Pennsylvania Press, Philadelphia, PA, 2016) 75–6, 103.

[9] I accept the idea that 'Inclusion is a key dimension of democracy that underlines the principles of liberty and civic and political equality *for all*.' (Original emphasis.) See Zilla (n 5) 2.

[10] As a matter of fact, some relevant scholars are doing so. See e.g. M Graber, M Tushnet and S Levinson (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, New York, NY, 2018).

not mutually exclusive.[11] On the one hand, some scholars present what I call a 'reactive approach' to populism. As an intuitive response, they propose to hamper popular participation by avoiding plebiscites, referendums, or any other kind of public engagement.[12] The idea is to close the political (and constitutional) system in order to protect it from backlashes or populist attacks. In this approach, Constitutional Courts and judicial review play a crucial role.[13] On the other hand, it is possible to respond to populism from a 'structural point of view'. This approach considers that the emergence of populism has its roots in the multifaceted crisis of political representation which has identifiable institutional correlates.[14] Hence, to resist populism, public law should take into account the lack of responsiveness and accountability of representative systems. This article puts forward a proposal in that direction; it advances a response to populism in the form of new institutional design that generates strong participatory mechanisms to appropriate 'the popular'. In this manner, public law can repair (and occupy) the cracks that allow the discursive strategy of populism.

The structure of the article is as follows. First, I characterise some aspects of populism. Then, I analyse certain particular features that can emerge from the attempt to constitutionalise populism. I refer to this phenomenon as 'constitutional populism'. Second, I address the question of 'what should public law do in response to populism' and critically explore the 'reactive approach' to preliminarily conclude that this strategy

[11] Similarly, Hailbronner and Landau summarise two different constitutional responses to populism: one is to use courts or other constitutional tools as a form of resistance against populist pressures, while the other is to respond to the root popular impulses that lead citizens to choose populists leaders. See M Hailbronner and D Landau, 'Introduction: Constitutional Courts and Populism' (April 2017) *International Journal of Constitutional Law Blog* available at <http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/>.

[12] Although it is commonly accepted that plebiscite and referendum are synonymous terms because both are methods of direct popular pronouncement, in this article, I will differentiate them. On one hand, I will use the term 'referendum' as a method of referring to a question or a set of questions to the electorate directly rather than allowing them to be settled by the people's representatives in the legislature. See D Robertson, *A Dictionary of Modern Politics* (Europa Publications, London, 1993) 412. This term, as used by the Venezuelan and Bolivian constitutions, is limited to big constitutional issues, and it can be initiated by the legislature, the executive or electorates themselves. On the other hand, I will use the term 'plebiscite' to describe a mechanism which allows voters to decide whether to approve or not a course of action about ordinary policy issues. In this understanding, plebiscites can be initiated only by the government and they offer to citizens a 'take it or leave it' choice. 'Because a plebiscite is commonly regarded as highly manipulative, the term has a negative connotation.' See L Morel, 'Referendum' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 501. This mechanism, for instance, is provided in the Colombian constitution.

[13] This approach is described in Part III.

[14] Roberts (n 1) 156.

alone is deficient and gets us nowhere. I instead suggest, thirdly, a structural approach to populism which aligns with popular constitutionalism. Thus, I propose a conceptual distinction between popular constitutionalism and constitutional populism. I argue that constitutional law should focus on the creation of inclusive and interdependent institutions based on the idea of participation. This idea of participation should go beyond the functions of expression and political legitimisation; rather it should focus on the aspects of deliberation, shaping power, and control.[15] Finally, I use new Latin American constitutionalism (NLC) as an example of possible reactions/responses before a deep crisis of representation in two different ways. On the one hand, the NLC can be seen as configuring clear cases of constitutional populism. On the other hand, it tried to introduce arrangements of popular constitutionalism that allow facing systematic exclusion and strengthening democracy. In the wake of rising populism, this article contributes to the existing scholarly debate by critiquing populism and its constitutional expression and advancing arguments in favour of popular institutional systems.

II. The challenge of populism

Populism is a contested concept,[16] difficult to comprehend outside of its contexts.[17] Its democratic affiliation is widely debated, although most scholars believe that populism is democratic but refers to a *borderline*[18]

[15] C Zilla, 'El acceso al poder, procesos electorales y partidos políticos' (6 December 2016) Working Paper, *Ius Constitutionale Commune en América Latina y las Estructuras del Estado Conference* (Max Planck Institute, Heidelberg).

[16] Y Meny and Y Surel, 'The Constitutive Ambiguity of Populism' in Y Meny and Y Surel (eds), *Democracies and the Populist Challenge* (Palgrave Macmillan, Basingstoke, 2002) 1; K Weyland, 'Clarifying a Contested Concept: Populism in the Study of Latin American Politics' (2001) 34(1) *Journal of Comparative Politics* 1; C Rovira Kaltwasser, 'The Ambivalence of Populism: Threat and Corrective for Democracy' (2012) 19(2) *Democratization* 184; Mudde and Rovira Kaltwasser (n 2) 2.

[17] Thus, the characteristics of Latin American populism are hardly the same as those expressed in the US or Russia in the 19th century, and even less with current European right-wing populism. That is why some authors see no other way of defining populism but according to the particular circumstances in which it occurs, or constructing a taxonomy of various types of populism, or finally, offering some sort of 'ideal-type'. See P Taggart, 'Populism and the Pathology of Representative Politics' in Y Meny and Y Surel (eds), *Democracies and the Populist Challenge* (Palgrave Macmillan, Basingstoke, 2002) 62, 66. Other scholars, however, emphasise the common historical root of modern populism and define it as a global anti-liberal phenomenon. See F Finchelstein, 'Returning Populism to History' (2014) 21(4) *Constellations* 467.

[18] B Arditi, 'Populism as an Internal Periphery of Democratic Politics' in F Panizza (ed), *Populism and the Mirror of Democracy* (Verso, New York, NY, 2005) 72, 77.

or *disfigured*[19] case of democracy. It is also agreed that it is in obvious tension with liberalism and the principles of constitutional democracy, since these emphasise restrictions on State power and the protection of minority rights. Both of these aspects limit majoritarian rule, which is preponderant in the case of populism.[20] In light of this, it seems difficult to talk about *constitutional* populism without structuring a quasi-oxymoron.

Beyond these definitional difficulties, we may notice certain distinctive features in populisms.[21] For example, it is possible to see a distinction between 'the real People' as a sociological unity[22] reflected in the majority and the corrupt 'elite', represented by the minority.[23] Hence, the polarisation of politics (through a dualistic and antagonist simplification: friend/enemy)[24] and a critique of pluralism are common characteristics.[25] Another key feature is detachment from some procedures typical of constitutional democracies under the pretext that they complicate or distance politics from the people and hinder the realisation of the popular will (which does not require intermediations).[26] We also find a particular concept of representation unmediated by institutions but based on the concept that the leader knows what the *homogeneous* people want.[27]

This has negative consequences for the exercise of political power such as verticality, lack of accountability, and the problem of ending

[19] N Urbinati, *Democracy Disfigured. Opinion, Truth, and the People* (Harvard University Press, Cambridge, MA, 2014) 7–9, 128–9.

[20] Ibid, 129; C Mudde, 'The Populist Zeitgeist' (2004) 39 *Government and Opposition* 541, 561; M Canovan, 'Taking Politics to the People: Populism as the Ideology of Democracy' in Y Meny and Y Surel (eds), *Democracies and the Populist Challenge* (Palgrave Macmillan, Basingstoke, 2002).

[21] It is possible to find different definitions of populism, which aim to overcome the aforementioned difficulties. Populism is defined primarily as 'a *political strategy*', see Weyland (n 16) 14. Secondly, populism as a particular *style* of political communication; and finally as an *ideology*, see Mudde (n 20) 543. In this article, populism will be understood in these overlapping ways, considering it as a spectre of democracy (always connected with democratic politics). See B Arditi, 'Populism as a Spectre of Democracy: A Response to Canovan' (2004) 52 *Political Studies* 141. Another definition is proposed by E Laclau, *On Populist Reason* (Verso, London, 2005) 222, for whom populism is directly 'the very essence of the political'.

