

Gender, Populism and Constitutional Degradation

Conceptualising the Link between Constitutional Degradation and Gender Populism

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INTRODUCTION

The advancement of populist politics in Europe and in other parts of the world has engendered not just 'democratic backsliding',¹ but also the 'degradation of constitutional processes' captured here by the shorthand constitutional degradation.² This entire Special Section contends that gender is a crucial yet understudied prism through which to explain these interconnected developments. The present article provides a comparative theoretical framework for the entire

¹We adopt Stephen Haggard and Robert Kaufman's definition of democratic backsliding as 'a process in which democratically elected leaders weaken democratic institutions' and we focus on 'threats that come out of the constitutional process itself': S. Haggard and R. Kaufman, *Backsliding: Democratic Regress in the Contemporary World* (Cambridge University Press 2021) p. 2.

²M. Loughlin, 'The Contemporary Crisis of Constitutional Democracy', 39 *Oxford Journal of Legal Studies* (2019) p. 435 at p. 438.

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Special Section. It explains the pivotal role that gender populism has played in this process of constitutional degradation in both discursive and substantive terms with the rise of right-wing populism in Europe through specific constitutional manifestations of gender populism.

We conceptualise constitutional degradation as an attenuation of rights correlated with the undermining of the separation of powers in favour of the executive. In turn, this leads to the systematic weakening of the values and structures of the liberal constitutional order. Populist constitutional politics questions representative democracy as an effective and legitimate form of government, attacks the judiciary as a technocratic institution, and rejects social and political pluralism.³ We adopt a minimalist definition of populism as a ‘thin-centred ideology’ based on the irreconcilable opposition between ‘the pure people’ and ‘the corrupt elite’,⁴ but we focus on right-wing populism for three reasons. First, it has been the most successful populist variant in capturing power, especially in Europe in recent years; conversely right-wing populism’s anti-immigration agenda has also infiltrated the political program of non-populist parties. Second, right-wing populism is ideologically exclusionary, while ‘left-wing variants promise the inclusion of the excluded’.⁵ Finally, ‘all current versions of right-wing populism [display] an “obsession with gender” and sexuality’.⁶ Gender populism is defined as the set of discourses surrounding sex, gender, and sexuality broadly captured by the expression ‘the anti-gender movement’, which include ‘new forms of mobilization against gender and sexual equality’.⁷ While it is incorrect to identify anti-gender movements solely with right-wing populism, right-wing populism fully embraces anti-gender ideology, identifies with that movement, and often represents its institutional and political organisational version.

This article aims to understand recent constitutional developments under the rubric of gender populism across European democratic regimes and explain the

³W.A. Gaston, *Anti-Pluralism: The Populist Threat to Liberal Democracy* (Yale University Press 2018).

⁴C. Mudde and C. Rovira Kaltwasser, ‘Populism and (Liberal) Democracy: A Framework for Analysis’, in C. Mudde and C. Rovira Kaltwasser (eds.), *Populism in Europe and in the Americas: Threat or Corrective for Democracy?* (Cambridge University Press 2012) p. 1 at p. 8.

⁵C. de la Torre, ‘Introduction to Part III – The Populist Politicization of Inequalities and Differences’, in C. de la Torre (ed.), *Routledge Handbook of Global Populism* (Routledge 2018) p. 147.

⁶G. Dietze and J. Roth, ‘Right-Wing Populism and Gender: A Preliminary Cartography of an Emergent Field of Research’, in G. Dietze and J. Roth (eds.) *Right-Wing Populism and Gender* (Columbia University Press 2020) p. 7 at p. 8.

⁷D. Paternotte and R. Kuhar, ‘The Anti-gender Movement in Comparative Perspective’, in R. Kuhar and D. Paternotte (eds.), *Anti-Gender Campaigns in Europe – Mobilizing against Equality* (Rowman & Littlefield International 2017) p. 253.

intimate relationship between gender populism and constitutional degradation. Crucially, we argue that gender populism takes an ambiguous stance towards gender equality. On the one hand, right-wing populist politics has relied upon and promoted anti-gender discourses, policies, and laws, with the aim of clawing back at the equal citizenship and rights that women and LGBTQI+ people have progressively secured over the past few decades. Examples include the establishment of so-called LGBTQI+-free zones in Poland, the restrictions on the rights of same-sex parents in Italy, the proliferation of anti-trans legislation, the curbs on abortion in Poland and the US,⁸ and the banning of gender perspectives in Romania.⁹ On the other hand, populist leaders have also instrumentally deployed arguments ostensibly anchored in the promotion of gender equality to target diasporic groups through interventions with a clear constitutional dimension. For instance, the exclusion of Muslim women through the ban on wearing the face-veil in public in France,¹⁰ and the ban on wearing a full body swimsuit in municipal swimming pools in Belgium,¹¹ have a clear intersectional dimension.¹² The erosion of the equal citizenship of women, LGBTQI+ people, and diasporic groups have been long-standing goals of right-wing populist politics across Europe, but they have also been instrumental in attacking and subverting the liberal constitutional order itself, and the European constitutional project.

Yet the constitutional dimension of the rhetoric, policies, and legal interventions under the rubric of gender populism remains under-researched. This contribution aims to fill this gap by examining the intimate relationship between constitutional degradation and gender populism in right-wing populist political strategy. We sketch a comparative constitutional framework to map this symbiotic relationship. Our core argument is that the combined phenomena of constitutional degradation and gender populism sustain and advance one another, and that this symbiotic pattern can be observed throughout Europe and beyond. More precisely, we posit that constitutional degradation and democratic decay under right-wing populist regimes can be better understood through the

⁸*Dobbs v Jackson Women's Health Organization*, No. 19-1392, 597 U.S. (2022).

⁹E. Brodeală and G. Epure, 'Nature versus Nurture: "Sex" and "Gender" before the Romanian Constitutional Court: A Critical Analysis of Decision 907/2020 on the Unconstitutionality of Banning Gender Perspectives in Education and Research', 17 *EuConst* (2021) p. 724.

¹⁰ECtHR 1 July 2014, No. 43835/11, *S.A.S. v France*.

¹¹ECtHR 24 September 2024, No. 54795/21, *Missaoui and Akhandaf v Belgium*.

¹²The approach adopted here is in line with the 'intersectional ... feminisms dedicated to the structural and inseparable entanglements of different axes of oppression and inequalities such as race, class, and gender – which practice a variety of forms of resistance against White mainstream feminisms, who often side with right-wingers in their anti-immigration stance': Dietze and Roth, *supra* n. 6, p. 10.

weaponisation of gendered discourses of national belonging – both in terms of the populist ideological apparatus and strategic roadmap. Whereas it may be thought that gender populism is just a rhetorical device in populist attacks on liberal constitutionalism, our argument goes much further. We contend that the right-wing populist articulation of a gendered form of national belonging is pivotal to the ideological appeal and electoral success of right-wing populist forces and to legitimise their constitutional interventions. As a result, the corruption of the values and structures of the liberal constitutional order is instrumental in eroding the rights of women, LGBTQI+ people, and diasporic communities. At the same time, gender degradation in the constitutional arena provides right-wing populism with the tools and justification to undermine the liberal constitutional order.

Ultimately, we contend that the intimate relationship between gender populism and constitutional degradation is explained by a specific interplay of the foundational and structuring functions of constitutions. The foundational aspect of constitutions – as illustrated by Hanna Lerner – pertains to the identity-building expressive function of modern constitutions, which ‘serve as the charter of the polity’s identity’ and therefore to define who ‘We, the People’ are.¹³ Right-wing populism aims to redefine the collective identity of the people. The constitution’s structuring function, instead, relates to the establishment of a frame of government alongside the constitutional protection of human rights. Here we focus on the constitution’s key task of placing meaningful restraints on executive power to protect liberty and on populist efforts to weaken those restraints. As a result, the constitutional domain becomes a crucial battleground for populist leaders, especially once they have seized political power, in both symbolic and substantive terms.

Ideologically, populism seeks to subvert the liberal underpinnings of ‘constitutional patriotism’ as framed by Jürgen Habermas.¹⁴ The civic solidarity sustaining liberal constitutionalism ought to be supplanted with ideological narratives justifying the displacement of the intra-elite settlement, which is at the heart of any constitution. Substantively, populism aims to distort and weaken the constitution’s structural constraints on executive power; these constraints are the *raison d’être* of modern constitutions. Gender degradation then becomes a very useful tool to subvert liberal constitutional norms and praxis. In fact, gender functions as a central heuristic device of right-wing populist nationalist ideology, which is then manifested in populist constitutional politics. This is because gender (used here to encompass also sex and sexuality) is an identity-marker *transversal* to the collective identity of the polity, which is expressly built on notions of ethnicity,

¹³H. Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press 2011) p. 202.

¹⁴J. Habermas, *Between Facts and Norms* (Polity 1997).

language, religion, history, and culture. While gender is not usually directly associated with nationalist ideology, the highly emotive responses to gender politics make gender an essential ideological catalyst for right-wing populist mobilisation. As such, gender also becomes a crucial instrument to legitimise populist constitutional interventions aimed at subverting key tenets, structures, and guarantees of liberal constitutionalism.

