

In the Loop of Surplus Enjoyment: Populism and the Paradox of Constitution

Jan Sowa

Abstrakt Artykuł analizuje populizm jako symptom ujawniający strukturalny paradoks tkwiący w sercu nowoczesnej demokracji parlamentarnej: napięcie między władzą konstytuującą a władzą ukonstytuowaną. Odwołując się do krytyki „jurystokracji” Rana Hirschla oraz do klasycznej debaty między Hansem Kelsenem a Carlem Schmittem, tekst proponuje psychoanalityczną reinterpretację teorii konstytucyjnej w świetle lacanowskich pojęć Realnego, Symbolicznego i nadmiarowej rozkoszy (*plus-de-jouir*). Autor argumentuje, że liberalny porządek oparty na fikcji trójpodziału władzy funkcjonuje jako mechanizm kastracji, który przekształca kolektywną siłę władzy konstytuującej w symboliczny podmiot „ludu”. Populizm w tym ujęciu stanowi powrót wypartej rozkoszy tkwiącej w mocy konstytuującej – Realnego ludu – w obrębie symbolicznego pola polityki. Śledząc tę libidinalną dynamikę, artykuł wskazuje, że atrakcyjność populizmu nie wynika z manipulacji ideologicznej, lecz z trwałej obecności Realnego w samym porządku konstytucyjnym. Studium konkluduje, iż obrona demokracji wymaga rozpoznania i włączenia tej konstytutywnej nadwyżki, a nie jej represjonowania.

Słowa kluczowe władza konstytuująca, władza ukonstytuowana, populizm, nadwyżka rozkoszy (*plus-de-jouir*), jurystokracja, reprezentacja demokratyczna, liberalny konstytucjonalizm, lacanowska teoria polityczna, Realne i Symboliczne

Abstract This article examines populism as a symptom that reveals a structural paradox at the heart of modern parliamentary democracy: the tension between constituent and constituted power. Drawing on Ran Hirschl’s critique of “juristocracy,” and engaging with the classical debate between Hans Kelsen and Carl Schmitt, the text proposes a psychoanalytic reinterpretation of constitutional theory through Lacanian concepts of the Real, the Symbolic, and surplus enjoyment (*plus-de-jouir*). It argues that the liberal order’s fiction of the separation of powers functions as a mechanism of castration that transforms the collective force of constituent power into the symbolic subject of “the people.” Populism in this view represents the return of the repressed enjoyment of the constituent force – the Real of the people – to the symbolic field of politics. By tracing this libidinal dynamic, the paper suggests

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that populism's disruptive appeal stems not from ideological manipulation but from the persistence of the Real within the constitutional order itself. The study concludes that any defense of democracy must recognize and accommodate this constitutive excess rather than seek to repress it.

Keywords constituent power, constituted power, populism, surplus enjoyment (*plus-de-jouir*), juristocracy, democratic representation, liberal constitutionalism, Lacanian political theory, the Real and the Symbolic

Even a brief look at the political turmoil provoked by the ongoing populist assault on the liberal *status quo* reveals the key role played by the struggles around the judiciary and legal system. Everywhere around the world – from Poland to Brazil, to the UK, to the US – populist leaders and governments have at least vehemently criticized the functioning of the judiciary, and in many instances challenged its independence, from meddling in the procedure of appointing judges all the way to confrontations with top constitutional courts. Such actions of course provoke moral panic in the liberal milieu, because the separation of powers is one of the cornerstones of the liberal political order. Truth be told, it remains more of an ideological fiction – or a Kantian regulating ideal at best – as, in practice, even in a model liberal country such as the US, the judiciary has never been fully autonomous from other branches of government – as the very mechanism of constituting the US Supreme Court illustrates. However, the fiction of the separation of powers is necessary to maintain the liberal order, so the panic is well founded and should not surprise anyone.

What is never mentioned in liberal condemnations of populist assaults on the judiciary is that the discussion around its status and position has also been ongoing in scholarly circles hardly animated by populist politicians. Ran Hirschl's book *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* offers a good example. Here is the outline of the problem opening the book, which was published in 2004, well before the current wave of populist rebellions:

Over the past few years the world has witnessed an astonishingly rapid transition to what may be called juristocracy. Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.¹

¹ R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, with Internet Archive, Harvard University Press, Cambridge, MA 2004, p. 1.

Hirschl is far from the simplification of populist rhetorics, and paints a complex picture of a plethora of issues that have led to such a development:

My underlying assumptions in developing this explanation for constitutionalization and judicial empowerment are: (1) the expansion of judicial power is an integral part and an important manifestation of the concrete social, political, and economic struggles that shape a given political system and cannot be understood in isolation from them; (2) the political origins of constitutional reform cannot be studied in isolation from the political origins of constitutional stalemate and stagnation; (3) other variables being equal, prominent political, economic, and judicial actors are likely to favor the establishment of institutional structures that will benefit them the most; and (4) constitutions and judicial review hold no purse strings and have no independent enforcement power, but nonetheless limit the institutional flexibility of political decision-makers.²

Hirschl describes a genuine threat to democratic decision-making that has only grown more serious since he wrote the book. “Judicial empowerment” is not only the enemy of populists and conservatives, but also serves them as a tool: both in Poland and the US, the right wing has managed to restrict access to abortion by judiciary means, not via democratic process. There seem to be other problematic issues concerning the judiciary besides the populists’ refusal to respect the separation of powers. As is the case with many other matters, populism, with all its “savage” violence, is just a symptom of a genuine socio-political predicament that the liberal establishment does not want to address or even recognize. Instead of automatically siding with the liberal in a thoughtless manner, the progressive-critical milieu should instead provide its own, divergent critique of “juristocracy.” Based on his book, it is difficult to say what Hirschl’s political agenda is, but a lot of what he describes is also problematic from a progressive-emancipatory point of view:

Judicial empowerment through constitutionalization is best understood as the product of a strategic interplay between three key groups: threatened political elites, who seek to preserve or enhance their political hegemony by insulating policy making in general, and their policy preferences in particular, from the vicissitudes of democratic politics while they profess support for democracy; economic elites, who view the constitutionalization of rights, especially property, mobility, and occupational rights, as a means of placing boundaries on government action and promoting a free-market, business-friendly agenda;

² Ibid., p. 11.

and judicial elites and national high courts, which seek to enhance their political influence and international reputation.³

To a liberal mind, the populist assault on the independence of the judiciary, as well as the way that branch of government is being used as a cunning tool to advance certain political goals, may seem pure madness; the analytical gaze, though, should not be content with such an answer, however self-reassuring it may look. What seems much more fruitful is to look at the conundrum as a symptom. The subject experiences a symptom as an incomprehensible, annoying disruption of its routines: a slip of the tongue, a bizarre association, an unexpected parapraxis. Attempts to interpret the symptom as a “normal” amalgam of symbols and images fail – it seems to convey no meaning. Nevertheless, the entire psychoanalytical edifice is built on the assumption that although that is how a symptom looks to the subject – and it cannot look any different – it not only can be apprehended, but it offers insights that, paradoxically, are not furnished by what makes sense in the subject’s life. The trick is not to treat the symptom as representation – be it symbolic or imaginary – but to approach it as a riddle, a kind of rebus where symbols and images are deliberately distorted, and the only way to decode the message is not to take any of them at face value. A symptom, in psychoanalytic understanding, is a kind of impossible double of the Real, to use the terminology of French philosopher Clément Rosset. It may serve the same function: “The privilege of the double is to pose in the most acute way the question of the real, of the reality of what one represents as the real: to be a revealer of it.”⁴

So what is the question posed by the populist assault on the judiciary if we treat it as a symptom: a riddle, a puzzle, a rebus to be solved? Just as the importance of the separation of powers for the very foundation of the liberal order indicates, it is exactly the core question on which the entire edifice of the republican-parliamentary is built: What is the relation between what is most often called “constituent power” – the ability of the people to constitute legal and political order – and the constituted power: the system of institutions and mechanisms that regulate the everyday functioning of that order? Let us take the psychoanalytic, symptomatologic approach as the guiding star, and embark upon a brief journey in search of a better understanding of the problem that the populist revolt has forced us to confront: the paradox of constitution.

The very concept of the split between the constituent and constituted power could only emerge – just like most of modernity – with the slow decay of the theological approach to politics, which had offered its particular solution to the

³ Ibid., pp. 11–12.

⁴ C. Rosset, *L'objet singulier*, Editions de Minuit, Paris 1985, p. 16.

problem of the origin of power in pre-modern times.⁵ The notion of a divine, supernatural foundation of power, as in the doctrine of the king's two bodies,⁶ provided a way to avoid the problematic paradoxes that otherwise emerged: that of infinite regression – where the source of power's legitimacy needs to have another source of legitimacy, which again needs another source, and so on – or that of self-reference – where the sovereign is in itself the origin of its own power. There is, of course, a third way, the one that modernity took – that of immanence, where the power within a given community is founded on the community itself – but for various political and theological reasons, it was not the solution that any monarchy could have opted for. Once the entire theological-political edifice of feudalism starts to decay in early modern times, the immanent option slowly creeps into the imagination of political philosophers. In his *Discourses on Livy* (written around 1517, published in 1531), Niccolo Machiavelli advocates for a mixed system, with elements of monarchy, aristocracy, and democracy. The importance he gives to both active civic engagement and the populace's role in maintaining a well-functioning state can be interpreted as a sign of the gradual turn toward political immanence and away from transcendental foundations. Another important figure in early discussions that led to the emergence of the concept of constituent power as an attribute of the people was Jean Bodin, the author of *Six Books of the Republic* (also known as *The Six Bookes of a Commonweale*, written in 1576). Martin Loughlin believes the origins of the concept of “constitution [...] as a juridical instrument deriving its authority from a principle of self-determination [...] lie in Calvinist reinterpretations of Bodinian sovereignty. They coined the concept of a ‘double sovereignty’, with personal sovereignty (*majestas personalis*) being held by the ruler and real sovereignty (*majestas realis*) vesting in the people.”⁷

Once modernity started to mature in the 18th century, the notion of constituent power came to the forefront of political debates. Jean-Jacques Rousseau is undoubtedly the most significant figure of that period when it comes to conceptualizing popular sovereignty. He does not use the expression “constituent power,” but his notion of general will may be seen as foundational to the contemporary idea of constituent power, as it affirms that the ultimate power of creating, modifying, and abolishing government lies with the people. According to Rousseau, any political system that fails to represent the general will lacks legitimacy.

The concept of “constituent power” and its differentiation from “constituted power” plays a central role in one of the seminal treatises of late-18th-century political thought: Emmanuel Sieyès's pamphlet *What Is the Third Estate?*

⁵ Antonio Negri and Michael Hardt developed an interesting and inspiring approach to the question of constituent power in contemporary philosophy. I have deliberately chosen not to refer to it, not so much because it functions in a different conceptual framework, that of schizoanalysis, but because, while it provides many interesting insights into the problem, it seems to be too optimistic about the possibility of actually rendering constituent power operational in an unmediated, direct manner.

⁶ E. H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology*, with Internet Archive, Princeton University Press, Princeton, NJ 1997.