[22] Canovan (n 20) 34; Urbinati (n 19) 147.

[23] Part of the populist rhetoric is the assertion that the people have been betrayed by those in charge. See Meny and Surel (n 16) 12.

[24] In a clear reference to C Schmitt, *El Concepto de lo Político* (Alianza Editorial, Madrid, 1999) 56. There are even theorists who prefer to characterise populism from a negative conception, that is, as an 'enemy' to fight and not from the positive term of the 'people' or their recognition. See R Savage, 'A Comparison of "New Institutionalized" Populism in Venezuela and the USA' (2014) 21(4) *Constellations* 518, 520.

[25] Urbinati (n 19) 131; Müller (n 8) 101.

[26] Meny and Surel (n 16) 9.

[27] Urbinati (n 19) 129; Taggart (n 17) 67. Although, populism exists only in representative systems as a permanent shadow of representative politics. Müller (n 8) 101.

terms/succession of power. However, a possible positive role for populism is preserved because it can still manage to include marginalised sub-sectors of society in political life through distribution of social welfare and somehow recover the 'broken promises' of democracy for the people.[28] As mentioned before, this last characteristic can be a possible explanation of the rise of populism over the world.

Populism can develop a constitutional strand that would be called 'constitutional populism'. Adding the adjective *constitutional* to the term populism implies a change of perspective, which in my opinion relates with the possibility of *institutionalising* populism that initially seemed contradictory in its own terms. In this way, some scholars discuss an attempt to institutionalise the populist discourse within a stable set of politics or democratic institutions. In other words, populism tries to institutionalise processes and practices capable of stabilising these populist regimes against internal or external threats.[29] The way to institutionalise is, precisely, through reforms to the constitution. This *constitutionalisation* of populist politics increases the difficulties of dealing with populism from (an internal) public law perspective.

Some scholars define constitutional populism simply as '*the political attitude that seeks to rely on the reform of the Constitution to defend interests and aspirations of the people and meet their immediate demands, without having a long-term goal*'.[30] It is difficult to see in this definition a real evaluation parameter of the so-called constitutional populism other than the one that describes claims to satisfy through constitutional means as *immediate* or *short-term*, provided it is easy to distinguish what those claims are and why they should not be worthy of consideration. A greater effort should be made to define this new category that does not address the interests and aspirations that reforms intend to satisfy, but (i) the *forms* and (ii) *content* of these reforms, and (iii) the *opportunistic* attitude of populists regarding the constitution. This last feature means that they appeal to it as a source of legitimacy when it supports their proclamations and they ignore or favour its reform when it represents an obstacle. [31]

[28] Meny and Surel (n 16) 16. On the ambivalent relationship between populism and democracy, see Rovira Kaltwasser (n 16).

[29] Savage (n 24) 520, 527. After all, as Müller has noticed: 'populists are not generally "against institutions" … They only oppose those institutions that, in their view, fail to produce the morally correct political outcomes. Populists in power are fine with … *their* institutions' (original emphasis). JW Müller, 'Populist Constitutions – A Contradiction in Terms?' (April 2017) *International Journal of Constitutional Law Blog*, available at <http://www.iconnectblog.com/2017/04/populist-constitutions-a-contradiction-in-terms/>.

[30] J Rincón Salcedo, 'Las democracias andinas, entre "populismo constitucional" y "constitucionalismo popular"' (June 2006) 3 *Visages D´Amérique Latine* 33, 35.

[31] It is not necessary that all these features are given in order to identify populist reforms or constitutions; it is enough that some of these are present.

(i) Constitutional populism could be distinguished by the *forms* in which constitutional reforms are made. If the reform is top-down, that is if it acts on behalf of the people (popular sovereignty) but without their direct participation in the discussion of the reform or favouring participation only to sectors related to government authorities, it may be a populist reform.[32] This would also be the case if there is participation from different sectors but their dissenting opinions are silenced or ignored in the outcome or if they are subject to direct influence of the executive power.[33] In other words, we may recognise constitutional populism when participation of 'the people' is limited to plebiscitary effects. Plebiscitarian forms (and effects) of participation are singularised by the excessive emphasis on voting to ratify or legitimise the leader who acts on behalf of the people; this often takes place at the expense of other meaningful modes of participation.[34] In this sense, people do not define or construct the political alternatives; such initiatives reside outside and above their ranks, and popular subjects are vertically constructed around the figure of the leader rather than being self-constituted.[35]

We must also pay attention to the amendment dynamic once the constitution has been modified. Thus, one must be sceptical of the government's actions that lead to multiple and successive constitutional reforms carried out to reduce any difficulties it encounters, including those established in the clauses favoured by them.[36] Finally, we must also note the practice of replacing justices (or changing the institutional design of Courts) in the case of not

[32] G Negretto, 'El populismo constitucional en América Latina. Análisis crítico de la Constitución Argentina de 1949' in A Luna-Fabritius, P Mijangos y Gonzalez and R Rojas Gutierrez (coords), *De Cádiz al Siglo XXI. Doscientos años de constitucionalismo en México e Hispanoamérica (1812–2012) (Taurus, México, 2012)* 345, 371. The 2011 constitution of Hungary is a clear example, where 'the key parts of the constitution-drafting process occurred behind closed doors … public debate never occurred … the only alterations that had any chance of passage were those submitted by Fidesz. Democratic opposition parties, whose proposals were virtually all rejected, eventually walked out of the chamber and did not vote on the final constitution … the new constitution passed parliament by the requisite two-thirds vote (all Fidesz members) and was signed by the president … without even contemplating a public referendum to ratify the result.' See M Bánkuti *et al*., 'Disabling the Constitution' (2012) 23(3) *Journal of Democracy* 141–2.

[33] A Bernal, 'The Meaning and Perils of Presidential Refounding in Latin America' (2014) 21(4) *Constellations* 440, 452.

[34] One problem of this kind of participation is that there is no way to make sure that people support for the constitution is due to its particular merits, or it is based on different considerations, such as the support for the leader, the hope for a change, the expression for disapproval towards the previous political order, and so on. A similar understanding in Offe (n 4) 7–9, 14.

[35] Roberts (n 1) 143. See also Barr (n 4) 35, 36.

[36] Good examples are the multiple reforms that Chavez and Correa made to the 1999 constitution of Venezuela and 2008 constitution of Ecuador, respectively, or now, the constituent assembly that Maduro is supporting for Venezuela.

being able to reform the constitution and/or having non-favourable interpretations for the government.[37]

(ii) Regarding the *content* of reforms, constitutional populism, although institutionalised, reflects populism in its constitution. Populist constitutional clauses tend to relax controls on the government or increase the power of the executive. Certain examples of these are granting exception or legislative powers to the Executive, allowing re-elections, or frustrating any opposition, controlling the media, and intervening in autonomous entities.[38] In fact, focusing only on this aspect, some authors define constitutional populism as a category that refers to profound and multiple constitutional reforms that aim to transform only 'the power of the President of the Republic, in countries where institutional design allows an excessive use of public prerogatives by the Head of Government'.[39]

A second type of populist clauses can be found in the constitutional regulation of decision-making processes, which omit deliberative, horizontal and reflective foresights. This leads some scholars to consider specific to populist constitutions the idea of a plebiscitary, centralist and anti-parliamentary democracy, together with a communitarian vision of rights. This last feature would make it possible to condition the exercise and recognition of individual rights to achieve those collective goals whose interpretation is left to the State.[40] Although, in my opinion, this communitarian vision does not necessarily have to be in the constitution, it may take place in actual practice of populism regarding constitutions that have established classic liberal rights.

[37] Although on this matter we should consider the context in which it occurs. Since, if you have an extremely rigid constitution with judicial supremacy, making the path of constitutional reform difficult and facing long-standing interpretive struggles with the judiciary, perhaps the measure may not be objectionable.

