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## RESEARCH ARTICLE

### Populist Understandings of the Law: A Conservative Backlash?

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**ABSTRACT:** The main argument is that the contemporary manifestations of right-wing populism in Europe ought to be understood, at least in part, as reactions to a distinctive form of postwar European society, which I will call here embedded constitutional democracy. The argument is that the populist reaction to embedded constitutional democracy generally takes a conservative form. This conservatism is expressed in rather different ways (ranging from ethno-religious views to 'illiberal liberal' ones), but at the same time populism displays a shared core of criticisms on liberalism, and in particular regarding the internationalized or global version of liberalism. In the article, I will start with a brief analysis of the emergence of postwar society in the form of embedded constitutional democracy, used as a backcloth for the subsequent discussion of critical views of liberal understandings of the law in conservative populist thinking. I will, then, focus on populists' critical views of liberalism and 'globalism', analyzed in the form of contemporary articulations of (conservative) populism in both East-Central Europe (Hungary and Poland), and Western Europe (France, Italy, the Netherlands). In order to identify ideological affinities and critical positions, I discuss four themes: abstractness and inauthenticity, identity threat, domination, and legal fundamentalism.

**KEYWORDS:** anti-liberalism, conservatism, legal fundamentalism, populism, rule of law

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## 1. Introduction

The main argument in the article is that the contemporary manifestations of right-wing populism in Europe ought to be understood, at least in part, as reactions to a distinctive form of postwar European society, which I will call here *embedded constitutional democracy*<sup>1</sup>, that is, a multilateral system of societies characterized by constitutional democracy, universal human rights, various levels of juridification (as *inter alia* expressed in the role of apex courts) and international (legal) interdependence and integration. The argument is that the populist reaction to embedded constitutional democracy, as based on a liberal understanding of democracy, and as grounded in the rule of law and universal human rights, generally takes a conservative form. This conservatism is expressed in different ways (as becomes clear, for instance, from different approaches to human rights by rightwing populist movements in Eastern and Western Europe), but a shared set of criticisms on liberalism, and in particular on the liberal, internationalized juridical project of society is equally evident, as will be shown in the article.

The argument in the article is grounded in a socio-legal understanding of modern democracy, which is in significant contrast to those approaches, not least prominent in political science, but equally so in constitutional law, which tend to take liberal democracy, and its juridical structures, for granted.<sup>2</sup> Here, while law is understood as an intrinsic part of the social relations in modern societies, it is acknowledged that the role, and particular manifestations, of law in society differ from society to society as well as change over time. In this regard, ‘embedded constitutional democracy’ as it developed in post-war Europe is understood as a distinctive political-legal project, in which law and judicial institutions have become ever more prominent, and in turn are increasingly embedded in international and transnational legal regimes through processes of juridification (the extension of law in society) and judicialization (the growing prominence of judicial institutions). The main argument in the article is that the recent manifestations of right-wing populism in Europe

<sup>1</sup> The inspiration comes from John Ruggie’s ‘embedded liberalism’, (Ruggie 1982). As Ruggie argues, ‘The liberalism that was restored after World War II differed in kind from that which had been known previously’, in that ‘unlike the economic nationalism of the thirties, it would be multilateral in character’ (392-3). Perhaps more relevant is, however, Jan-Werner Müller’s notion of ‘constrained democracy’: Jan-Werner Müller states: [in the postwar era] ‘no known set of institutions in any way “returned” and neither was “liberalism” in any nineteenth-century sense (as a matter of ideas, let alone in terms of a social base) revived after 1945. What emerged instead might best be described as a new balance of democracy and liberal principles, and constitutionalism in particular, but with both liberalism and democracy redefined in the light of the totalitarian experience of midtwentieth-century Europe. While many of the central institutions and values of the post-war period could be seen as functional equivalents of certain liberal ideas, the inherited political languages of liberalism were almost universally rejected as relativistic, or simply unsuitable for the age of mass democracy. In other words, in post-war Western Europe a new, chastened Weberian politics triumphed: not charismatic, but firmly centred on the executive and pragmatic leaders; not geared towards generating meaning, but based on more than economic success (namely, moral foundations, such as natural law); not animated by a comprehensive liberal vision, but attempting to integrate citizens through shared values rooted in a rejection of the fascist past and the Communist threat from the East in the present’ (Müller 2011: 129).

<sup>2</sup> For a critical discussion of populism with regard to both political science and constitutional law, see Oklopcic 2019. As Oklopcic aptly argues: a ‘theory of populism is a theory for those who are either committed to the idea of liberal democracy in practice, or for those who are unwilling to reconsider the meaning of that idea in theory’ (204). For a critical discussion of political science approaches, see (De la Torre and O. Mazzoleni 2019). There are, surely, exceptions, such as the work of Bojan Bugarić (e.g. Bugarić 2019).

are a critical reaction against this post-war liberal-legal project. The populist legal mindset does *not* reject the law as such, but rather understands the role and the nature of law in a radically different manner from the prevalent postwar convention of modern constitutionalism, which is grounded in legal liberalism and anti-totalitarianism.

The first claim, and point of departure, in this article is that European societies in the post-1945 period relatively converged towards a particular form, that of embedded constitutional democracy, in which significant processes of *juridification* of modern societies are manifest (Croce 2018), and in which the significance of law, human rights, also constitutional law, and judicial institutions has importantly increased, to the detriment of, among others, politics and political institutions (Hirschl 2004; Stone Sweet 2008). A second claim is that recent manifestations of populism, since in particular the early 2000s, can be understood as including an important component of critique on this model of embedded constitutional democracy, which is *inter alia* understood as leading to an excessive juridification of society. Populist forces form a counter-reaction and converge on forms of what I will call ‘*legal cynicism*’ or also ‘*legal scepticism*’ towards prevailing understandings of liberal law and the rule of law<sup>3</sup>. Such scepticism is itself significantly informed by conservative positions on the law. I should stress that populist legal scepticism or legal resentment targets ‘liberal legalism’ or ‘legal liberalism’, that is, a distinctive liberal understanding of the law, or better still, a specific combination of liberalism and legalism.<sup>4</sup> Legal scepticism hence refers to a critique of what is perceived as an excessive form of legalism, not of the law as such.

While there is an extensive discussion on the positions of rightwing populism on, amongst others, migration, national identity, European integration, and party politics, there is little systematic attention to their understanding of the law.<sup>5</sup> The argument in this article is that this is unfortunate, as a not negligible part of the populists’ political actions and discourses as well as critiques can be related to a distinctive *legal* critique, which identifies key problems in contemporary societies as related to an allegedly excessive presence of the law. In this, (rightwing) populism tends to take a critical or ‘cynical’ approach to liberal understandings of law, the rule of law, and constitutionalism. Elsewhere, and more in general, I have called this legal mindset ‘legal resentment’ (Blokker 2019).

