

ARTICLE

Populism: A health check for constitutional democracy?

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Abstract

“Populism” appears everywhere: a frequently proffered assessment—or perhaps diagnosis—of constitutional systems around the world. Both its supporters and opponents emphasise its newness. But its physiognomy, causes, and impact on legal orders and institutions are a matter of deep controversy. In a few words, its contours and core components adapt to different constitutional settings. Populist forces back a variety of agendas, which often overlap in a more rhetorically than concrete way.

The authors of this issue divide themselves among opponents to populism and moderately optimistic observers. In this respect, populism has probably become a catalyst both for its supporters and detractors. Populism identifies through ideas that rally increasing number of discontents. But also opponents identify as populists the perceived threats to liberal democracy as they understand them.

Defining populism has not simply proven to be a Sisyphian task; it has also showed that it is all but easy to pin down what a liberal democracy is made of. Contemporary debates about the fate of democracy need to abandon metaphysics for a more realistic, down-to-earth approach that is sensitive of the specificities of each constitutional setting.

Keywords: Populism; Constitutionalism; Liberal democracy; Constituent Power; Rule of Law Enforcement

A. Populisms and anti-populisms

This special volume focused on populism has set itself an ambitious challenge. For “populism” appears everywhere: a frequently proffered assessment—or perhaps diagnosis—of constitutional systems around the world. Yet populism is associated with widely varying agendas and implementation strategies. Our images of the populist landscape lack clear definition. In Hungary and Poland, populists are identified by their pursuit of illiberal ideals; in Italy populists fight economic austerity and resist the arrival of immigrants and refugees; in the United States and the United Kingdom, populists reaffirm their sovereignty by cutting their ties with the international community and supranational bodies; in Venezuela, populists have transformed a democracy into an autocratic, totalitarian regime. As Bojan Bugaric demonstrates in his Article, populism is a Janus-faced phenomenon, which rallies peoples by emphasizing core concepts such as democracy, accountability, or majoritarian rule, but may give these concepts a worrisome twist.¹

The contributors bring some order to this disparate field. In their analysis of what populism is, most reference thin or ideational accounts that identify populism as a style or mode of political action independent of its ideological valence. Particularly prominent in the Articles—as well as the academic literature generally—is Cas Mudde’s and Cristóbal Rovira Kaltwasser’s influential definition of a “thin-centered ideology that considers society to be ultimately separated in two

*The authors are the guest editors of the parallel special issue entitled *Populism and Popular Control in Constitutionalism*, 20 GERM. L. J. (2019), issue 2.

¹Bojan Bugaric, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, in this issue.

homogeneous and antagonistic camps, ‘the pure people’ and the ‘corrupt elite’.² Paul Blokker, however, considers that the search for a clear-cut definition—specifically the thin-centered or thin ideology—is analytically counter-productive.³ Blokker’s skepticism is perhaps borne out by the meanings and variants of populism that the authors canvas alongside the thin ideational account.

Halmi distinguishes between good or true populism, which is democratic and reflects a genuine implementation of popular sovereignty, and bad or false populism, which is authoritarian.⁴ Halmi’s focus is on the authoritarian populism that has emerged in Central and Eastern Europe, particularly Poland. In somewhat similar terms, Bugarcic distinguishes between authoritarian populism and emancipatory populism, which is democratic and anti-establishment, although Bugarcic’s focus is the latter rather than the former.⁵ Tushnet while accepting that populists share a mode of action—the invocation of the unitary people—emphasizes the substantive dimension of populist politics. Here significant differences emerge between the policy objective of left-wing and right-wing populists, the former perhaps less opposed—in Tushnet’s account—to ideals of constitutional democracy.⁶ Blokker distinguishes between inclusionary and exclusionary populism, between reformist and revolutionary populism, and between transnational and national populism. Populisms of the former kind seek to include more people within the state, to reform the institutions of constitutional democracy rather than replace them, to build a transnational people to match the emergence of transnational institutions.⁷ What is immediately obvious is that different authors explicitly work with different understandings of populism. Less obvious but just as important, perhaps, is the expansiveness of understandings. Populism is not a discrete phenomenon, let alone the narrow thin-centered ideology. Rather it connotes a whole understanding of or attitude to government, as broad and as contested as constitutionalism itself. Scheppele notes that the very idea of populism may melt into the air if it does not track the way in which ordinary people generally use the term.⁸ But a populism that accommodates so many different usages may not facilitate analytical clarity.

