

ARTICLE

# Constitutions as Mediums of Collective Identities

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## Abstract

When we think about constitutions, we tend to see them predominantly through the normative lens of legality, forgetting about the social implications of constitutions and the lives thereof. And even when we do study them from a more socio-legal perspective, we usually associate them solely with the state. This understanding of constitutions is the legacy of not only a state-centric approach in legal science but also of an institutional approach, particularly in political science. It shapes our understanding of constitutions as legal regulations of an institutional framework of the state and the conduct of politics. Moreover, the liberal tradition compels us to see constitutions as tools to restrain the power of the state and ensure the rights and liberties of individuals; that is, as tools of the liberal rule of law.

However, as I argue in this Article, constitutions are a very powerful, and potentially effective, way of shaping the collective identities of not only the state but also of the political people. Therefore, they should be understood not so much as factors of restriction but as mediums for the articulation of collective experiences, self-understanding, goals, dreams, and fears—in other words, articulations of collective imaginaries.

For this purpose, I shall discuss in the first part of this Article the importance of conceptualizing the state and the political people as autopoietic organizational systems and the consequences of such conceptualization. That is, both the state and the political people are, in fact, operationally closed organizations defined solely by the articulation of their collective imaginaries—by the decisions. In this way, constitutions are only one of the possible decisions and nevertheless one of the most influential.

In the second part, I shall discuss the nature of constitutions as law decisions of the organizational system of the state with the example of the Czech Republic and its 1992 Constitution. The Czech example will demonstrate how the constitution articulates the constitutional imaginary of the membership of the state, how it articulates the understanding of the state's constitutional identity, and, at the same time, shapes it. Moreover, the Czech example will show us the clear division between the constitution and “its” people; in other words, that it is not the people who makes or adopts constitutions, nor is the constitution an articulation of the political people's collective identity or its nature. This distinction between the state and the political people is, in fact, one of the crucial arguments for the social systems theory approach to both the state and the political people as it enables us to not only distinguish between those two phenomena but also, and perhaps more importantly, to conceptualize their interrelationship—structural coupling—as I shall explain shortly.

The third part of this Article focuses on how the constitution can shape the popular identity of the political people by being appropriated as a cultural product by the popular imaginary. I shall discuss how the political people can appropriate the constitution as a cultural product and, through such appropriation, express its self-understanding—that is, how the constitution can be translated into the operation of the organizational system of the political people and become its communication, that is, its decision. However, whereas every modern state expresses its constitutional identity also through its constitution, not every political people appropriates the constitution of the state with which it is coupled. There are political peoples, such as the Czech one, which do not appropriate the constitutions to express their popular identities. Thus, the cultural appropriation of the constitution will be demonstrated through the example of the Italian political people, which has a strong connection with the Italian Constitution of 1948.

The state and the political people are locked in a state of structural coupling, they irritate—influence—each other constantly. I argue that structural coupling between the state and the political people is the primary reason why we should be interested in the combined social systems theory–social imaginary approach as it provides us with the theoretical framework necessary to explore, and hopefully understand, how the state and the political people influence and shape each other, and, consequently, enables us to build the legitimacy of our modern democratic system of governance not on the illusion of unity of the state and the people but, quite the opposite, on their acknowledged division and interrelationship.

However, it is vital to add that the main purpose of this Article is not to analyze one state and political people, and their constitutional and popular identities in their complexity as this would be beyond the possibility of one article, but to lay down the theoretical framework for such analysis using examples of various states and peoples. Therefore, the two cases used in this Article have been chosen for their capacity to demonstrate the various ways in which the constitution shape either constitutional or popular identity in the most simple and succinct way possible.

**Keywords:** Constitutions; social systems theory; imaginary; identity; Czechia; Italy

## A. State and Political People as Organizational Systems

Before I delve into the constitution as a medium of articulation and shaping of constitutional and popular imaginary, it is necessary to clarify whose imaginary and, consequently, whose identity the constitution can articulate and shape. In other words, it is necessary to conceptualize the state and the political people as autopoietic organizational systems and explain how their imaginaries are realized.

Usually, when we think about a political people and its identity, we tend to consider it as something human-centered; that is, we are inclined to study human beings, either as individuals or groups—for example, leaders, civil society, and classes. The same applies, more or less, to the state and its identity. Even when the state is approached as an institution, we are seeking human influence, the human reason behind its institutional framework. From Aristotle to Hobbes and Habermas, we have always focused on the human being. However, it “no longer holds that current society can be successfully analyzed on the basis that it is—or should be—fundamentally humane and that it is, on principle, an assembly of individual human beings.”<sup>1</sup> Our attention has to shift towards the study of human communication, as only the communication itself can communicate,<sup>2</sup> be it on the level of individuals or the level of society.<sup>3</sup> Consequently, both the state and the political people should be understood as systems defined by their communication, not by the qualities, intentions, or opinions of their members. That brings me to Luhmann’s social systems theory and the term *autopoiesis*.

It is necessary to explain social systems theory briefly, so we can move forward and discuss the organizational structure of the state and the political people and their internal operations.

Following social systems theory, organizational systems are built upon their specific kind of communication—the decisions<sup>4</sup>—and their ability to operate within multiple function systems—of law, politics, economy, and so on—and occupy the communicative space of those systems. Those decisions are the key to any understanding of the nature of any organizational system, as it is the series of decisions that constitutes the organizational system.<sup>5</sup> It is only the decision of an organizational system that enables another decision to be taken—which is the core of the autopoiesis principle as described by its father, biologist Francisco Varela:

<sup>1</sup>HANS-GEORG MOELLER, *LUHMANN EXPLAINED: FROM SOULS TO SYSTEMS* 5 (2006).

<sup>2</sup>See *id.* at 6.

<sup>3</sup>See CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 83 (1963).

<sup>4</sup>See NIKLAS LUHMANN, *ORGANIZATION AND DECISION* 41 (2018).

<sup>5</sup>See *id.* at 36.

If you, for instance, try to understand what a cell is as the smallest living system without intending to explain how it is structured, that it reproduces itself, that it develops, etc.—if you simply want to say what it really is—then you will come to the following very simple answer: A living system is an organization that preserves itself as a result of its organization. How does it do this? It produces components that produce components that produce components. This is no mystery: enzymes produce enzymes. The boundary of the cell is its membrane. The membrane, again is a process that limits the diffusion and thus preserves the internal network of production that produces the membrane. Everywhere you see systems that exist due to a kind of Münchhausen-effect: they manage to grab themselves by the hair and pull themselves out of the swamp . . . . This is the case in many areas. (Biological) autopoiesis is only one example. Other examples are language, and, possibly, families, firms, etc.<sup>6</sup>

In other words, the organizational system re-produces itself by means of its own operations—decisions and organizational structure—creating its social reality by differentiating itself from its environment. Therefore, an organizational system is operationally closed, it processes only its own operations and cannot be subject to direct interference from another organizational system. That, however, does not mean that organizational systems are causally closed. As I shall explain in more detail later in Parts B and C, an organizational system is constantly irritated by its environment, and such irritation resonates within the organizational system by translating the irritating communication into the communication of the organizational system.