In the article, I will start with a brief analysis of the emergence of postwar society in the form of embedded constitutional democracy, used as a backcloth for the subsequent discussion of critical views of liberal understandings of the law in conservative populist thinking. I will, in this, focus on both Western and East-Central European populists. Populists’ critical views of liberalism and ‘globalism’ will be analyzed in the form of contemporary articulations of (conservative) populism in East-Central Europe, as particularly manifest in Hungary and Poland, and in Western populist discourse (France, Italy, and the Netherlands), including in the form of what Benjamin Moffitt has called ‘illiberal liberalism’ (Moffitt 2017).

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<sup>3</sup> Legal cynicism (as used in a very different study, that is, on deviance amongst different minority groups in American society, Sampson & Jeglum Bartusch, entails ‘cynicism about the rules of society and their application’, and relates to the ‘lack of support for the regulations of larger society’ (782).

<sup>4</sup> The populist vision dovetails with critical scholarly views of forms of liberalism. As John Gray has argued, ‘[c]urrent [liberal] orthodoxies treat the law as an accomplished fact. By passing over the political conditions that make the rule of law possible, the legalist liberalism that has prevailed over the past generation has been able to represent law as a free-standing institution. It has contrived to disregard that the institution of the law always depends on the power of the state’ (Gray 1995: 131-2).

<sup>5</sup> Some important exceptions should be acknowledged, that is, in socio-legal and criminological studies of the distinctive area of criminal law and ‘penal populism’ (Pratt and M. Miao 2019; Pratt 2020).

## 2. The Juridification of Modern Societies

Modern societies have from early on been perceived as closely related to the ideas of universal human rights and constitutions as their central dimensions, an observation often followed by a reference to article 16 of the Declaration of the Rights of Man and of the Citizen of 1789: ‘A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all’. The significance of the constitutional dimension remained evident throughout the nineteenth and twentieth centuries, not least in national independence struggles, but it can be argued that it is most prominently so after the Second World War that constitutionalism – understood in a very distinctive, legalistic manner – becomes understood as an essential component of the overall constitution of modern, democratic societies.

The postwar period is of special interest for a sociological perspective on juridification and constitutions: one may observe a clear break with the earlier prevalent understanding of modern constitutions as deeply grounded in local political communities or the people, an idea expressed clearly in the works of scholars such as Savigny or Hegel (cf. Madsen and Thornhill 2014: 1). After 1945, constitutionalism increasingly became understood as a *universalistic* political programme, in which national societies become intimately part of an international scheme of legal norms and principles. In this process, judicial institutions taken on an increasingly important position in modern societies, as exemplified by the growing importance of independent higher and constitutional courts.

The postwar period stands out in the novel imagination of democratic orders as strongly grounded in judicial institutions, the rule of law, and constitutional frameworks, in a narrative which identifies an independent and depoliticized constitutional and rights-based order as the most robust antidote to totalitarianism. The distinctive societal role of constitutions becomes the guarantee of order and stability, not least by means of a deliberate narrowing of the space of politics through juridification of some of its most essential aspects,<sup>6</sup> but also due to the fact that national constitutional orders in Europe are increasingly embedded in international legal regimes, such as the human rights regime of the European Convention of Human Rights on the one hand, and the (economic) legal norms of the European integration project, on the other. The new understanding of constitutionalism, often labelled ‘legal constitutionalism’ (Blokker 2013; Sajó and Uitz 2017) or ‘new constitutionalism’ (Hirschl 2004; Gyorfí 2016) entails, in the words of Gyorfí, a limiting of the constitutional imagination, in that a distinctive constitutional model becomes the general blueprint for all countries to follow, without much deeper reflection on its local relevance or potential alternatives (Gyorfí 2016: 30-33).

A major expression of this narrowing of the constitutional imagination regards the active promotion of a legal-constitutional model in the European context. This is not only due to a specific approach to post-totalitarian transition (as in Germany and Italy), or the latter’s reflection in the EU enlargement policies (as in the cases of the Mediterranean countries in the 1970s and 80s and the East-Central European countries in the 1990s), but also a result of the specific development of European integration itself, in which courts with a strong constitutional character have played an increasingly prominent role (Ferejohn 2002: 42). Such courts limit the ‘capacities of national political institutions to make and implement domestic and international policy’ (Ferejohn 2002: 42). The European trajectory of integration takes a specific, and it will be suggested, one-sidedly, legalistic form in which judicial institutions and actors are upfront (at least until the 2007 crisis),

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<sup>6</sup> E.g. human rights, cf. Ferejohn 2002.

and in which legal and constitutional instruments are utilized to further build up a European order.<sup>7</sup> As argued by Kate Nash,

For more than 50 years – albeit in fits and starts – legal constitutionalism, the view that rights are depoliticised by referring disputes over their interpretation to constitutional courts, and that other branches of the state must defer to judges’ decisions, has been the dominant model through which human rights are to be achieved in Europe. As a result, there is now effectively a kind of European constitution (Nash 2016: 1296).

It is this distinctive, liberal and legal-constitutional model that right-wing populists criticize, using a range of critical arguments. Right-wing populists, as we will see below, often take a conservative position, defending a traditional perspective of the community, which is now allegedly threatened by universalistic, abstract, and ever-expanding norms and rights.

### 3. A Populist Backlash in Europe

As argued above, a significant postwar trend is the emergence of distinctive constitutional democratic regimes, importantly embedded in an international system of human rights and political and legal integration and grounded in a rationale of anti-totalitarianism. In the Western European context, a main critique on embedded constitutional democracy is formulated in terms of ‘globalism’ and ‘sovereignism’, both arguments often promoted by populists. *Globalism* is a term used to criticize universalist understandings of modern society and the alleged subjugation of societies to forces external to itself, *in primis*, international and transnational political and legal regimes (in particular the European Union, but also the European Convention of Human Rights and its institutions). *Sovereignism* is a political perspective which strongly prioritizes the nation-state, and in particular the idea of a historical nation and its identity and traditions. A further, and strongly related, critique is that of *liberalism*, understood as the main ideological vehicle of globalism and as supporting a ‘progressive hegemony’ (Vossen 2011), and hence decried for its alleged monopolistic position in political thought and politics, but also as providing the main building blocks for embedded constitutional democracy in the form of rights equality, multi-culturalism and the protection of minorities. Liberalism is often understood in rather loose terms<sup>8</sup> in the populist critique and is frequently equated with neo-liberal ideas of the market, as well as cosmopolitan, universalist ideas regarding European integration, human rights, and ‘open society’. Liberalism is frequently counterposed to the native culture, historical roots, and traditions of the local community.