⁷ M. Loughlin, “The Concept of Constituent Power,” *European Journal of Political Theory* 13, no. 2 (2014): pp. 218–37.

published in January 1789. The importance of Sieyès derives not so much from some exceptional depth of analysis or originality of thought but from their timing and context. Through the figure of Sieyès, the concept of constituent power becomes directly linked with two notions that, in a way, create the ultimate horizon of modern politics: constitution and revolution. Constituent power is at the origin of both – it legitimizes the revolutionary act of overthrowing the *ancien régime* and underpins the constitutional act of creating the new one.

The fact that, with the advent of modernity, the constituent power becomes operational on the practical level, does not make the theoretical problems behind it go away; on the contrary, in a very ironic way, both problematic paradoxes that political theology tried to circumvent – infinite regression and self-reference – returned with a vengeance. Does constituent power exist prior to establishing constituted power in the act of constitution? Should it be assumed that this act completely depletes the constituent power, rendering it inoperative – or maybe even non-existent – once the constituted power is established? If it is the foundation of the constitution, can it indeed disappear? And if so, what does the edifice of the constitution rest upon? As Filippo Del Lucchese argues, “constituent power makes the foundation of law problematic because it makes the unresolved tension between the factual and political moment on one side and the normative and legal moment on the other visible.”⁸

All of these dilemmas are clearly visible in the debate between Hans Kelsen and Carl Schmitt that *de facto* sets the stage for investigations of constituent power in contemporary legal studies.⁹ Both jurists put considerable effort into elucidating the relationship between constituent and constituted power; however, they adopted opposing strategies. Kelsen opted for a kind of nominalism: he believed constituent power to be a mythical element of political order that does not have any legal reality, and therefore cannot be a part of legal studies. Within any given constituent order, the constituent power exists in name only, as a point of quasi-religious reference; it seems structurally fundamental, but it does not have any real significance for legal debates.¹⁰ Schmitt adopted a position that is labelled as “decisionism.” He affirmed that constituent power is an actual force of collective will exercised by a given community. It exists before the constitution is drafted, and, in his opinion, represents a political faculty belonging to a nation or a unified ethnicity. Its sovereignty amounts not so much to establishing a constitution but to the possibility of deciding to act against or beside the constitution.¹¹ Hence, Schmitt’s state of exception is the ultimate marker of sovereign power, which is impossible under Kelsen’s assumptions.

⁸ F. Del Lucchese, “Spinoza and Constituent Power,” *Contemporary Political Theory* 15, no. 2 (2016): pp. 182–204.

⁹ For a good synthetic overview of this debate, see H. Lindahl, “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood,” in N. Walker and M. Loughlin, *The Paradox of Constitutionalism*, Oxford University Press, Oxford 2007; and Loughlin, “The Concept of Constituent Power.”

¹⁰ See H. Kelsen, *The Essence and Value of Democracy*, Bloomsbury Publishing, London 2013, Ch. 2, “The People,” pp. 35–46.

¹¹ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, ed. George Schwab, with a Foreword by T. B. Strong, University of Chicago Press, Chicago 2006, Ch. 2, “The Problem of Sovereignty as the Problem of the Legal Form and of the Decision,” pp. 16–35.

If we somehow metaphorically describe the legal system as a literary text, Kelsen's constituent power would be its narrator, while Schmitt's would be its author. The narrator seems to have power over the narrative, but in actual fact they are just another position – a name arising from the very structure of the text. The power of the narrator is not real, it is just a textual effect, and their very existence does not precede the text itself – both are created in the same instance of writing; thus, a narrator cannot act against or besides the text. The author, on the other hand, is there before the text; they are not only logically but also ontologically its creator, and for that reason can decide to do whatever they want with it: rewrite it or even destroy it altogether. Thus, Schmitt argues, with a mystical pathos:

From the infinite, incomprehensible abyss (*Abgrund*) of the force (*Macht*) of the *pouvoir constituant*, new forms emerge incessantly, which it can destroy at any time and in which its power is never limited for good. It can will arbitrarily. The content of its willing has always the same legal value like the content of a constitutional definition.¹²

In more recent debates, a third position has emerged that aims to solve the debacle of “normativism vs. decisionism.” It is called “relationism” and can be associated with scholars such as Hans Lindahl and Martin Loughlin. The latter traces back the relationist solution to Herman Heller, a contemporary of Kelsen and Schmitt, who died prematurely in 1933 in Spain after being forced with his family into exile from fascist Germany. Loughlin affirmatively quotes Heller's attempt at providing a solution to the paradox of constituent power as going beyond the debate between normativism and decisionism: “Every theory that begins with the alternatives, law or power, norm or will, objectivity or subjectivity, fails to recognize the dialectical construction of the reality of the state and it goes wrong in its very starting point.”¹³ In a dialectical way, relationism puts forward a sublation of the contradictory positions of Kelsen and Schmitt, and assumes that “power resides neither in ‘the people’ nor in the constituted authorities; it exists in the relation established between constitutional imagination and governmental action.”¹⁴ Thus, according to relationism, neither the constituent nor the constituted power can be regarded as primary in a temporal or logical sense; they both arise in relation to one another, and only this relation can be regarded as foundational for the modern democratic state. Loughlin links constituent power to the category of the people, thus allowing us to bring this short excursion into the field of legal studies to a close: “Constituent power not

¹² C. Schmitt, *Dictatorship*, quoted in Del Lucchese, “Spinoza and Constituent Power,” p. 190.

¹³ H. Heller, *Staatslehrein his Gesammelte Schriften*, quoted in Loughlin, “The Concept of Constituent Power,” p. 230.