To summarize what I have said so far and apply it directly to the state and political people, I shall go through several theoretical observations of Luhmann concerning organizational systems and explain them through the examples of the state and the political people.<sup>7</sup>

## I. Luhmann's Theoretical Observations

### 1. An Organizational System Is Defined by Its Decisions That Have No Essentialist Value.

The political people could be considered a model example of the organizational system as its existence is evident to us only in the moments of its decisions. Outside of these decisions, there seem to be no political people at all.<sup>8</sup> That is, if there is anything like people's will (*Volkswille*) or people's spirit (*Volkgeist*),<sup>9</sup> we cannot access it. The decisions of the political people are a framework of its common activities, a framework of its imaginary that enables what Anderson calls a "calendrical movement of community"<sup>10</sup>—all members, or nearly all, of the political people, participate in the common activity at the same time knowing the others are doing the same.

Even though it is almost impossible to give a close list of all possible decisions of the political people, there are four types that, I am convinced, are the most regular ones: 1) Electoral decisions and referenda; 2) mass demonstrations, strikes, and revolutions; 3) the celebration of public holidays; and 4) cultural-product appropriation.

It is of little surprise that the first on my list of decisions are the electoral ones. After all, "the people, as a unit, is a fiction produced by the quasi-magical event of the election process."<sup>11</sup> However, when I say that electoral decisions articulate the popular imaginary, it is not the results of the election I am talking about but rather the electoral campaign and voting itself.

<sup>6</sup>MOELLER, *supra* note 1, at 13.

<sup>7</sup>See LUHMANN, *supra* note 4, at 29–35. Numbering does not correspond to that of Luhmann, as I mention and summarize only those most relevant to our discussion.

<sup>8</sup>See Judith Butler, *Laclau, Marx, and the Performative Power of Negation*, VERSO BLOG (Jan. 26, 2022), <https://www.versobooks.com/blogs/5238-judith-butler-laclau-marx-and-the-performative-power-of-negation>.

<sup>9</sup>See Erich Kaufmann, *On the Problem of the People's Will*, in WEIMAR: A JURISPRUDENCE OF CRISIS 196, 196–206 (Arthur J. Jacobson & Bernhard Schlink eds., 2000).

<sup>10</sup>BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 35 (2006).

<sup>11</sup>HANS-GEORG MOELLER, *THE RADICAL LUHMANN* 8 (2012).

The results—that is, who has been elected—are not a decision of the political people but of the state as it is the state that adopts the electoral legislation to regulate the translation of the votes into mandates. The popular imaginary is articulated by the topics and social demands articulated within the electoral campaign and by the people's decisions to participate in this imaginary by vote.

Referenda are of the same nature as electoral decisions but have a different type of result; however, as I have just said, the result is a decision of the state and not of the political people. Therefore, referenda also articulate the popular imaginary through the campaigns and discussions preceding them, not through their results.

The mass demonstrations, strikes, and revolutions are, similarly to the previous type of decisions, an articulation of the popular imaginary of various social demands—higher wages, social justice, anti-corruption demands, and so on. On the one hand, in contrast to electoral decisions and referenda, they are not repetitive, or, more precisely, their purpose is not to be repetitive but to solve the demand once and for all. On the other hand, electoral decisions and referenda presume the repetition and future possibility, as well as the need to articulate the same demands again. That is, when we participate in a revolution, we hope it is the “final” one, that once it is finished there will be no need for another one. However, if the demonstrations, strikes, and revolutions are one-off decisions and are not taken repetitively, how can they articulate the popular imaginary? Even though they are one-off decisions, they are imagined repetitively thanks to the popular memory—here, I adapt Beiner's<sup>12</sup> term of *social memory*. For example, the Mexican Revolution of 1910–1920 is interpreted and re-interpreted again and again in that way and thus articulates the popular imaginary of the Mexican political people.

The celebration of public holidays is the foremost example of the popular imaginary through the process of popular memory and popular forgetting because they articulate the popular imaginary of past decisions; that is, how the political people understands itself through those past decisions. Consequently, not all public holidays are an articulation of the popular imaginary but rather only those that are related to the objects of the popular imaginary—for example narratives of the political people.<sup>13</sup> How the past decision is celebrated is irrelevant; it can be a military parade—the Russian Moscow Military Parade—nation-wide celebrations—American Independence Day—or even without any major organized celebrations at all—the Czech Struggle for Freedom and Democracy Day. Vital is the continuous re-interpretation of the past decisions important for the self-understanding of the political people.

The last type of possible political people's decisions are the cultural-product appropriation ones. The political people can imagine itself through the appropriation of these cultural products, and can articulate its popular imaginary through this cultural product—for example, a song—Italian *Bella ciao*—a piece of literature—Kyrgyz epos of *Manas*—a statue—U.S. Statue of Liberty—a piece of legislation—the Constitution of Italy or the U.S. Constitution—or a map—Indonesia and its inclusion of the Western New Guinea as described by Anderson.<sup>14</sup>

When searching for the state's decisions, there is probably no better place to look than the constitution.<sup>15</sup> It is, after all, the constitutional identity we are talking about. However, there is no reason to limit the possible decisions solely to the constitution and not to include other legislation concerning constitutional matters—such as electoral legislation or standing orders of parliament—regardless of its formal standing within the hierarchy of the legal order. However, the legislation is not fixed and frozen in the time of its enactment, as Vorländer explains:

<sup>12</sup>See GUY BEINER, REMEMBERING THE YEAR OF THE FRENCH: IRISH FOLK HISTORY AND SOCIAL MEMORY (2009).

<sup>13</sup>See ROGERS M. SMITH, STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP 2 (2003) (discussing examples of Czech, Italian, Kyrgyz, and Afrikaaner collective identities).

<sup>14</sup>See ANDERSON, *supra* note 10, at 176–78.

<sup>15</sup>See GARY J. JACOBSON, CONSTITUTIONAL IDENTITY 348 (2010).