In many postwar societies in Western Europe, including France, Germany, Italy, the Netherlands, and the UK, clear forms of ‘backlash politics’ have emerged, in which core principles of the universalistic, liberal-constitutional model of the postwar years, grounded in extensive of human rights and minority protection, are heavily contested (Oomen 2016; Thornhill 2019). The cases that will be discussed here are France (Ras-

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<sup>7</sup> Apart from a legalistic bias, it is equally important to stress a ‘market bias’, in that distinctive market rights have taken precedence in specific phases of European integration (see Blokker 2019; Brunkhorst 2016). This indicates a broader link between law, human rights, and the ascendance of neoliberalism (as decried by inter alia Moyn 2018 and Marks 2013).

<sup>8</sup> Ryszard Legutko, a prominent intellectual in the Polish Law and Justice party, discerns a common dimension to different expressions of liberalism, ranging from ‘radical free market capitalism to certain forms of the welfare state, from Ludwig von Mises to John Rawls, from Reaganomics to the European Union’ (Legutko 2008: 7).

semblement National), Italy (Lega), and the Netherlands (Partij voor de Vrijheid; Forum voor Democratie).<sup>9</sup> The emergence of anti-progressive, in distinctive ways anti-liberal, political forces has often been labelled as populist, but in this the emphasis has been predominantly placed on style, strategy, and rhetoric, while the underlying ideological, ideational dimensions have been frequently ignored (Oudenampsen 2018). This regards for instance the case of the Netherlands, where a pioneering, progressive democratic regime underwent a significant conservative turn in the early 2000s (Oudenampsen 2018; Vossen 2011). If ideational dimensions to ‘backlash politics’ remain understudied, this is even more the case with the legal dimensions of populism.<sup>10</sup> As argued, in the extensive debates on rightwing populism there is hardly any attention for populist positions on law, human rights, and constitutionalism. I will however argue that in various cases, including Western Europe, populists formulate a relatively broad critique on the ‘rule of law state’ and of liberal, legal ideas (Hirsch Ballin 2011).

In North-Western Europe, this frequently includes the phenomenon of what Moffitt describes as ‘illiberal liberalism’, that is, ‘parties combine policies that are undeniably xenophobic and putatively anti-liberal with at times classically liberal positions in other policy areas’ (Moffitt 2017: 114). In the ideational analysis proposed here, this refers to the simultaneous endorsement of sovereigntist and anti-globalist positions, on one hand, and the favouring of rights for distinctive ‘in-groups’ (women, homosexuals), on the other. In other words, rights are seen as strictly related to a distinctive political community and its ‘own’ in-groups, refuting, in this, a universalistic approach. The illiberal liberal or ‘civilizationist’ form of populism, on the face of it, appears in great contrast with conservative, religious positions as found (increasingly) in the Italian Lega, or in the Polish Law and Justice party. While this contrast is evident, in reality there is, as we will see, a significant overlap in anti-universalist and sovereigntists positions towards the law in both religious and secular forms of populism.

As emerges from the discussion below, it appears evident that the universalist, liberal project and its understanding of the law, in particular regarding international, EU law, and human rights, is being contested throughout Europe (as for instance in the case of Brexit) (Oomen 2016; Madsen 2019), even if the populist backlash is more acute in East-Central European countries - to which I will turn now - especially in terms of authoritarian tendencies in populism-in-government.

A number of the ‘new democracies’ in East-Central Europe (ECE) have witnessed a clear form of political backlash in recent years. The ECE-region, made up of countries that made a transition to liberal democracy relatively recently, provides an important set of examples regarding both the institutionalization of embedded constitutional democracy (since 1989) and in terms of a societal and political reaction in the form of populist critiques of the liberal understanding of the law. In fact, the post-communist countries form particularly important examples, because these societies have seen both a strong tendency towards juridification since 1989 - in terms of constitutionalization, the extension of human rights and other legal regimes, and the rise of prominent courts - and a strong, relatively recent, populist backlash. In particular the cases of Hungary (Fidesz) and Poland (PiS) have seen a radical backlash in recent years.

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<sup>9</sup> The German *Alternative für Deutschland* will also be briefly mentioned.

<sup>10</sup> The term ‘backlash’ originally refers to the conservative backlash in the United States, which emerged in particular against the legal dimensions of progressivism, not least in the form of Supreme Court rulings.

Originally, the momentous changes in ECE around the year 1989 were widely understood as ‘legal revolutions’ or ‘legalistic revolutions’,<sup>11</sup> and as ushering in the transformation of the former communist countries towards liberal-democratic regimes. Currently, however close to 30 years since the regime change, the region witnesses a strong backlash in the form of a *counter-revolution by law* or *counter-constitutionalism* (Scheppele 2017; Sledzinska-Simon 2017). Observers identify in particular in Hungary and Poland constitutional ‘capture’ by populist forces as well as a defiance of and attack on judicial institutions, in the name of popular sovereignty and a strong critique of liberalism.

In the extensive debates on ‘backsliding’ in the region, relatively little attention is paid to the ideational foundations and forms of critique present in populist counter-constitutional projects, their relation to long-standing conservative narratives on liberal democracy, and the distinctive telos of populist politics. As Ewa Dąbrowska argues for the case of Poland, ‘There is scant academic literature on the *ideas behind* the political change realized by PiS since 2015’ (Dąbrowska 2018: 93). In short, populist approaches to the law need careful investigation, as populists criticize liberal views of the law, propose different relations to the law, and manage to mobilize significant social support in favour of their populist projects.

In sum, the article argues that key populist developments in both ECE<sup>12</sup> and WE<sup>13</sup> - despite significant differences between East and West with regard to for instance democratic consolidation, issues of democratic transition, and forms of nationalism - need to be understood as conservative reactions to what is perceived as liberal-legalist domination (identified in domestic democratic institutions as well in supranational ones). In both ECE and WE, conservative intellectuals and civil society groups have been gathering strength since the 1990s, and in particular since the early 2000s. Conservative forces have increasingly radicalized, and have become significant political forces, mobilizing society, and providing intellectual support, expertise, and legitimacy to populist projects. As Balázs Trencsényi and his colleagues have argued with regard to ECE:

The radicalization of conservatism, which characterized the political and discursive landscape of the region after 2000, can be properly understood only in relation to the liberal ascendancy of the 1990s. This is not only because neoconservatives constructed their own identity in opposition to liberalism, but also because their efforts to define the political divide in terms of exclusive cultural-ideological dichotomies can be traced back to the postdissident discourse, defining liberal politics in terms of a broad consensus (Trencsényi 2018: 277).