[38] These kinds of contents allow applying the concept of constitutional populism to older populisms (as long as those populisms have reformed their constitutions) as well as to neoliberal populisms. In the case of Menem (Argentina), one of the main purposes of the 1994 constitutional reform was to allow re-election and to increase the power of the executive, for instance establishing more expansive decree authority. Another measure Menem took was to pack the Supreme Court increasing the number of Justices from 5 to 9.The same applies to Fujimori in Perú, who disbanded opposition-controlled parliaments and imposed a new constitution that greatly expanded presidential attributions. See K Weyland, 'Neoliberal Populism in Latin America and Eastern Europe' (1999) 31(4) *Comparative Politics* 379. In the definition I am proposing there is no relation between a constitutional populism and a specific economic policy.

[39] JP Sarmiento Erazo, 'Populismo constitucional y reelecciones, vicisitudes institucionales en la experiencia sudamericana' (2013) 11(1) *Estudios Constitucionales* 569, 572.

[40] Negretto (n 32) 346, 368. Blokker also characterises 'populist constitutionalism' content as reflecting a critical attitude (or 'legal resentment') towards liberal constitutionalism and liberalism's justification and rationalisation of society. See P Blokker, 'Populist Constitutionalism' (May 2017) *International Journal of Constitutional Law Blog*, available at <http://www.iconnectblog.com/2017/05/populist-constitutionalism/>.

A third type of populist constitutional content 'sets a number of highly specific policy preferences in stone', excluding the possibility of future policy choices that would have been the agenda of day-to-day political struggle.[41] This kind of clauses can establish what is called an exclusive or 'partisan constitution', whose purpose is to perpetuate the regime's power and goals even after losing an election.[42] One can see the difficulty of defining precisely what would be a populist reform in this vein. As Dixon argues, without substantive criteria, it is hard to distinguish constitutional clauses that, even if strongly constraining the scope for future policy change are legitimate, from those that are not.[43]

Finally, populist constitutions cannot function without liberal democratic-type clauses since they need mechanisms of power legitimation and support of a constitutional discourse, although they are under strain.[44] Hence, even if constitutional reforms were to be institutionalised, (iii) constitutional populism makes an opportunistic use of their constitutions, which in any case will always be *under* the invoked popular sovereignty in permanent action. From this perspective, populism uses institutions as a means to obtain more power rather than to limit it, making *ideological* legitimacy prevail against procedural or constitutional legitimacy.[45] As Müller puts it, 'populists certainly aren't constitutionalists in a normatively meaningful sense'.[46] This is because, populism presents an 'anti-institutional dimension, of a certain challenge to political normalization, to ''business as usual''',[47] which makes it difficult to reconcile with constitutionalism.

[41] Müller (n 29). However, for some scholars this is not a specific problem of populism. As Zilla explains, another risk of representative democracy is the *future choices' foreclosure*, which means 'that today's majority or ruling minority deeply constrains the political choices available in the future'. See Zilla (n 5) 9.

[42] Müller (n 29) quoting Dieter Grimm.

[43] R Dixon, 'Populist Constitutionalism and the Democratic Minimum Core' (April 2017) *International Journal of Constitutional Law Blog*, available at <http://www.iconnectblog.com/2017/04/populist-constitutionalism-the-democratic-minimum-core/>. In fact, some scholar have noticed that this is actually the authoritarian side of liberal-democratic constitutionalism. In the words of Frankenberg, the authoritarian side of the constitutional moment is: 'closing constitutional debate and submitting a people, majority or minority to a covenant, forcing a collective identity upon an internally fragmented society, offering constitutional protection to some interests, claims and actions, and, with the same *coup de main*, excluding others. Those who lost … are relegated to the side-lines where they have to wait for their historical chance to demystify the established authority.' G Frankenberg, 'Authoritarian Constitutionalism – Coming to Terms with Modernity's Dreams and Demons' (2018) Research Paper of the Faculty of Law of the Goethe University Frankfurt/M No 3, 7.

[44] Negretto (n 32) 343.

[45] Urbinati (n 19) 152, 159. In the words of Schmitt: 'Against the will of the people, especially an institution based on discussion by independent representatives has no autonomous justification for its existence', quoted in ibid, 160.

[46] Müller (n 29).

[47] Laclau (n 21) 123.

III. The reactive approach

The recent peace process in Colombia could be seen as an example of this first approach. After the first Colombian peace agreement that resulted in a negative popular plebiscite, given the reported populist manipulation of the electorate,[48] a second peace agreement was negotiated solely by political elites with the consent of the Constitutional Court but without popular intervention.[49] The general reaction after the 'plebitusa'[50] was to take away important political decisions from people. The people that supported 'no' were seen as emotionally influenced, irrational, or selfish, in a manner similar to those who voted for Brexit in the UK.

In this sense, some scholars try to think of different solutions, not limited to the Colombian case, in order to avoid populist trends or at least to lessen its consequences.[51] The institutional ally they find is constitutional or supreme courts.[52] If constitutionalism has two foundational ideas, one related to the protection of autonomy (limitation of power) and the other one related to guaranteed self-government (popular sovereignty),[53] facing the abusive expansion of the latter, judges could be seen as the natural defenders of the former.

[48] In this sense, the political campaign pro 'no' was full of emotional discourse and misinformation. Some of the circulating slogans were against 'castro-chavismo', terrorism, impunity, 'gender ideology' or president Santos himself. None of those things was under question in the plebiscite and allowed a great polarisation within society. See A Gómez-Suárez, *El triunfo del No: la paradoja emocional detrás del plebiscito* (Ícono Editorial, Bogotá, 2016).

[49] Until now, the Constitutional Court is defining the way in which the agreement would be possible.

[50] A derogatory term for the plebiscite.

[51] A clear example, in response to Donald Trump's election can be seen in S Gardbaum and R Pildes, 'Populism and Democratic Institutional Design: Methods of Selecting Candidates for Chief Executive in the United States and Other Democracies' (2017) The Jean Monnet Working Paper 5/17, available at <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Stephen-Gardbaum-and-Richard-H.-Pildes.pdf>.

[52] It is worth noting that the Constitutional Court in Colombia could resist power threats and pressures, and in this sense it is considered a well-functioning Court. See J González-Jácome, 'In Defense of Judicial Populism: Lessons from Colombia' (May 2017) *International Journal of Constitutional Law Blog*, available at <http://www.iconnectblog.com/2017/05/in-defense-of-judicial-populism-lessons-from-colombia/> and J González-Bertomeu, 'Working Well Is The Best Strategy: Judges under Populism' (May 2017) *International Journal of Constitutional Law Blog*, available at <http://www.iconnectblog.com/2017/05/working-well-is-the-best-strategy-judges-under-populism/>. Nevertheless, this is not the story in other countries under populist regimes, where the first measure governments take is to dismantle any kind of judicial resistance.

[53] R Gargarella, *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution* (Oxford University Press, New York, NY, 2013) 5.

In this sense, Arato has suggested that '[w]hen representation through elections fails, courts potentially yield a second democratic channel that becomes all the more important under a populist regime'.[54] In a more radical view, Issacharoff considers that in the current populist wave 'the problem is not a rejection of democracy, but too much democracy'.[55] Therefore, he trusts courts to forestall this descent into dominant leader control in established democracies. Using the UK's Supreme Court performance after Brexit as an example, the author asserts that courts should serve to reinforce the constitutional constraints necessary for democratic governance.