Accordingly, constitutions should by no means be understood as institutions which have reached the end of their possibilities for development once they come into force . . . . Where constitutions are able to take on constituting and legitimating functions, they then evolve. This is not only determined by changes to the wording of constitutional texts. It is also determined by forms of silent, creeping constitutional change, and by fundamental changes which arise over time, and transform the original document to the point that the original constitution is barely recognizable. The wording may in fact remain unchanged, but altered political circumstances and social contexts give the terms a different meaning, so that their interpretation represents an act of adaptation to the changed reality. These adjustments and alignments to current reality are carried out by political forces and social interpreters, the medial public and the citizens themselves.<sup>16</sup>

That brings us to the decisions of constitutional adjudication, which is often considered even more critical for articulating constitutional identity than the constitutional legislation itself as it reflects the state's nature as a living and experiencing entity.<sup>17</sup> However, with a general validity, there is no way to classify one type of state's decisions as more influential in shaping its constitutional identity than the others, not least because of the uneven position, role, and powers of constitutional courts in different countries.<sup>18</sup>

In addition to the constitutional legislation and constitutional adjudication, another type of state decision articulates its constitutional imaginary—constitutional politics and the individual decisions of various constitutional actors, no matter their form. Like the previously mentioned decisions, these decisions articulate much more what *is* an element of the constitutional imaginary than what *ought to be*; that is, they do not state what ought to be done, but they do it. We could even say the previous two types of state decisions articulate the desires of the state's membership and constitutional politics and the individual decisions fulfill them by experiencing the constitutional reality.

Therefore, to summarize, there are three types of state decisions articulating the constitutional imaginary: 1) Law decisions; 2) judicial decisions; and 3) other decisions of various constitutional actors, no matter their form or nature.

## *2. The Organization Is an Autopoietic System That Must Be Able to Distinguish Itself from Its Environment.*

Both the state and the political people are clearly different from the function systems within which they operate, and it would be a grave error to equate the state with the function system of law and consider it as a pure product of legal norms, just as it would be an error to consider the political people as either purely legal product of constitutions or as a democratic expression of collective power.

## *3. The Organization's Identity Is Ever-Evolving as No Decision Is Final but Must Leave Space for Another One to Enable the Future Re-Production of the Organization.*

As there is no essentialist basis for the constitutional identity of the state or the popular identity of the political people, and those identities are constituted by the collective imaginaries, they are not

<sup>16</sup>Hans Vorländer, *Constitutions as Symbolic Orders: The Cultural Analysis of Constitutionalism*, in *SOCIOLOGICAL CONSTITUTIONALISM* 209, 216 (Paul Blokker & Chris Thornhill eds., 2021).

<sup>17</sup>See CJEU, Joined Cases C-53/04 & 180/04, Cristiano Marrosu v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate, -ECLI--EU--C:2005:569 (joined opinion of Advocate General Maduro) (Sept. 20, 2005), para. 40, <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C%2CT%2CF&num=c-53/04>.

<sup>18</sup>See Helle Krunke, *Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature*, in *CONSTITUTIONAL IDENTITY IN A EUROPE OF MULTILEVEL CONSTITUTIONALISM* 114, 120 (Christian Calliess & Gerhard van der Schyff eds., 2020).

fixed but constantly evolving. Both are shaped by the experiences of their membership, their self-understanding, and their self-distinguishment from the organizational system's environment.<sup>19</sup>

*4. No Particular Decision Is Able to Constitute the Organization on Its Own; a Series of Decisions Based on Connectivity Is Required. Nevertheless, Such Connectivity Is Not Rational or Logical.*

The awareness of the previously made decisions and the anticipation of possible future ones are vital for the collective imaginary of both the state and the political people. The state, for example, enacts legislation knowing its connectivity with those enacted previously and anticipating the possibility of its future revision. Similarly, the political people demonstrates in the streets knowing the successes and failures of past demonstrations and anticipating that the current one is not the last one; that is, it is not a “final battle” over the future of society and, therefore, that the current demonstration is not a total war that the political people is not allowed to lose.

*5. The Operational Closure of an Organization Is Absolute, as Is Its Autopoiesis. However, That Does Not Imply Causal Isolation.*

Both the state and the political people are operationally closed and, therefore, cannot process the operations of the other. On the one hand, the political people cannot make decisions in the same way as the state—for example, by convening—as it is not a demographic category of “real” people but a political one. On the other hand, the state cannot leave its legally regulated decision-making procedures if it is to maintain its institutionalized nature. Both of them are locked in a continuous mutual irritation of each other—structural coupling. In that way, the state is trying to influence the popular imaginary by promoting its ideological framework within the educational system, and the political people tries to influence the state by means of demonstrations, strikes, public opinion, and so on.

*6. The Organizational System Is in Control of What Outside Influences Are Going to Be Translated into Its Own Operations and in What Manner. Consequently, Any Image of the Environment Is Created by the Organization Itself, and to That Extent, It Serves as “The Other” for the Organization.*

When considering the electoral decision of the political people, as an example, it is the political people who engages in pre-electoral discussions and casts the votes. However, it is the state that translates those discussions, the social demands, and the votes into mandates. In other words, the state decides who is allowed to vote, how the voting right is exercised, and how the votes are translated into mandates. Therefore, it is the state that creates its own understanding of the political people as its environment, that creates its own understanding of the people's will. The same, of course, applies to the political people and its understanding of the state and its nature.

*7. The Decision-Making Is Possible Because of the Organizational Structure That Also Ensures the Constitution of Connectivity Between Particular Decisions.*

It is the organizational structure that enables the decision-making process; that is, the collective imaginary is articulated into decisions through the personal, procedural, and value elements of the organizational structure.<sup>20</sup> The personal elements are those who articulate the collective imaginary—an example being parliament articulating the constitutional imaginary and political

<sup>19</sup>See Pierre Bourdieu, *The Social Space and the Genesis of Groups*, 14 *THEORY SOC.* 723, 730 (1985).

<sup>20</sup>This triad of the organizational structure is heavily inspired by Smend's integrative theory. See Rudolf Smend, *Constitutions and Constitutional Law*, in *WEIMAR: A JURISPRUDENCE OF CRISIS* 213 (Arthur J. Jacobson & Bernard Schlink eds., 2000); see also Werner S. Landecker, *Smend's Theory of Integration*, 29 *SOC. FORCES* 39 (1950).



parties articulating the popular imaginary—and procedural elements regulate the decision making process to eliminate the infinite number of possible decisions—including legislative process as the state’s procedural element and language as the political people’s one. The value elements create the connectivity between the particular decisions—like the rule of law narrative in the case of the state and the political power narratives in the case of the political people.

## II. Personal Elements

The personal elements are those who articulate the collective imaginary of the political people and the state. In other words, they are the decision-makers of the political people and the state, they are the building block of any organizational structure, and to analyze them means to examine the decisions they make.

In the case of the political people, the imaginary is articulated by the 1) political parties, politicians, and ad hoc revolutionaries and 2) intelligentsia and its organizations. The former play a central role in articulating the popular imaginary: “[I]n fact, [political] leaders routinely propagate and institutionalize particular visions of their political communities in broad-ranging ways . . . .”<sup>21</sup> The latter are those who interpret the political people to the political people itself but, at the same time, remain “remote from everyday political battles.”<sup>22</sup> This rather heterogeneous group consists of the intellectuals by trade—scholars, teachers, priests, journalists, and so on—and those giving the political people a sense of “homogeneity and an awareness of its own function”<sup>23</sup>—trade unionists, civil society leaders, students, and so on; or, in Gramsci’s words, it consists of a traditional and organic intelligentsia.<sup>24</sup>

In the case of the state, the personal elements consist of the “usual suspects”—the head of state, parliament, government, and the constitutional court.