It is in my view crucial to analyse distinctive manifestations of rightwing populism as distinctive political projects that mobilize anti-liberal, conservative forces in society and to elucidate such populist rhetoric and

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<sup>11</sup> Jiří Příbáň, for instance, spoke of the ‘fiction of legal revolutions’ (Příbáň 2002: 89), and together with Wojciech Sadurski of a ‘self-limiting and legalistic revolution’ (Příbáň and Sadurski 2006: 299). The former Chief Judge of the Hungarian Constitutional Court László Sólyom related to the ‘revolution under the rule of law’ (Sólyom 2003).

<sup>12</sup> I am not implying that this is the case in the same manner throughout the region. While the Hungarian and Polish cases fit our discussion neatly, manifestations of populism elsewhere appear different. The Czech populism of Andrej Babiš is for instance often defined as ‘technopopulism’, lacking in a strong nationalist or conservative component (cf. Havlík 2019). In the case of Romania, the populism of the governing PSD has appeared as less conservative and nationalist.

<sup>13</sup> As is visible in the political projects of the Italian Lega, the French Rassemblement National (cf. Fournier 2019), or the Dutch Partij voor de Vrijheid (cf. Mazzoleni and Voermans, this issue; Oomen 2016) and Forum voor Democratie.

practice as attempts to dismantle liberal-constitutional institutions in the name of a conservative, illiberal project.<sup>14</sup>

## 4. Conservatism

While many observers regard right-wing populists as opportunistic, cynical, and power-grabbing politicians, it is difficult to deny that there is a distinctive normative and ‘ideological’ thrust to the discourse and policies of populist governments, such as those of the Fidesz and PiS, but also of, for instance, the Dutch Partij voor de Vrijheid or the Italian Lega. The roots of many of the populist constitutional projects in Europe lie in their ideational bases of anti-liberalism and conservatism (Scheppelle 2019; Csillag and Szelenyi 2015; Jasiński 2018; Grzebalska and Pető 2018). Populists single out liberalism as the main enemy and display it as ‘evil and threatening’.<sup>15</sup> Anti-liberalism forms in this a core dimension of the ideational foundations of conservative populism.

The relation between rightwing populism and conservatism is a prominent one, but as of yet not sufficiently discussed. Admittedly, conservatism knows many varieties. Yet, a few central dimensions of conservatism can be identified (O’Sullivan 2015: 346). Conservatives strongly question the optimistic Enlightenment belief in progress and in the malleability of society according to rational design. Conservatives tend to appreciate traditional, spontaneous social ties, a collective societal identity, emphasize culture as a prominent dimension of social integration, and claim to want to save an existing, ‘authentic’ community. In addition, and as O’Sullivan has observed, conservatism in its reactionary version relates to an ‘essentially utopian vision of a perfectly harmonious hierarchical society’ (O’Sullivan 2015: 348).

In Western Europe, populists decry that the ‘oikos’, ‘what is one’s own’ (Baudet 2013: 68), is ‘being destroyed by a range of phenomena’, including ‘multiculturalism and open borders’, ‘the European Union, which takes away the self-control of the inhabitants of our country and sets up a bureaucracy which can overrule national parliaments in practically any point’ (Baudet 2013: 68). The right-wing populist Thierry Baudet of the Dutch Forum voor Democratie follows Roger Scruton in denouncing this as ‘oikophobia’. Baudet, inspired by the Spenglerian thesis of the *Untergang des Abendlandes*, has further promoted the view that ‘someone has to save the Netherlands—and Western civilization—from their impending downfall’ (Faber 2018) and wants to defend local Dutch culture from the assault of foreign enemies and the EU.

Similarly, Geert Wilders of the Dutch Partij voor de Vrijheid (the Freedom Party) argued in 2005 in favour of the abolishment of article 1 of the Dutch Constitution, which refers to freedom of expression and non-discrimination, and proposed to revise it so that it referred to the ‘dominant culture’ of the Netherlands, the judeo-christian tradition and humanism. And in the presidential campaign of Marine Le Pen, she put forward the following proposition:

The defence of national identity, [and] the values and traditions of French civilization. To inscribe into the Constitution, the defence and the promotion of our historical and cultural patrimony...The promotion of secularism and the fight against communitarianism. Inscribe into the Constitution the principle: «The Republic

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<sup>14</sup> The – now collapsed - ‘yellow-green’ populist coalition of the Lega and the Movimento Cinque Stelle in Italy is a good example, in that it pursued policies against universal, individual human rights (for instance, in migration policy), criticized powerful judicial institutions, displayed scepticism towards minority rights, and openly defied the European integration project.

<sup>15</sup> Wolff-Powęska (2018: 59). Krzysztof Jasiński speaks of a “conservative modernization” strategy’ (Jasiński 2018).



does not recognize any [ethnic, religious] community». Restore secularism everywhere, extend it to the entire public sphere, and inscribe it into Labour Law (Le Pen 2017).

Matteo Salvini of the Italian Lega defends Italy by emphasising its Christian religion and traditions against (liberal) multiculturalism and Islamic influences (Schwörer 2018), while on the European level seeking alliances with conservative populist parties, such as by means of the conclusion of a common programme with the Polish PiS (and other such parties) in the context of the European elections of 2019 on ‘development, family, and the Christian roots of Europe’.<sup>16</sup>

In East-Central Europe, Polish conservatives<sup>17</sup> regard liberalism, in its promotion of modernity, Western civilization, grounded in moral decline, consumerist thinking and a negatively understood pluralism and multiculturalism, is undermining culture, religion, and national identity (Wolff-Powęska 2018: 59). In Hungary, a similar conservative mindset is upfront in public debate as well as in politics.<sup>18</sup> In the words of Frank Furedi, the ‘political outlook of Fidesz is best described as a synthesis of conservative nationalism and Christian democracy’ (Furedi 2017: 5).

A more systematic analysis of the ideas underpinning conservative populism in Europe appears fruitful. A key dimension in this might be a primary interest in an analysis of conservative populism’s *critical stance* towards liberal understandings of the law and liberal constitutionalism. Such an exercise is important for a number of reasons: it enhances our understanding of how (rightwing) populists perceive the law, it gives insight in which dimensions of liberal legalism are considered problematic by populists, and it might help us understand of how to imagine a constitutional democratic state which is less vulnerable in the face of populist challenges.

