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in honor of JÜRGEN HABERMAS

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POPULAR SOVEREIGNTY, POPULISM AND DELIBERATIVE DEMOCRACY¹

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"A state, is called the coldest of all cold monsters. Coldly lieth it also; and this lie creepeth from its mouth: 'I, the state, am the people.'"

(Friedrich Nietzsche, *Thus Spoke Zarathustra*).

Abstract

This article investigates the relationship between popular sovereignty, populism, and deliberative democracy. My main thesis is that populisms resurrect the polemical dimension of popular sovereignty by turning "the people" against the "power bloc" or the "elite", and that it is crucial that this terrain not be ceded to authoritarian distortions of this basic contestatory grammar. Furthermore, I contend that populist forms of politics are compatible with a procedural and deliberative conception of democracy. I first engage with the assumption that populism and a procedural model of democracy are incompatible, demonstrating that this assumption relies on a conservative bias which ties the exercising of communicative power to a "duty of civility" (Rawls). I then engage with radical-democratic reconstructions of the procedural notion of popular sovereignty which emphasize the unleashing and diversification of peoplehood in communication circuits and the mutual permeability of constitutional politics, parliamentary legislation, and the public sphere. Thirdly, I conclude that populisms are an essential part of communicative power in modern democracies and part of its dialectical structure.

In *Between Facts and Norms*, Jürgen Habermas elaborates his seminal reconstruction of popular sovereignty. Drawing on a variety of theoretical and historical resources, he advocates a procedural and deliberative model of democracy, arguing that "[...]

¹ I thank Loren Balhorn for helpful comments and language support.

popular sovereignty is no longer embodied in a visibly identifiable gathering of autonomous citizens. It pulls back into the, as it were, 'subjectless' forms of communication circulating through forums and legislative bodies. Only in this anonymous form can its communicatively fluid power bind the administrative power of the state apparatus to the will of the citizens."² Habermas does not seek to "divest popular sovereignty of its radical-democratic content",³ but instead transfers it to the role of "subjectless" communicative power which backgrounds, restrains, and nurtures the exercise of administrative power. This aspect of Habermas's work has had a significant influence on discussions concerning deliberative democracy and public reason in recent decades, to which I cannot do justice at this point.⁴

Nevertheless, it seems vital to recall that Habermas's approach is characterized by a peculiar tension with regard to the role of "the people" in popular sovereignty. From the outset, Habermas rejects all substantive or primordial notions of the people as unitary agent.⁵ Following a line of thought that extends back to the seminal work of Hans Kelsen and assumes pride of place in contemporary legal and constitutional theory, he argues that the people as constituent power serves primarily as a fiction for the legal and political system to reflect on its foundations.⁶ In his own words: "The people from whom all governmental authority is supposed to derive does not comprise a subject with will and consciousness. It only appears in the plural, and as a people it is capable of neither decision nor action as a whole."⁷ Because democratic will-formation is channelled through procedures, subjective rights, and the separation of powers, "the people" cannot actually exist, but rather plays out as an abstract communicative mechanism internalized in the interplay of communicative and administrative powers.

However, scholarship on deliberative and procedural democracy tends to be discordant on how to interpret this internalization.⁸ More specifically, it remains unclear whether the reference to "the people" or the adoption of a conscious "we the people" perspective by political agents is limited to a separate layer of constitutional politics in need of a specific normative structure (most notably the endorsement of liberal constitutionalism), or if, on the contrary, it is unleashed and remains, in all of its varieties, at the disposal of communicative power.

In this article, I demonstrate how this tension has resurfaced in recent discussions on populist forms of politics, in which some authors, such as Nadia Urbinati and Jan-Werner Müller, assume that populism and procedural models of democracy are

² Habermas 1996, p. 136.

³ Ibid.

⁴ Habermas 1996, p. 304ff; Cohen 1998; Besson/Marti 2006; Lafont 2006.

⁵ Habermas 1998.

⁶ Kelsen 1920 p. 28; Dyzenhaus 2012.

⁷ Habermas 1996, p. 469.

⁸ Fraser 2007; Müller 2007; Kreide 2016; Gregoratto 2015.

incompatible.⁹ Over the following pages, I argue that this is not the case – that populist forms of politics should be understood as expressions of a vital aspect of popular sovereignty in the republican-democratic tradition, namely its “polemical” aspect.¹⁰ It is not only a fictitious backdrop for the legitimation of public institutions, but inserts apersisting countervailing power against tendencies towards the “growth of independent, illegitimate powers” (*Verselbstständigung*).¹¹ Further, I contend that authoritarian types of populism distort and transform this polemical aspect by resurrecting a homogenous and closed notion of “the people” in opposition to the “Other”. However, it seems worth considering whether these can only be confronted on the polemical terrain where the transformation and distortion takes place, rather than through attempts to instil in the people an ex-ante-Rawlsian mindset that removes the contestatory grammar of “we the people” from the circuits of communicative power.

In the first and second sections (I and II), I look at recent approaches from procedural and deliberative democratic theory and their perspective on the incompatibility of populism and democracy. These tend to nurture a conservative bias by restricting the reference to the people to a separate layer of higher-ranking constitutional politics and tying the exercise of communicative power to a “duty of civility” (Rawls). Consequently, social actors are deprived of the language to scandalize oligarchic tendencies among governing powers and incite constitutional contestation or renewal. In the third section (III), I engage with radical-democratic reconstructions of Habermas’s procedural notion of popular sovereignty emphasizing the unleashing and diversification of peoplehood in communication circuits, as well as the mutual permeability of constitutional politics, parliamentary legislation, and the public sphere. Finally, I show how these insights lead to a reassessment (IV) of popular sovereignty and a different strategy in confronting authoritarian populisms (V).