## III. Procedural Elements

The procedural elements of the organizational structure enable, through the regulation of the decision-making process, decisions to be made and ensure the reproduction of the organizational system. Similarly to the personal elements, the procedural elements need to be examined through the decisions of the organizational system in hand.

The political people’s procedural elements enable the personal elements to participate in electoral campaigns, join strikes and demonstrations, celebrate public holidays, and appropriate any cultural product suitable for the articulation of the popular imaginary; in other words, they enable the political people membership to engage in the collective popular imaginary, to participate in a collective communication, and to understand the information value of the social context.

Socialization comes about simply by living in a social context and does not require special attention. It presupposes participation in communication, especially the possibility of reading the behavior of others not as mere fact but as information—as information about dangers, disappointments, coincidences of all kinds, about realizing a relation to social norms concerning what is appropriate in a situation. More than attributed selection is involved.<sup>25</sup>

Therefore, what we are looking for are common language and social context awareness.

The former is a *sine qua non* of any collective communication and creation of the representational link between the political people membership and its personal elements.

<sup>21</sup>SMITH, *supra* note 13, at 4–5.

<sup>22</sup>KARL MANNHEIM, IDEOLOGY AND UTOPIA 10 (1954).

<sup>23</sup>ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 5 (11th ed. 1992).

<sup>24</sup>*See id.*

<sup>25</sup>NIKLAS LUHMANN, SOCIAL SYSTEMS 205 (Dirk Baecker & John Bednarz, Jr. trans., 1995).

Moreover, the common language is essential for any popular imaginary as it is a highly informal and de-institutionalized process—“he speaks the language of his group; he thinks in the manner in which his group thinks.”<sup>26</sup>

However, the existence of the common language is insufficient to initiate any popular imaginary on its own. An awareness of the social context and understanding of the social facts’ informative value is necessary. For example, on the one hand, Friday strikes in the public transport industry in Italy are almost a traditional articulation of the Italian popular imaginary that is not considered to be anything extraordinary. On the other hand, such strikes would be considered an extreme decision in most of the post-Communist countries of Central and Eastern Europe. The same decision articulates different imaginary because of different social contexts.

An important consequence of the key role of social context awareness is a somewhat uneasy integration of new members into the political people as such awareness is built continuously over time by living among the political people at hand, and cannot be taught as quickly and easily as the procedural elements of the state organizational structure. Moreover, the bulk of social context awareness is gathered during institutionalized secondary education when the popular memory—and forgetting—is implanted.<sup>27</sup>

The procedural elements of the state, however, are heavily institutionalized and present procedures that require little to no further explanation: 1) Legislative process, 2) constitutional adjudication, 3) legal regulation of individual decisions, and 4) constitutional traditions. All of the state’s procedural elements reflect, and shape, the predominantly legal nature of the state organizational structure, which is, for all legal scholars, more than familiar and does not stray far from the “mainstream” understanding of the state as institutionalized power—structure.

#### IV. Value Elements

The value elements are key for any understanding of both the personal and procedural elements and the decisions of the organization system as they give them their meaning through contextualization. The series of decisions is established by the value-based connectivity that selects those decisions that will be part of the popular or constitutional identity and those that will not. That is, some decisions will be forgotten, and some will be remembered and reinterpreted by the popular or constitutional imaginary. This process of *popular/constitutional memory* and *popular/constitutional forgetting*, to modify Beiner’s terms of *social memory*<sup>28</sup> and *social forgetting*,<sup>29</sup> effectively enables the forgetting of those decisions that are in contradiction with others, that do not fit into the series of decisions, and interpreting those compatible desirably. Consequently, past decisions are either forgotten or remembered and interpreted through the lens of value elements.

In the case of the value elements of the political people, to simplify the vast complexity of the social reality, I shall follow Smith’s categories of people’s narratives:<sup>30</sup> 1) Economic narratives, 2) political power narratives, and 3) ethically constructive narratives.

The economic narratives are the people’s notion that belonging to one people brings economic benefits to its membership.<sup>31</sup> The political power narratives are built on a belief that the existence of the political people ensures that everyone can participate in the exercising of political power.

<sup>26</sup>MANNHEIM, *supra* note 22, at 2.

<sup>27</sup>The roots of exclusion of many communities lie precisely in their exclusion from the education system—or from its mainstream—which leads to their lack of social context awareness and inability to participate—fully and equally—in the popular imaginary. One example of such segregation is the exclusion of Roma communities in Czechia.

<sup>28</sup>See BEINER, *supra* note 12.

<sup>29</sup>See GUY BEINER, FORGETFUL REMEMBRANCE: SOCIAL FORGETTING AND VERNACULAR HISTORIOGRAPHY OF A REBELLION IN ULSTER (2018).

<sup>30</sup>See SMITH, *supra* note 13, at 60.

<sup>31</sup>See *id.*



Finally, the ethically constitutive narratives claim the political people is constituted by preexisting qualities such as culture, religion, ethnicity, race, language, history, or gender.<sup>32</sup> The ethically constitutive narratives are, in fact, an exquisite example of the might of the collective imaginary because even though the popular identity is not based upon any fixed or preexisting quality but is constituted by continuous popular imaginary, the popular imaginary of the political people can be of the people's self-understanding as a community based precisely on such preexisting and fixed qualities. In other words, the political people can experience itself in a way denouncing any importance and relevance of the experiencing in the first place.

In case of the value elements of the state, we are returning to, one could say, known territory, as the four groups of values that are always present within any democratic state are 1) rule of law, 2) separation of powers, 3) human rights, and 4) the economic system.

The rule of law value group determines how the principles of the rule of law, or *Rechtsstaat*, are concretized within a particular context, that is, how the principles of legal certainty and legality are realized. The separation of powers, quite unsurprisingly, is all about the distribution of power within the organizational structure of the state. The human rights value group gets us closer to the substantive understanding of a modern democratic state, that is, a state based on respect for human rights. Without going into a discussion of whether there are any universally applicable human rights, it is clear that the understanding of individual human rights and their prioritization is very much different even in so-called Western democracies—it is probably enough to mention the right to life and different approaches to capital punishment in the U.S. and Europe, or different approaches to the regulation of abortion. The last group—the economic system—strongly shapes the very foundations of the constitutional identity as it is intertwined with the previous group of human rights; for example, it shapes the constitutional imaginary regarding the role of the state in society, whether it should be a neoliberal voyeur or whether it should adopt a much more proactive approach in targeting social inequality and injustice.