This kind of reaction is not new. As Müller explains, in Western Europe, the aftermath of the high point of totalitarian politics (National Socialism and Italian Fascism) was to direct the whole political development 'toward fragmenting political power (in the sense of checks and balances, or even mixed constitution) as well as empowering unelected institutions or institutions beyond electoral accountability, such as constitutional courts, all in the name of strengthening democracy itself'.[56] That process was based on a great deal of distrust of popular sovereignty, being implicitly anti-populist, with also deep reservations about the idea of parliamentary sovereignty. This 'constrained democracy', as the author called it, was also the model followed by the European Union. As a result, the outcome is a political order 'particularly vulnerable to political actors speaking in the name of the people as a whole against a system that appears designed to minimize popular participation'.[57]

A similar argument is made by Bickerton and Invernizzi, who consider that 'populism is a reaction against the growing technocratization of contemporary politics'. Hence, they criticise proposals like Rosanvallon's, according to which 'the transfer of political power to ''independent authorities'' drawing their legitimacy from their ''impartiality'' vis-á-vis social conflicts may provide a bulwark against (…) populism', because for them 'populism and technocracy cannot function as correctives for one another, since any increase in one or the other is likely to reinforce the underlying set of developments from which they both stem', that is

[54] A Arato, 'Populism and the Courts' (April 2017) *International Journal of Constitutional Law Blog*, available at <http://www.iconnectblog.com/2017/04/populism-and-the-courts/>.

[55] 'Or, more precisely, the risk is democracy unbounded from institutional constraints.' See S Issacharoff, 'Safeguarding Democratic Institutions' (April 2017) *International Journal of Constitutional Law Blog*, available at <http://www.iconnectblog.com/2017/04/safeguarding-democratic-institutions/>.

[56] Müller (n 8) 94. Although it is very controversial whether National Socialism and fascism had pre-populist roots or not; the comparison is appropriate to the extent that it represents a public law response to the phase of a constitutional crisis.

[57] Ibid, 96.

'the crisis of party democracy'.[58] For this reason, as it was pointed out, the reactive response to populism is self-frustrating. A structural approach focused on the creation of inclusive and interdependent institutions based on the idea of participation is more effective.

IV. The structural approach

From a structural point of view, the way public law should deal with populism is through a complete examination of the causes of its spread. It should be accompanied by imaginative thinking about alternative constitutional arrangements to prevent its possibility. It is not necessary to create new institutions; however, it is important to reconsider those we already have in a comprehensive manner.

Taking the 'crisis of representation'[59] as the main problem to be dealt with, in this section I argue that popular constitutionalism (as a different category from the previous analysed 'constitutional populism') can be a useful starting point to advance alternative constitutional designs.[60] Popular constitutionalism emerges as an attempt to rescue the debate on the role of people in discussing and deciding constitutional issues.[61] In normative terms, popular constitutionalism advocates that 'the views of ordinary people about constitutional meaning should play at least as large a role in constructing the nation's constitutional understandings as do the

[58] See C Bickerton and C Invernizzi Accetti, 'Populism and Technocracy' in C Rovira Kaltwasser *et al.* (eds), *The Oxford Handbook of Populism* (Oxford University Press, Oxford, 2017) 337, 338. P Rosanvallon, *Democratic Legitimacy. Impartiality, Reflexivity, Proximity* (Princeton University Press, Princeton, NJ, 2011).

[59] Including under this term, malfunctioning of the political system: high levels of corruption, estrangement between the electorate and representatives, inability of the political class to put problems on the agenda and to debate solutions, lack of proper procedural or institutional instruments capable of channelling non-conventional views, new demands or needs, dissatisfaction with the political and economic results of government action, loss of trust in the representative system, etc. See Meny and Surel (n 16) 14. For this reason, scholars talk about the 'reactive' feature of populism which prevents it from having a particular ideological content. See Canovan (n 20) 32; Taggart (n 17) 68–9.

[60] I am aware that it is difficult to speak of 'a' popular constitutionalism, but for practical reasons, in this article I will use the category in its 'normative strand' generalising common grounds in their 'best light'. For distinctions within popular constitutionalism see R Niembro Ortega, 'Una mirada al Constitucionalismo Popular' (2013) 191 *Isonomía* 38. For the distinction between the 'normative' and the 'descriptive' strands within popular constitutionalism, see M Tushnet, 'Popular Constitutionalism and Political Organization' (Spring 2013) 18 *Roger Williams University Law Review* 1.

[61] R Gargarella, 'Prólogo' in AM Alterio and R Niembro Ortega (eds), *Constitucionalismo Popular en Latinoamérica* (Porrúa, Ciudad de México, 2013).

views of elites, and especially the views of Supreme Court justices'.[62] Taking those concerns to the institutional level, popular constitutionalism promotes the idea of a flexible, not fully comprehensive, constitution[63] and of an extra-governmental interpretation of it.[64] This aspect challenges judicial supremacy,[65] and in certain cases, even refutes any form of judicial review.[66] It also seeks a greater democratisation and participation in political and economic institutions,[67] and reaffirms the relationship between law and politics.[68]

In light of this brief characterisation, it is possible to identify convergences and divergences between constitutional populism and popular constitutionalism. The first and fundamental convergence is that both preserve the role of popular culture, of 'the people', in political life, giving it a strong role. However, divergences can be grouped under three categories: (i) the notion of the people they support, (ii) how they propose to mediate the popular will,[69] and (iii) how the framers of the constitution conceive the idea of popular participation.

(i) While it was identified that populists see people as an 'all-inclusive' or a single unit,[70] the opposite occurs among supporters of popular constitutionalism, who see 'people' as a plural whole, with disagreements operating on a *permanent* basis and under equal conditions with other political actors. Thus, the 'people' for popular constitutionalists do not dissolve into a whole, but eventually express themselves when faced with

[62] Tushnet (n 60) 1.

[63] We can distinguish 'between the thick Constitution and the thin Constitution', with popular constitutionalism vindicating the latter. See M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, New Jersey, NJ, 1999) 9, 12.

[64] According to Kramer, this is the basic principle of popular constitutionalism. See LD Kramer, 'Undercover Anti-Populism' (2005) 73(4) *Fordham Law Review* 1343, 1344.

[65] See LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, New York, NY, 2004) 125.

[66] The rejection of Judicial Review is based on empirical studies of the effects that it has had, demystifying the dominant visions and showing the limited capacity of the courts to stop or reverse policies adopted by the executive and legislative powers, or to directly impose their own agenda. See R Gargarella, 'El nacimiento del constitucionalismo popular. Sobre *The People Themselves*, de Larry Kramer' (April 2006) 112 *Revista de libros de la Fundación Caja Madrid*. Also J Waldron, 'A Right-Based Critique of Constitutional Rights' (Spring 1993) 13 *Oxford Journal of Legal Studies* 1.

[67] Gargarella (n 66).

[68] M Tushnet, 'Popular Constitutionalism as Political Law' (2006) 81 *Chicago-Kent Law Review* 991.

[69] The term 'popular will' is used in this article to refer to the capacity of ordinary people and civil society to form a majoritarian will in a given moment, within a contrast of different opinions, interests and preferences in order to take a decision about a public affair.

[70] It is worth mentioning that this unity exists even considering differences among people. As Laclau explains, populism operates in a logic of equivalence–difference according to which 'the equivalential moment presupposes the constitution of a global political subject bringing together a plurality of social demands' and represents them hegemonically through empty signifiers. Laclau (n 21) 117.

specific conflicts and issues. They present their views and dissents through both their representatives and public opinion or social movements. In fact, as a social movement, one of the most important differences is that the 'popular' does not have a centralised leadership; it is 'spontaneous', and it is not organised so as to conquer political power at a governmental level.[71] That is, it is a notion of plural and democratic people whose substrate is the individual and not an organic whole.[72]

(ii) In regard to mediation of the popular will, as we saw 'the people' for populist are the ones who directly legitimate political institutions without further mediation other than their stated prevailing will. Here, it is more accurate to use the term 'general will' instead of popular will, in clear reference to Rousseau's conception of the 'capacity of the people to join together into a community and legislate to enforce their common interest'.[73] Thus, rather than a rational process constructed via the public sphere, the populist notion of general will – 'which is always in the right and always works for the public good'[74] – is based on the unity of the people[75] and is equated to majoritarian will. In this sense, the people become 'substantive' as they go beyond elections and representation, vindicating a more spontaneous relationship and a direct consensus between them and the leader. In this manner, populists seem to assimilate popular sovereignty and governmental institutions.[76]

This direct relationship leader–people, along with the transgression of regulated procedures, is done under an allegedly necessary rebalancing of the distribution of political power in favour of the majority. For this reason, some authors say that populism makes for a sort of 'redemption politics',[77] and find grounds to justify it.[78] However, while it is true that

[71] Urbinati (n 19) 129. At this point the author tries to show how social movements such as 'Occupy Wall Street', as much as they have a populist rhetoric, cannot be cataloged as populist.