I. Populism and Procedure

Populism today is resurfacing as a political phenomenon. While the word is often used pejoratively in public discourse, theoretical and comparative research on populism relies on a formal definition in order to adequately grasp the variety and historical persistence of populist movements. This definition states that populist forms of politics operate through the distinction “‘people’/elite” or “‘people’/power bloc”.¹² In populist discourse, “the people” is mobilized against the existing elite or power bloc. In the words of Margret Canovan: “Populism in modern democratic societies is best

seen as an appeal to ‘the people’ against both the established structure of power and the dominant ideas and values of the society.”¹³ In contradistinction to encompassing ideologies such as liberalism, conservatism or socialism, populism is seen as “thin-centred ideology”, articulated by a variety of actors and compatible with different political camps.¹⁴ As studies on the history of populist movements show, they range from the peasant movements of the Middle Ages to rural American agrarian populism, as well as the populisms of left, right, and centre in our contemporary world.¹⁵

However, these investigations into the history and characteristics of populist movements tend to overlook that the invocation of “the people” is not only a matter of bolstering mere political discourse, but of constitutional politics addressing the higher-ranking dimension of the legal and political community, the distribution of powers, and the overall design of rule-making and application. Bruce Ackerman’s studies of American constitutional history identify a “dualist” distinction between constitutional and regular politics.¹⁶ Constitutional politics appear in situations where popular mobilizations and decision-making bodies deliberate and struggle over the higher-ranking order of the community, thereby exerting framing effects on simple legislation and everyday political and legal business. While first-order political communication is concerned with legislation and political decision-making within the existing constitutional framework, second-order constitutional discourse addresses the foundational dimension of the political community: it seeks to re-negotiate the basic distribution of powers and rights claims.

Viewed against this backdrop, populisms are more than social and political movements. They utilize the framework of popular sovereignty for their basic communicative operation: the introduction of a second-order constitutional discourse into the first-order discourse of the political system. Populism does not only refer to certain policy issues, but invokes “the people” as constituent power on which the political community relies. It embraces a constitutional grammar and chains itself to the already established communicative self-reference of the legal and political system. The plurality of populist movements can be explained from this angle: because they all draw on popular sovereignty and the primacy of “the people”, they can cast their respective social basis according to the multi-faceted character of foundational peoplehood.¹⁷ They can invoke the people as an assemblage of political *citoyens*, of the atomized-bourgeoisie, of subjective rights-holders, of economic entrepreneurs, or labouring workers and peasants. Furthermore, populists do not rely on a societal foundational

⁹ Müller 2016a; Urbinati 2014.

¹⁰ See Habermas 1996, p. 297 (in the English edition of *On Facts and Norms*, “polemisch” [polemical] is translated as “offensive understanding”, which only partially conveys the notion of polemics).

¹¹ Habermas 1996, p. 441.

¹² Laclau 1981, p. 166; see Mouffe 2005.

¹³ Canovan 1999, p. 3.

¹⁴ Mudde 2004, p. 543.

¹⁵ Canovan 1981; Stavrakakis 2014; Dupuy 2002.

¹⁶ Ackerman 1989, p. 461.

¹⁷ On this plural and even paradoxical internal structure of popular sovereignty, see the contributions in Loughlin/Walker 2007.

force which checks and authorizes public institutions, but in fact can also turn the constitutional structure or the state against the “elites”, supranational agreements, or economic powers (what Marx calls “the party of Order” in his *Eighteenth Brumaire of Louis Bonaparte*).¹⁸

Contemporary deliberative critiques of populism argue that this intertwining of popular sovereignty and regular political discourse exhibits inherent flaws. The claim to represent “the people” against the elite falls prey to a categorical mistake: namely, a flawed conception of what constitutes the “people” in the first place. Although populist movements refer to a constitutional grammar, it seems that the embodiment of “the people” against other strata of the community displays totalizing and authoritarian tendencies which undermine deliberative procedures, ultimately with anti-pluralistic consequences. If nothing else, this is at least how Jan Werner-Müller has framed his insights into the incompatibility of populism and democracy. Müller argues that populists invoke a unitary conception of the people which excludes other social groups from the public sphere from the outset. Although they make use of the constitutional grammar, they simultaneously claim to represent the only true foundational force at the heart of the community. According to Müller, the “basic claim of populists consists in: we – and only we – represent the true people.”¹⁹ Müller stresses that this strive towards the embodiment of the people in a particular group, movement, or party resurrects a constitutional grammar, but operates through a false reconstruction of popular sovereignty in which the respective excluded social groups (the “Others”) must always fear being deprived of their participatory equality. “The people” is portrayed as “morally pure, homogenous” and confronted with an “amoral, corrupt and parasitic elite which does not belong to the people.”²⁰

Nadia Urbinati has taken a similar route. To her, the central aspect of a procedural notion of democracy is the “disfigured” people.²¹ Claims to represent the people as a whole through populist embodiment are inherently anti-democratic, as they misconstrue the role of the people: the popular will can only be reconstructed ex-post facto because it emanates from an interplay of different procedures in a variety of public spheres where those subjugated to the constitution have a say in determining the common good. Now, Urbinati bemoans a “power verticalization” in populist discourse, fixing the popular will beforehand.²² It evokes a scenario that threatens the exchange of arguments in public discourse, and is prone to undermine the liberal achievements of modern constitutionalism. Urbinati fears that populists “shatter constitutional democracy”, “centralize power”, “weaken checks and balances”, “strengthen

en the executive” and “transform elections in a plebiscite of the leader”.²³

Although Müller and Urbinati employ a thicker definition than the comparative research on populism, and although it is questionable whether the anti-liberal characteristics of populism can be generalized to all types (e.g. agrarian or left-wing populisms), both identify anti-pluralism as the main problem. In both accounts, this operates on two levels: on the first level, populisms exclude some social groups from “the people” by marking them as the “elite”, the “power bloc”, or the “Others”. Note that Müller and Urbinati appear to make no distinction between excluding the “power bloc” and the “Other” from the people. To them, populism is always characterized by a rigorous exclusion of the “Other”. In that respect, they deviate from the standard definition in comparative populism research, which relies solely on the “people/elite” distinction. On the second level, populisms raise a totalizing claim when portraying themselves as already embodying the people, thereby denying other parts of the people the possibility to raise representative claims at all. Populism monopolizes the grammar of democratic constitutionalism in one social and political force.