This article explores two aspects of the intimate relationship between constitutional degradation and gender populism: *ideological drivers* and *constitutional manifestations*. First, we investigate the *ideological drivers*, understood as the discourses linking gender populism and constitutional degradation, to explain how right-wing populist movements legitimise their assault on both gender equality and the constitutional liberal order. We begin by focusing on the role of gender in right-wing populist framings of ‘the will of the people’, which rely on the populist construction of ‘the people’ through exclusionary nationalism and majoritarianism. Then, we analyse the way in which populist leaders conceptualise constitutional safeguards as an obstacle to the actualisation of ‘the will of the people’ – an obstacle that needs to be removed. This effectively equates constitutional degradation to the corrosion of the rule of law, especially in its substantive meaning. We conclude this section by exploring the populist conflation of anti-gender ideology with anti-cosmopolitanism aimed at attacking both so-called national liberal elites and EU institutions. Second, we examine the *constitutional manifestations* of gender populism, focusing on the attack on the equal citizenship of women, LGBTQI+ people and diasporic communities. Ultimately, this article brings in conversation the structuring and expressive functions of modern constitutionalism to conceptualise, critique, and challenge the symbiotic relationship between constitutional degradation and gender populism.

IDEOLOGICAL DRIVERS OF GENDER POPULISM

This section explores the ideological drivers of gender populism aimed at legitimising populist leaders’ claims to power across Europe, and their assault on the constitutional order once they have infiltrated state power. We argue that populist ideological drivers need to be understood in the context of the gendered populist reframing of ‘the people’ at the constitutional level.

Gender populism between exclusionary nationalism and majoritarianism

To understand populist ideological drivers pertaining to gender we build on the definition of populism as an ideology based on the irreconcilable opposition

between ‘the pure people’ and ‘the corrupt elite’.¹⁵ More specifically, we investigate the way right-wing populism deploys an exclusionary version of gender to re-frame ‘the pure people’. Then we explore the constitutional implications of this gendered discursive intervention for the expressive and structuring functions of the constitution. In fact, for populist political projects to extract ‘the “true people” from the empirical people’, they must first draw legitimacy from the liberal notion of ‘the People’ (capital P) understood as the ‘collective sovereign’ that underpins the liberal constitutional order itself.¹⁶

With respect to the constitution’s foundational function, populism and constitutionalism are not mutually exclusive; instead, populism appropriates the constitutional rubric through both ‘mimetism and parasitism’.¹⁷ While drawing on the language and structures of liberal constitutionalism, populism seeks to supersede the indirect nature of popular sovereignty at the heart of modern constitutional democracy: ‘populism competes for political power in order to merge the representative and the represented’.¹⁸ The merging of the right-wing populist leader with ‘the pure people’ necessitates the construction of ‘the pure people’ in ethno-cultural terms, reflecting a particular context at a particular time. In other words, the inclusionary legal fiction of ‘the People’, which incorporates everybody within the state territory and functions as the basis of political authority, is supplanted by a particular subset of people, ‘the people’ defined on culturally contingent terms.

The process of translating ‘the People’ into ‘the people’ that right-wing populists claim to represent – i.e. ‘the pure people’ – is quintessentially exclusionary. The manufacturing of ‘the pure people’ requires the exclusion of ‘the corrupt elites’ but also of those individuals and groups that do not conform with the socio-cultural parameters that populist leaders project on the country’s ‘silent majority’ they claim to represent.¹⁹ The othering at the heart of right-wing populist politics relies on manufacturing dividing lines between social groups: ‘by making cultural, linguistic, or ethnic differences more explicit, populist leaders contribute to turn those individual boundaries into something closer to a political border’.²⁰ Thus, populism manufactures a set of ‘enemies of the people’ inside and

¹⁵Mudde and Rovira Kaltwasser, *supra* n. 4, p. 8.

¹⁶N. Urbinati, *Me the People: How Populism Transforms Democracy* (Harvard University Press 2019) p. 77-79.

¹⁷G. Martinico, *Filtering Populist Claims to Fight Populism – The Italian Case in a Comparative Perspective* (Cambridge University Press 2022) p. 11-20.

¹⁸Urbinati, *supra* n. 16, p. 90.

¹⁹M. Follert, ‘The Silent Majority, Populism, and the Shadow Sides of Democracy’, 28 *Constellations* (2021) p. 455.

²⁰J.J. Olivas Osuna, ‘Populism and Borders: Tools for Constructing “the People” and Legitimizing Exclusion’, 39 *Journal of Borderland Studies* (2024) p. 203 at p. 204.

outside state borders to anoint the populist leader as the champion and defender of the ‘the pure people’.²¹

In this discursive construction, ‘the pure people’ are imagined as authentic, and so is their populist leader. Thus, the concept of ‘authenticity’ as ‘self-definition’ is pivotal to the populist re-imagining of ‘the people’ as the legitimate basis of political authority in their quest for merging the representative with the represented.²² Populist framings of legitimate political representation build on liberal constitutionalism but also imbue the notion of ‘the people’ with contingent ethno-cultural narratives presented as ‘authentic’. Ultimately, self-definition and the manufacturing of a purported similarity between the people and the populist leader underpin populist claims to political legitimacy: ‘the populist–public relationship involves an intertwining of public trust in the populist and public self-trust that can ultimately create a positive feedback loop of public trust’.²³ By short-circuiting the representative element of constitutional democracy, populism makes a powerful claim of political authenticity through unmediated forms of socio-cultural identification between the populist leader and the people. This identification between the populist leader – portrayed as authentic, autochthonous, rooted – and ‘the pure people’ results directly from the mistrust towards those characterised as the cosmopolitan, deracinated, even ‘degenerate’ liberal political elites, who are then re-cast as ‘the enemy of the people’ alongside non-national groups.

We now turn to the deployment of gender in ‘the arguments that populist theorists and leaders devise as they attempt to demonstrate that the legitimate people coincide with only “a part” of the whole’.²⁴ Populist politics is context-dependant, and so is the articulation of gender to frame the people/enemy dichotomy.²⁵ Nonetheless, right-wing populist movements across Europe have consistently deployed a gendered and racialised construction of ‘the people’. This phenomenon has been aptly characterised as a gendered form of ‘exclusionary populism’ built on ‘a mixture of ethno-nationalism and traditionalism’.²⁶ Populism and nationalism are ‘analytically distinct but not analytically

²¹T. Wojczewski, ‘Enemies of the People: Populism and the Politics of (In)security’, 5 *European Journal of International Security* (2020) p. 5.

²²M.S. Kuo, ‘Authenticity: The Ultimate Challenge in the Quest for Lasting Constitutional Legitimacy’, 41 *Oxford Journal of Legal Studies* (2021) p. 265 at p. 284–286.

²³D. Vitale and R. Girard, ‘Public Trust and the Populist Leader: A Theoretical Argument’, 11 *Global Constitutionalism* (2022) p. 548 at p. 570.

²⁴Urbiniati, *supra* n. 16, p. 81.

²⁵S. Abi-Hassan, ‘Populism and Gender’, in C. Rovira Kaltwasser et al. (eds.), *Oxford Handbook of Populism* (Oxford University Press 2017) p. 426 at p. 428.

²⁶A. Śledzińska-Simon, ‘Populists, Gender, and National Identity’, 18 *International Journal of Constitutional Law* (2020) p. 447 at p. 450.

independent' phenomena with respect to how they construe the notion of 'the people'.²⁷ Thus, authenticity, self-trust, and gender collide in shaping right-wing populist accounts of national belonging.

Discourses surrounding sex, gender, and sexuality – together with the social hierarchies that they create and sustain – provide powerful ideological impetus to populist politics because they pertain to *both* the private *and* public spheres. Gender politics has deep personal meaning and implications at individual, family, and community level, which in turn facilitate the process of identification between the populist leader and the people supporting populist claims of authenticity.

The fields of gender, family, and sexual politics are heavily loaded with emotions – fears, passions, impulses to protect – which right-wing populist actors trigger and transfer into affective patterns.²⁸

Populist assumptions about the 'moral superiority of "the common man"' and 'the feel-good politics' it entails, together with forms of nativism and appeals to 'the natural order', allow for sex, gender and sexuality to become 'ideal markers for distinguishing the good from the threat' – whether the threat is liberal elites or diasporic communities, or usually both.²⁹

Significantly, sex, gender and sexuality are identity-markers that are *transversal* to national identity and therefore not immediately associated with ethno-cultural forms of nationalism. But they also intersect with ethnicity, race, class, religion, education, political orientation, and other markers usually foregrounded in nationalist forms of belonging, including populist ones. In the face of profound intersectional social diversity and stratification,³⁰ right-wing populist constructions of 'the people' require the manufacturing of *both* the people's socio-cultural unity as the basis of political legitimacy *and* socio-cultural cleavages to identify the enemies of the people. Pointedly, 'populism is not only concerned with gender as an issue itself but also with gender as a meta-language for negotiating different conditions of inequality and power'.³¹ Thus, right-wing populism invokes a gendered version of national belonging to project a vision of ethno-cultural homogeneity of 'the people' based on authenticity and self-trust. Conversely, the

²⁷E. Brubaker, 'Populism and Nationalism', 26 *Nations and Nationalism* (2020) p. 44 at p. 45.