¹⁴ Loughlin, “The Concept of Constituent Power,” p. 231.

only involves the exercise of power by a people: it simultaneously constitutes a people.”¹⁵ And – he continues – “constituent power always refers back to constituted power. In this sense, the foundation in its ideals (i.e., with respect to its normative form) can only be understood virtually.”¹⁶

■ The King’s Two (?) Balls (and His *Phallus*)

It is astonishing how little reference to psychoanalytical thought one finds in the debates around constituent power in contemporary legal studies. The above-quoted volume, edited by Martin Loughlin and Neil Walker, is a comprehensive presentation of the issue – it contains sixteen texts in its almost 400 pages, and only one of them makes partial references to psychoanalytical concepts in discussing the notion of dissensus.¹⁷ It is understandable why legal scholars consider Jürgen Habermas the most crucial contemporary thinker for their intellectual endeavor (several authors quote Habermas, and the volume’s bibliography contains ten of his works, more than of any other living philosopher); however, they are deeply mistaken in this belief. The omission of Jacques Lacan is an oversight of an ironic – or even comical – character to anyone acquainted with the visual metaphors used by him to make some of his key concepts more accessible: the cover of the book contains a reproduction of the famous Escher graphic with ants traveling around a Möbius loop. The editors must have believed – quite correctly – that this image pertinently expresses the complex and complicated relationship between the constituent and the constituted power; they likely did not realize that they have found themselves at the center of Lacanian territory.

If one had to answer unequivocally the question of what is the most critical issue of Lacanian psychoanalysis read not in a clinical way (as a practical, “therapeutic” method) but treated philosophically, as a theory of culture and society, it would surely be this: What is the relationship between force and meaning? Many Lacanian investigations and concepts developed throughout his long and meandering teaching – quilting point (*point de capiton*) and Master-Signifier; object *a* and desire in general; the Real; *jouissance*; *sinthome*; *le Nom-du-père*; demand; his understanding of drive; the mirror stage (and the “subject building” function of the Imaginary in general); phantasm; the Big Other; *la coupure* (and the resulting “barred” subject, \$), among several others – contain at their core precisely this question: How does an element which in itself is meaningless (that is, not belonging to the register of the Symbolic) exert a force

¹⁵ Ibid., p. 229.

¹⁶ Ibid.

¹⁷ See E. Christodoulidis, “Against Substitution: The Constitutional Thinking of Dissensus,” in Walker and Loughlin, *The Paradox of Constitutionalism*.

on the psychic apparatus “translating” into meaning, in the sense of creating or shaping the meaningful practice of the subject? In this sense, Lacan is also wrestling with the problem central to Derrida’s deconstruction – tackling it, in my opinion, in a much better way: “force is the other of language without which language would not be what it is.”¹⁸

But is it not precisely the conundrum surrounding the relationship between the constituted power, the entire legal system it functions in (that is, the Symbolic or the Law), and the constituent power itself? We do not know what the latter exactly is, even if it obviously has some relation with the constituted power and, inconveniently, keeps on haunting it. Could it belong to the Real? Or maybe to some of its avatars, like *jouissance*, for example? Or even the surplus enjoyment (*plus-de-jouir*) – a particular affective configuration that functions as a compensatory formation originating from the denial and renunciation of enjoyment?¹⁹ Let us attempt a psychoanalytic exploration of the paradox of the constitution, to see if it can also shed some light on what is one of the central issues of the populist revolt: the problem of democratic representation.

We need to start our investigation where the entire conundrum originates, both historically and logically – with monarchy, because it is there that neither the concept of constituent power nor of the people makes any sense; it can thus serve as a degree zero to which all the rest relates. Why is it that monarchy does not need these concepts nor even allow for their development? In psychoanalytic terms, a monarchy is a model example of the logic of castration, as Lacan understood this fundamental mechanism of subjectivity. We really need to go beyond the confines of the dull, bourgeois inscription of the Oedipal triangle in the logic of family that Deleuze and Guattari rightly criticized – and Lacan does precisely that. Just as, in the words of Frederic Jameson, for Lacan, “the separation, through language, of the paternal function from the biological father is precisely what permits the child to take the father’s place in his turn,”²⁰ Lacan’s concept of castration is a general blueprint of socialization not so much within the family but also – or even primarily – beyond it. What castration amounts to is a situation where a would-be subject agrees to give up some potential ways of seeking her enjoyment so as to be allowed to function in the broader symbolic structure of society. The prohibition of incest is fully necessary – maybe even the core prohibition of this kind – but not the only one. We enter into this type of “deal” with society on many occasions, and in that sense Deleuze and Guattari are correct: the problem is not that the Oedipus complex does not exist but that there are a thousand of them. We are allowed into the parlor only if we accept that it is not a place to shit. We can only be

¹⁸ J. Derrida, “Force and Signification,” in J. Derrida, *Writing and Difference*, Routledge, London 2010, p. 31.

¹⁹ See G. Rubio, “Plus-de-jouir et plus-value,” *Champ lacanien* 5, no. 1 (2007): p. 52.

²⁰ F. Jameson, “Imaginary and Symbolic in Lacan: Marxism, Psychoanalytic Criticism, and the Problem of the Subject,” *Yale French Studies* no. 55/56 (1977): p. 362.

licensed to drive a car if we agree not to do so in certain ways, even if they seem enjoyable, like driving very fast or under the influence of psychoactive substances. We are welcomed into the community of academic researchers holding PhD degrees only after having proven we have accepted the confines of methodology, and thus agreed not to seek knowledge and present it in whatever way but only by following methodological prescriptions. That is what castration means – accepting one’s impotence, defined as the inability to do something, in exchange for some potency: being enabled to take a position in the broader network of symbolic exchange; in other words, becoming a subject.