Admittedly, there are many critics of denoting anti-pluralism as an essential feature of populism.²⁴ However, the question remains as to what the underlying assumption concerning the exercise of constitutional politics actually is.²⁵ Müller and Urbinati advocate a version of public reason in which the respective participants deliberate, but are obliged to renounce the (politically tempting) gesture of embodying the people, and thereby violating the deliberative possibilities of other agents.

This is very much in line with what John Rawls called a “duty of civility” in *Political Liberalism*.²⁶ With this conception, Rawls sought to restrain the available set of arguments and behaviours in the public sphere. More specifically, he was interested in the horizontal dimension of deliberation between citizens. In the interactions between public institutions – or between public institutions and the citizenry – it is clear from the outset that the constitution regulates and restrains what these institutions or public officials can do at any given moment, as they can only exercise their power within the limits of the legal framework. But the question remains as to whether the constitutional framework exerts binding effects on deliberation and will-formation among citizens in the horizontal direction. While public institutions and officials are restrained by their legal duties,²⁷ a similar legal regulation of the public sphere would,

²³ Urbinati 2014, p. 129.

²⁴ Errejon/Mouffe 2015; Stavrakakis 2014; Stäheli 2003.

²⁵ As far as I can see, Müller and Urbinati warn against populisms without attempting to exclude them completely from the public sphere through legal recourse. For a stricter account of banning certain types of argument and behaviour from the public sphere, see Bonotti 2014.

²⁶ Rawls 1993, p. 216ff.

²⁷ Rawls 1993, p. 215.

¹⁸ Marx 1972, p. 155.

¹⁹ Müller 2016a, 26.

²⁰ Müller 2016a, p. 42.

²¹ See Urbinati 2014.

²² Urbinati 2014, p. 153.

according to Rawls, run the risk of undermining free speech.²⁸

Thus, Rawls only takes the moral duty of civility into consideration. He argues that “the ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fair-mindedness in deciding when accommodations to their views should reasonably be made.”²⁹

The duty of civility binds the deliberating citizenry to a shared base of constitutional essentials and standards of reciprocity. These essentials can be interpreted in various and even antagonistic ways. Nevertheless, the duty of civility stabilizes the exercising of public reason by establishing a common language for a mutual understanding within reasonable pluralism, and ensures the basic ability of all citizens to contribute to will-formation by excluding uncivilized types of behaviour and solipsistic argument from the public sphere.³⁰

Contemporary critiques of populism follow a similar line of thought. In their eyes, populism breaches such a duty of civility by disrupting deliberative intercourse in the public sphere. While some types of claim-making certainly have a negative impact on public deliberation (e.g. claim-making through violence, or religious arguments largely divorced from constitutional language), the case of populism is a more nuanced issue. At first, populist discourse appears to be in line with the basic condition of the duty of civility. It channels contestation through the constitutional essentials (in this case “popular sovereignty”), and thus makes its demands accessible to the entire community’s public reasoning. One could argue that – compared to forms of social unrest, disobedience, or other types of disruptive behaviour – populism is a contestatory candidate which is, in principle, most eager to meet the duty of civility.

However, Müller and Urbinati introduce a peculiar twist at this point, arguing that populism is a dangerous threat to procedural notions of democracy because it operates from precisely *within* constitutional grammar. By drawing on popular sovereignty, populism *usurps* the constitutional essentials, gives them a unilateral-voluntaristic twist (“will of the people”), and ultimately undermines the procedural conditions of public deliberation. The threat to democratic procedures emanates from authoritarian and totalizing movements which disguise themselves as expressing constitutional politics, i.e. referring to popular sovereignty as the central tenet of the democratic constitution without embracing its full meaning. They latently breach participatory equality, separation of powers, and basic rights – fundamentals which must be respected by all participants in democratic discourse.

II. “We Are *Also* the People”?

Müller und Urbinati repeat the main arguments already lurking in the juridical understanding of popular sovereignty. Here, it is widely acknowledged that reference to “the people” must be limited to the reconstructive reasoning of constitutional courts, or internalized into (constituted) procedures of constitutional change or amendment.³¹ Popular sovereignty is seen as a legal device that can and should not be activated politically, serving as a stabilizing fiction for the constitutional order. “The people” is an instance of attribution and legitimization rather than a battle cry or call to arms (*Kampfbegriff*).³²

Müller, however, does not fully endorse this dichotomous view. To him, it is still observable and vital that constitutional politics and the reference to “the people” can play a role in the regular political process. He admits that “in a stable liberal-republican democracy, the constitution may not be unavailable for political struggle. On the contrary: it would be strange if parts of the constitution (not the constitution as a whole, in a single moment) was not a recurring object of intense, but reasonable conflict. However, the withdrawal from the basic idea of mutual justification of political rule among free and equals must be excluded as illegitimate.”³³

Proceeding from here, Müller establishes his model of constitutional politics. Groups can refer to the constitution, deliberate about the second-order dimension, and even make use of civil disobedience as political practice, but they must renounce the populist temptation of already embodying the people as a whole, and of excluding particular social groups from its reach.