[72] Ibid, 163. 'the main political character of a democracy is not so much that the people are collectively involved but that they are involved as individuals, that they have an *equal political liberty*' (original emphasis). Not all popular constitutionalists have made explicit their definition of the people and therefore the trend has been highly criticised. See e.g. L Alexander and LB Solum, 'Popular? Constitutionalism?' (2005) 118 *Harvard Law Review* 1594.

[73] Mudde and Rovira Kaltwasser (n 2) 16. In fact, these authors considered the 'general will' as a core concept of the populist ideology.

[74] JJ Rousseau, *The Social Contract* (1792) Book 2, 3.

[75] Mudde and Rovira Kaltwasser (n 2) 18.

[76] See MP Saffon and N Urbinati, 'Procedural Democracy, the Bulwark of Equal Liberty' (2013) 41(3) *Political Theory* 452–3.

[77] M Canovan, 'Trust the People! Populism and the Two Faces of Democracy' (1999) 47(1) *Political Studies* 2.

[78] MP Saffon and JF González-Bertomeu, 'Latin American Populism: An Admissible Trade-off between Procedural Democracy and Equality?' (2017) 24(3) *Constellations* 416.

populism can have a democratising role, it can also have negative effects for democracy if it translates, as it often does, into proposals that replace representative institutions with plebiscitarian forms of participation.[79] The problem with these plebiscitarian forms is that although they may seem to empower the people, they actually give them the role of a passive and reactive 'audience', rather than that of political agents.[80]

On the contrary, all those defined as popular constitutionalists focus on 'mediating' the popular will through institutions. They propose to change institutional designs to ensure that power does not remain in the hands of the judiciary, as they plead for a strengthened form of representative and social institutions. In this sense, Tushnet explains that popular constitutionalism neither advocates for direct popular referenda nor for plebiscitary democracy. However, it is a practice embedded in the structures of ordinary political contests, and in particular contests among political parties over fundamental questions of constitutional meaning. His 'idealized image is of parties developing platforms on matters of constitutional import and seeking public approval of those platforms'.[81] However, it is possible to incorporate popular will beyond parties' platforms through other institutional mechanisms.

To start with state institutions, at the legislative level, people can have an impact on decisions, for example, through law initiatives, public hearings,[82] the 'empty chair' institution,[83] and indigenous, women or other minorities' quotas. At the judicial level, people can make themselves heard not only by being part of a judicial process or citizens' juries, but by presenting *amicus*

[79] Urbinati (n 19) 134, 152. It is worth mentioning that populism cannot be equated to the plebiscitarian forms of democracy, although personalisation of power or 'Caesarism' makes the concepts overlap. Ibid, 172–5.

[80] Saffon and Urbinati (n 76) 452.

[81] M Tushnet, 'Derecho constitucional crítico y comparado' in R Gargarella and R Niembro Ortega (eds), *Constitucionalismo Progresista: Retos y Perspectivas. Un homenaje a Mark Tushnet* (IIJ-UNAM, Ciudad de México, 2016) 1, 11.

[82] On 14 June 2018 Argentina's Chamber of Deputies approved a bill liberalising abortion laws after more than two months of public hearings, where more than 700 people – academics, doctors, Secretaries of Health, members of civil society, NGOs, Churches, ordinary people, and others – participated with defence and opposition statements in a historical deliberation.

[83] According to art 101 of the Ecuadorian constitution: 'The sessions of decentralized autonomous governments shall be public, and at these sessions there will be an *empty seat* that shall be held by a representative of the citizens, depending on the topics to be dealt with, for the purpose of participating in their debate and decision making' (italics mines). Art 77 of the Citizens Participation Act regulates this mechanism, giving voice and vote to a citizen who is considered as a civil society representative. The modality under which she or he is elected and participate is regulated by every decentralised autonomous government where the institution takes place. See F Ramírez and A Espinosa, 'Ocupando la silla vacía. Representación y participación en el tránsito posconstitutional del Ecuador' (2012) 81 *Cuadernos del Cendes* 29, 109.

curiae, through public hearings, by participating in Justices appointments,[84] and through dialogic mechanisms.[85] At the executive level, it is possible to implement institutions like the recall or referendums initiated by the people. Other mechanisms that can mediate people's claims and also improve inclusion are Ombudsperson's institutions, participatory budgets, prior consultation of indigenous people[86] and, as some scholars propose, 'mini public' or 'deliberative panels'.[87] In order not to perpetuate unequal social structures, participation mechanisms need to specifically target discriminated and excluded population groups so they don't have to overcome socio-economic barriers by themselves. One of the ways to do so is by designing and allocating specific and differential rights to those groups.[88]

In this way, popular constitutionalism pays attention to procedures and institutions, and not to content, precisely to enable a plurality of voices and understandings of fundamental political issues. Implicit is the idea of an *ongoing discussion*, of fallibility in decisions, and precariousness in the exercise of power. In this sense, all results are reviewable and the fact of being part of the minority today does not prevent one from becoming part of the majority tomorrow. Institutions, besides receiving voices and arguments, should also encourage a time of reflection and equality of political actors, whilst avoiding being counter-majoritarian.

[84] Art 198 of Bolivian Constitution is interesting because it allows Justices of the Plurinational Constitutional Court to be chosen by ballot. Although judicial selection processes can be considered as mechanisms of political accountability, they can be included as processes to mediate the popular will. See M Tushnet, 'Judicial Accountability in Comparative Perspective' in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, Oxford, 2013) 69.

[85] Section 33 of the Charter of Rights in Canada (1982) inaugurates the idea of constitutional dialogue. See P Hogg and A Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal* 75; R Gargarella, '¿Por qué nos importa el diálogo? "La cláusula del no-obstante", "compromiso significativo" y audiencias públicas: Un análisis empático pero crítico' (2017) III *Revista del Centro de Estudios Constitucionales* 5, 161. Gargarella insists that dialogical practices must be institutionalised and non-discretionary, in order to allow equal participation.

[86] According to the Indigenous and Tribal Peoples Convention, No. 169 ILO (1989), and the United Nations Declaration on the Rights of Indigenous Peoples (2007), which includes the right to free, prior and informed consent of indigenous peoples (art 10 and 29.2)

[87] See e.g. Offe (n 4) 14–17.

[88] T Alfonso Sierra, *Redistributing Through Property Rights? Race, Welfare and Collective Land Tenure Systems in Colombia and Mexico* (Doctoral Dissertation, Sociology Department, University of Wisconsin-Madison, 2018) 15. The provision of collective property rights for indigenous peoples and Afro descendant communities is the specific right Alfonso Sierra analyses. In her words: 'the existence of this differential right has provided the leverage for ethnic communities to claim autonomy in their territories, to demand the right to prior consultation for every administrative decision that may affect them and to become an equal other for the state and for the traditional land owners'.

Accordingly Robert Post, for example, makes various proposals to strengthen chains of communication between elected representatives and public opinion through the active participation of people.[89]

Meanwhile, populism challenges precariousness,[90] since the populist government is the government of the people. This way, the possibility of other existing majorities in the future is not considered, with the only option being antagonism, i.e., the corrupt elite ruling against the people. This clearly goes against political representation as it denies disagreement rather than addressing it. As a result, it also compromises pluralism since diversity of opinion is seen as a transitory phenomenon that should be overcome by reaching a deeper unification of the masses, preferably under the guidance of a charismatic leader.[91]

(iii) Finally, from the specific point of view of popular participation, while populism supports *top-down* mechanisms; popular constitutionalism upholds *bottom-up* mechanisms of participation. While populists support participation only as far as it serves to be expressive and it functions to legitimise politics,[92] allowing institutional design wherein centralisation of power gets along with popular participation without a lot of inconsistency.[93] In this sense, the possibility of equal access to political power is denied. In other words, the capacity to influence decision-making processes is closed for people. In clear contrast to the above, popular constitutionalism stresses deliberation, shaping and control functions of participation that tends to maximise people capacity to discuss and to form preferences and judgments on public affairs, encouraging equal access to power. The point here is to foster autonomous, horizontally-organised collective subjects at the grass-roots level in order to give such actors decision-making roles in public policymaking process.[94] These sort of participatory mechanisms work when organic and induced participation are combined and allow people to participate effectively.[95] This means that state institutions must

[89] R Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Harvard University Press, Cambridge, MA, 2014) 5, 8.