## B. Czechia: Constitution as a State Decision

The constitution as an articulation of the constitutional imaginary is definitely the “usual suspect” of the constitutional identity discussion. The constitution—in a broader sense of the word, including also other legislation dealing with constitutional matters, even though not named “Constitution”—articulates the most basic constitutional imaginary of all elements of the organizational structure of the state.

In this part, I shall demonstrate, using the example of the 1992 Constitution of the Czech Republic, how the constitution can articulate the constitutional imaginary of the state's membership—in this case, particularly the members of government, and the head of state—and how the constitution-making process is, in fact, a state decision and not one of the political people. In other words, I shall demonstrate that the constitution cannot be understood as an articulation of the will of the people or society's consensus.

The birth of the 1992 Czech Constitution<sup>33</sup> is not only more than interesting but is also particularly fit to serve as a straightforward and relatively uncomplicated example of a constitution as a state decision. When the Communist régime fell in 1989, Czechoslovakia embarked on a rocky road of setting down the terms of inner cohabitation of the Czechs and Slovaks in a federative state. This road ended with the General election of June 1992 which was won by ODS–KDS (Civic Democratic Party–Christian Democratic Party) in the Czech lands and by HZDS (the Movement for a Democratic Slovakia) in Slovakia. Although the electoral campaign had not been about the possibility of dissolution of the Czechoslovak Federation, the leaders of the winning parties and prime ministers of the Czech and Slovak Republics, Václav Klaus (ODS) and

<sup>32</sup>See *id.* at 64.

<sup>33</sup>Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic].

Vladimír Mečiar (HZDS), respectively, reached an agreement on the dissolution of the federation about a month after the election. The two independent republics—the Czech Republic and the Slovak Republic—were supposed to be constituted by the 1st of January 1993. Consequently, there were fewer than six months to write the new Czech Constitution, gain enough support for it in the Czech National Council—the Czech Parliament within the Czechoslovak Federation—, and enact it. This very limited time frame itself could explain why the Czech people was not included in the constitution-making process; however, there are other, and likely much more important reasons—the new Constitution was supposed to articulate the ideas and opinions of the Czech government and the former Czechoslovak president Václav Havel.<sup>34</sup> Moreover, the majority of the population was against the dissolution and, therefore, would most probably sabotage the constitution-making process.<sup>35</sup>

The constitution of the independent Czech Republic was written by a Government Commission for the Preparation of the Constitution of the Czech Republic (“the Government Commission”) in about four months<sup>36</sup> without any input from the people.<sup>37</sup> Moreover, the Government Commission consisted of philosophers and legal practitioners, and politicians themselves, of course, who were appointed by the coalition Government and had to follow the Government’s instructions.<sup>38</sup> Moreover, as the Government was right-wing and all the renowned constitutionalists and legal theorists at that time were left-wing, there was no constitutional lawyer or legal theorist in the Government Commission.

The Government Commission faced constant demands from the Government and its prime minister Václav Klaus, who demanded a two-chamber parliament<sup>39</sup> and a strengthening of the powers of the prime minister—into a “semi-Chancellor” type; President Václav Havel<sup>40</sup> who was against a direct presidential election;<sup>41</sup> the governor of the Czechoslovak Central Bank Josef Tošovský who lobbied for the new Central Bank having its part in the Constitution;<sup>42</sup> or the presidents of the Supreme Court of the Czechoslovak Federation and the Supreme Court of the Czech Republic Otakar Motejl and Antonín Mokrý who pushed for a four-tier judicial system.<sup>43</sup>

Therefore, even though the Government Commission did a remarkable and almost impossible job of writing the Czech Constitution in such a short time—and it should be noted, the Constitution itself is of very high quality—the constitutional imaginary it articulated was of the state’s membership, more precisely, of the then right-wing Government, resigned president, and some of the influential members of the Czech National Council and judiciary. Not only it did not reflect the popular imaginary of the political people or its identity, but quite to the contrary, it was

<sup>34</sup>President Havel resigned on July 20, 1992 as a form of protest against the dissolution of the Czechoslovak Federation. However, all political actors were counting on him to be the first president of the independent Czech Republic.

<sup>35</sup>No referendum was called in 1992. However, according to polls from 2017, 60% of Czechs and 57% of Slovaks were against the dissolution in 1992 and only 27% of Czechs and 35% of Slovaks were in favor. The polls were conducted by CVVM SOÚ AV ČR, v.v.i., IVO, and Focus as part of the survey “Naše společnost,” available online at: [https://cvvm.soc.cas.cz/media/com\\_form2content/documents/c2/a4464/f9/po171205.pdf](https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a4464/f9/po171205.pdf).

<sup>36</sup>The first meeting was held on July 10, 1992 and the draft was finished on October 24, 1992.

<sup>37</sup>A similar commission was established by the Czech National Council (the Czech parliament) but it has little to no influence on the actual drafting process.

<sup>38</sup>See JINDŘIŠKA SYLLOVÁ & MIROSLAV SYLLA, *ÚSTAVA ČESKÉ REPUBLIKY 1992, DOKUMENTY A OHLASY* 47–50 (2018).

<sup>39</sup>Initially, Václav Klaus was indifferent to the number of chambers. However, later on, when political support of the Federal Assembly for the Dissolution Act was needed, he decided to push for a bicameral parliament to be able to offer membership in the future upper chamber to members of the Federal Assembly. Interestingly enough, the upper chamber—the Senate—was not established until late 1996.

<sup>40</sup>President Havel resigned on July 20, 1992 but maintained influence over the process even afterwards.

<sup>41</sup>See TOMÁŠ NĚMEČEK, VOJTĚCH CEPL: *ŽIVOT PRÁVNÍKA VE 20. STOLETÍ* 89 (2010).

<sup>42</sup>See *id.* at 96.

<sup>43</sup>Even though not directly said, it was obvious none of them wanted to lose their position. Therefore, the Supreme Court of the Czech Republic was created for Motejl and the High Court for Mokrý. See *id.*

designed to change it, as is self-evident from the article of then Prime Minister Václav Klaus sent to the Czech newspaper *Český deník* on July 31, 1992:

Our constitution has to . . . define the rights of the citizens in such a way that the rights enabling an individual to do something and the rights protecting an individual against other individuals, groups of individuals, or the state dominate over those promising or claiming something concrete and substantive. Only the former are genuinely liberal rights; the latter are based upon the socialist delusion . . . . I know it is possible (although not easy) to guarantee freedom, but it is impossible to guarantee information (or perfect environment, health, decent housing, or anything of this sort) . . . .

The Czech Constitution . . . has to be based on an understanding of the fundamental civil rights (and duties) utterly different from the one we were used to for such a long time during socialism and the one that is inherent to us (and subconsciously accepted) more than we are willing to acknowledge.<sup>44</sup>

The new constitution was supposed to initiate a *true* societal transformation, to deconstruct any collective identities of the people, trade unions, or classes, and to establish a new society of individuals.<sup>45</sup> In this way, the new Czech Constitution expressed another strong narrative of the Czech constitutional imaginary—legal constitutionalism.