For Müller, a legitimate constitutional politics must internally “mirror” the basic tenets of liberal constitutionalism. When it comes to references to constitutional essentials, it must consciously endorse the pluralistic basic structure of an ideal deliberative procedure, while actors must consciously adhere to this mindset. This can be described as a “mirroring doctrine”, in which “the ideal sets each person’s duties irrespective of how other participants are actually, in the real deliberative situation, behaving”.³⁴ Consequently, he has argued that democratic societies should rely on a culture of constitutional patriotism in the public sphere, “where citizens acknowledge each other as free and equals; complete intolerance against specific political views (not only against the exercise of violence or its explicit incitement) is not compatible with these basic intentions.”³⁵

The existing literature on deliberative democracy, however, has problematized

³¹ See Isensee 1995; Dyzenhaus 2012.

³² Müller 1997, p. 41ff.

³³ Müller 2010, p. 67.

³⁴ Estlund 2006, p. 80.

³⁵ Müller 2010, p. 83.

²⁸ See Bonotti 2014.

²⁹ Rawls 1993, p. 217.

³⁰ This evokes the issue of context-sensitiveness and what counts as “civil”, see Estlund 2001; Thunder 2006.

such mirroring doctrines. David Estlund has argued that the picture becomes more complex if we accept that deliberation takes place under non-ideal circumstances. It necessitates a reflection on the relevant context in order to assess what types of behaviour and political practices are best suited to foster deliberation.³⁶ Estlund focuses on the question what types of behaviour can be regarded as “civil” in the context of huge power imbalances between agents. He argues in favour of “wider standards of civility”, “triggered specifically as remedial responses to certain violations of the conditions needed to foster good democratic deliberation – in particular, power’s interference with reason.”³⁷ According to Estlund, power asymmetries can, under specific circumstances, allow for disruptive forms of behaviour and deviations from the deliberative ideal. The overall idea is that the mirroring perspective falls prey to an excessive degree of idealization. Non-deliberative political practices can be more promising candidates in approximating the situation to an ideal procedure.

Mansbridge et al. have taken a similar stance when discussing the relevance of power asymmetries in real world deliberation. Deliberative democracy, in their view, allows for and even affords neutralizing mechanisms:

*“If in a two-party interaction one party has greater power than the other, the less powerful party may appropriately increase its power to equal the first in order to neutralize the first, thus producing as close as possible an approximation to the ideal of no power in deliberation. A deliberative democrat might, for example, justify strikes or the threat of strikes on these equalizing or neutralizing grounds. Any use of power to create the conditions for listening in situations of impeding inequality would also qualify.”*³⁸

Here, the authors draw on strategies of contestation which attempt to neutralize existing asymmetries. While the respective practices are not portrayed as normatively neutral (and still in need of justification), the question is raised as to whether they contribute to a process of democratizing public deliberation at a given moment.³⁹ The focus is on their effects with regard to approximating the “ideal of no-power”.

In this perspective, actors’ self-descriptions as well as the overall consistency with the constitutional consensus remain relevant, but are part of a broader setting in which several other variables, such as power asymmetries or non-intended effects, must also be considered. On these grounds, John Dryzek has argued that populisms must only not be evaluated in terms of their respective mindsets or self-descriptions, but with

respect to their effects on deliberative systems,⁴⁰ citing the example of right-wing populism in Australia. Dryzek takes an observer’s standpoint and demonstrates how the populist articulation of prejudice concomitantly engendered a democratic counter-culture. Although not immediately compatible with ideal deliberation, populism can assume a peculiar function in exploring relevant issues, triggering political protest, and making diffuse discontent accessible to the political process.

Contrarily, Müller insists on a mirroring doctrine which binds the exercise of constitutional politics to a specific “duty of civility” and liberal-democratic aspirations. He elaborates his own model, reliant on the assumption that political movements can and should adopt a distinct perspective on popular sovereignty. Rather than raise a pars pro toto claim (“We the (only) people”), its claim to “We are also the people” represents “the legitimate civil societal claim of those who feel forgotten or excluded.”⁴¹ By taking this stance, movements avoid excluding other social groups and undermining their participatory equality, instead challenging “the existing procedures and mechanisms of political inclusion”.⁴²

Let us take a closer look at Müller’s “we are also the people”, which he portrays as the alternative to populism’s totalizing gestures. Müller stipulates that political agents are able to frame their respective claims towards redefining “the people” as follows: a social group re-introduces the notion of “we the people” and prompts deliberation concerning the distribution of powers, rights, social boundaries, and the fundamental social structure by claiming to be an equal part of the political community. Communication must renounce all exclusionary biases towards other social groups and, accordingly, “the people” takes part in the incited deliberation in its entirety. For this reason, we must assume that such political action is possible in the first place: namely, that excluded groups appear and use the grammar of “we the people” while at the same time renouncing claims to embody the people, and that such political action is framed in a way that no other social group is threatened or excluded.⁴³

Obviously, inclusionary scope is an important aspect of popular sovereignty.⁴⁴ Here, groups and individuals who can demonstrate that they are addressees of law can mobilize legitimate reasons to be included in the authorial dimension and claim their rights. Looking back, we find a long history of struggles for legal inclusion. However, struggles for and around popular sovereignty have always had a vertical (as opposed to merely a horizontal) dimension as well. In all their facets, they addressed social and

⁴⁰ Dryzek 2010, p. 82. For a critique of such systemic views see Owen/Smith 2015.

⁴¹ Müller 2016a, p. 21.

⁴² Müller 2016a, p. 84.

⁴³ This starting point is questionable if we assume that the already constituted political and legal system frames social communication and is characterized by totalizing fictions such as “the people”. A politics that completely abstains from these totalizations is difficult to imagine, at least as long as it remains internalized in the established political system (see Stäheli 2003).

⁴⁴ See Espejo 2011.

³⁶ Estlund 2001.

³⁷ Estlund 2001, p. 49.

³⁸ Mansbridge/Bohman/Chambers/Estlund/Follesdal/Fung/Lafont/Manin/Martí 2010, p. 82 f.