[90] By precariousness I mean the non-permanent duration of the government.

[91] Saffon and Urbinati (n 76) 442, 450.

[92] I am following Zilla (n 15), for the differentiation between the expressive, political legitimation, deliberative, shaping and control functions of participation.

[93] Tensions between centralisation of power and participatory mechanisms arise when the latter pretend to democratise access to political power, understanding access to political power not *strictu sensu* as power takeover but *latu sensu* as shaping power.

[94] See Roberts (n 1) 143.

[95] *Organic participation* 'is spurred by civic groups acting independently of, and often in opposition to, government'; '*Induced participation*, by contrast, refers to participation promoted through policy actions of the state and implemented by bureaucracies'. (Original emphases.) G Mansuri and V Rao, *Localizing Development. Does Participation Work?* (The World Bank, Washington, D.C., 2013) 31–2.

recognise and incorporate previous organised local organisations to decision-making processes, and not only create bureaucratic spaces of participation.[96] In addition, 'differential approaches' to vulnerable groups must be incorporated as mandatory into participatory instances in order to guarantee the inclusion of their voices, respect of their rights to participation and equality, and to avoid the risk of reproducing existing social hierarchies.[97] This standpoint assumes that the community participates actively in all phases of public policy, providing necessary information and formulating proposals to design and execute the policy.[98] Therefore, the question is not just how much democracy is participatory, but also how democratic is participation.[99]

Of course, considering only participatory mechanisms is not enough to solve inequalities that cause crises in representative democracies. A systemic and contextual view is needed to evaluate institutional designs. In this sense, attempts to immunise the democratic system against socio-economic inequalities are imperative.[100] For instance, it is essential to secure public funding for political parties and electoral campaigns, accompanied with strict transparency rules and limits of private financing of political campaigns.[101]It is also important to regulate mass media in order to avoid communication monopolies or oligopolies and guarantee fair competition among ideas, values, and interests, so as to give everyone a chance to generate political impact. Simultaneously, non-institutional spaces of social deliberation, concertation, execution of public policies and control are needed, and this will be possible only with empowerment of civil society outside state institutions. Thereby, social protest has to be protected and guaranteed as a fundamental form of political expression. Other fundamental measures have to include public access to information, broad judicial legitimation (including collective actions), and affirmative actions to warrant equal access to rights for vulnerable groups.[102]

To conclude, the extent to which popular constitutionalism arrangements foster autonomous and self-constituted organisation, providing citizens a role in government, the likelihood of success for populist parties will expectably diminish. In Roberts' words, the stronger organised the civil

[96] R Ondrik, 'Participatory Approaches to National Development Planning', *Vol. Manila, Filipinas:* Asian Development Bank, available at <https://zdoc.site/a-participatory-development-aparticipatory-development-is-a-.html>.

[97] See Alfonso Sierra (n 88).

[98] Ibid, quoting USAID Colombia Land and Rural Development Program, available at <http://colombialrdp.org/>.

[99] Zilla (n 15).

[100] Ibid.

[101] Post (n 89).

[102] A Noguera Fernández, *El sujeto constituyente: Entre lo viejo y lo nuevo* (Trotta, Madrid, 2017) 145.

society is, 'the more difficult it is for any political leader to appropriate popular subjectivity from above for a personalist project'.[103]

V. Some lesson from Latin American constitutionalism

It is possible to find in the constitutions of the NLC examples of both reaction and response to deep crises of political representation. In this section I analyse some features of the constitution of Venezuela and Bolivia to demonstrate how some of its provisions are clear examples of constitutional populism, but others can be identified as novel arrangements of popular constitutionalism. This will allow us to reflect on the potentialities and risks of these constitutional innovations with the intention of rethinking institutional designs in search of improving political representation.

Facing exclusive and illegitimate political systems, the constitutional processes of Venezuela (1999), Ecuador (2008) and Bolivia (2009)[104] were advanced with the stated purpose of solving the political and social marginalisation of certain groups (especially indigenous people),[105] as well as social inequality resulting from the application of neoliberal policies, particularly during the 1980s and 1990s.[106] Likewise, their purpose was to overcome the concept of a constitution as power limiting and to conceive it as a democratic formula where the constituent power expresses its will.[107] In this sense, the NLC has provided limitation of constituted powers, but the function that those limits fulfil serves as an organisational instrument to enforce democratic decisions.[108] This understanding conceives the

[103] Roberts (n 1) 146.

[104] I will refer to these constitutions as the ones that make up the NLC as long as their creation processes have been described as 'ground-breaking', 'transformative' or 're-foundational'. See R Viciano Pastor and R Martínez Dalmau, 'Fundamento teórico del nuevo Constitucionalismo Latinoamericano' in R Viciano Pastor (ed), *Estudios sobre el nuevo Constitucionalismo Latinoamericano* (Tirant lo Blanch, Valencia, 2012) 11, 30; B de Sousa Santos, *Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur* (Plural, La Paz, 2010) 85; and Bernal (n 33).

[105] R Gargarella, 'El nuevo constitucionalismo latinoamericano: Promesas e interrogantes', available at <http://www.palermo.edu/Archivos_content/derecho/pdf/Constitucionalismo_atinoamericano.pdf>.

[106] Viciano Pastor and Martínez Dalmau (n 104) 21, 22.

[107] Ibid, 16.

[108] Here, the article follows the distinction made by Möllers between a separation of power as empowerment or as limitation of government, which corresponded with an understanding of freedom through public authority (positive freedom) and freedom from it (negative freedom) respectively. See C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, Oxford, 2015) 40–3. The NLC correspond to the former understanding, which Holmes calls 'positive constitutionalism'. See S Holmes, 'Precommitment and the Paradox of Democracy' in J Elster and R Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press, Cambridge, 1988) 195.

constitution as a *political law* which is primarily concerned with its democratic legitimation.[109] Hence, constitutions empower: 'they establish institutions which allow people to cooperate and coordinate to pursue projects that they cannot achieve on their own'.[110] Furthermore, constitutions of the NLC are full of symbolic language that envisions a future state that has to be constructed.[111]

These constitutions have been considered to be clear cases of constitutional populism, as well as configuring novel arrangements of popular constitutionalism. At the level of its constitutional models, there are some commonalities with popular constitutionalism, especially because both are based on the idea of citizen participation, which is the heart of the institutional political system.[112] Participation goes far beyond the constituent act or the election of representatives, since it perpetuates along the constitutional texts in areas such as the popular, legislative, and constitutional initiatives or the approving, consultative, recall, and abrogative referendums.[113] It is also reflected in citizen control instances of public administration[114] and in the recognition of forms of communitarian democracy developed by indigenous peoples.[115] Finally, participation is not limited to formal institutions, but there are also mechanisms of informal participation such as neighbourhood assemblies, open councils, accountability committees, and citizens' observatories.[116] In short, we can

[109] Tushnet (n 68) 991. Viciano Pastor and Martínez Dalmau (n 104) 20, 36.

[110] J Waldron, *Political Political Theory* (Harvard University Press, Cambridge, MA, 2016) 34.

[111] Viciano Pastor and Martínez Dalmau (n 104) 37.

[112] See F Palacios Romeo, 'La reivindicación de la polis: Crisis de la representación y nuevas estructuras constitucionales de deliberación y participación en Latinoamérica' in C Storini and JF Alenza García (dirs), *Materiales sobre neoconstitucionalismo y nuevo constitucionalismo latinoamericano* (Editorial Aranzadi, Pamplona, 2012) 147, 177.