Of course, the enjoyment that is thus foreclosed does not simply go away. A part of it is always delegated to an object – usually a human actor – that is supposed to be able to enjoy in the way we cannot. The paradigmatic example is the father as the figure who has access to the person beyond our sexual reach: the mother. But there are other examples: supposedly privileged individuals who are allowed to break the rules and not be held accountable for that – arrogant members of elites, lazy immigrants, cunning Jews, etc. They have the dick and balls that we got cut. That is why the *phallus* is always a signifier of lack: the subject never has it; it is always necessarily in possession of someone else, who can enjoy in the ways that the subject cannot. The *phallus* would not exist at all if we had it – it is not an organ, like a penis, but a signifier of lack.

Monarchy plays perfectly into this general scheme of castration: its subjects become subjects because they are subjects, to use the ambiguity of the noun “subject” crucial for Foucault’s concept of subjectivation based on the positive productivity of power (his *as-sujet-issement*). Feudalism entire is a matryoshka of castrations: we only have some rights, being a vassal of a lord who is himself castrated by an upper-level aristocrat, and so on, unto the very top, where the king resides, being the proper possessor of the generalized social *phallus*. This is what the royal insignia – a scepter and an apple – stands for: the dick and the balls. Or at least one ball. Where the other one is probably remains the biggest unresolved mystery of political theology.

As much as it is a significant achievement of emancipation in European history, the end of monarchy creates many problems when interpreted from a psychoanalytical standpoint. Castration is there for a reason. As a neat expression often attributed to Lacan goes: *Père ou pire* – father or worse. Psychoanalysis does not subscribe to the optimistic view of human nature that lays at the basis of, for example, schizoanalysis: not all evil in the world can be attributed to a malevolent agent who manipulates desire and frustrates enjoyment.²¹ Much evil flows directly from realizing the desire and from enjoying,

²¹ For more discussion on that, see T. McGowan, *Capitalism and Desire: The Psychic Cost of Free Markets*, Columbia University Press, New York 2016, pp. 109–110.

especially from the surplus enjoyment (*plus-de-jouir*). Néstor Braunstein highlights a difference between Lacan and Freud in this respect: “For Lacan, contrary to Freud, castration is not a threat, but rather a saving grace. The real, terrifying threat is that castration be lacking.”²²

Of course, as Todd McGowan points out, “enjoyment is neither inherently positive or negative: its political and psychic valence depends on how we mobilize it.”²³ Hence, the function of the Law – of the Master-Signifier (S1), of the Symbolic (S2), of the Name-of-the-Father, all operating through the signifier as such – is to protect others from some forms of the mobilization of our enjoyment; and not only them, but also to protect ourselves from it. It is there in order to – as the phrase used by Jenny Holzer in multiple art projects goes – “protect me from what I want.” Néstor Braunstein articulates the same imperative in yet another paraphrasing of Lacan’s concept of castration: “The subject must renounce *jouissance* in exchange for the promise of an other *jouissance* proper to those subjects of the Law.”²⁴ He points out that even the very concept of enjoyment “reaches Lacan through an unexpected path: the law” – more precisely, from Hegel’s philosophy of right.²⁵ Thus, Lacanian enjoyment and his interpretation of Law are concepts that condition and illuminate each another – if enjoyment is the substance, then the Law is the form:

The Law here shows its essence: the regulation of the restrictions imposed on the *jouissance* of bodies – in other words, the social contract. What is it lawful to do and what are the limits in regard to one’s own body and that of others? As one can see, this is an issue regarding the barriers to *jouissance*: legality and liberties.²⁶

In short, this is also the primary function of what Lacan calls “the sinthome”: by linking signifier and *jouissance*, the subject is saved from an uncontrolled invasion of the surplus enjoyment that disintegrates subject-form, as the latter is too weak to handle such intensity. It concerns any subject, not just a fragile, “snowflake,” bourgeois, soft, “woke,” etc. subject, as opposed to a strong, brave, revolutionary, “unwoke” one. In the Lacanian view, a subject is only possible as the barred subject, a subject split between the conscious and the unconscious by the castrating cut of the Name-of-the-Father, whose function is to prevent unrestricted access to enjoyment. An entirely uncastrated subject would be a subject of pure unconscious – of full enjoyment, totally uncontrolled desire, and complete disrespect for any interdiction. It could not be a human subject – and not for moral or ethical reasons, but for purely practical, even logical

²² N. A. Braunstein, *Jouissance: A Lacanian Concept*, SUNY Press, Albany 2020, p. 41.

²³ T. McGowan, *Enjoyment Right & Left*, Sublation Media 2022, p. 10.

²⁴ Braunstein, *Jouissance*, p. 29.

²⁵ *Ibid.*, p. 17.

²⁶ *Ibid.*, p. 18.

matters: if we all just fuck whomever we want at any moment, shit all over the place, beat or kill whomever annoys us, and try to take possession of any object we desire, human society would be impossible. And without society, there would be no subjects. Some would say that animal societies also implement similar limitations. That is true, but nevertheless, the human animal is the only one for whom the interdiction can be introduced and sustained by signifier alone, so the transhumanist argument against the alleged anthropocentrism of psychoanalysis does not hold here.

The end of monarchy – the king’s death, which historically started with the slow demise of his sublime, supernatural body and the general passing of religious imagination – opened societies up to a new kind of collective, political enjoyment. Once God/father is dead, everything becomes possible. Interestingly enough, Jean-Pierre Vernant points to similar circumstances that led to the establishment of democracy in Greece after the Dorian invasion of the 12th century BC:

A type of kingship was destroyed forever, a whole form of social life centered on the palace. A person, the divine king, vanished from the Greek horizon. [...] The king’s disappearance prepared the way [...] for two interdependent innovations: the institution of the city-state and the birth of rational thought.²⁷

This new, all-encompassing political possibility to shape the world in whatever way we collectively decide, without any limitations posed by monarchy and feudalism, this phantasmatic experience of pure political immanence, of full access to unconstrained and unmediated enjoyment, is precisely what the name “constituent power” stands for. The same kind of force animates a slogan often chanted during left-wing demonstrations: “The people united will never be defeated.”