³⁹ See Bagg 2015.

in many cases already established power relations: through the reference to popular sovereignty, political and social power was “de-constituted” (Beaud), “centralized” and “constituted” (Thornhill) or “legalized” (Kriegel).⁴⁵ In this sense, popular sovereignty must be seen as a revolutionary device which cannot be detached from excluding and overcoming certain established practices and de-legitimizing existing institutions and social classes. At least when it emerges in political and social struggles, its power resides precisely in the fact that it appeals to the inclusionary “people” as a whole by being directed against established power relations and asymmetries.⁴⁶

Thus, popular sovereignty does not rely on a horizontal division of constituted powers, but on a vertical scheme of organseparation. It binds public institutions to the will of the people through the constitution, but not the people to the constitution: otherwise, the vertical dimension wanes and, concomitantly, the possibility of constitutional renewal “from below” evaporates (with the side effect that constituted organs are reinforced and may no longer fear revolutionary change).⁴⁷

Furthermore, most social movements do not solely demand inclusion – rather, “inclusion” is in many cases polemically directed against certain already integrated groups. Take the example of the feminist movement: the feminist demand for formal inclusion in “the people” and enjoyment of equal rights has always been accompanied by a critique of power relations between men and women. Here, the movement has always drawn on exclusionary mechanisms ranging from the exclusion of men from deliberative fora to the creation of safe spaces and the moralization of public discourse.

Populism must be understood as resurrecting this vertical dimension. At least initially, it proceeds from the vertical relationship between a social base (“the people” and elites, constituted organs, or powers blocs suspected of self-referential empowerment. In this sense, it reacts to what Habermas has identified as the “colonization” of society through administrative powers.⁴⁸ Ingeborg Maus speaks of the “tyranny of the state apparatuses”, while Hauke Brunkhorst observes a similar phenomenon that he calls the “managerial mindset”.⁴⁹ Because constituted organs, elites, and powerful classes possess a lingering structural advantage in defining the common good, popular sovereignty attains a polemical function: it serves those subjugated to power as an opportunity to block the ongoing colonization of society and self-empowerment of elites. This polemical use of popular sovereignty is inherently negative and cannot dispense with drawing a distinction between above and below, the people and the elites, non-functionaries and functionaries, subaltern and ruling social classes.

⁴⁵ Beaud 1994; Thornhill 2011; Kriegel 1996.

⁴⁶ Möller 2015.

⁴⁷ See Eberl 2009.

⁴⁸ Habermas 1981, p. 332ff.; see Schecter 2013, p. 166 ff.

⁴⁹ Maus 2011, p. 395; Brunkhorst 2014, p. 47ff.; see also McCormick 2011.

Neglect for the polemical side of popular sovereignty runs like a red thread through most deliberative critiques. In emphasizing that the modern notion of “the people” is and should be in a process of constant renegotiation, Müller quotes a parliamentary address by German Chancellor Bismarck, an ardent critic of liberal democracy:

“We all belong to the people, I have popular rights (Volksrechte), too, to the people also belongs his Majesty the Emperor; we are the people, not just the gentlemen who are making certain old claims that are traditionally called liberal, but are not always liberal. I take exception to them monopolizing the name of the people and to exclude me from the people!”⁵⁰

Undoubtedly, the struggle over what “the people” is and who takes part in it has a long history.⁵¹ Nevertheless, this quotation demonstrates the limits to its insinuated pluralism. Bismarck gives his speech as Chancellor of the country, in the halls of its national parliament. He speaks not only as a human being or citizen, but as a functionary of a constituted organ. Moreover, he claims that his *majesty* – again: not as a human being or citizen, but as constituted organ – is also part of the people. Bismarck defends the horizontal pluralism of deliberative interaction between kings and servants, majesties and subjects, parliament and the crown in the name of an inclusionary *demos*.

The emergence of popular sovereignty, on the other hand, can only be explained as a powerful and effective device in excluding the *ancien regime* from “the people”, not as citizens and rights-holders, but as institutions and social classes with privileged access to influence societal communication. The totalizing *pars pro toto* claim at the heart of populist discourse can be understood as grappling with this division: it questions the structural advantages of powerful social groups and elites within public deliberation, and thereby draws a negative line between “above” and “below”.

Yet contemporary liberal critiques of populism decouple popular sovereignty from its polemical and vertical dimension. According to this perspective, constitutional politics can only be defended as the demand for increased responsiveness and inclusionary scope of the already existing notion of “the people”: constitutional struggles must adhere to a duty of civility and mirror the liberal-republican framework of already existing democratic constitution.

III. “The People” as Subjectless Form of Communication

This reconstruction, however, is not the only plausible interpretation of

⁵⁰ See Müller 2016b, p. 72. Müller argues that one can fight against functionaries and powerful social classes, but one may not claim that “only a particular kind of *populares* properly represents the authentic people” (ibid., p. 23).

⁵¹ See Rosanvallon 1998; Morgen 1988.

Habermas's notion of popular sovereignty. The repatriation of popular sovereignty to subjectless forms of communication and the interplay of administrative and communicative power can also be read in a different vein. From this perspective, the reference to "the people" can take the exactly opposite direction: because democratic will-formation relies on the notion of popular sovereignty, the reference to "the people" and even attempts to embody the general will are multiplied and diversified in the public sphere, and subsequently channelled through the procedures of administrative power. Raising a representative *pars prototo* claim is not necessarily a violation of the duty of civility, but the reference to "the people" in its manifold (and even crude) expressions is at the disposal of the public sphere and takes part in its communicative potential. The risk of authoritarian or illiberal populisms is less dangerous than the conservative move to deprive a polemical "we the people" perspective of communicative power and tie the exercising of popular sovereignty to the existing constitution.