Czech legal constitutionalism is an overarching narrative bringing together several values of the Czech constitutional identity, all of them expressed by the Czech Constitution as a state decision: 1) The *Rechtsstaate* principle, 2) the anti-ideological nature of the Czech constitutional imaginary, and 3) the centrality of the representative nature of the Czech democracy.

The—Czech version of the—*Rechtsstaate* principle is based upon the Habsburg traditions of legal formalism, the Kelsenian pure theory of law—naturalized by Czechoslovak jurist František Weyr and his Brno normative school of law—and the abuse of law by the Communist régime between 1948 and 1989. Consequently, the Constitution, as a supreme law of the country, is interpreted in the light of a very broadly understood *Rechtsstaate* built around non-legal substantive matters such as morale principles<sup>46</sup> and, at the same time, because of its constitutionally-entrenched nature, being out of the reach of both the politics and the political people.

Moreover, in line with the *Rechtsstaat* principle, the Czech constitutional imaginary is also deeply anti-ideological; that is, shaped by strong notions of rationalism and apolitical politics. The former is based on the idea, that democracy is not, and cannot, be found upon emotions and feelings but upon rationality and expert knowledge—*epistémé*; in other words, because of the dominance of ideology during the Communist régime, the current Czech constitutional imaginary strongly prefers law and its authoritative instruments over politics and its deliberative means. The latter follows the same logic: The Czech state is there not to promote any comprehensive doctrine—equality, social justice, and so on—but to safeguard human rights based upon higher moral values common to all.<sup>47</sup>

The last of the trio, the value of representative democracy, is very much complementary to previous values. Even though the roots of Czech preference for representative democracy lie

<sup>44</sup>Václav Klaus, *Podaři se nám česká ústava?*, ČESKÝ DENÍK, July 31, 1992 (quoting SYLLOVÁ & SYLLA, *supra* note 38, at 615–16).

<sup>45</sup>There is a famous Czech saying from that time that captures the mood brilliantly: “*Není žádný lid, jsou jen lidé.*”—“There is no people, there are only people.”

<sup>46</sup>See *Nález Ústavního soudu ze dne 26.11.1992 (ÚS)* [Decision of the Constitutional Court of November 26, 1992], Pl. ÚS 1/92 (Czech).

<sup>47</sup>The ideas of apolitical politics are, traditionally, connected with the former President of the Czech Republic, Václav Havel, whose idea of the state was very close to Rawls liberal principle of legitimacy, as expressed. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (2005).

within the First Czechoslovak Republic—1918–38—when the tools of representative democracy were essential for the Czech nation’s dominance over the German minority within the institutions of the state,<sup>48</sup> the reasons of the current preference for the representative democracy lie in the Czech state’s distrust in the Czech political people. The distrust is partially driven by the historic experiences of the Czech people voting for undemocratic political parties—the electoral victory of the Nazi SdP (*Sudetendeutsche Partei*, Sudeten German Party) in 1935 and the Communist Party in 1946—and partially by the belief that the people is not able to follow to the expert knowledge and choose rationally the “right” solution.

Therefore, the Czech Constitution of 1992 is, on the one hand, built upon the parliamentary traditions of the First Czechoslovak Republic, which had been wiped out of the institutional memory of any Czech constitutional institution a long time ago, and, on the other hand, is promoting strong neo-liberal ideas of social privatism and economic individualism—the former ingrained in Czech society from the times of state socialism, the latter going against the public perception of the state as a social state guaranteeing decent living conditions for all members of the society. As such, the Czech Constitution is a clear example of a state decision expressing the constitutional imaginary of the state and consolidating its constitutional identity, a decision made solely by the state without any interference from the political people. However, even though the Czech Constitution of 1992 was written during the turbulent times of the democratic transformation against the wishes of the political people and with the intention to serve as a tool for re-shaping—or deconstructing—the political people itself, it still has quite strong support of the political people, with a majority of the people being against its complete overhaul.

Quite interestingly, the majority of the political people—57.73%—think that the Constitution actually contains and protects the values upon which the political people is imagined, even though the Constitution is, as has been said earlier, strongly legalistic (Table 1).<sup>49</sup> The reason behind this paradoxical support is, most probably, hidden in the adherence of the Czech people to the rational technocracy and all its articulation. That is, the Czech people values highly all the apolitical ways of governing, such as the judicial decisions or the caretaking governments—governments of experts—and all the tools offering neutral, objective, rational—that is, apolitical—ways of social life, such as scientific—expert—opinions or public media.

As evident from Table 2, those groups that articulate—or are perceived as such—the reason, facts, bi-partisan information, and authoritative decisions are considered by the Czech people as representing its values; whereas those groups that articulate opinions and are engaged in—political—discussions do not. In other words, the Czech people perceives itself as a collective built upon rationality and “truths” and expect the same from the Czech state, which is the reason of the people’s compliance with, and even adherence to, the Czech legal constitutionalism as expressed by the 1992 Constitution.

Therefore, as the case of the Czech Constitution demonstrates, not only is the constitution a powerful medium of the state’s constitutional identity, but also, even when such a decision is taken solely by the state itself and against the wishes of the political people, it still can be considered legitimate by the political people even though it did not participate in its making.

### C. Italy: Constitution as a Political People Decision

The constitution, as demonstrated by the Czech case, is without a doubt a law–decision of the state articulating its constitutional identity. However, I argue that it might also serve as a focal point of the articulation of the popular imaginary. Such an argument is hardly new, as many

<sup>48</sup>See FERDINAND PEROUTKA, *O VĚCECH OBECNÝCH I 52* (Daniel Bohdan ed., 1991).

<sup>49</sup>With 19.74% of the respondents thinking otherwise and 22.41% of them thinking the Constitution neither contains and protects the values of the Czech people, nor does not. Data based on survey conducted in a collaboration with Median in January 2021 as part of the Establishment Research Project (<https://establishment.cz>).

**Table 1.** Do you think the Czech Constitution should be completely rewritten?

|                               |        |
|-------------------------------|--------|
| Yes, it should                | 26.92% |
| Neither should, nor shouldn't | 21.32% |
| No, it shouldn't              | 51.77% |

Source: Own data; survey research conducted in collaboration with Median in January 2021 as part of the Establishment Research Project.