²⁸Dietze and Roth, *supra* n. 6, p. 11.

²⁹N. Spierings 'Why Gender and Sexuality Are Both Trivial and Pivotal in Populist Radical Right Politics', in Dietze and Roth (eds.), *supra* n. 6, p. 41 at p. 42-43.

³⁰F. Anthias, 'The Material and the Symbolic in Theorizing Social Stratification: Issues of Gender, Ethnicity and Class', 52 *British Journal of Sociology* (2001) p. 367.

³¹Dietze and Roth, *supra* n. 6, p. 8.

exclusion of so-called outsiders helps build electoral consensus, legitimise populist political agendas, and weaken substantive constitutional protections.

The articulation of 'the people' and 'the nation' is crucial to the concept of popular sovereignty, which underpins the liberal constitutional edifice.³² Right-wing populism narratively construes gendered hierarchies of national belonging to appropriate, redefine and ultimately short-circuit the notions of popular sovereignty and representative democracy. Populist leaders invoke nationalist tropes to imbue the concept of 'the pure people' with historical legitimacy and foster a sense of belonging, but ultimately 'nations and national projects are gendered projects'.³³

Nira Yuval-David and Floya Anthias identified :

Five ways in which women have tended to participate in ethnic and national processes and in relation to state practices:

1. as biological reproducers of the members of national collectives
2. as reproducers of the boundaries of national groups (through restrictions on sexual or marital relations)
3. as active transmitters and producers of the national culture
4. as symbolic signifiers of national difference
5. as active participants in national struggles.³⁴

We now explore how right-wing populism deploys sex, gender, and sexuality to manufacture 'the pure people' in nationalist terms, to harness the power of 'self-trust'. Gender functions as both an inclusionary (even if hierarchal) and exclusionary catalyst for right-wing populist mobilisation. On the one hand, it reinforces gender stereotypes, relations, hierarchies, and ultimately inequality by invoking national traditions and authenticity, and building on 'self-trust'. Gender populism separates 'the pure people' from the 'degenerate' cosmopolitan enemy within. On the other hand, populism harnesses the discourse of gender equality to manufacture a dividing line between the modern and 'civilised' autochthonous people and the 'uncivilised' outsiders as illustrated by the concepts of 'femonationalism'³⁵ and 'homonationalism'.³⁶

³²B. Yack, 'Popular Sovereignty and Nationalism', 29 *Political Theory* (2001) p. 517.

³³S. Walby, 'Gender, Nations and States in a Global Era', 6 *Nations and Nationalism* (2000) p. 523.

³⁴N. Yuval-Davis and F. Anthias, 'Introduction' in N. Yuval-Davis and F. Anthias (eds.), *Woman-Nation-State* (Palgrave Macmillan 1989) p. 1 at p. 7.

³⁵S.R. Farris, *In the Name of Women's Rights – The Rise of Femonationalism* (Duke University Press 2017).

³⁶J.K. Puar, *Terrorist Assemblages: The Rise of Homonationalism in Queer Times* (Duke University Press 2007).

The symbiotic relationship between gender populism and constitutional degradation is justified in both nationalist and majoritarian terms.

First, right-wing populism instrumentalises sex, gender and sexuality to discipline the members of the political community within the boundaries of the state. Gender populism demands conformity to this neo-traditionalist gendered hierarchy centred on the 'heteronormative nuclear family as the only model of social organization' from the members of the ascribed ethno-cultural nation.³⁷ For instance, we have witnessed a frontal assault on LGBTQI+ rights under the right-wing populist governments in Poland, Hungary, and Italy. But gender populism also ostracises groups not deemed to belong to the ethno-cultural nation due to their religion, ethnicity, language, and culture by 'claiming to be in possession of a more advanced gender regime'.³⁸ For instance, right-wing populists berate Islam for oppressing and excluding Muslim women, but then seek to ostracise Muslim women from public space on account of their dress. These populist ideological drivers hinge on a gendered and racialised way of imagining the unity of 'the people' by invoking an imagined national past: patriarchal, heteronormative, and ultimately ethno-cultural. As Helen Irving has illustrated, theories of constitutional identity must also account for gender (not just race, ethnicity, and class) as a relevant difference because 'women have historically also articulated a constitutional identity – an understanding of constitutional citizenship – that is specifically a claim for both gender neutral *and* gendered equality'.³⁹ Irving's approach (extended to include also sexuality and gender identity for the purpose of our article) helps explain populism's reliance on gender politics to mobilise political support along the lines of both identity and difference. It also elucidates how gender populism is instrumental in legitimising populist assaults on liberal constitutional democracy, which are integral to constitutional degradation.

Second, gender populism is also legitimised in majoritarian terms and, in turn, legitimises populist majoritarian claims. This is because 'populism is both a claim about the unity of the people and a claim to majority power within a particular representative frame'.⁴⁰ Populist leaders rely on majoritarianism to legitimise their agenda through a crude notion of the democratic principle equated solely to

³⁷G. Dietze, 'Right-Wing Populism and Gender', in M. Oswald (ed.), *The Palgrave Handbook of Populism* (Palgrave 2022) p. 277 at p. 278.

³⁸J. Roth, 'The Gender Politics of Right-Wing Populism and Intersectional Feminist Contestations', in Oswald, *supra* n. 37, p. 291 at p. 295.

³⁹H. Irving, 'Constitutional Identity Theory and Gender: The Missing Referent', *Sydney Law School Research Paper No. 17/56* (11 July 2017), <https://ssrn.com/abstract=3000165>, visited 28 February 2025.

⁴⁰Urbinati, *supra* n. 16, p. 79.

electoral majority.⁴¹ While free and fair elections remain the *conditio sine qua non* for a liberal constitutional democracy, they are not sufficient – substantive constitutional protections remain indispensable.⁴² We focus on the constitutional actions of populist leaders understood as ‘elected officials and contenders . . . who deploy majoritarian appeals to undermine the institutional checks and protections of liberal democracy’.⁴³ More specifically, right-wing populists in power assert that the majority of ‘the people’ support *both* a traditional view of gender roles within the ascribed ethno-cultural nation *and* the condemnation of perceived gender inequalities within diasporic groups. Thus, populism deploys majoritarian claims to legitimise both its gender politics and its constitutional interventions in this domain.

Gender degradation as rule of law corrosion

The deployment of nationalist and majoritarian arguments to sustain gender populism is instrumental in subverting the liberal constitutional order not just in its foundational function but also in its structuring function. The populist framing of constitutional guarantees as a restriction on ‘the will of the people’ – i.e. ‘the silent majority’ for whom the populist leaders claim to speak – is devised to weaken those safeguards. The erosion of constitutional safeguards ultimately equates to rule of law corrosion, i.e. the undermining of counter-majoritarian constitutional values and institutions.⁴⁴ The constitutional casualties of populism are *in primis* courts and fundamental rights as the foremost expressions of liberal counter-majoritarian checks on executive power and ‘constitutional patriotism’. Thus, in the populist playbook, courts lack democratic legitimacy, which majoritarianism construes as purely electoral, while constitutional rights lack the particularistic legitimacy based on the populist definition of ‘the people’ in exclusionary terms.⁴⁵

⁴¹We do not equate ‘majoritarianism’ with ‘populism’; we argue that populism weaponises majoritarianism as a tool to legitimise its strategic political objectives. See M. Tushnet, ‘What’s the Problem with Populism?’, 19 *EuConst* (2023) p. 182 at p. 183.

⁴²Tom Ginsburg and Aziz Huq identify ‘three such “floor” requirements for a working democracy’: ‘free and fair elections’, ‘liberal rights of speech and association’, and ‘the stability, predictability, and publicity of a legal regime [i.e.] *rule of law*’ in T. Ginsburg and A. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) p. 9.

⁴³Haggard and Kaufman, *supra* n. 1, p. 2.

⁴⁴B. Bugarič, ‘Central Europe’s Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism’, 17 *International Journal of Constitutional Law* (2019) p. 597.

⁴⁵J. Waldron, ‘Rule-of-Law Rights and Populist Impatience’, in G.L. Neuman (ed.), *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge University Press 2020) p. 43.

Right-wing populist leaders justify their encroachment on the rights of historically marginalised groups such as women and LGBTQI+ individuals by framing their demands for recognition as both minoritarian (trumping the will of the people, i.e. the majority) and anti-national (trumping the will of the 'pure' people). Conversely, right-wing populist leaders weaponise certain gendered cultural norms of diasporic communities to construct another majority-minority divide within the polity, reinforce the fear of threats from both 'anti-national' minority groups within and from across the border, and legitimise exclusionary laws and policies that stem from their anti-immigration, ultra-nationalist agenda. Gender populism not only affects the constitution's foundational aspect but also its structuring function.