Deliberative critiques of populism continue to draw on a dualistic distinction between the regular process of legislation on the one hand, and constitutional politics on the other. Both levels seem to afford different standards of justification and adequate types of behaviour and argumentation. However, Habermas's perspective on the withdrawal of popular sovereignty to anonymous communication circuits can be interpreted not just as modernizing established dichotomies in liberal contract theories, but as a restatement of Hans Kelsen's monistic and procedural revolution in legal theory from the 1920s onwards.

At the very least, this is how Hauke Brunkhorst understands the withdrawal of popular sovereignty to anonymous circuits of communication. He traces the roots of this figure back to Hans Kelsen's legal theory.⁵² From the outset, Hans Kelsen was sceptical of political and sociological conceptions of "the people", instead establishing "the people" as a juridical fiction (a "hypothesis") distant from the real-world pluralism of different social groups:

*"The 'People' as a unity is absolutely essential for democracy, since, theoretically at least, the former is not only—indeed not so much—the Object, as it is the Subject of rule. [...] Yet, from a concrete point of view, there is nothing more problematic than this unity which goes by the name, the People. Sociologically, it is riddled with national, religious, and economic differences and thus represents more a bundle of groups than a coherent, homogeneous mass."*⁵³

For Kelsen, "the people" serves as an instance of juridical attribution, merely designating the "sum of the individuals of a specific legal order who were subject to

⁵² Brunkhorst 2011; Brunkhorst 2014, p. 346ff.

⁵³ Kelsen 1920f.

the norms belonging to that order".⁵⁴ However, he neglects to derive from this juridical notion of the people a separate layer of constitutional politics in which political agents must endorse certain types of behaviour or argumentation. Rather, Kelsen follows a strictly procedural perspective, juridifying the state and the political system in its entirety, and does not allow for any impositions of virtue (*Tugendzumutungen*). He considers democracy to be centred around legislation in which a variety of actors, institutions, and decision-making bodies take part. Democracy amounts to a procedural "method" designed to "construct and engender law".⁵⁵

Brunkhorst argues that legal theory has neglected Kelsen's insistence that juridification is directed against all dualisms and consequently follows a radical democratic mindset, while all legal rules can be changed politically.⁵⁶ At the outset of the 20th century, legal and constitutional theory were still dominated by a dualistic perspective which distinguished between state and law, state and society, subjective and objective law, private and public law, legislation and norm-application, national and international law.⁵⁷ This led legal theory to certain problematic flaws, drawing distinctions between different spheres and thereby "naturalizing" one part of the distinction – or at least prioritizing one over the other. Either it prioritized the authority of the state over the legal system, the national constitution over international law, or it limited democratic legislation to political processes and handed the concretization of norms over to technocratic elites. Alternatively, it assumed that the constitution of private property law could not be altered by public law and parliamentary legislation. Furthermore, the dualisms relied on a reifying concept of representation in which agents or organs embody a pre-given social substrate (correspondence theory).

This leads Brunkhorst to read the reformist Kelsen as a revolutionary, to the extent that his insistence on juridification overcomes these dualisms and conceives of all organs as applying a "constructive and procedural method of egalitarian and inclusive will formation".⁵⁸ "Like any method", Brunkhorst proceeds, "this method can be improved and replaced by other methods (functional equivalents even to parliamentarism) which (under certain conditions) are more appropriate than the existing ones."⁵⁹ In this sense, popular sovereignty must be reconstructed as an encompassing "method" of law-generation which neither relies on the state nor the private or collective individual. It spreads through society and relies, as Kelsen argued in *The Essence and Value of Democracy*, on a process of "a radical mechanization of the social process of

⁵⁴ von Bernstorff 2010, p. 58.

⁵⁵ Brunkhorst 2014, p. 351.

⁵⁶ Brunkhorst 2011; Brunkhorst 2014, p. 346ff; see the chapter in Kelsen's *Introduction to the Problem of Legal Theory*, 'Overcoming the Dualism of Legal Theory' (Kelsen 2002, p. 37ff).

⁵⁷ Brunkhorst 2014, p. 348ff.

⁵⁸ Ibid, p. 355.

⁵⁹ Ibid, p. 355f.

organization".⁶⁰ This mechanization can be expressed by a variety of constitutional forms and modes of representation and, at least in Brunkhorst's reconstruction, is not bound to liberal constitutionalism as long as it safeguards the freedom and equality of legal subjects.

Following Brunkhorst, modern democracy cannot be understood in dualistic terms, but has to be reconstructed as an overarching process of communication in which different organs and institutions, layers of simple or constitutional law, legislation and norm-application all contribute equally to democratic will-formation, and must be evaluated against this backdrop. Popular sovereignty is dispersed and internalized into a communicative practice where all organs evolve in the same distance to the democratic principle. It is noteworthy here that every organ assumes a particular function, but cannot be derived out of dichotomous distinctions between state and society, public and private law, constituent and constituted power. All powers, organs and practices participate in a "continuum of concretization" which applies, renews, or changes general laws.⁶¹

Accordingly, the distinction between constitutional politics and simple legislation must not be understood as a dualism of two separate layers. Although the constitution's function is different from that of parliamentary legislation, both levels exhibit a reciprocal permeability: parliamentary legislation is to a large extent concerned with constitutional politics in the sense of concretizing constitutional essentials and basic rights, and is itself also able to change the legal regulation of society as long as this is consistent with the method of popular sovereignty: "this legally enables the parliamentary transformation from capitalism to socialism and the socialization of the means of production."⁶² In this sense, even social and political revolution is internalized in the method of popular sovereignty, as they can be proceeded by means of legal reform. This echoes Kant's famous dictum that "*das Volk ist beständig constituierend*", that 'the people' is "continually constituent",⁶³ while the constitutional court's function consists not of engaging with constitutional spirits, values, history, or cultures from a higher standpoint of rationality, but solely of the sober protection of minority and oppositional rights.⁶⁴

This radical democratic perspective on popular sovereignty highlights a communicative twist, namely, it is decoupled from concrete agents. Habermas emphasizes

⁶⁰ Kelsen 1920, p. 27. The 2013 English translation cited in the bibliography bases itself on the 1929 expanded edition, from which several passages (such as this one) are omitted, and thus have been translated from the original German here.