**Table 2.** Do the following entities represent the values of the Czech society?

|                                   | Represent | Neither represent, nor don't represent | Don't represent |
|-----------------------------------|-----------|--|-----------------|
| Political parties and politicians | 23.1%     | 33.4%                                  | 43.5%           |
| Media and journalists – public    | 41.5%     | 32%                                    | 26.5%           |
| Media and journalist – private    | 21.6%     | 37.9%                                  | 40.5%           |
| Scientists and academics          | 55.3%     | 34.2%                                  | 10.5%           |
| Experts                           | 36.3%     | 41.5%                                  | 22.2%           |
| Courts                            | 49.1%     | 33%                                    | 18%             |

Source: Own data; survey research conducted in collaboration with Median in March 2023 as part of the Establishment Research Project.

constitutionalists would agree the constitution is capable of steering the people's identity-creation process or would even say that the constitution creates the identity of the people. However, my argument is a bit different. I do not claim that the constitution creates or influences the people's identity directly, as it is impossible due to the autopoietic nature of the organizational system of the political people. I argue that the political people itself can appropriate the constitution as a cultural product to articulate its understanding of its own existence; that is, that it is the political people itself who transforms the legal nature of the constitution into a wider cultural one, that the constitution is a merely an irritation that is translated into the internal operation of the political people—into the people's perception of the constitution.

Therefore, in this section, I shall demonstrate how the Italian political people appropriated the Italian Constitution of 1948 to articulate its popular imaginary of the Italian people based on a shared culture.

The Italians, when asked about the fundamental values constituting the basis of the Italian political people, listed, among others, culture at 59%, traditions at 55%, and language at 52%—see Table 3 below. The Italian popular imaginary understands the Italian political people as based upon culture in the broader sense of the word. Culture is seen as a unifying aspect that overcomes the long-lasting historical divisions between the peoples of the Apennine Peninsula—Guelphs and Ghibellines, Settentrione and Mezzogiorno, fascists and communists, monarchists and republicans, Christian Democrats and Communists.

Moreover, when we speak about the Italian culture—or culture in Italy—we speak above all about *la bellezza*—beauty. As Ainis rightly points out, “[i]s there any unifying element, any element that distinguishes the Italian culture from those of other nations? If yes, it is beauty.”<sup>50</sup> It is the beauty of not only the language and art in all forms, but also of public spaces surrounded by beauty and, consequently, of a public life filled and shaped by beauty. Even though somewhat exaggerated, especially the comparative element—but not according to Sgarbi himself—it might be said that “Italy is the most beautiful country in the world; and that is not a cliché: It is a factual

<sup>50</sup>MICHELE AINIS & VITTORIO SGARBI, *LA COSTITUZIONE E LA BELLEZZA*, introduction para. 3 (2016).

**Table 3.** Which of the following elements constitute the basis of the “Italian people”?

|                                  |        |
|----------------------------------|--------|
| Culture                          | 59.31% |
| Traditions                       | 55.31% |
| Language                         | 51.75% |
| Personal freedoms                | 39.41% |
| Religion                         | 34.00% |
| Italian state                    | 32.06% |
| Respect for the private property | 23.19% |
| Mutual solidarity                | 20.12% |
| Ethnicity                        | 15.81% |
| Economic prosperity              | 13.69% |
| Collaboration within communities | 13.31% |
| Environmental responsibility     | 13.00% |
| Success of individuals           | 9.50%  |
| There is no “Italian people”     | 21.69% |

Source: Own data; survey “*La percezione dei partiti anti-establishment in Italia*” conducted in collaboration with Istituto Demopolis in May 2021 as part of the Establishment Research Project (<https://establishment.cz>). Multiple choices allowed.

matter—objective, both qualitatively and quantitatively. Italy, therefore, can’t not have beauty as a constitutional element.”<sup>51</sup>

For Italians, the Constitution is an articulation of this beauty. That being said, it does not mean the Constitution is perceived strictly in this way. It would be, for example, a grave misunderstanding to ignore the antifascist tradition of the Resistance and its influence on the people’s perception of the Constitution, as masterly expressed by Calamandrei during a discussion with students in Milan, January 26, 1955:

If you want to go on a pilgrimage to the birthplace of our Constitution, go to the mountains where the Partisans died, go to the prisons where they were jailed, go to the fields where they were hung. Wherever an Italian died to redeem freedom and dignity, you should travel there with your mind, young souls, because it is there that our Constitution was born.<sup>52</sup>

Therefore, it is this broader understanding of Italian culture as beauty, antifascist Resistance, or the social dimension of labor, all demonstrated by Roberto Benigni in his TV show *La Costituzione Italiana: La Più Bella del Mondo* at RaiUno, which enables the Italian political people to understand the Constitution as something beyond the law, as a “fountain of beauty”<sup>53</sup> expressing the nature of the Italian political people,<sup>54</sup> or better said, “the Italian Constitution is a mirror, the Italians are the images that it reflects.”<sup>55</sup>

<sup>51</sup>See *id.* introduction para. 10.

<sup>52</sup>Steven G. Calabresi & Matteo Godi, *Italian Constitutionalism and its Origins*, 6 *It. L. J.* 23, 23 (2020).

<sup>53</sup>AINIS & SGARBI, *supra* note 50, introduction para. 4.

<sup>54</sup>According to the survey “*La percezione dei partiti anti-establishment in Italia*” conducted in cooperation with Istituto Demopolis in May 2021, 75% of Italians think the Italian Constitution contains and protects the values upon which the identity of the Italian people is built.

The question was “Do you think the Italian Constitution contains and protects the values upon which is the Italian people built?” with 44% definitely yes, 31% rather yes, 7% neither yes nor no, 12% rather no, 6% definitely no.

<sup>55</sup>AINIS & SGARBI, *supra* note 50, introduction, para. 9.



**Table 4.** Do you trust the following institutions?

|                           | Yes, I do | Neither trust, nor don't trust | No, I don't |
|---------------------------|-----------|--------------------------------|-------------|
| Government                | 38.57%    | 28.00%                         | 33.43%      |
| President of the Republic | 58.25%    | 12.62%                         | 29.13%      |
| Parliament                | 25.13%    | 34.68%                         | 40.19%      |
| Civil Service             | 17.00%    | 28.88%                         | 54.12%      |
| Political parties         | 8.68%     | 27.31%                         | 64.01%      |
| Magistratura              | 32.88%    | 21.50%                         | 45.62%      |
| Police                    | 65.75%    | 20.25%                         | 14.00%      |
| Legal system              | 35.12%    | 29.00%                         | 35.88%      |

Source: Own data; survey “*La percezione dei partiti anti-establishment in Italia*” conducted in collaboration with Istituto Demopolis in May 2021 as part of the Establishment Research Project (<https://establishment.cz>).

**Table 5.** Do you think the Italian Constitution should be completely rewritten?

|                               |        |
|-------------------------------|--------|
| Yes, it should                | 26.38% |
| Neither should, nor shouldn't | 5.88%  |
| No, it shouldn't              | 67.74% |

Source: Own data; survey “*La percezione dei partiti anti-establishment in Italia*” conducted in collaboration with Istituto Demopolis in May 2021 as part of the Establishment Research Project (<https://establishment.cz>).

It is also this perception of the Constitution as something beyond, or maybe above, the law, that unites the Italian political people and express and protects its values,<sup>56</sup> which is behind the strong feeling of the Italian people regarding the Italian Constitution as something belonging to it.