The use of the same word – “power” – in the expressions “constituent power” and “constituted power” is misleading and should be corrected. In the first instance, it is power in the same sense that Nietzsche uses in his “will to power” – not power in the organized, institutional sense of holding an office (as it is in “constituted power”), but rather a might, or a force. The French translation of Nietzsche’s notion is “*volonté de puissance*.” This looks like a better candidate that Sieyès could have employed: *puissance constituante*. In English, we could use “force” or “might”; maybe “vigor” – the equivalent of the French *élan* – would even do. It needs to be a different word than the one used in the second expression – “constituted power” – as that refers to something

²⁷ J.-P. Vernant, *The Origins of Greek Thought*, Cornell University Press, Ithaca 1984, p. 10.

well-defined, organized, formalized, and internally differentiated. In contrast, constituent “power” is imprecise, fluid, unformalized, and undifferentiated (lacking the internal divisions characteristic of constituted power). That is how Sieyès himself conceptualized it:

As for the constituent force (*pouvoir constituant*), it is a principle that it cannot be subjected to any form, any rule, etc. The constituent force (*pouvoir constituant*) is the national will, expressing itself in any way whatsoever; on everything that can concern the Constitution.²⁸

Alternatively, we could keep “power” in the first expression and look for an alternative to the second occurrence of the same term: constituted “authority” or “administration.” Nonetheless, using the same word in both instances is confusing because, psychoanalytically speaking, what is traditionally labelled as “constituted power” belongs to the Symbolic, while so-called constituent power is Real. It is a different way of phrasing the concept of double sovereignty, where Loughlin locates the origin of the division between constituent and constituted power: *majestas personalis* is Symbolic, whilst *majestas realis* is – as its name indicates – Real. As is often the case, the truth is not hidden in any way – the truth is out there.

■ Castration of the People

The Real can never be adequately represented in the Symbolic, yet neither can it be completely ignored. The relation between these two elements cannot be narrowed down to either of the poles of such an opposition. So the Real is simultaneously excluded and most intimately present (though with no symbols or images to represent it). That is why Lacan coined the term *extimity* to convey this paradoxical relation, and used the image of a Möbius loop to illustrate the relation between the two topologically. The Möbius loop is a surface with only one side and one edge, although due to a peculiar twist of the two-dimensional surface in the third dimension, it seems to have two sides and two edges. There is an easy empirical way to prove that it has just one side: move in a straight line – just like the ants in Escher’s picture – and you will eventually reach “the other” side without crossing any edge. So “the other” side is at the same time “external” and “internal,” hence Lacan’s neologism. As Tom Eyers put it, “[i]t is not so much that the Real imposes itself from an outside, as form on

²⁸ E.-J. Sieyès, *Quelques idées de Constitution applicables à la Ville de Paris*, quoted in J. Guilhaumou, “Nation, individu et société chez Sieyès,” *Genèses. Sciences sociales et histoire* 26, no. 1 (1997), thematic issue *Représentations nationales et pouvoirs d’État*: p. 20.

matter, but rather that the very arrival of the Real as cause is always-already prepared for by the Symbolic context upon which it impacts, a context that contains within it the Real aspect of signification as its ‘extimate’ limit.”²⁹ That is precisely what the constituent force is to the constituted power: its *extimacy*. Relationism in legal studies, as Loughlin describes it, seems to refer to precisely this extimate relation between the two, and corresponds neatly with how Lacan conceptualized the relation between the Real and the Symbolic: the Real is not there prior to the Symbolic nor *vice versa*; they both come into existence through the act of bending the loop in the relation of (un)representability combined with the materiality of the signifier. Neither can be there without the other, just like the “two” sides of the Möbius loop.

Something new in the political order of the time was born with the movement from monarchy toward republic – a force able to constitute political reality itself: the constituent force. As a form of enjoyment, it belonged to the order of the Real. Therefore, it needed to be tamed to appear in the Symbolic register of the established political reality, in the constituted power. It had to be castrated for a new collective subject of “the people” to emerge. This subject comes to life from the beginning as the barred subject split between its Real constituent force and Symbolic constituted power. What Madison clearly states about the disputes leading to the establishment of the American republic – “the total exclusion of the people, in their collective capacity, from any share in the [government]”³⁰ – is precisely the formula of a new castration that replaces the old monarchical one.

However, it is impossible to eliminate enjoyment just by symbolically denying it. As Martin Loughlin insists, “constituent power exists only insofar as it resists institutionalized representation.”³¹ Theoretically – from the perspective of the dominant views in legal and political theory – it should become completely “exhausted by and absorbed within the settled constitutional form,”³² but practically, it does not. In principle, “a division of powers [...] is a way of acknowledging that a people is never directly present to itself as a unity: whoever claims to speak on its behalf may only do so if the claim can be questioned by another power,”³³ but in practice, enjoyment, belonging to the Real, knows nothing of such a differentiation of faculties, and keeps on disrupting that division in one way or another – for example in the form of populism.

Therefore, as a matter of fact, there are, analytically speaking, two “people” – the Real that holds the constituent force and the Symbolic that acts within the constituted power – configured in the form of a Möbius loop: one surface with one edge that seems to be cut into two. “The people” as the barred

²⁹ T. Eyers, *Lacan and the Concept of the ‘Real,’* Palgrave Macmillan, London 2012, p. 80.

³⁰ J. Madison, “The Senate Continued,” *The Federalist* no. 63 (March 1, 1788), Project Gutenberg, http://www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0063.