Populist leaders portray constitutional constraints on their political agenda as undemocratic and even unpatriotic. Exclusionary nationalism and majoritarianism help conjure the populist image of 'the constitutional straitjacket' thwarting the so-called 'will of the people', which justifies populist-driven rule of law corrosion.⁴⁶ The 'will of the people', however, is a manufactured and retrofitted rhetorical device underpinned by electoral success that extends well beyond any legal notion of parliamentary supremacy in the liberal sense. It is a concept designed to bolster the populist version of popular sovereignty, one that supersedes its indirect nature under liberal constitutionalism, and that instead promises to establish a direct and unmediated relationship between the populist leader and 'the people'.⁴⁷ To focus on the nationalist and majoritarian underpinnings of gender populism is to understand simultaneously the ideological engine of populist politics and its instrumental approach to constitutional subversion. Ultimately, gender degradation in the constitutional domain requires the degradation of liberal constitutional values, and vice versa.

The relationship between populism and constitutionalism is a complex one. Populist leaders accept constitutionalism in so far as it is a tool for efficient governance bestowing authority and legitimacy on those who govern. 'The constitution of the people has a productive sovereign force because it grounds legitimacy in consent; this, in turn, obligates each subject to obey the law'.⁴⁸ In this respect, as Nicola Lacey illustrates,

The availability of a purely formal conception of the rule of law – the rule of law not merely as useful 'knife' (Raz 1979) but even as 'weapon' (Maravall 2003) – may become a tool in the hands of the populist constitutionalist. Indeed,

⁴⁶Martinico, *supra* n. 17, p. 20-22.

⁴⁷M. Canovan, 'Taking Politics to the People: Populism and the Ideology of Democracy', in Y. Mény and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave Macmillan 2022) p. 25 at p. 33-38.

⁴⁸Urbinati, *supra* n. 16, p. 79.

the rule of law not only constrains but enables governmental power, and populist governments need law as much as any other regime. ... this amounts to a corruption of the rule of law, what we might call rule by law rather than the rule of law, although the specific form that subversion takes will vary across time and place.⁴⁹

We argue that populism is ultimately *instrumental* in its relation to constitutionalism: while recognising its uses, populist leaders ‘downplay ... the constitution’s status as a rigid higher law’ and engage in frequent constitutional revisions.⁵⁰ This frequency has clear implications for the constitution’s structuring function, as repeated substantive changes increase the unpredictability of the constitutional framework, and its instability. Symbolically, frequent constitutional change also delegitimises and weakens the norms, values, and principles that the existing intra-elite settlement at the heart of the constitution was designed to enshrine, crystallise, and safeguard over time.

Populism’s acceptance of constitutionalism and rule of law constraints is indeed partial and is explained by a key element of the populist ‘repertoire’ – *anti-institutionalism*. It is ‘an elaboration ... of the vertical opposition between people and elite and/or the horizontal opposition between inside and outside’.⁵¹ Populist anti-institutionalism is inextricably intertwined with the continuous attempts to supersede the indirect nature of popular sovereignty. In fact, it is ‘in the gap between sovereignty and the government, which operates only through representation’ that populism infiltrates.⁵² Populist efforts to merge the representative with the represented ignite a reconceptualisation of liberal constitutional structures and representative democracy:

Populism distrusts the mediating functions of institutions ... They often claim to promote direct rather than representative democracy, most often through majoritarian procedures like referenda or plebiscites, but sometimes through experiments with ‘horizontal’ – ‘distributed, participatory and networked’ ... – forms of political involvement.⁵³

Therefore, in the unmediated populist constitutional space the ideological conflation of the governed with those who govern underpins populist claims for

⁴⁹N. Lacey, ‘Populism and the Rule of Law’, 15 *Annual Review of Law and Social Science* (2019) p. 79 at p. 86–87.

⁵⁰P. Blokker, ‘Populism as a Constitutional Project’, 17 *International Journal of Constitutional Law* (2019) p. 536 at p. 545–546.

⁵¹R. Brubaker, ‘Why Populism?’, 46 *Theory and Society* (2017) p. 357 at p. 364.

⁵²Urbini, *supra* n. 16, p. 85.

⁵³Brubaker, *supra* n. 51, p. 365–368.

political unity – claims destined to remain unfulfilled. Gender politics is instrumental to manufacturing two key pillars of right-wing populist discourse: the political unity of the nation based on selective exclusion *and* the threats to this idea of the nation. This approach is not just supremely unhelpful in resolving forms of social, political, and economic conflict, but also pernicious as it only exacerbates societal cleavages and polarisation.

Gender populism, anti-Europeanism, and rule of law corrosion

The relationship between gender populism and rule of law corrosion across Europe is not solely explained by comparing different national experiences but also requires careful consideration of the supranational European dimension. We argue that the anti-gender ideology of right-wing populist forces across Europe is both an instrument and a justification to attack European institutions aimed at ideologically subverting European ‘constitutional patriotism’,⁵⁴ and substantially eroding further rule of law constraints.

The anti-Europeanism of right-wing populist forces is rooted ideologically in forms of anti-cosmopolitanism, anti-globalisation, anti-multiculturalism, and ultimately authoritarianism couched in nationalist and anti-institutionalist arguments.⁵⁵ In fact, right-wing populism’s inherently anti-pluralistic, exclusionary and *particularistic* notion of political community is at odds with transnational forms of governance. Thus, populist parties portray supranational institutions as an obstacle to the realisation of the ‘will of the people’; they weaponise a crude understanding of the notions of ‘authenticity’ and ‘direct democracy’ pitted against ‘cosmopolitanism’ and ‘internationalism’. As James Ingram aptly reminds us, ‘populism is often anti-cosmopolitan and cosmopolitanism is often antipopular ... but there are good reasons for not simply presuming their incompatibility’.⁵⁶ In fact, the anti-gender movement is itself transnational and aptly described by Silvia Suteu as a form of ‘dark cosmopolitanism’.⁵⁷ Notwithstanding the global network of right-wing populist forces, populists display a strong anti-European rhetoric and opposition to supranational institutions, which they disparage as technocratic, unrepresentative, and

⁵⁴M. Kumm, ‘The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History’, 6 *German Law Journal* (2005) p. 319 at p. 354.

⁵⁵P. Blokker, ‘Populist Nationalism, Anti-Europeanism, Post-nationalism, and the East-West Distinction’, 6 *German Law Journal* (2005) p. 371 at p. 389.

⁵⁶J. Ingram, ‘Populism and Cosmopolitanism’, in Rovira Kaltwasser et al., *supra* n. 25, p. 644 at p. 645.

⁵⁷Silvia Suteu used the expression ‘dark cosmopolitanism’ to describe the international anti-gender networks during the discussion at a parallel session of the 2024 Annual Meeting of the International Association of Public Law in Madrid on 8 July 2024.

oligarchic. Ironically, the anti-gender-movement brings together actors who find representation within the European Parliament.⁵⁸

Gender populism seeks to advance strategically by collapsing in ideological terms the notion of corrupt anti-national liberal elites with forms of transnational governance. In this respect, the anti-gender rhetorical toolkit has proven a useful instrument to attack both intergovernmental and supranational institutions that are capable of constraining populist leaders and their policies. In the populist playbook, the ‘gender revolution’ aims at dismantling the centrality of the monogamous heterosexual family and gender binary based on biological sex. It is presented as a covert operation in which an insidious network of individuals and institutions are complicit. ‘Corrupt elites play a key role in this process, and international institutions, be it either Europe or the United Nations, are a key vehicle of “gender ideology”, undermining the principles of national sovereignty and democratic deliberations’⁵⁹ – for instance, the large demonstration against sexual education and information held in Warsaw in 2015 when gender was defined on some banners as the ‘Ebola coming from Brussels’.⁶⁰

⁵⁸F.G. Santos and D. Geva, ‘Populist Strategy in the European Parliament: How the Anti-gender Movement Sabotaged Deliberation about Sexual Health and Reproductive Rights’, 9 *European Journal of Cultural and Political Sociology* (2022) p. 475 at p. 501; J. Kantola and E. Lombardo, ‘Strategies of Right Populists in Opposing Gender Equality in a Polarized European Parliament’, 42 *International Political Science Review* (2021) p. 565 at p. 579. The 2024 European elections, held between 6 and 9 June, marked a significant shift toward the right across the European Parliament. The European People’s Party (EPP) maintained its position as the largest political group, while the Socialists and Democrats (S&D) experienced a decline, though they retained second place. Meanwhile, Renew Europe and the Greens suffered notable losses. In Italy, Fratelli d’Italia achieved a decisive victory, reflecting a broader trend of growth for populist and right-wing parties across Europe, that can be recognised also in France where Rassemblement National posted unprecedented results, in Germany where the far-right outperformed the party of Chancellor Scholz, in Austria with the Freedom Party, in Poland where the far-right emerged as the second-largest political force, and in Portugal where for the first time the far-right gained representation in the European Parliament. Despite these gains, populist and sovereignist parties do not hold an absolute majority in the European Parliament, so their future influence will depend on their ability to form strategic alliances with other political forces: see C. Mudde, ‘The 2024 EU Elections: The Far Right at the Polls’, 4 *Journal of Democracy* (2024) p. 121 at p. 134, J. Jansen and T. Nguyen, ‘Between Continuity and a Perforated “Cordon Sanitaire”: On the 2024 European Elections’, *Verfassungsblog*, 13 June 2024, <https://verfassungsblog.de/between-continuity-and-a-perforated-cordon-sanitaire/>, visited 28 February 2025, G. Ivaldi and E. Zankina, ‘Conclusion for the Report on 2024 EP Elections under the Shadow of Rising Populism’, *populismstudies.org*, 29 October 2024, <https://www.populismstudies.org/conclusion-for-the-report-on-2024-ep-elections-under-the-shadow-of-rising-populism/>, visited 28 February 2025.