## 5. The Conservative Populist Critique on Liberal Legalism

An analysis of the general critique on liberalism raised by conservative thinkers provides important insights into rightwing, conservative populist approaches to the law, but equally into problematic dimensions of taken-for-granted liberal understandings of the law or the ‘limits of the law’ (Sumption 2016). The claim here is not that rightwing populists necessarily share all such conservative views of society. Rather, the argument is that rightwing populism - both in its more conservative, religious guise (prevalent in East-Central Europe but not only there) and in its ‘illiberal liberal’ version (evident in North-Western Europe) – displays a similarly critical approach towards liberal legalism/liberal universalism: as an abstract, disembedded, artificial ideology as well as practice of political governance.

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<sup>16</sup> See <https://it.sputniknews.com/opinioni/201901117085285-Salvini-da-Kaczynski-alleanza-comune-di-chi-vuole-salvare-Europa/>.

<sup>17</sup> It is important, but beyond the scope of this article, to recognize important differences between conservatives in ECE. Whereas some, such as Ryszard Legutko and András Láncki, have strongly criticized liberal constitutionalism, individual rights, and related judicial institutions (such as independent apex courts), others, such as István Stumpf, take a more moderate position. Lech Morawski, one of the ‘pseudo-judges’ of the Polish Constitutional Tribunal (deceased in 2017), endorsed a view of ‘judicial restraint’, in which the Constitutional Tribunal takes a less active role and parliament (and government) become more prominent. See, in general, for extensive discussions of different conservative currents (Matyja 215; Dąbrowska 2018; Trencsenyi et al. 2018, chapter 6).

<sup>18</sup> Kim Scheppele has discussed the anti-liberal ideology of the Hungarian Fidesz party in-depth (see Scheppele 2019).

In the version of ‘sovereignism’, prevailing in Western European countries such as France and Italy, this conservative dimension comes through in a strong instance on the rights of the European peoples, sovereignty of the people as a priority, and the denunciation of the abstract individual rights on which also the EU is allegedly built. This argument is for instance made by Paolo Becchi, a professor of philosophy and author of the *Manifesto Sovranista. Per la liberazione dei popoli europei* (Becchi 2019: 18-9), initially close to the Italian Five Star Movement, but now considered near to Salvini’s Lega. In the conservative views of Thierry Baudet, the recently emerged intellectual-cum-populist in the Netherlands (who holds a PhD in law from the University of Leiden, supervised by Paul Cliteur and Roger Scruton), it is the insistence of Western liberal societies on individual, inalienable rights that weakens traditional social institutions such as the family, the nation, and traditions as such (Baudet 2019).

In the context of anti-communist and anti-liberal ideas of conservative thinkers in East-Central Europe, one significant example is the work of Ryszard Legutko (a Polish political theorist and a Member of European Parliament for the Polish Law and Justice party (PiS)). In his work, liberalism is denounced as displaying suspicion towards collective societal institutions, such as the family, while human rights are frequently understood as arbitrary claims of specific political groups raised against the common good (cf. Legutko 2016). Another significant example is András Láncki, a political philosopher and the ‘more-or-less official regime philosopher’ of the Hungarian Fidesz party (Scheppele 2019: 317). In the period 2010-16, Láncki headed the Fidesz-related conservative think tank *Századvég*. He has been the Director of the Institute of Political Science and Philosophy at Corvinus University and is currently its rector. Láncki equally criticizes liberalism and liberal constitutionalism in the name of what he calls ‘political realism’ (Láncki 2015). In a manner similar to that of Legutko, Láncki equates liberalism with communism, denouncing what he identifies as a ‘totalitarian’ thrust of both in the name of a utopian view of society. He further criticizes liberalism for its role in undermining the community and the excessive focus on the rights of the individual (Láncki 2015).

In order to identify ideological affinities and critical positions between different manifestations of rightwing populism, grounded in conservative positions, below I will discuss a number of recurring themes and claims that appear in various populist arguments and discourses, in both East and West. The four themes I will analyse are: abstractness and inauthenticity, identity threat, domination, and legal fundamentalism.

### *5.1 Abstractness and inauthenticity*

A key dimension of the populist critique is the claim that liberalism is an abstract and inauthentic ideology, which is incapable of interacting with ‘thick’ or ‘real’ community life. Liberalism’s insistence on abstract, universalist, individual human rights pushes it further and further away from the real life-forms of family and society.<sup>19</sup> Conservative populists tend to understand the liberal approach as merely a ‘thin’ one, in that it allegedly understands thicker, cultural, non-procedural or more substantive ideas a matter of private or group preferences, which ought not to be part of public politics. Legutko’s argument is, for instance, that liberalism ‘lacks in weight’, which seems a version of the well-known critique of liberalism as a formal-procedural idea, which portrays liberalism as a dispassionate, instrumentalist view of politics. According to Legutko, this also means that liberalism – in its ‘sterility’ - has little if anything to say about substantive,

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<sup>19</sup> The populist critique of liberalism is frequently rather sweeping, and fails to take into account the many available strands of liberalism and of significant changes over time. Liberalism’s varieties is for instance analyzed in Freedon (2008); see also Gray (1995).

human moral questions; indeed, liberalism for him is ‘comparably simplistic and equally impoverishing’ [as was communist thought].<sup>20</sup> While liberal rules are of a procedural, universalist, and inclusive kind, this comes at the cost, according to Legutko, of ‘being more and more remote from reality’.<sup>21</sup>

This idea is echoed in the Dutch politician-cum-intellectual and leader of the populist Forum voor Democratie Thierry Baudet’s critique of universalism as denying particular identities in the name of an abstract, universalist understanding of rationality. The impact of liberalism on society means that it increasingly undermines ‘social hierarchies, customs, traditions, and practices that existed prior to the emergence of the new system’ [i.e. liberal democracy] (Legutko 2016: 131). In the view of Baudet, liberalist universalism leads to a system in which particularist differences are banalized (while all social groups are supposedly equal in an ‘all-inclusiveness of loyalties’ (Baudet 2012), while core identities (such as the Dutch identity) are marginalized because of the multicultural arrangement (Baudet 2012; cf. Cliteur 2018: 293). In this, Baudet understands liberalism as subject to a series of ‘universalist fallacies’. Drawing inter alia on John Rawls’ political liberalism, Baudet indicates that one of the universalist fallacies is that liberal ideals (in a version of the ‘globalist’ critique, understood in the form of ‘supranationalism and multiculturalism’) (Baudet 2012: 202), form abstract and ‘‘objective’ criteria of justice’’ and are, in his view, hence unrelated to or too much disembedded from specific, particularistic societies (Baudet 2012: 203).

For Paolo Becchi, an intellectual close to the Lega, liberalism always presupposes that the ‘holder of rights is, and can only be, the singular individual, the singular person in the abstract... We have forgotten that men never exist only “by themselves”, they do not live on an island of Robinsonian memory, but they live in families, communities, peoples, all with their own traditions, customs, conventions. We have forgotten that states are not abstract entities, but the concrete, existential expression of the political will of particular peoples’ (Becchi 2019: 18).