⁶¹ Ibid, p. 356. Brunkhorst identifies a tension between Kelsen's critique of dualism and his conception of the 'basic norm' and the 'legal system and its hierarchical structure' as the last 'remnants of dualism' (Brunkhorst 2014, 356; Kelsen 2008, p. 55ff).

⁶² Brunkhorst 2014, p. 351.

⁶³ Maus 1992, p. 81.

⁶⁴ Van Ooyen 2003, p. 132ff.

this communicative dispersion in *On Facts and Norms*: "This fully dispersed popular sovereignty is not even embodied in the heads of the associated members. Rather, if one can still speak of 'embodiment' at all, then sovereignty is found in those subjectless forms of communication that regulate the flow of discursive opinion- and will-formation [...]. Subjectless and anonymous, an intersubjectively dissolved popular sovereignty withdraws into democratic procedures and the demanding communicative presuppositions of their implementation."⁶⁵ In Habermas's view, the administrative circuits are nurtured by the communicative potential emerging in the public sphere. This communicative potential constitutes a "wild" complex" and shows an "anarchic structure".⁶⁶ But indeed, the underlying emancipatory possibilities of free communication remain "vulnerable to the repressive and exclusionary effects of unequally distributed social power, structural violence and systemically distorted communication [...]."⁶⁷ One cannot have one element without the other: if we locate the republican-democratic credentials in communicative power, then here looms the risk of authoritarian and totalizing distortions and even of repression. Against an orderly understanding of communicative power which affords the mirroring of the constitution in the heads of the participants, Regina Kreide reminds us that "communicative power is directed at changing established institutions, abolish them or invent new ones [...]. Democracies are puzzling projects which rely on a certain informality as well as on experiments or the shifting of borders; they are multi-faceted, loud and sometimes irrational."⁶⁸

IV. Populism and Neutralization

If we take this radical democratic reconstruction into account, which (1) regards popular sovereignty as a method of democratic legislation, reliant on a monistic "continuum of concretization", and (2) acknowledges the ambivalence of communicative power between polemical use and repressive distortion, we gain a different perspective on populism altogether. Constitutional politics, deliberation within the political system (e.g. in the parliamentary sphere) and deliberation within the public sphere must be regarded as mutually permeable, where the various layers are entangled in a dialectic of emancipation and repression. Moreover, such a perspective abstracts from the motives and intentions driving agents to participate.⁶⁹ Uncivilized forms of political behaviour, misinterpretations of democracy, and illiberal opinions are part of

⁶⁵ Habermas 1996, p. 486.

⁶⁶ Ibid, p. 307.

⁶⁷ Ibid, p. 307f.

⁶⁸ Kreide 2014, p. 287.

⁶⁹ See from a Kantian perspective: Niesen 2001; from a critical systems theory "transsubjective" view: Fischer-Lescano 2012.

the public sphere, and the procedural notion of democratic will-formation does not impose any particular virtues on the agents involved. Public will-formation can only reach its full explorative and transformative potential when it abstains from ex ante censorship and includes even communications that distort or misinterpret constitutional essentials, do not use existing constitutional grammar at all, or call for constitutional revolution or renewal.

Most notably, such a radical democratic account rejects the incompatibility thesis. Populisms tend to blur the lines between constitutional politics, parliamentary deliberation, and the public sphere. They can neither be understood as solely concerned with higher-ranking constitutional deliberations, with parliamentary legislation, nor with the mobilization of communicative potential in the public sphere. But for a such monistic reconstruction, this does not amount to a real danger: on the contrary, populisms simply *mirror* the continuum of concretization and must be seen as concomitant of modern representative democracy, i.e. the spread of the constitutional grammar of “we the people” throughout society. They simply express the reality that contestation in representative democracies is channelled and framed by this grammar.

Here, the major difference to the conservative bias in the aforementioned liberal accounts becomes visible. Liberal accounts are grounded in a variety of Protestant aniconism, restricting references to “the people” to the layer of constitutional politics and establishing a “duty of civility” which excludes populist discourse from the realm of democratic culture. The radical democratic reconstruction of popular sovereignty argues in the opposite direction: popular sovereignty and the claim to represent the people is part of all power circuits in modern democracies. Accordingly, all agents can in principle make use of this language, be it under the auspices of explicit populism (people/power bloc), of constitutional reform, or simple political popular discourse. The grammar of popular sovereignty cannot be tied to specific agents. It disperses into society and serves as backdrop for political communication.

The main effect of this dispersion can be located in neutralization. Contrary to Protestant aniconism, only the pluralisation of claims to “we the people” (as opposed to its restriction) allows for an on-going democratic conflict and deliberation. The totalizing gesture of populisms is not restricted by normative arguments, but by the factual diffusion of popular sovereignty in anonymous communication circuits. Totalizing claims to representing the people are confronted with other (totalizing) attempts to embody and represent the people, can ultimately be challenged by new totalizing attempts, etc.⁷⁰ The plural character of peoplehood must be understood from a different angle: it is not intended as a restriction to the “we the people” perspective, but rather unleashes the grammar and – as long as procedural safeguards exist – exposes

⁷⁰ Here, there is no difference to Laclau’s reconstruction of Claude Lefort’s dictum that in democracy the ‘place of power remains empty’. Laclau believes this emptiness is caused mainly by the potential for political contestation over the representation of “the people” (and not by the existence of human and subjective rights alone), see Laclau 2005, p. 166.

it to public scrutiny and contestation. The indeterminacy of “the people” and the debate around its inclusionary scope is an effect of neutralization, which operates not through restraint on public deliberation in the sense that all agents must adhere to a Rawlsian mindset and resist the populist temptation, but through the communicative dispersion which allows “the people” to emerge as an essentially contested concept. More specifically, the forceful attempts of socially powerful classes and institutions to represent and embody the people are not only restrained by legal and constitutional norms, but also by counter-cycles of communicative power.