⁵⁹D. Paternotte and R. Kuhar, ‘“Gender Ideology” in Movement: Introduction’, in Kuhar and Paternotte, *supra* n. 7, p. 1 at p. 7.

⁶⁰E. Korolczuk and A. Graff, ‘Gender as “Ebola from Brussels”: The Anticolonial Frame and the Rise of Illiberal Populism’, 43(4) *Journal of Women in Culture and Society* (2018) p. 797 at p. 821.

This ideological framing strongly links gender populism and anti-Europeanism. It results from the EU's growing commitment to gender equality in recent years – a commitment achieved through a combination of hard law, soft law, and harmonisation processes under the Gender Equality Strategy 2020-25.⁶¹ In terms of hard law, some of the most important recent developments are the 2023 EU Directive on pay transparency,⁶² and the 2024 Directive on violence against women and domestic violence.⁶³ The EU's commitment to equality on the basis of sex, gender, and sexuality has also progressively extended to LGBTIQ+ rights through the LGBTIQ+ Equality Strategy 2020-2025. The backlash against the EU's commitment to gender equality has been pronounced, and gender populism has made significant inroads ideologically and strategically. For instance, in the 2019 European elections, the percentage of parliamentarians explicitly opposed to gender equality, women's sexual and reproductive rights, sex education, LGBTIQ+ rights, and the Istanbul Convention reached around 30%, increasing significantly from the previous legislature.⁶⁴

Adherence to the values of sexual and gender equality among EU member states has been uneven due to the significant political and territorial cleavages within the Union. Some member states have now institutionalised forms of gender populism at the national level and sought to counter EU-level gender equality initiatives. The approval process of the EU Directive on combatting violence against women and domestic violence is a telling instance of competing visions of gender equality within the Union. Several member states refused to support the ground-breaking amendments 103 and 104 on the definition of rape based on the lack of explicit consent. These amendments were modelled on the Spanish rape law that provides that only an explicit and clear 'yes' constitutes consent to sexual acts.⁶⁵ Hungary, the Czech Republic, Bulgaria, Slovakia, Latvia,

⁶¹See https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en, visited 28 February 2025. For key commentary on the Gender Equality Strategy 2020-2025 see P. Debusscher, "The EU Gender Equality Strategy 2020-2025: the Beginning of a New Season?", in B. Vanhercke et al. (eds.), *Social Policy in the European Union: State of Play 2022: Policymaking in a Permacrisis* (Brussels ETUI 2022) p. 91 at p. 110; E.L. Maes and P. Debusscher, 'The EU as a Global Gender Actor: Tracing Intersectionality in the European Gender Action Plans for External Relations 2010–2025', 31 *Social Politics: International Studies in Gender, State & Society* (2024) p. 49 at p. 71.

⁶²EU Directive 970/2023.

⁶³EU Directive adopted on 7 May 2024.

⁶⁴E. Zacharenko, 'The Neoliberal Fuel to the Anti-gender Movement', *International Politics and Society*, 30 September 2019, <https://www.ips-journal.eu/regions/europe/the-neoliberal-fuel-to-the-anti-gender-movement-3747/>, visited 28 February 2025.

⁶⁵First-reading report: 2022/0066(COD); Committees responsible: FEMM and LIBE (Rule 58); Co-rapporteurs: Frances Fitzgerald (EPP, Ireland), Evin Incir (S&D, Sweden). See [https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/760440/EPRS_ATA\(2024\)760440_EN](https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/760440/EPRS_ATA(2024)760440_EN).

and Lithuania explained their lack of support for the amendments on the grounds that they do not subscribe to the values and principles of the Istanbul Convention underpinning the amendments. Others – Portugal, Malta, Estonia, France, and Germany – opposed the amendments on technical legal grounds, arguing that sexual violence does not fall under EU competence. This legalistic approach stemmed from a restrictive interpretation of Article 83 TFEU, which includes the sexual exploitation of women and minors under the crimes within EU competence but not rape or sexual violence.

The outcome of the 2024 European Parliament elections⁶⁶ has been crucial with respect to gender equality given the growth of far right parties and their ongoing mobilisation around sexuality and reproduction. Populist electoral campaigns have focused on the ‘traditional family’ and erased the rights of other families. They have espoused a biological understanding of sex to weaponise women’s rights against LGBTIQ+ rights, and simultaneously invoked a constructed notion of Western gender equality for anti-immigration purposes.⁶⁷

Paradoxically, EU institutions have provided a key forum for transnational populist alliances aimed at subverting the functioning of the EU from within.⁶⁸ Poland represents a significant example of the convergence of gender populism, anti-gender mobilisation, and governmental action aimed at gender degradation under the previous right-wing populist regime. Following the electoral change of 2023, Poland will be a key country to observe to assess the trajectory and traction of gender populism. At the time of writing, Poland scores the lowest of all EU member states in the Rainbow Index with a score of 15 (59 points below the top score of 76 by Belgium and Denmark); the Rainbow Map and Index are the state of the art of LGBTI rights reported per year by ILGA-Europe – an independent, international, non-governmental organisation, actively working in Europe and

pdf, visited 28 February 2025. For the research on the definition of rape in the member states, see European Parliamentary Research Service, *Definitions of Rape in the legislation of EU Member States*, Members’ Research Service, PE 757.618 (January 2024), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2024/757618/EPRS_IDA\(2024\)757618_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2024/757618/EPRS_IDA(2024)757618_EN.pdf), visited 28 February 2025. For the procedural history, see [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0066\(COD\)&cl=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0066(COD)&cl=en), visited 28 February 2025.

⁶⁶See *supra* n. 58.

⁶⁷M. Macaluso, ‘Partiti populistici, diritti e uguaglianza di genere’, 11 *Società Mutamento Politica* (2020) p. 44.

⁶⁸S. Volk, ‘Speaking for “the European People”? How the Transnational Alliance Fortress Europe Constructs a Populist Counter-Narrative to European Integration’, 66 *Politique européenne* (2019) p. 149; M. Zulianello and E. Gahner Larsen, ‘Populist Parties in European Parliament Elections: A New Dataset on Left, Right and Valence Populism from 1979 to 2019’, 71 *Electoral Studies* (2021); J. Kantola and C. Miller, ‘Party Politics and Radical Right Populism in the European Parliament: Analysing Political Groups as Democratic Actors’, 59 *Journal of Common Market Studies* (2021) p. 801.

Central Asia.⁶⁹ More broadly, it remains to be seen whether the convergence of anti-gender ideology and populist politics will succeed in infiltrating EU institutions and undermining them from within, while galvanising their supporters at the local and national level.

CONSTITUTIONAL MANIFESTATIONS OF GENDER POPULISM

This section investigates how gender populism manifests itself in both its expressive and structuring constitutional dimensions by exploring two sets of case studies across Europe. First, we focus on the impact of gender populism on the growing restrictions on the reproductive rights of LGBTQI+ individuals. Second, we analyse populist efforts to marginalise diasporic communities through the criminalisation of female genital cutting (FGC) and the face-veil in the name of a Western notion of gender equality.

Gender populism and reproductive rights 'beyond' the natural order

The issue of reproductive rights occupies a unique position in framing of the relationship between right-wing populism and gender. It is closely linked to the populist idea of 'restoring' an idealised 'natural order', which includes but is not limited to sex, gender, and sexuality.⁷⁰ Gender populism articulates the notion of 'nature' in identitarian terms both in the public and private spheres to enhance feelings of national belonging; the idea of the 'natural order' shapes both the national homeland defined in ethno-cultural terms and the family framed as monogamous, heterosexual, and marriage-based. Thus, biopolitical reproduction becomes central to the populist upkeep of both the nation and the family. Right-wing populist leaders condemn and oppose any forms of biological reproduction beyond the heteronormative paradigm labelling them as 'against the order of nature'. The populist treatment of the LGBTQI+ reproductive sphere represents an ideal lens through which to understand the interplay of gender populism and constitutional degradation in both its foundational and structuring dimensions.

Gender populism distorts the interpretation of key fundamental constitutional values at the heart of the European liberal constitutional heritage, *in primis* that of human dignity, to prevent the recognition of gender and sexual diversity. Gender populism weakens these values by eroding their inclusive scope, thus contributing

⁶⁹See ILGA Europe, *Rainbow Europe Map and Index 2023*, 11 May 2023, <https://www.ilga-europe.org/report/rainbow-europe-2023/>, visited 21 March 2025.