³¹ Loughlin, “The Concept of Constituent Power,” p. 233.

³² M. Loughlin and N. Walker, “Introduction,” in Walker and Loughlin, *The Paradox of Constitutionalism*, p. 6.

³³ Lindahl, “Constituent Power,” p. 22.

subject is a signifier of constituent force – that is, enjoyment – but devoid of its surplus element, so that it can safely operate within the confines of a new, post-monarchical order. Sheldon Wolin articulated this without reference to psychoanalytical language: “A political constitution is not the fulfilment of democracy but its transfiguration into a ‘regime’ and hence a stultified and partial reification.”³⁴ I believe psychoanalytical conceptual framing allows us to better grasp the process’s complexity.

We could introduce a new notation to account for that: “~~the people~~” (with strikethrough), to refer to the constituted political subject that can only act through its representatives, and keep “the people” to refer to the prephallic “subject” of constituent surplus enjoyment. Inverted commas are necessary because there is no such thing as a “prephallic subject”; the subject only arises through the castration; that is, through the establishment of the *phallus* that allegedly belongs to some other supposedly able to do what the subject cannot. As Lacan’s “new formula for the subject” affirms, “the subject is literally at his beginning the elision of a signifier as such, the missing signifier in the chain.”³⁵ It needs to be struck-through to communicate, as Yannis Stavrakakis phrases it, “a lack of the real *jouissance* castrated through socialisation.”³⁶ There is only so much we can do with linguistic notation. Hence, the “prephallic subject” in inverted commas refers to the formation of a pure constituent force that is not a subject. However, we attribute some subjectal features to it, mainly the ability to purposefully act in the gesture of establishing the constituted power.

Populism promises to get rid of the bar of ~~the people~~. Its fantasy relies on a delusionary “promise of recapturing a lost/impossible *jouissance* as fullness.”³⁷ Hence, the importance of various figures of unity and purity in populism – they represent an “imagarisation of enjoyment as fullness, which promises to bring back something irretrievably lost through socialisation,”³⁸ Hence also the disrupting force of populism: it is an attempt to bring into politics something that does not fit its symbolic framework, yet is operational within it in its affective, energetic, libidinal aspect: popular sovereignty, collective will, the figure of the people, etc. This affective dimension of populism is the chief reason for its appeal despite its nonsensical symbolic content.

Foreclosing the signifier of populism – the liberal silver bullet that is supposed to “save democracy” – will not achieve anything regarding the perseverance of its affect. Lacan talked about this issue in his seminar dedicated to anxiety:

I have tried to say what affect is not: it is not the being given in its immediacy, nor is it the subject in a somewhat raw form. It is, to put it in no uncertain terms, not

³⁴ See S. S. Wolin, “Norm and Form: The Constitutionalizing of Democracy,” in J. Peter Euben et al., *Athenian Political Thought and the Reconstruction of American Democracy*, Cornell University Press, Ithaca 1994, p. 55.

³⁵ J. Lacan, *The Ethics of Psychoanalysis 1959-1960: The Seminar of Jacques Lacan*, Routledge, London 2013, p. 224.

³⁶ Y. Stavrakakis, *The Lacanian Left: Psychoanalysis, Theory, Politics*, Edinburgh University Press, Edinburgh 2007, p. 74.

³⁷ *Ibid.*, p. 77.

³⁸ *Ibid.*, p. 78.

protopathic. [...] And it is precisely for this reason that it has a close structural relationship with what is, even traditionally, a subject. [...] What I have said, however, about affect is that **it is not repressed**; and Freud says the same as me. It is unmoored, it drifts away. We find it displaced, crazy, inverted, metabolized, but it is not repressed. **What is repressed are the signifiers that anchor it** [emphasis added – J.S.].³⁹

Yannis Stavrakakis adds a neat general explanation to this part of Lacan's teaching:

repression does not touch affects directly but only ideas (signifiers). Affects, however, are displaced and transformed as a result of repression: in repression affect and thought are dissociated from each other. As a result, representation is directed to the unconscious, while affect remains and gets attached onto another, substitute (often symptomatic) representation.⁴⁰

However, it is an equally futile task to look for signifiers that could fully express affect – it just operates in different registers. Where the *non-dupes errent* is in their belief that if we tear down the veil of ideological illusion and get rid of all limitations imposed by the mechanisms of representation, the people will be able to finally, freely and, fully express itself, that is, in Lacanian terms, to find the one and only authentic, genuine, proper, “protopathic” signifier that can convey who the people Really are. That is not possible – we are never going to be able to liberate “the people,” as it is not discursively accessible in any way; it “does not exist” in the Lacanian sense of this negation (which means it is not fully contained within the Symbolic). “The people” is a moniker of what Sheldon Wolin labelled “democracy’s political surplus, the unwillingness of the demos to remain contented with a simple ‘share’ in the major political institutions.”⁴¹ As a surplus, it does not fit within the confines of the system; only the people exist therein. The function of the veil of ideological illusion is to perform the twist in the Möbius loop that makes the people possible in the first place. No veil, no people. The legal theory of a republican state – as epitomized, for example, by Martin Loughlin’s account of constituent power – is as explicit about it as the American Founding Fathers were: in general – that is, except for some very precise and isolated episodes – the “sovereignty of the people” can be enacted only by the medium of their representatives,⁴² while “the concept of constituent power belongs either to the world of myth – a political myth that grounds the authority of the basic norm – or is an expression of raw power.”⁴³ Something that

³⁹ J. Lacan, *Séminaire 1962-1963. L'Angoisse*, Version AFI, Association Freudienne Internationale, Paris n.d., pp. 20–21.

⁴⁰ Stavrakakis, *The Lacanian Left*, p. 213.