[113] G Pisarello, 'El nuevo constitucionalismo latinoamericano y la constitución venezolana de 1999: balance de una década' (November 2009) 1 *Sin Permiso* 10; e.g. art 70 of the Venezuelan constitution; in Ecuador, art 103-13; art 11 of Bolivian constitution.

[114] Like the creation of the 'Citizen Power' in the constitution of Venezuela (Title V, Chapter IV), the 'Power of Transparency and Social Control' in the 2008 Ecuadorian (Fifth Chapter, Title IV), and the function of 'Participation and social control' in the 2009 Bolivian (art 241 and 242). Only the last one is outside the institutions of the State and recognised as a communitarian and circumstantial organisation of the people. See Noguera (n 102) 144–5.

[115] See R Uprimny, 'The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges' (2011) 89 *Texas Law Review* 1587, 1595; also Sousa Santos (n 104) 118–22, in what is referred to as intercultural democracy.

[116] See A Noguera, 'What Do We Mean When We Talk about "Critical Constitutionalism"? Some Reflections on the New Latin American Constitutions' in D Nolte and A Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Ashgate, London, 2012) 109. According to the author, the epitome of this recognition is the right to resistance considered expressly in art 98 of Ecuadorian constitution.

find in the NLC an explicit willingness to 'transcend elite constitutionalism towards a popular constitutionalism'.[117]

However, other views of these constitutions cast doubt on the effectiveness of the one stated above. In this sense, some scholars emphasise that it is difficult to expect wide citizen participation when power is politically concentrated and territorially centralised.[118] These remarks, plus the political practice developed in recent years in these countries, allowed to describe Venezuela, Ecuador and Bolivia as cases of populism.[119] Thus, the instrumental use of legislation, the concentration of power in the executive, the destruction of institutions that generated some control, and the restrictions on certain fundamental freedoms (in particular freedom of speech)[120] have forced even the original advocates of the model to become critics.[121] In the cases of Venezuela and Ecuador, 'people power tends to be invoked or cited, as an accompaniment or as acclamation, but not as autonomous power'.[122] In this sense, Negretto explains that amongst all mechanisms of citizen participation, the only ones that have become effective are those that have a purely plebiscitary and anti-deliberative impact, such as the 'referendum'.[123]

In light of this, should we conclude that the NLC is a kind of constitutional populism and reject it? The answer depends on the particulars of each case. As Noguera explains, there is a relation between the nature of the constituent subject (party, leader–mass or social movements) and the type

[117] Viciano Pastor and Martínez Dalmau (n 104) 42. As expressed by D Nolte and A Schilling-Vacaflor (eds), 'Introduction: The Times They Are A Changin': Constitutional Transformations in Latin America since the 1990s' in *New Constitutionalism in Latin America. Promises and Practices* (Ashgate, London, 2012) 3, 19, 'the adoption of the new constitutions was part of bottom-up process, including legal mobilisation, and was among the central demands of social movements and citizens that were discontent with the previous social and political order'.

[118] See Gargarella (n 53) 172–7.

[119] I say *to some extent* because it is necessary to distinguish institutions and political practices of those countries.

[120] C de la Torre and CJ Arnson (eds), 'Introduction: The Evolution of Latin American Populism and the Debates over Its Meaning' in *Latin American Populism in the Twenty-First Century* (Woodrow Wilson Center Press, Washington, D.C., 2013) 1, 4.

[121] See C Rodríguez-Garavito, 'Los derechos humanos y la "nueva" izquierda latinoamericana' (12 March 2014) *Open Democracy*, available at <https://www.opendemocracy.net/openglobalrights-blog/césar-rodr%C3%ADguez-garavito/los-derechos-humanos-y-la-"nueva"-izquierda-latinoame>; B de Sousa Santos, '¿La Revolución ciudadana tiene quién la defienda?' (9 May 2014) *Diario Público España,* available at <http://blogs.publico.es/espejos-extranos/2014/05/09/la-revolucion-ciudadana-tiene-quien-la-defienda/>.

[122] R Gargarella, 'El "nuevo constitucionalismo latinoamericano": Un constitucionalismo que no termina de irse' (4 February 2015) Working Paper, ITAM's faculty seminar, 25.

[123] Negretto (n 32) 370. It is worth noting that the author uses the terms referendum and plebiscite as synonymous.

of democracy or constitution that emerges from it.[124] Hence, it is possible to find important differences in the kind of participation supported by NLC constitutions that allows assessing them differently. In the following paragraphs, I discuss briefly some features of Venezuela's and Bolivia's constitutions as paradigmatic counterpoints.[125]

In the case of Venezuela, the identification of the people/mass with the leader formed the constituent subject, which habilitated a highly majoritarian form of direct democracy.[126] The 1999 constitution had two effects: on the one hand, it weakened the legislative branch and transferred decision-making power to the executive. The constitution changed the traditional bicameral legislature to a unicameral called 'Asamblea Nacional' (National Assembly), which lost some authorisation power.[127] But, most importantly, the National Assembly lost its most fundamental functions: the legislative function and the check function over the executive.[128]

[124] Noguera (n 102) 45.

[125] I will not discuss Ecuador for space reasons, but for relevant literature on the case see ibid 144; A Noguera Fernández and M Navas Alvear, *Los nuevos derechos de participación ¿ Derechos constituyentes o constitucionales? Estudio del modelo constitucional de Ecuador* (Tirant Lo Blanch, Valencia, 2016); C de la Torre (ed), 'The Contested Meanings of Insurrections, the Sovereign People, and Democracy in Ecuador, Venezuela, and Bolivia' in *The Promise and Perils of Populism: Global Perspectives* (University Press of Kentucky, Lexington, KY, 2015) 349; Bernal (n 33); C de la Torre, 'The People, Democracy, and Authoritarianism in Rafael Correa's Ecuador' (December 2014) 21(4) *Constellations* 457; C Montúfar, 'Rafael Correa and His Plebiscitary Citizens' Revolution' in C de la Torre and CJ Arnson (eds), *Latin American Populism in the Twenty-First Century* (Woodrow Wilson Center Press, Washington, D.C., 2013) 295; R Ávila Santamaría, 'De la utopia de Montecristi a la distopía de la revolución ciudadana' in *et al.* (eds), *El correísmo al desnudo* (Montecristi Vive, Quito, 2013) 70; J Wolff, 'New Constitutions and the Transformation of Democracy in Bolivia and Ecuador' in D Nolte and A Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Ashgate, London, 2012) 183; MA Cameron, 'The State of Democracry in the Andes: Introduction to a Thematic Issue of Revista de Ciencia Política' (2010) 30(1) *Revista de Ciencia Política* 5; C Bernal Pulido, '¿Es inconstitucional utilizar el procedimiento de enmienda para reformar la Constitución del Ecuador con el fin de establecer la relección indefinida del Presidente?' Available at: <http://www.creo.com.ec/mailing/boletinanuncio/001/informe.pdf>.

It is worth noting that Rafael Correa did not run for presidency in 2017, engaging in that way in 'ordinary politics'. Lenín Moreno won the 2017 elections and the Council of Citizens Participation and Social Control is now dismantling institutions such as the Constitutional Court due to the alleged link between its members and the former executive. See <https://www.vistazo.com/seccion/pais/politica-nacional/consejo-destituye-todos-los-jueces-constitucionales>. J Wolff, 'Ecuador after Correa: The Struggle over the "Citizens" Revolution' (2018) 38(2) *Revista de Ciencia Política* 281.

[126] Noguera (n 102) 46. The author calls this kind of democracy 'mobilization democracy'.

[127] As e.g. in the 1961 Venezuelan constitution the Senate was to authorise the President the promotion of officers, captains and colonels of the armed forces, while in the 1999 constitution this provision was eliminated.

[128] The partial loss of legislative function was made via enabling law (art 236.8 of the constitution) that allows the president to legislate by executive actions. Ibid, 103.