This strong sense of appropriation by the Italian political people is clearly demonstrated in its distrust in the institutions of the state—see Table 4—and dissatisfaction with the Italian democracy on the one side,<sup>57</sup> and with the unwillingness to change the Italian Constitution on the other—see Table 5. It is obvious that from the perspective of the Italian people, the Constitution is not to be blamed for the perceived unfortunate state of the Italian state and the level of Italian democracy as it is, from the people's perspective, severed from the framework of the state and belonging to the people itself.

In this regard, the Italian case demonstrates that the constitution, even though a decision of the state, can serve as a focal point of the popular identity of the political people if appropriated by it as a cultural product. The political people can perceive the constitution as expressing its hopes, addressing its fears, protecting its values, and arising from the same social space and being shaped by the same social experience as the people itself, and in such case, the constitution creates a strong narrative, which the personal elements of the political people—politicians, trade unions, journalists, artists, priests, and so on—can use to foster the development of the popular identity of the political people and to build a strong bond between the political people and the founding ideas of the state.

<sup>56</sup>See Survey “*La percezione dei partiti anti-establishment in Italia*”, *supra* note 54.

<sup>57</sup>According to the survey “*La percezione dei partiti anti-establishment in Italia*” conducted in cooperation with Demopolis in May 2021 as part of the Establishment Research Project (<https://establishment.cz>), only 18.88% of Italians are satisfied with the Italian democracy in contrast to 68.50% who are not.

#### D. Conclusion

This Article presents constitutions as law decisions of the state on the one hand and as objects of cultural appropriation by the political people on the other. Moreover, it demonstrates the ability of the constitutions to serve as a strong irritant affecting both the constitutional and popular imaginary.

Even though the argument that the constitutions are vital articulations of the constitutional identity of the state is hardly novel or surprising, I argue that it is necessary to walk this way up to its end. In other words, when we say that the constitution expresses—besides other state decisions—the constitutional identity of the state, we should accept the consequences of such conceptualization, that is, that even in democracy, the constitutions are decisions of the state and its institutional framework and the political people stays outside of this decision-making process. Nevertheless, as demonstrated by the case of the Czech Constitution of 1992, even though the constitution is an outcome of the constitutional imaginary of the state with no interference from the people, it does not mean it lacks democratic legitimacy when the state's constitutional imaginary and the people's popular imaginary are situated within the same social space, sharing the same social awareness, arising from the same social experience—as expressed, within the Czech case, by the adherence to the rationality by both the state and the political people.

Furthermore, the article presents the constitution as a medium of a collective identity of the political people; that is, in the Italian case, the Italian political people—in its eyes—appropriated the Constitution as a cultural product, it stripped it of its legal nature and made it part of the broader social context within which the political people is situated and which co-defines it. In this sense, the constitution can serve as a powerful focal point of the popular imaginary, which expresses the values, hopes, and dreams of the political people, or more precisely, even though the constitution in hand is rarely read, its perception by the political people carries a narrative that, if being repeatedly told within the social space by the personal elements of the people—trade unions, political parties, intelligentsia, and so on—might build not only a cornerstone of the popular identity of the people but also a very powerful connection between the political people and the idea of the state<sup>58</sup> beyond any loyalty or trust to the particular institutions or persons representing them.

However, the primal focus of the Article is not constitutions per se but their nature as state and political people decisions articulating the constitutional and popular imaginary. By focusing on constitutions as explanatory examples, I propose a theoretical framework conceptualizing the state and, perhaps even more importantly, the political people as organizational systems that exist within multiple function systems—of law, economy, politics, culture, and so on—and are operationally closed to each other. The state and the political people were not chosen without a reason, quite to the contrary, they represent the dual nature of democracy based upon the liberal principle of the rule of law and the democratic principle of the majoritarian rule of the people. Consequently, by conceptualizing the state and the political people as organizational systems, we can finally overcome the urge to merge those two together in the pursuit of democratic legitimacy united in constitutionalism. In other words, we can begin our journey from the notion of non-existent people being represented by the state towards the, most probably never-reachable, point where the state and the people exist beside each other and influence each other by the means of irritations—to stay within Luhmannian terminology.

The present Article, therefore, represents a first step in the theoretical pursuit of the conceptualization of dual democratic legitimacy based on the constitutional identity of the state and the popular identity of the political people, the former constructed by the state's decisions articulating the constitutional imaginary, the latter by the political people's decisions articulating

<sup>58</sup>See Maurice Hauriou, *The Theory of the Institution and the Foundation: A Study in Social Vitalism*, in *THE FRENCH INSTITUTIONALISTS: MAURICE HAURIUO, GEORGES RENARD, JOSEPH T. DELOS* 93 (Albert Broderick ed., 1970) (discussing an idea similar to the directive idea of the state as conceptualized).

the popular imaginary. The importance of such conceptualization lies in the opportunity to recognize the division between the state and the people and their legitimacies, and in the opportunity to understand their agonistic relationship that defines a modern democracy. The importance lies in the overcoming of the current efforts to build democratic legitimacy around the idea of the constitution as the expression of both the rule of law and the majoritarian principle, that is, the constitution as the decision of the state on its organization and self-limitation and, at the same time, as the decision of the people to transfer its sovereignty to the state. Only that way can we have a chance to overcome the dominance of the rule of law—and the state and its institutionalized power—over the majoritarian principle—and the people.<sup>59</sup> To be clear, overcoming the dominance of the state, and its rule of law, over the people, and its majoritarian principle, does not mean to push towards the dictatorship of the majority and dismantle any restrictions safeguarding the rights of the minority and, as Sadurski points out, the equality of the people's membership in the first place,<sup>60</sup> because that would mean replacing one dominance by another. The ultimate goal, towards which the conceptualization of the state and the political people presented in this article is just a first step, is to reconcile the political people with the state and find a framework of democracy built upon a dual legitimacy of the state and the political people as two equals that complement and strengthen each other in order to avoid both the elitist legalistic state-dominated democracy and the unrestricted dictatorship of the majority steered by authoritarian-like leaders.

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<sup>59</sup>Such dominance is very well expressed in the requirement of the state institutions to take into account their democratic legitimacy but only as long as it does not concern the rule of law itself, as Amato notes: “[W]hen the rule of law is at stake, there are boundaries that cannot be crossed.” *RULE OF LAW VS. MAJORITARIAN DEMOCRACY 5* (Giuliano Amato, Benedetta Barbisan, & Cesare Pinelli eds., 2021).

<sup>60</sup>See Wojciech Sadurski, *Majority Rule, Democracy and Populism: Theoretical Considerations*, in *RULE OF LAW VS MAJORITARIAN DEMOCRACY 189, 196* (Giuliano Amato, Benedetta Barbisan, & Cesare Pinelli eds., 2021).