⁷⁰E. Baro, 'Personal Values Priorities and Support for Populism in Europe – An Analysis of Personal Motivations Underpinning Support for Populist Parties in Europe', 43 *Political Psychology* (2022) p. 1197.

to substantive rule of law corrosion. On the one hand, right-wing populist parties oppose women's rights and their self-determination by targeting the so-called '*gender habeas corpus*'.⁷¹ They promote traditionalist family values to increase natality rates within the heterosexual members of the ascribed ethno-cultural nation at the expense of individual bodily autonomy. On the other hand, they do not recognise *any* reproductive rights for LGBTQI+ individuals. More specifically, in countries where right-wing populist parties have seized power, the crucial legal question is whether the notion of reproductive rights applies *at all* to individuals outside the heterosexual cis-gender paradigm.

Italy provides a clear illustration of the relationship between gender populism and the restriction of LGBTQI+ reproductive rights. Three constitutional strategies inform the denial of equal access to reproductive rights for LGBTQI+ individuals.

First, literal and conservative readings of the text of the 1948 Constitution of Italy have prevented the extension of reproductive rights to LGBTQI+ individuals. Article 29 of the Constitution recognises the rights of the family defined as 'a natural institution founded on marriage'.⁷² While deemed anachronistic by many, this clause has been invoked to prevent the recognition of marriage equality for same-sex couples. In 2010 the Italian Constitutional Court deployed Article 29 to define a legally valid marriage under Italian law: while 'true that the concepts of family and marriage cannot be considered "crystallized" with reference to the time when the Constitution came into force', constitutional interpretation cannot 'affect the core of the norm, modifying it in such a way as to include in it phenomena and issues not considered in any way when it was issued'.⁷³ This interpretation of the constitutional text effectively precluded marriage equality by deploying interpretative techniques described in the American context as 'faux originalism'.⁷⁴

Italy is not unique in this privileged constitutional treatment of the heterosexual family; many other constitutions contain similar provisions. This pattern of foregrounding a neo-traditionalist family paradigm, however, has been amplified by the recent electoral successes of right-wing populist parties and their constitutional interventions fostering so-called 'traditional' family values. For

⁷¹F. Rescigno, *Per un habeas corpus di genere: salute, autodeterminazione femminile, sex and gender medicine* (Editoriale scientifica 2022).

⁷²The official English translation of the Italian Constitution is available at https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf, visited 28 April 2024.

⁷³Italian Constitutional Court, judgment No. 138/2010.

⁷⁴R.A. Posner and E.J. Segall, 'Faux Originalism', 20 *Green Bag* 109 (2016).

instance, Hungary's Fundamental Law adopted in 2012,⁷⁵ defines marriage as 'the basis of the nation's survival', and the union between a man and a woman,⁷⁶ with a 'commitment to have children'.⁷⁷ Hungary provides a clear illustration of the gendered forms of belonging at the intersection of the public and private domains that right-wing populism promotes. Gender populism treats the family as a makeshift cover for a political power project ultimately aimed at capturing state power.⁷⁸ More specifically, this kind of constitutional framing not only strengthens populism's ideological primacy of the heterosexual family as the basis of the ethno-cultural nation, but it is instrumentally deployed to deny the equal citizenships of LGBTQI+ individuals.

Second, the non-recognition of same-sex marriage at the constitutional level has had a cascading effect on LGBTQI+ reproductive rights under right-wing populism. Importantly, the expression 'reproductive rights' can be misleading if equated with a 'right to reproduction'. The latter has been attacked by right-wing populists because it would extend the right to reproduction to all individuals beyond (married) heterosexual couples composed of cis people. Moreover, in the European constitutional context it is more accurate to refer to 'rights related to reproduction', which include voluntary termination of pregnancy, protection against obstetric violence, protection of reproductive health in terms of prevention and contraception, etc.⁷⁹ In line with this approach, the Italian Constitutional Court adjudicated a case on heterologous fertilisation in 2014 and clearly stated that 'the choice of [a] couple to become parents and to form a family that also includes children constitutes an expression of the fundamental and general freedom of self-determination'.⁸⁰ This is a freedom stemming from the constitutional articles protecting fundamental rights, equality, and private and

⁷⁵The Fundamental Law of Hungary (2011), see the consolidated version in English, <https://njt.hu/jogsabaly/en/2011-4301-02-00>, visited 28 February 2025.

⁷⁶Art. L.1, Hungarian Constitution (2011).

⁷⁷Ibid., Art. L.2.

⁷⁸G. Serughetti, 'Genere, razza, sessualità: Il populismo di destra come politica dell'identità', in GenIUS, *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, online first, 13 February 2023; G. Serughetti, *Il vento conservatore. La destra populista all'attacco della democrazia* (Laterza, 2021).

⁷⁹Important judgments by the ECtHR, for instance, on abortion *A.B., C. v Ireland* 2010 (25579/05), *P. and S. v Poland* 2012 (57375/08), *S.F.K. v Russia* 2022 (5578/12), *M.L. v Poland* 2023 (40119/21); on obstetric violence (actually the Court does not use this term): *Ternovsky v Hungary* 2010, *Dubská and Krejzová v the Czech Republic* 2016; *Hanzelkovi v the Czech Republic* 2014, *Kononova v Russia* 2014; on sterilisation, *Y.P. v Russia* 2022 (43300/13), *V.C. v Slovakia* 2011 (18968/07).

⁸⁰Italian Constitutional Court, judgment No. 162/2014, esp. p. 6 *Considerato in diritto*, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/162-2014_en.pdf, visited 28 February 2025.

family life, although it does not necessarily imply the creation of a new fundamental right. Hence, the public duty of vertical solidarity to implement all necessary measures to ensure individual access to reproduction is limited by other constitutional values (such as human dignity, gender equality, the right to health, and the protection of minors). The ruling, however, only applies to heterosexual couples and does not entitle LGBTQI+ individuals to reproductive rights in Italy.

Finally, the European dimension to LGBTQI+ reproductive rights, including the rulings of the European Court of Human Rights, has been unable to displace the discrimination against LGBTQI+ individuals in reproductive matters at member state-level. Article 8 of the ECHR covers the right to decide whether to have children only in specific situations, e.g. the right not to undergo forced sterilisation, which has been crucial to the Court's jurisprudence on transsexuality.⁸¹ However, the assertion of a positive right to parenthood has been more problematic, as seen in the case law on adoption. In terms of medically assisted procreation, the Court has interpreted the right to access to procreation under Article 8 by deploying a vast margin of appreciation to recognise the divergence among European legal systems, and respect national approaches to reproduction regulation. It seems that the Court has sought to avoid being entangled in domestic partisan politics and antagonising the governments of member states on the sensitive issue of reproductive politics.⁸² Thus, it remains impossible for citizens of member states to rely on Article 8 to require their home state to provide parental rights to groups excluded under national legislation. In fact, the Court went as far as recognising the support and protection of the traditional family by member states as a valid aim.⁸³

Amidst the lack of protection of LGBTQI+ reproductive rights at the European level and the hostile constitutional terrain at national level, in February 2023 Italy's right-wing government introduced a Bill to create a universal crime of surrogacy to pursue Italian citizens who undergo this medical procedure abroad.⁸⁴

⁸¹Guide on the case law of the European Convention on Human Rights of LGBTI persons, updated 31 August 2024, https://ks.echr.coe.int/documents/d/echr-ks/guide_lgbti_rights_eng, visited 22 March 2025. See also R. Lee, 'Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States' Laws Regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans People', 33 *Berkeley Journal of International Law* (2015) p. 113 at p. 115; A. Sharpe, *Transgender Jurisprudence* (Routledge 2007).

⁸²See for example ECtHR 4 December 2007, No. 44362/04, *Dickson v The United Kingdom*; ECtHR 3 November 2011, No. 57813/00, *S.H. and Others v Austria*.

⁸³ECtHR 7 November 2013, Nos. 29381/09 and 32684/09, *Vallianatos v Greece*.

⁸⁴Bill N. 887. G. Gatta, 'Surrogazione di maternità come "reato universale"? A proposito di tre proposte di legge all'esame del Parlamento', *Sistema penale* (2023). Draft Bills C. 342 Candiani, C. 887 Varchi e C. 1026 Lupi, see www.camera.it, visited 28 February 2025.

However, surrogacy has been a criminal offence in Italy since 2004, while assisted reproductive technologies like IVF have only been available to heterosexual couples.⁸⁵ From a constitutional perspective, the idea that surrogacy is incompatible with equality, understood as anti-discrimination but also anti-subordination, is well-established. Italy's Constitutional Court has affirmed that surrogacy irreconcilably conflicts with human dignity.⁸⁶ But the populist creation of a universal crime of surrogacy goes much further.