## 5.2 Threat to Identity

Rightwing populists tend to understand distinctive rights (such as minority and religious rights) as one the main vehicles through which national identity is being undermined. A key problem for conservatives is liberalism’s insistence on egalitarianism, which, as argued by the Polish philosopher Legutko, renders ‘all social hierarchies [as] immediately problematic because they were, obviously, not natural’ (Legutko 2016: 132). The egalitarian drive in liberalism, grounded in the idea of individual rights, means that no part of society is safe from liberalism’s political interference:

People might generally agree that they are all equal before the law, but this will not dispel the concerns of a dedicated egalitarian, who will argue that this principle is too abstract to be sufficient in every instance. After all, even if we respect equality before the law, other types of inequality and domination continue to exist and their existence is morally repugnant and cannot be tolerated. He will then add that the persistence of inequality and domination has its origin in their being moored in people’s customs and habits, which – as can be expected – considerably thwarts the principle of equality before the law (Legutko 2016: 134).

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<sup>20</sup> Legutko (2016: 118). One can find a similar argument in Lánctzi’s work.

<sup>21</sup> Legutko (2016: 13). Lánctzi makes a similar point in *Political Realism and Wisdom* that liberalism fails to engage with reality (Lánctzi 2015).

According to this communitarian critique of liberalism, the liberal tendency to root out all forms of inequality, including those of religious, ethnic, and sexual minorities, leads to the destruction of existing social communities and their ‘thick’ identities: ‘Because egalitarianism weakens communities and thus deprives men of an identity-giving habitat, it creates a vacuum around them’.<sup>22</sup> In the words of the Hungarian philosopher András Láncki, the utopian ideas of liberalism ‘want to get rid of everything that is rooted in bequeathed processes. Utopian ideas are against all traditions, which is frightening and useless’ (Láncki 2015: ix).

Significantly different versions of this critique can be found. In the case of Marine Le Pen and the Front National (now Rassemblement National (RN)), including in Le Pen’s recent presidential campaign in 2017, ‘communautarisme’ (which refers to the granting of distinctive group rights to minority groups in France, including religious (in particular muslims) as well as a sexual minorities) is denounced as a threat to French national unity. The latter is based on the idea that ‘France is a very old human and legal creation. Nothing

is there by chance. Secularism is how we handled religious conflicts that had plunged our country into a bloodbath’ (Reid and Le Pen 2016). The extension of rights in the name of egalitarianism and non-discrimination jeopardizes this ‘very old human and legal creation’ and leads to the ‘tyranny of the minority’, which threatens existing French traditions and identity (Fournier 2019; Eltchaninoff 2017). In an interesting twist, Le Pen criticizes ‘communautarisme’ in the name of secularism and ‘laïcité’ (Le Pen 2017; Almeida 2017). She argues that ‘the Islamic fundamentalists cannot accept [the rules of secularism], for one simple reason, which is that they consider sharia to be superior to all other laws and norms, including the French constitution. That’s unacceptable’ (Reid and Le Pen 2016). In the past, the Front National has engaged, in the municipalities where it was governing, in cutting the funding for organizations that promote minority and religious rights. In a complex twist, and in someways akin to what Moffitt indicates in Northern European countries as ‘illiberal liberalism’ (Moffitt 2017), the RN promotes French republican egalitarianism and its emphasis on universalist rights against the particularistic idea of the extension of minority rights. As the young secretary-general of RN has argued: ‘We want to revive the principle of a Republic which guarantees the equality of rights among its citizens and which allows philosophical and religious freedoms’. For RN, this does not at all mean ‘putting all religions on an *equal footing*’.<sup>23</sup>

The various Dutch manifestations of populism appear to be of a *sui generis* kind (for instance, in the more active promotion of a Dutch culture of tolerance for sexual minorities and LGBT rights), but at the same time display affinities with this critique of liberal egalitarianism.<sup>24</sup> From one perspective, what unites all rightwing populist approaches, in both East and West, is an insistence on the preservation of an allegedly distinctive national identity (explicitly grounded in Christianity in the cases of Hungary, Poland, but also Italy, while related to Christianity in a more implicit way in the secularist, ‘civilizational’ versions (Brubaker 2017) in the Netherlands and France). One key dimension that unites East and West is the identified enemy of Islam, as a principal threat for Western Christianity and civilization. In both East and West, the liberal-democratic

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<sup>22</sup> Legutko (2016), p. 135. A further dimension to the weakness and inauthenticity of liberalism, according to conservatives, is that it is lacking in ‘independent thinking’ (for those countries that have ‘imported’ liberalism) and displays a form of ‘voluntary colonialism’. Such inauthenticity is in particular inherent in the project of European integration, Wolff-Powęska (2018), pp. 60-1. Legutko equally claims that the Polish have not only been made financially, but also mentally dependent on Western mentors and benefactors (Wolff-Powęska 2018: 62).

<sup>23</sup> Cited in: Eltchaninoff (2017), 1501; emphasis added. Similar arguments are made by the German Alternative für Deutschland (AfD), AfD (2017), *Manifesto for Germany. The Political Programme of the Alternative for Germany*.

<sup>24</sup> As attested also by Moffitt (2017: 115-6).

state is understood as a facilitator of the spread of Islam, through its tolerant approach, expressed through a pluralistic understanding of democracy, minority rights, and open borders. In the terms of Thierry Baudet, the ‘Rechtsstaat’ or human-rights based, constitutional democracy ‘limits the majority’. It constitutes a ‘break on the popular will, [and provides] a guarantee for minorities’ (Baudet 2013: 1609). The thrust of the argument seems to be that too many rights granted to minorities (related to religious symbols and customs for instance) may lead to the undermining of the majority culture and identity. According to Baudet, the conservative tradition, in contrast, defends the ‘conventions of the ordinary people, the prejudices of ordinary man’ (Baudet 2013: 1626). A further thrust in the argument, shared amongst various rightwing populist movements, is that the liberal project promotes an artificial form of society, based on notions of ‘progress’ and ‘Enlightenment’, which clash with traditional cultural forms and ways of being.