On the other hand, the constitution established direct ratification power to the people, without any intermediation. So, participation was considered within a centralistic perspective,[129] wherein the leader is the architect of the people's unity, with whom there is a hierarchical relation. In this approach, the source of the people is external and its unity fragile,[130] which makes it possible to talk about constitutional populism *tout court*. Although the Venezuelan constitution was inclusionary in its first moment and, it could thus be seen as a first step to overcome the so-called crisis of representation, it did not foster meaningful participation or group autonomy within the people. Hence, it became a personalistic political project of building and maintaining the power hindering the contestation dimension of democracy.[131] Unfortunately, Venezuela today can hardly be called a democratic regime. Electoral and judicial institutions are entirely captured and Maduro's government has silenced and persecuted opposition, replacing politics by violence and militarisation.[132]

On the contrary, the 2009 Bolivian constitution was founded on a different understanding of 'the people'. They were not conceived of as an organic totality (as in Venezuela) but acted as a group of individuals, of struggles and social movements.[133] The constitution was written by a consortium of different social actors who were previously organised around struggles against exclusion and colonialism. Consequently, the institutional design was based on distrust towards the State and empowerment to social movements with specific recognition of rights to vulnerable groups. This allows decentralisation of power, self-management, and an appropriation of the public by people in a practice of permanent conflictual relation with the State.[134] As an example, in the second part of the Bolivian constitution there is an organisational function related to 'participation and social control' (Title VI) which – unlike similar functions in Venezuelan and Ecuadorian constitutions – is not institutionalised in any concrete authority. In 2013, the '341 Act on participation and social control' was enacted granting the function to organic social actors (such as unions, neighbourhood meetings and other legally recognised actors), communitarian actors (such as indigenous people and nations), and

[129] In this sense, the issues to discuss are the ones that government is interested in; all broadcasting and media are dominated by the government, participation mechanisms are activated only to provide popular support to the leader, independently of the issue in question. In other words, participation has an instrumental character that pretends to legitimise an act of government.

[130] Noguera (n 102) 101–9.

[131] Barr (n 4) 40. Huber and Ruth (n 4) 464.

[132] JF González-Bertomeu and MP Saffon, 'Jan Werner Müller: *What Is Populism?*' (2017) *Book Review* 15(4) *I.CON* 1234.

[133] Noguera (n 102) 108, 137.

[134] Ibid, 131, 151.

circumstantial actors (included all those organised for a specific goal),[135] thus institutionalising channels for popular participation in government control.

The crucial component here is the social group's autonomy that characterises the relationship between those in government and the citizenry.[136] This autonomy suggests access to political power and it is consistent with participatory 'mechanisms by which citizens themselves have a direct role in government'.[137] For these reasons, the Bolivian constitution not only endorses the inclusiveness dimension of democracy, but also the contestation dimension.[138] As Roberts points out, in Bolivia 'Evo Morales – unlike Hugo Chavez – has been repeatedly challenged not only by elite opponents, but also by organised popular constituencies that retain a substantial capacity for autonomous political expression.'[139] So, his leadership rests upon a different logic of political authority and mobilisation, which in fact, is 'the very antithesis of populism'.[140]

As a result, this constitution can be typified as an example of popular constitutionalism, whose enforcement is not monopolised by the State, but is shared with the people's direct participation. Clearly this constitution is perfectible; however, it generates its own identity by serving as a basis for starting a strong, democratic project capable of further improvements. In brief, even if the constitutional reforms that gave rise to the NLC were massively supported,[141] they tried to respond to specific needs, and to generate normative constitutions that went far beyond the short-term goals;[142] thus the institutional outcome of each one is very different.

It is true that populism is not *necessarily* linked to the content of a particular constitution. Yet it is linked to the way political leaders exercise

[135] Ibid, 145. See (n 114).

[136] Barr (n 4) 42.

[137] Roberts (n 1) 143.

[138] Huber and Ruth (n 4) 464 quoting R Dahl.

[139] Roberts (n 1) 146.

[140] K Roberts, 'Latin America's Populist Revival' (2007) 27(1) *SAIS Review of International Affairs* 14.

[141] Thus the referendum to approve the 15 December 1999 Venezuelan constitution had an approval of 71 per cent of the vote. In the case of Ecuador, the referendum that called to consult the public on the need to reform the constitution (15 April 2007) had a support of 81.5 per cent of the vote. Meanwhile, the referendum to approve the constitution (28 September 2008) had a 65 per cent support. In the case of Bolivia, 61 per cent of voters approved the constitution in a referendum on 25 January 2009. Source: S Linares, 'The Democratic Genesis of a Constitution: Venezuela, Ecuador and Bolivia in Comparative Perspective' (presentation facilitated by the author, 2009).

[142] C Courtis and R Gargarella, *El nuevo constitucionalismo latinoamericano: promesas e interrogantes* (United Nations-ECLAC, Santiago de Chile, 2009) 9–11.

their power, leaders who can use the great majority's support to avoid any obstacle and even constitutional provision that undermines their leadership. On the contrary, popular constitutionalism needs institutional frameworks that generate, support, foster and protect people involvement in public affairs and their access to political power. In any case, as Courtis and Gargarella point out, the achievement of the promises of a constitution depends on the proper functioning of ordinary politics.[143] In that sense, it is worth recalling that the enormous quantity and variety of populist experiences that have occurred in the world cannot be associated with any particular type of constitution but rather with the disdain for any of them. Now, insomuch as constitutional reforms flourish in order to re-elect such leaders indefinitely, increase their own power, ignore preset controls, and dismantle any opposition, so also can constitutions, such as Bolivia's be transformed into constitutional populism. But still, it is possible to justify those arrangements if they improve social conditions for people, incorporate previous marginalised people into politics and are a necessary step to reinforce democracy.

To conclude, one could say that while there is an agreement regarding the idea that in their *political practice* the countries in question are populist, *institutionally* they mix an intention to realise the goals of popular constitutionalism, participation and citizen empowerment with constitutional populism's provisions such as the concentration and centralisation of power, both of which are contradictory.[144] However, difficulties in assessing these new constitutions should not prevent us from upholding certain provisions and criticising others. Rejecting them for their populist developments makes us fall into a false dichotomy that ends up supporting the previously established deficient model. In short, not all popular is populist, and identifying them would only leave us with the elitist alternative.

VI. Conclusion

The importance popular constitutionalism gives to the people, to the decision of the majority to shape and control functions of participation and to social mobilisation, does not necessarily imply populist drifts. On the contrary, this institutional model can reinforce democracy, legitimise political decisions, generate inclusion, and avoid the appropriation of popular interest and values by populist discourses and leaders.

[143] Ibid, 17.

[144] In the context of 'fragile democracies', the outcome of these contradictions is in favour of centralisation of power and in rescission of participation. See Issacharoff (n 55).

Populism has a very rich history of experiences and studies, which provide it with distinctive features, very different from those of popular constitutionalism. These features survive in the novel notion of constitutional populism with the particularity that constitutional reform is used to give populist regimes some stability and legitimacy.

Although some authors consider that there have been experiences of popular constitutionalism, these are rare, incipient, or rather idealised. That is why so many scholars try to make a sort of normative reconstruction of constitutionalism, adding the popular component to serve as a critique of elitist institutional design currently prevalent in most Western countries and as an alternative to face the so-called crisis of representation.

In this article I argued that some arrangements of the NLC go in the right direction, insomuch as they create new institutional systems that generate democratic participatory mechanisms. That is one of the key reasons why some historically marginalised groups in Bolivia have been able to push for actual inclusion in policymaking processes, and it is also a good reason to pay attention to these mechanisms.

It is not hard to imagine that proposals such as popular constitutionalism find resistance from status quo defenders and give rise to fears of the unknown. Indeed, an easy and common way to resist them is to classify them as populist and give them the negative connotation of this phenomenon without much rigour. The key finding, as per this study, is that popular constitutionalism and constitutional populism are two very different categories with the only common factor of having people at their centres.

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