On 4 November 2024, Italy enacted Law No. 169, making surrogacy a universal crime. However, the provision criminalising Italian citizens undergoing surrogacy abroad conflicts with both national and international legal principles. The revised Article 12, paragraph 6, of the 2024 legislation now states:

Whoever, in any form, engages in, organises, or promotes the commercialisation of gametes, embryos, or surrogacy shall face imprisonment for three months to two years and fines ranging from €600,000 to €1,000,000. If these acts are committed abroad concerning surrogacy, Italian citizens shall be punished under Italian law.

This measure aims to disrupt 'reproductive tourism' to surrogacy-friendly jurisdictions. Yet, from its inception, the law has faced substantial criticism regarding both its legitimacy and efficacy.

One of the primary concerns about the law relates to its alignment with fundamental principles of criminal law. While the term 'universal crime' has gained traction in political discourse, it is not codified within Italian criminal law. Extending the criminalisation of surrogacy to acts committed abroad conflicts with two essential principles: territoriality and double criminality.

The territoriality principle, enshrined in Article 6 of the Penal Code, limits the application of Italian criminal law to acts occurring within the country's borders. Exceptions, outlined in Article 7, apply to crimes of extraordinary severity, such as genocide or human trafficking, which warrant universal jurisdiction under international law. However, surrogacy – a practice often legal and regulated in other jurisdictions – does not fit this category.

Furthermore, the principle of double criminality precludes punishing an act in Italy if it is not considered a crime in the jurisdiction where it occurred. This discrepancy complicates efforts to justify the law's extraterritorial reach, given that surrogacy remains lawful in many countries.

⁸⁵Law No. 40/2004.

⁸⁶Italian Constitutional Court, judgment No. 272/2017 and No. 33/2021, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_272_2017_EN.pdf, and https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%2033%20del%202021%20red.%20Vigan%C3%B2%20EN.pdf, visited 28 February 2025.

The law also neglects the implications for children born through surrogacy. By focusing solely on adult conduct, it overlooks children's rights and welfare. European and Italian case law suggests that denying the establishment of parentage outright would violate the child's fundamental rights. The European Court of Human Rights and Italian High Courts have upheld the principle that a child's best interests must prevail, requiring the state to recognise relationships between biological parents and their children or provide alternative means for establishing parentage.⁸⁷ These measures are going to be both ineffective and counterproductive, and this is an important symptom of the populist nature of this legislative intervention.

Rather than curbing surrogacy, the criminalisation of its extraterritorial practice might simply redirect prospective parents to jurisdictions where the practice is more opaque and less regulated. Wealthier individuals with access to such services are unlikely to abandon their plans but may instead pursue surrogacy in regions where birth certificates omit key details or conceal the process entirely. This shift increases risks for both surrogate mothers and children, undermining the very values the law claims to uphold. By imposing an absolute ban, the law inadvertently perpetuates the vulnerabilities it seeks to address. It demonstrates a paradoxical alignment with ideologically driven policies rather than pragmatic solutions.⁸⁸ When right-wing populists consider surrogacy for same-sex couples (even if it is predominantly used by heterosexual couples), they invoke the constitutional concept of dignity to deny them, more precisely the dignity of the surrogate mother. But when LGBTQI+ individuals are harmed by homotransphobic hate speech right-wing populists do not recognise their dignity. Similarly, gender populism entirely abandons the well-established principle of the best interest of the child in matters of reproductive rights concerning children born through surrogacy. As such, the criminalisation of surrogacy beyond Italy's borders is a symbol of the current right-wing populist regime's opposition to

⁸⁷Italy has been recently condemned by the ECtHR for not complying with Art. 8 ECHR. On 31 August 2023, the Court issued the *C. v Italy* judgment (No. 47196/21, which became final on 30 November), concerning the refusal by the Italian authorities to register the foreign birth certificate of a child born through a surrogacy arrangement in Ukraine in 2018. See A. Riccioli, 'Again on Surrogacy. The Violation of Article 8 of the Convention: An Analysis of the *C. v. Italy* Judgement', *Euwonder blog*, 7 September 2023, <https://euwonder.jus.unipi.it/2023/09/07/again-on-surrogacy-the-violation-of-article-8-of-the-convention-an-analysis-of-the-c-v-italy-judgment/>, visited 28 February 2025.

⁸⁸R. Zamperini, 'The Universal Criminalization of Surrogacy: The Wide-ranging Shortcomings of a Brief Piece of Legislation', *Euwonder blog*, 10 December 2024, <https://euwonder.jus.unipi.it/2024/12/10/the-universal-criminalization-of-surrogacy-the-wide-ranging-shortcomings-of-a-brief-piece-of-legislation/>, visited 28 February 2025.

LGBTQI+ reproduction and of its ideological support to 'traditional' forms of parenthood as illustrated by the condemnation of 'uterus rental'.

This phenomenon illuminates the constitutional implications of gender populism in both its expressive and structuring dimensions. Ideologically, populist invocations of the 'natural order' in the guise of the traditional family have justified the constitutional exclusion of LGBTQI+ individuals from biological and national reproduction. Substantively, LGBTQI+ marginalisation necessitates the manipulation of constitutional values and mechanisms. Italy's legislative proposal upends the orthodox relationship between extraterritoriality and criminal law because the legitimacy of punitive intervention is not based on international law, but on policy choices projected beyond national borders.⁸⁹ To date, no criminal prosecution has been launched in Italy for the criminalisation of surrogacy under the 2004 law. Thus, it seems unlikely that Italy might prosecute individuals under the new 'universal' crime of surrogacy.

This distorted, symbolic, and propagandistic use of criminal law to stigmatise surrogacy by a populist regime is symptomatic of constitutional degradation.⁹⁰ Law acquires a signalling function to transmit, teach, and amplify the populist worldview and values. This devaluation of the criminal law equates to rule of law corrosion, which in turn translates into a typically authoritarian pedagogical effort by identifying the 'enemies' of the law. In fact, populist attacks on the reproductive rights of LGBTQI+ individuals translate into a more general assault on the rationality of law and on the general principles underpinning the constitutional system. Unsurprisingly, Italy refused to sign the EU Declaration for the promotion of European policies in favour of LGBTQ+ communities on 17 May 2024, alongside Hungary, Romania, Bulgaria, Croatia, Lithuania, Latvia, the Czech Republic, and Slovakia.

The weaponisation of women's rights against diasporic communities

This section explores another constitutional manifestation of gender populism, the weaponisation of Western notions of gender equality against ethno-cultural and religious minorities. We concentrate on the constitutional manifestation of the legal treatment of diasporic women's bodies under the rubric of gender populism to reveal the intimate connection between nationalism, nativism, and gender populism. While anti-immigration nationalism cannot always be equated

⁸⁹M. Pelissero, 'Surrogazione di maternità: la pretesa di un diritto punitivo universale. Osservazioni sulle proposte di legge n. 2599 (Carfagna) e 306 (Meloni), Camera dei deputati', *Sistema penale* (2021), www.sistemapenale.it, visited 29 April 2024.

⁹⁰E. Stradella, 'Recenti tendenze del diritto penale simbolico', in E. D'Orlando and L. Montanari (eds.), *Il diritto penale nella giurisprudenza* (2009) p. 241.

to right-wing populism, both forms of political mobilisation appeal to a partial notion of gender equality to legitimise exclusionary policies against diasporic communities.⁹¹ The net effect is to undermine the rule of law through a subversion of key constitutional principles and mechanisms designed to protect minorities from the majority. Gender populism seeks to re-articulate the relationship between multiculturalism and constitutionalism by claiming that the tension between the universal protection of women's rights and the particularistic protection of minority rights is irreconcilable. This is where gender populism seeks to infiltrate the constitutional arena and subvert it from within by appropriating its language and mechanisms.

Women from diasporic groups have been at the centre of the conflict between minority rights and national rights based on legal and substantive equality. Populist leaders have concentrated their ideological and legal attacks on a set of cultural practices to other diasporic communities, depict them as backward, anti-national, and incapable of integrating, and ultimately exclude them from 'the people' they claim to represent. We explore the constitutional manifestations of the criminalisation of FGC and the wearing of the face-veil across Europe to explain the exclusionary and discriminatory impact of gender populism on diasporic communities.

FGC has been one of the key areas of populist intervention both in discursive and substantive terms. While there have been concerted efforts at both national and European levels to eradicate the practice, FGC remains a rallying cry for right-wing populists.⁹² FGC is criminalised in all 27 EU member states, and at the European level, the Victims' Rights Directive (2012/29/EU) recognises FGC as a form of gender-based violence, obliging member states to ensure that victims have access to specialist support services, counselling, and free shelters in emergency scenarios.⁹³ Additionally, Article 38 of the Istanbul Convention, ratified by the EU in 2023, explicitly prohibits female genital mutilation, categorising it as gender-based violence. Notwithstanding the extensive legal instruments already in place to combat the practice, there have been instances of performative legal interventions surrounding FGC at the national level across Europe to harness the

⁹¹S. Farris, 'Femonationalism is Not Populism', 1 *Scenari* (2021) p. 347 at p. 374.