### 5.3 Domination

In a conspiracy theory-type of denunciation, liberalism is criticized by rightwing populists as a partisan, minority ideology, while human rights are portrayed as instruments to strengthen liberal hegemony. The anti-liberal critique argues that human rights – as legal norms that promote equality – are highly problematic, in that their furtherance results in the undermining of the common good and the protection of partisan interests. Human rights become in this reading ‘arbitrary claims, ideologically motivated, made by various political groups in blatant disregard of the common good, generously distributed by the legislatures and the courts, often contrary to common sense and usually detrimental to public and personal morality’.<sup>25</sup> The argument is clearly a conservative one, in that human rights are portrayed as protecting previously marginalized but now privileged groups against the interests of the traditional community and the ‘ordinary people’. One is reminded here of Hirschman’s ‘perversity thesis’ (Hirschman 1991), that is, the populist claim is that the liberal project achieves the opposite of what it promises (liberation). Rather than leading to a free society for all, the rule of law and liberal constitutionalism result in the - ever greater - dominance of distinctive groups in society and their ‘oppressive’ cosmopolitan, (neo-)liberal, individualist culture, to the detriment of large parts of society, understood as the ‘ordinary people’ with their local culture and mores.

For Legutko, liberalism portrays a certain hubris in thinking that liberalism is a ‘higher’ solution for societal problems. Indeed, it places itself in the role of ‘architectonic organizer of society’ and wants to ‘dominate by performing the roles of the guardians of the whole of the social system and the judges of the procedural rules within the system’ (Legutko 2016: 9). The contextual meaning of this view of liberalism is a strong critique of the dominant role of political and economic liberalism in post-communist transformation, criticizing both the individualist and imitative/mimetic dimension of the first and the strong market-orientation of the second.

In Baudet’s words, the liberal project risks leading to forms of ‘juristocracy’ or what he labels as ‘dicas-tocracy’, in which legislative power is subjugated to judicial powers, leading to the domination of non-elected judges who promote the self-interests of a ‘minority of defenders of constitutional democracy’ (Baudet 2013: 1626). The worst version of this is perhaps the rule of the judges of the European Court of Human Rights, where non-elected, non-national judges ‘impose’ their own ideas on fundamental rights on all member states of the Council of Europe. The vagueness of fundamental rights, according to Baudet, allows these

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<sup>25</sup> Legutko (2016), p. 140. This also means that intellectual knowledge and any form of expertise is frowned upon, while ‘popular knowledge’ is deemed superior (cf. Wolff-Powęska 2018: 6).

judges to issue opinions based on their own specific viewpoints, whereas it ought to be national judges and politicians, who, on the basis of their domestic, cultural perspective on human rights, are able to link rights with a distinctive political culture and community (Baudet 2013: 1745). According to Bauet, ‘who has the power to define what a “fundamental right” means in practice, has the power to impose his political views onto others’ (Baudet 2013: 1745).

For Becchi, the main culprit is the European Union, whose programme is to multiply ‘individual rights’ to the detriment of European nations and peoples, thereby ‘cancelling out’ the latter (Becchi 2019: 19). The current European constellation and its political, financial and judicial elites – a ‘“business committee” of global economic and financial lobbies – needs to be replaced by a Europe of sovereign states, according to Becchi, and hence the ‘rights of states’ and of ‘peoples’ need to be recognized explicitly (Becchi 2019). In Le Pen’s version of globalism, democracies are being subjugated to global forces that promote a form of ‘globalist totalitarianism’. Le Pen’s key target is equally the EU or ‘liberal Europe’, which rules as a bureaucracy and bypasses the will of the (French) people (Eltchaninoff 2017: 733). As Le Pen argues,

For too long, the people of the countries in the European Union, and perhaps Americans as well, have had a sense that political leaders are not defending their interests but defending special interests instead. There is a form of revolt on the part of the people against a system that is no longer serving them but rather serving itself (Reid and Le Pen 2016).

Pen denounces the ‘ultraliberalism’ of the EU and the ‘universal empire governed by the laws... of the market’.<sup>26</sup>

#### *5.4 Legal Fundamentalism*

The most forceful dimension of the populist critique is probably its insistence on the ‘fundamentalist’ or ‘totalitarian’ characteristics of liberalism and the human rights narrative. This fundamentalist dimension means for populists that the liberal approach has as its ultimately objective the rational reformatting of society on the basis of the idea of individual rights. As observed, populists frequently perceive human rights and law in general as not neutral, but rather as instruments of particular groups in society. A recurrent argument is that liberalism contains an almost unstoppable *drive* or *thrust* towards diffusing rights into society (in other words, favouring a process of juridification). Legutko, for instance, criticizes liberalism’s lack of weight, liberalism, but at the same time understands liberalism as a *comprehensive* political project, which uses the law and human rights to politicize society and to subject the entire collectivity to liberal norms. In post-communist societies, liberalism hence emerged as a ‘new wave of a new ideology’ (Legutko 2016: 141), which led to a rapid displacement of old ideas with the new liberal ideology or the ‘newest tides of modernity’ (Legutko 2016: 141). Liberalism – the project of a constellation of liberal, left-leaning, and pro-EU social forces – is seen as to endorse a strong programme of ‘political correctness’ which aims at the emancipation of society from any kind of exclusion and repression. In doing so, however, so Legutko claims, it turns into a project with a *totalitarian* drive or a form of ‘dictatorship’, which obliges citizens to ‘participate in the great collective enterprise, where everyone cooperates with everyone else at all levels and under all circumstances’ (Legutko 2016: 101).

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<sup>26</sup> Cited in: Eltchaninoff 2017: 783.

In Legutko's view, liberalism leads to the politicization of society or the drive to 'organize the entire fabric of society, communities became a natural object of, first, critique, and then, open attack, because they were seen as power structures of an alien nonliberal and nondemocratic nature' (Legutko 2016: 96). Law and human rights are utilized by liberals to effectively promote this programme. By means of the expansion of rights (women's rights, cultural rights endorsing multiculturalism), entire society becomes 'formatted' according to liberal ideas of freedom and tolerance. This politicization of society by means of the expansion of human rights can be referred to as 'legal fundamentalism'. As argued by Legutko:

It is the state that should incessantly work to impose and improve cooperation policies by removing all real and potential barriers, creating a favorable legal environment, and reshaping public space and education in such a way that the people's minds internalize the rules of politically correct thinking.

Such undertaking carries a high price. When the state takes over responsibility for the rules of cooperation and their enforcement on all layers of society, there will be no limits to its interference in people's lives. The laws it enacts must of necessity be increasingly more detailed and intrusive because what threatens those rules and has to be curtailed is believed to be hidden deeply in social practices and human consciousness. The slippery-slope argument, so often used by liberals, is particularly pertinent here. The logic of liberalism is that whatever seems to be the most obviously nonpolitical, sooner or later will become political. The logic of democracy—with its notions of participation, inclusion, and representation—only strengthened this tendency (Legutko 2016: 101).