⁴¹ See Wolin, “Norm and Form,” p. 49.

⁴² Loughlin, “The Concept of Constituent Power,” p. 220.

⁴³ *Ibid.*, p. 222. Martin Loughlin locates the origin of such an approach in Hans Kelsen and legal positivism, but also notes that “this stance is not confined to legal positivism: it is now being implicitly promoted by a broad range of contemporary normative legal theory founded on the autonomy – or intrinsic morality – of law” (222).

Joseph de Maistre had already half-jokingly commented on in 1795: “The people are the sovereign which cannot exercise their sovereignty.”⁴⁴

By the way, it is precisely here that we can see how the discursive-hegemonic approach of Laclau and Mouffe fails. What they describe as the formation of a chain of equivalences structured in a discursive manner by the nodal point of the empty signifier is relevant only if we talk about ~~the people~~ and not the people as such. It does not include the enjoyment of constituent force that is crucial for the people and must be repressed if ~~the people~~ are to come into existence. This enjoyment cannot be contained by any discourse in the way Laclau and Mouffe understand it, because it does not yield to deliberate manipulations of meaning by which the chain of equivalences is supposed to be constructed. It can only be understood as discursive in the Lacanian sense of discourse that goes beyond the realm of meaning (the Symbolic): “The unconscious is a work whose raw material is *jouissance* and whose product is discourse,”⁴⁵ as Néstor Braunstein formulates it.

The distinction between “the people” and “~~the people~~” allows us to identify the fundamental error of the republican order: politically, ~~the people~~ is liberalism’s big Other, and, for that reason, it functions as the subject who is supposed to know. As Alenka Župančič describes it, “those who are obsessed with avoiding all deception, and naivety, are precisely those who ultimately blindly believe that the Other knows exactly what she is doing, that is, is perfectly consistent in her existence and actions.”⁴⁶ This is the assumption of the all-knowing sovereign that expresses its will in the act of elections. It would be true if there were only ~~the people~~, that is, the castrated subject of parliamentarism. This would be precisely the postmodern world of Derrida’s *différance* and Baudrillard’s indefinitely deferred debt,⁴⁷ where politics could operate smoothly through rearticulations of chains of equivalences. But there is also the people – the Real that does not know but is constantly disrupting ~~the people~~ and, along with it, the entire system of the republican regime, within the shell of which it has been born. The current name of this disruption is “populism.”

To avoid an uncontrolled invasion of the social by the political *jouissance* of the people, the mechanism of the new, republican castration establishing ~~the people~~ deposits the insignia of power – mainly the *phallus* – in the hands of the representatives. This is performed in the British Parliament: the Sovereign’s Sceptre (part of the Crown Jewels)⁴⁸ is necessary for the State Opening of Parliament, marking the beginning of every parliamentary session. Each House of Parliament has its mace, and it must be physically present in the chamber during its sittings. In the House of Commons, proceedings cannot legally take

⁴⁴ J. de Maistre, *Study on Sovereignty*, quoted in Loughlin, “The Concept of Constituent Power,” p. 220.

⁴⁵ Braunstein, *Jouissance*, p. 37.

⁴⁶ A. Župančič, *The Odd One In: On Comedy*, MIT Press, Cambridge, MA 2008, p. 84.

⁴⁷ J. Baudrillard, “Global Debt and Parallel Universe,” *Critical Theory* August 24, 2015, 10/16/1996-10/16/1996.

⁴⁸ By the way, let’s notice a psychoanalytical irony here: the term “jewels” colloquially refers to male genitalia.

place unless the mace is lying on the table of the House. Similarly, in the House of Lords, the mace must be put on the Woolsack or on the table of the House before the Lords can debate.

Incidentally, the association of the scepter with the king's authority is not a modern invention. Jean-Pierre Vernant invokes the story, initially told by Herodotus, of Maeandrius offering to the people the scepter of the tyrant Polycrates after his death; it neatly conveys the relationship between the appropriation of royal insignia by the people and the establishment of democratic equality:

At the death of the tyrant Polycrates, Maeandrius – named by the dead man to bear the *skeptron* after him – called all the citizens together and announced his decision to abolish the tyranny: “I never approved,” he told them in substance, “of Polycrates’ reigning as a despot over men who were his equals [*de-spozon andron homoion heauto*] [...] For myself, I lay down the *arche es meson*, at the centre, and I proclaim *isonomia* for you.”⁴⁹

Here is where populism gets it wrong: ~~the people~~ cannot just grab the *phallus* and run around with it as if it were an ordinary stick. It needs to be deposited with a proper authority. And not because of dignity and so on; on the contrary, dignity is just an ideological – Symbolic – construction erected to prop up the Real necessity. If ~~the people~~ grab the *phallus* and start playing with it in whatever way they want – that is, if an attempt is made to render the Real directly present within the Symbolic, identifying itself with “the people” plain and simple, unbarred – then bad things happen. We know very well the fate of the formation that Carl Schmitt belonged to in his belief that constituent power is directly incarnated in an ethnically homogenous community: to make this community “whole again,” they murdered several million innocent victims and were indirectly responsible for almost 100 million dead in the war they started. Therefore, any “defense of democracy” that would be more than just an ideological self-consolation needs to aim at transforming our political reality – that is, the political Symbolic-Imaginary construction we inhabit – in such a way as to accommodate the Real in a less disruptive manner. Even if total avoidance of these disruptions is impossible, we have some degree of freedom in this respect. According to Freud – in an astonishingly optimistic assumption of psychoanalysis – there can be, at least to some extent, *ego* where *id* was: *Wo Es war soll Ich werden*.

⁴⁹ Vernant, *The Origins of Greek Thought*, pp. 126–27.

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