But how does this unleashing of the reference to the people protect itself against authoritarian abuses and distortions? This, at least, was the point of departure taken by deliberative critiques when warning that populists disguise as friends of “the people” while at the same time undermining the procedural conditions of possibility for a democratic conception of “the people” to emerge. However, the radical democratic perspective is not entirely agnostic with regard to possible articulations of peoplehood. Foremost, it binds the exercise of executive authority and political power to law, and thereby legally restrains the scopes for a complete embodiment of “the people” on behalf of constituted organs and administrative powers. But it abstains from “statification” (*Verstaatlichung*), as well as “constitutionalizing” political and public deliberation. In order to fulfil its anarchic, polemical and innovatory potential, communicative power must even accept “non-institutionalized” spaces of popular sovereignty,⁷¹ which, admittedly, are ambivalent achievements that can be used and recovered by authoritarian movements as well. But an adequate answer cannot consist of depriving of communicative power the anarchic, polemical and innovatory tools which lay siege to the administrative powers.

V. Conclusion: The Challenge of Authoritarian Populism

In this article, I argued that populism cannot be considered incompatible with a deliberative and procedural conception of democracy as such. I have tried to show that the incompatibility thesis relies on a specific interpretation of Habermas’s approach to popular sovereignty, characterized by a conservative bias which supersedes the polemical aspects of popular sovereignty, i.e. those which Habermas associates with the republican legacy and seeks to transfer to his conception of communicative power. I then contrasted this reconstruction with a radical democratic perspective which seeks to overcome these conservatisms by adopting a communication-centred conception that understands populisms as a concomitant of popular sovereignty. The flat-out rejection of populism on normative grounds is dangerous to the extent that it – at the same time – deprives of communicative power the polemical grammar necessary to attack administrative power and question the role of powerful social elites and elected functionaries.

⁷¹ Maus 2011, p. 92; see also Prien 2010, p. 154 ff.

The persistence of populist forms of politics must be explained with view to two processes: populist discourse first recovers this polemical grammar and directs it towards the "elite" or the "powerbloc, before subsequently embracing a certain notion of what "the people" is and what it consists of. The challenge of authoritarian populisms is found in this embrace, for it is here that political and social movements make use of the "people/powerbloc" distinction and transfer this basically democratic distinction to the distinction "We (as a closed and homogenous people)/the others". At stake here is an authoritarian distortion of the polemical grammar – a slight change that makes a huge difference. The persuasiveness of this slight change can be found in many instances, such as the work of Carl Schmitt. In his 1928 *Constitutional Theory*, Schmitt proceeds from a democratic conception of popular sovereignty, assuming the primacy of constituent power over constitutional forms. In his next step, however, he collapses the radical democratic content of this primacy into an authoritarian conception of "the people" founded on "substantive [...] similarity among the people" (Gleichartigkeit der Substanz) activated through the applauding of a political leader.⁷²

This transformative distortion constitutes authoritarian types of populism, and in fact makes them populist in the first place: they begin from a polemical use of popular sovereignty (people/elite), but ultimately connect it to an authoritarian and reifying conception of "the people" which faces invasion by the "Other". Without this two-stage model, we would have no choice but to describe authoritarian political movements as authoritarian, not populist.

From the standpoint of democratic politics, the incompatibility thesis is not only problematic in theoretical terms, but is also, more importantly, the wrong strategy against authoritarian populism. In order to confront the aforementioned distortive mechanism, we must work through the terrain on which the distortion emerges and search for alternatives. The struggle against the "populists" by way of civic education to equip the citizenry with a Rawlsian duty of civility and constitutional patriotism cedes the polemical dimension of popular sovereignty to authoritarian forces. Ultimately, it is only by recovering this polemical dimension that we will be able to undermine the communicative force of authoritarian populisms.

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⁷² Schmitt 1993 p. 275.

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RESPONDING TO THE CHALLENGES OF GLOBALISATION: HABERMAS ON LEGITIMACY, TRANSNATIONALISM, AND COSMOPOLITANISM

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As I am writing this paper, the world is reeling from the success of right-wing populist campaigns in the USA and some European countries. In the EU right-wing nationalist, populist movements are now optimistic that they will succeed to gain political power and to turn back the clock on the ambitious, trans-national project that has brought decades of peace to a war torn continent. The populists' success follows a series of global and European crises, including financial and legitimacy crises, many of which Habermas has predicted in several of his writings. They are due to failures to respond adequately to the challenges of globalisation.¹ The European project itself is at the heart of Jürgen Habermas's own political commitments and intimately linked to his uptake of the project of critical theory. Habermas's theory is well equipped not only to critically analyse society and explain social and political dangers, such as the rise of the far right, but also to offer solutions. In the light of current events, Habermas's critical social analysis and his normative project seem highly relevant (again). The aim of this chapter is two-fold. By examining Habermas's stance on globalisation, transnationalism and cosmopolitanism in the context of his wider project, I want to show just how powerful Habermas' social theory is in explicating the dangers of failing to respond adequately to the challenges of modernity and how far-sighted and practical the solutions on the back of a solid normative standpoint are.² However, a second point of this paper is to argue that Habermas is mistaken when he rejects a

¹ See for example Habermas, 2009.

² Habermas' explanation of the rise of right wing nationalism and xenophobia on the one side and neoliberalism on the other is not the only explanation available to Critical Theorists. Indeed a more complete explanation would combine the more socio-economic explanation Habermas offers with the social psychology of Adorno and Horkheimer and the psychoanalytic approach of Honneth.