Also Lánzi observes both the lack of weight of liberalism (it is 'notoriously relativistic'<sup>27</sup>) and the strong drive towards expansion in liberalism. He refers to the 'fundamentalism of [the] modern liberal absolutist claim to human rights' (Lánzi 2015: 82). Lánzi's view is that 'democracy's moral justification is a fundamentalist liberal defense of human individual rights' Once derived from nature, later from reason, today human rights can be *multiplied indiscriminately*... Reason itself has become fundamental as such, and its products, like human rights, create secular fundamentalism' (Lánzi 2015: 78; emphasis added). According to Lánzi, the 'real source' of human rights is hence 'human reason pretending to be capable of producing the desired blueprint of society' (Lánzi 2015: 81).

The Italian Lega equally denounces the distinctive political project behind human rights. As stated by a parliamentarian from the Lega in an Italian parliamentary debate on *ius soli*:

The future and mind-blowing society that you imagine envisages the *annihilation of what we have been until now* and the *facilitation by law* of a multicultural society (Rondini, cited in Bulli 2018: 19; emphasis added).

In the view of the Italian philosopher Becchi, it is in particular the connection between the European integration project and individual human rights that is the problem. In his plea for 'sovereignism', Becchi detects a forward-driving logic of rights: the 'rights' of individuals have multiplied, as a result of universal and principled "declarations", but often without any mechanism for protection whatsoever' (Becchi 2019: 18). For Becchi, 'euro-globalism needs exactly this: to cancel the peoples and substitute them with singular individuals, abstracted from any concrete characteristic, considering them all the same: "abstract" and interchangeable individuals, isolated, uprooted, without a language, without a culture and a history' (Becchi

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<sup>27</sup> As Lánzi argues: 'Relativism is to be refuted in moral issues because it blurs the possibility of making a real distinction between good and bad' (Lánzi 2015: 83).

2019: 19-20). The problem is, according to Becchi, that individuals do not exist ‘by themselves’, but ‘live in families, communities, peoples, each of them with their own traditions, customs, conventions’ (Becchi 2019: 18). Rather than individual rights, Becchi proposes the ‘rights of peoples’ (which he outlines in his Charter of the Rights of European Peoples).

The idea that there is a *drive* towards the eradication of local mores and culture is equally detected by Baudet, who relates it, as we have seen above, to ‘egalitarian’ multiculturalism. This means that the existence of a distinctive Dutch identity is denied by the protagonists of multiculturalism (NB. Baudet cites the Dutch Princess Máxima, who publicly stated that ‘*the Dutch identity does not exist*’ (Baudet 2012: 210). Significantly, Baudet identifies a historical impetus in multiculturalism, in that protagonists claim it is impossible to stop the progressive process of diffusion of multicultural forms of living together: ‘the Netherlands, thus, do not have a realistic option to withdraw from the world and to reverse the multicultural society anymore, as one cannot “turn back time” ‘ (Baudet 2012: 212; Cliteur 2004: 169). And, again, the advancement of rights is connected to a decline of community. Baudet argues that whereas originally ‘a citizen earned his “rights”... through the fulfillment of duties’. However, ‘[p]artly as a result of the discourse of “rights” gaining worldwide momentum, amongst others through the Universal Declaration of Human Rights, the idea that citizenship implies first and foremost the fulfillment of *duties* rather than the entitlement to *rights* was lost’ (Baudet 2012: 215; emphasis in original). As we have seen earlier, in his *Oikofobie*, Baudet claims that this distinctive universalistic ‘rights project’ is a *political* project, pursued by inter alia the European Court of Human Rights, which endorses a view on human rights as if founded on ‘universal principles of justice which do not need an interpretation based on time and place’ (Baudet 2013: 1745).

Finally, Paul Cliteur, a Dutch legal scholar, intellectual mentor of Thierry Baudet, and currently member of the Dutch senate for the Forum voor Democratie, identified a slightly different, but equally harmful logic to rights. In his view, rights are subject to inflation, as rights are continuously produced in the name of some new right, in a veritable ‘proliferation of fundamental rights’ (Cliteur 2004: 162). In his view, this leads to a loss of democracy, as rights tend to move political matters away from parliament towards courts and decision-making by judges. But it is equally undermining the *Rechtsstaat* or constitutional state, as ‘[h]igher law is only ‘higher’ due to the fact that there is also law of a lower rank. Everybody in the premier league, nobody in the premier league’ (Cliteur 2004: 165). Cliteur hence endorses a ‘conservative constitutionalism’. In his view,

[M]any of the constitutional changes since the 1960s are a ‘regress’ and not progress. They are a regress in the sense that they constitute a threat to the fundamentals of the democratic constitutional state (Cliteur 2004: 172).

## 6. Concluding remarks

I have argued in the article that contemporary manifestations of right-wing populism in Europe consists to an important extent in a reaction to postwar embedded constitutional democracy or ‘constrained democracy’, which is grounded in a distinctive form of liberalism, that of legal liberalism. This distinctive legal-liberal model has, over the years, become robustly institutionalized in a constellation of juridicial institutions such as constitutional courts and human rights regimes, and deeply entangled with supranational judicial institutions. In Western Europe, the ‘project’ of embedded constitutional democracy is importantly represented in the project of European integration, whereas in East-Central Europe, it is both the European integration pro-



cess and the post-1989 emergence of liberal democracy that are targets. A core argument in the article is that right-wing populists agitate against this embedded constitutional democracy as a regime that promotes extensive juridification and a culture of rights that is deeply grounded in liberal ideas. I have shown that the populist critique contains important conservative dimensions, in its denunciation of the characteristics of artificiality, identity threat, domination and legal fundamentalism in populist discourses. The alternative offered by the populists, which might be labelled ‘populist’, ‘illiberal democracy’, as well as ‘Europe of the peoples’, stresses popular and national sovereignty, executivism, majoritarianism, the importance of (a distinctively conservative interpretation of) national traditions, identity, and history, in what could be understood as a communitarian approach. In this, the legal mindset of populists does not reject law as such, but rather criticizes the liberal-legal understanding of constitutionalism and the rule of law, which it understands as excessively elitist, legalistic, internationalist or universalist, and societally invasive. Populists understand the law as an extension of the political majority which, in turn, is the alleged expression of national unity. One implication of the analysis in this article is that if we want to put a halt to the erosion of liberal democracy by populists, we need to take the critique of the ‘juridification of society’, the contested role of human rights, the effects of internationalization and ‘globalism’, and the denunciation of the liberal favouring of the partisan interests of elites seriously. This would also mean that we need to find ways in which human rights and constitutional norms effectively gain meaning for ordinary citizens, rather than being predominantly worthwhile for domestic and supranational elites.

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