⁹²D. Bader and V. Mottier, 'Femonationalism and Populist Politics: The Case of the Swiss Ban on Female Genital Mutilation', 26(3) *Nations and Nationalism* (2020) p. 644; D. Bader, 'Response to Commentaries on "From the War on Terror to the Moral Crusade against Female Genital Mutilation: Anti-Muslim Racism and Femonationalism in the United States"', 29(10) *Violence against Women* (2023) p. 1911.

⁹³D.M.C. La Barbera, 'Ban without Prosecution, Conviction without Punishment, and Circumcision without Cutting: A Critical Appraisal of Anti-FGM Laws in Europe', 17(2) *Global Jurist* (2017); A. Middelburg and A. Balta, 'Female Genital Mutilation/Cutting as a Ground for Asylum in Europe', 28(3) *International Journal of Refugee Law* (2016) p. 416.

retorical power of the criminal law. However, many of these national laws offer little in terms of substantive protection for individuals subjected to FGC. Instead, the classificatory power of law has been deployed as a vehicle of social and political exclusion under the guise of constitutional equality.

Italy's adoption of Law No. 7/2006 openly condemns the practice of FGC by introducing a specific offence, but it fails to provide any effective protection mechanisms for FGC victims – yet another example of the signalling function of criminal law for identitarian purposes.⁹⁴ This legislation does not recognise the refugee status of women who flee their home country to escape FGC or prevent their minor daughters from being subjected to FGC. In fact, these legal interventions marginalise victims even further. 'Intersex normalising surgery' is instead tolerated under Italian law.⁹⁵ Significantly, this legislation was not enacted by a right-wing populist government but by a centre-left government, demonstrating the infiltration of populist ideology and tactics into mainstream politics. Similarly, Switzerland adopted the Female Genital Mutilation Act in 2012 to regulate FGC but also genital cosmetic surgery. A recent study of the parliamentary debates surrounding this legislation (2005-11) concluded that FGC was portrayed as a threat to the Swiss nation (while cosmetic surgery was an expression of Swissness) thus becoming a criterion for exclusion from the Swiss political community along the lines of femonationalism.⁹⁶

Perhaps unsurprisingly, even the European Court of Human Rights has not been particularly supportive of FGC victims or potential victims. In 2016, the Court ruled that the repatriation of a third country national woman or girl to a country where FGC is practised does not constitute a breach of Article 3 of the ECHR if her family has the will and means to ensure she will not be subjected to FGC.⁹⁷ Other decisions by the European Court of Human Rights in the area of FGC seem to confirm the approach of allowing a wide degree of latitude to individual member states in dealing with this fraught practice.⁹⁸ Conversely, the Grand Chamber of the Court of Justice of the European Union has recently handed down a pro-women judgment in Case C-621/21, in which the court held that gender-based persecution in their home countries constitutes a valid ground

⁹⁴Law No. 7/2006.

⁹⁵F.R. Ammaturo, 'Intersexuality and the "Right to Bodily Integrity": Critical Reflections on Female Genital Cutting, Circumcision and Intersex Normalising Surgeries' in Europe', 25 *Social and Legal Studies* (2016) p. 591 at p. 610.

⁹⁶Bader and Mottier, *supra* n. 92, at p. 659.

⁹⁷ECtHR 7 June 2016, No. 7211/07, *R.V.A.B. and Others v The Netherlands*.

⁹⁸See for example ECtHR 8 March 2007, No. 23944/05, *Collins and Akaziebie v Sweden*; ECtHR 17 May 2011, No. 43408/08, *Izevbekhai and Others v Ireland*.

for asylum in EU member states.⁹⁹ This development pits the cosmopolitan human-rights based approach of a supranational court against the anti-immigration policies of member states.

Similarly, women's religious dress has been a source of populist attacks against diasporic communities, particularly Muslim women who wear the veil. In European liberal democracies, they embody examples of complex intersectional identities. Legal interventions in this domain, however, erase these social complexities and invoke gender equality to combat what legislators conveniently frame only as a gendered form of religious oppression. Thus, legal initiatives around minority women's religious dress are invariably of a populist nature: they aim to garner facile electoral consensus and reinforce the ethno-cultural cohesion of 'the people' by exclusionary methods. Europe has witnessed a proliferation of legal bans on wearing the face-veil in public.¹⁰⁰ Some of these measures have been challenged in the European Court of Human Rights, so far without success; the Court ruled that these measures did not violate ECHR rights.¹⁰¹ The Strasbourg Court adopted in these cases a wide margin of appreciation to member states, as both Articles 8 and 9 are subject to limitations by the state on several grounds, including public interest and public safety broadly defined. The Court, however, gave little consideration to intersectional inequalities and the potential for further marginalisation and exclusion from public life of Muslim women caught by the ban.

Stéphane Mechoulan has explored more deeply the reasons behind the 2010 burqa ban in France, and argued that the face-veil 'spearheads a competing political project' to that of 'living together' on the basis of the principle of *laïcité* upon which the French state is built.¹⁰² Thus, the face-veil ban in France and other European jurisdictions – like FGC in the Swiss context – has become a racialised legal tool to exclude certain individuals from the ongoing construction of the notion of 'the people' in whose name France is governed. The weaponisation of the dichotomy of 'Western gender equality' versus 'communitarian gender oppression' harnesses the power of the language, values, and instruments of liberal constitutionalism to discriminate against already

⁹⁹ECJ 16 January 2024, Case C-621/21, *WS v Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet*.

¹⁰⁰In 2010, France passed legislation to ban the burqa in public. Other EU member states followed suit: Belgium (2011), Bulgaria (2016), Norway and Austria (2017), Denmark and Luxembourg (2018), while in 2021 Switzerland held a referendum to ban the face-veil in public. Other European countries have introduced partial bans.

¹⁰¹ECtHR 1 July 2014, No. 43835/11, *S.A.S. v France*; ECtHR 11 July 2017, No. 4619/12, *Dakir v Belgium*; and ECtHR 11 July 2017, No. 37798/13, *Belcemi and Oussar v Belgium*.

¹⁰²S. Mechoulan, 'The Case against the Face-veil: A European Perspective', 16 *International Journal of Constitutional Law* (2018) p. 1267 at p. 1268-1269.

marginalised individuals. In doing so it degrades the protection offered by the constitution and its promise for substantial equality, inclusive participation, and equal representation.¹⁰³

CONCLUSIONS

The article provides a comprehensive exploration of the intersection between gender populism and constitutional degradation, emphasising their symbiotic relationship within the context of right-wing populist politics in Europe. It highlights how gender populism, characterised by discourses against gender equality and LGBTQI+ rights, becomes both a tool and a justification for undermining the liberal constitutional order. This study contributes to the literature by conceptualising gender populism not merely as a rhetorical device but as a fundamental ideological and strategic component of populist governance.

A key insight is represented by the dual approach of gender populism: on the one hand, it actively erodes the rights of women, LGBTQI+ individuals, and diasporic communities; on the other hand, it paradoxically appropriates gender equality narratives to advance exclusionary nationalist agendas. Examples include restrictions on reproductive rights, anti-LGBTQI+ legislation, and the weaponisation of women's rights against diasporic groups, such as veiling bans. These actions weaken constitutional safeguards and corrode rule-of-law principles, advancing majoritarianism and exclusionary nationalism.

This article's main contribution lies in the mapping of the ideological drivers and constitutional manifestations of gender populism through a comparative theoretical framework, bridging gaps in existing scholarship, by adding the gender

¹⁰³The debate on this point starts from the well-known position by Susan Moller Okin, who emphasises how the opposition between constitutional rights and the practices, customs, and interests of cultural minorities is a false dichotomy. Often the invocation of fundamental rights conceals attitudes that are fundamentally racist or nationalist, aimed at restricting the freedom of minorities to pursue their cultural traditions: S. Moller Okin, 'Recognizing Women's Rights as Human Rights', 97(2) *APA Newsletters* (1998), S. Moller Okin, 'Feminism and Multiculturalism: Some Tensions', 108(4) *Ethics* (1998) p. 661. Other scholars suggest that discrimination based on gender and ethnic origin is a complex issue that cannot be understood solely as a matter of individual rights. In fact, the rights recognised for communities can serve as tools for the (intersectional) protection of women belonging to minorities. Furthermore, the rights established and regulated by majorities should specifically take into account the particular situations within minority groups and address these through affirmative actions, thus moving beyond a liberal and individualistic view of rights, see I. Marion-Young, *Justice and the Politics of Difference* (Princeton University Press 1990). This is highly relevant also at the constitutional level, as underlined by G. Azzariti, *Il costituzionalismo moderno può sopravvivere* (Laterza 2013), G. Azzariti, 'Costituzionalismo meticcio, Editoriale', 24 *Federalismi* (2015) p. 62; G. Cerrina Feroni and V. Federico (eds.), *Strumenti, percorsi e strategie dell'integrazione nelle società multiculturali* (ESI 2018).

perspective on populism to the constitutional analysis of democratic backsliding. It posits that gender populism exploits the foundational and structuring functions of constitutions – redefining national identity and dismantling checks on executive power – to legitimise and facilitate its agenda. This insight aims to deepen our general understanding of the populist playbook by focusing on the neglected element of gender politics and its corrosive impact on liberal democratic structures.

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