Broadened from the thin-centered ideology, populism is no longer merely a constitutional phenomenon to be analyzed but has become a way of framing and understanding contemporary constitutions. This framework for analysis is based on an opposition between populism and something else, typically some variant of liberal constitutional democracy. Every populism has its anti-populism; and this opposition holds constant even as the understandings of populism and anti-populism shift quite radically. Scheppele suggests that we abandon the question of what is populism and instead ask why so many academics are obsessed with populism.⁹ For her, populism stands in opposition to liberal constitutional democracies. For Halmi, authoritarian populism stands in opposition to constitutionalism. The authoritarian populists of Hungary and Poland stand outside any plausible account of the value of constitutionalism because they have no aim to balance democracy or the protection of fundamental rights.¹⁰ Théo Fournier’s anti-populism is constitutional democracy. In a striking image, he presents constitutional democracy

²CAS MUDDÉ & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 5 (2017). Referenced by Gábor Halmi: *Populism, Authoritarianism and Constitutionalism*, in this special issue; Bojan Bugarcic, *supra* note 1, at 3; Julian Scholtes, *The complacency of legality: constitutionalist vulnerabilities to populist constituent power*, in this issue; Mark Tushnet, *Varieties of Populism*, in this issue. Scheppele refers to understandings of populism as based on tactics rather than ideological and substantive: Kim Lane Scheppele, *The Opportunism of Populists and the Defense of Constitutional Liberalism*, in this issue.

³Paul Blokker, *Varieties of Populist Constitutionalism: The Transnational Dimension*, in this issue.

⁴Halmi, *supra* note 2.

⁵Bugarcic, *supra* note 2.

⁶Tushnet, *supra* note 2.

⁷Blokker, *supra* note 2.

⁸Scheppele, *supra* note 2.

⁹*Id.*

¹⁰Halmi, *supra* note 2.

as the host for the parasite of populism. The parasite needs the host to survive but once established, populism seeks to destroy the constitutional democracy that initially sustained it.¹¹

Scheppele, Halmai, and Fournier are far from indifferent to the imperfections of liberal constitutional democracy, but they still see it as worthy of protection from populism. As the understanding of populism starts to shift in the ways described above, however, the normative preference reverses also: Some form of populism becomes the solution for problems with constitutionalism. For Scholtes, liberal constitutionalism, lacking a coherent account of constituent power, has over-constitutionalized aspects of public life. As a result, it is therefore rightly vulnerable to takeover by a populist decisionist approach to constitutions.¹² For Bugarcic, democratic populism stands in opposition to neoliberal economic policies and austerity, a crucial component of the European response to the financial crisis.¹³ As we saw above, Blokker presents the possibility of an inclusionary, reformist and transnational populism. This could align with a communitarian constitutionalism or perhaps even political constitutionalism, but stands in opposition to a dominant legal constitutionalism that understands the constitution as a law that channels popular sovereignty and prioritizes judicial institutions.¹⁴

These oppositional frameworks present, perhaps ironically, a distorted reflection of the rhetoric of opposition between a pure people and corrupt elite that animates populism, under the thin-centered ideology account. The phenomenon of populism seamlessly becomes part of the analytical framework for populism: Populism in practice involves oppositional rhetoric while the concept of populism is presented in oppositional terms. The direction of travel is both ways. Populism and anti-populism can seep out of analytical debate, acquiring ideational force in political disputes. Scheppele's article in particular highlights the political-motivational force of ideas such as populism and illiberalism in the Hungarian context. She argues that Orbán's real political ambition is autocracy; populism is merely the ideological device used to sell that project to the population.¹⁵ As a result, analytical frameworks that place populism in opposition to anti-populism may themselves underpin populist rhetoric. The consensual claims of liberal constitutionalism are undermined, for good or ill, by the claim that constitutionalism stands in opposition to populism. Populists can easily condemn as partisan the now definitionally opposed institutions of constitutional democracies. This charge of partisanship shifts the burden of proving their accusations from populists to their opponents. The latter are accused of defending the *status quo* by criticizing those who rally for change.

B. Diseases, symptoms, and cures

Notwithstanding their divergent understandings of populism and anti-populism, the articles adopt a similar form of identifying problems in contemporary constitutionalism, and suggesting solutions. If we continue to build a framework of analysis around populism, we can relate the Articles by adopting Fournier's image of the body and the parasite. For Fournier, Halmai, and Scheppele, constitutional democracy is a broadly healthy body that should protect itself against the disease of populism. For Blokker, Bugarcic, Scholtes, and—possibly—Tushnet, populism is more the symptom of a broader disease within constitutional democracy. The prognosis and cure depends on whether one sees populism as the disease or the symptom.

If populism is the disease, strengthened reassertion of constitutional democratic values is the cure. For Fournier, part of the response involves scholars articulating and defending the value of

¹¹Théo Fournier, *From Rhetoric to Action, a Constitutional Analysis of Populism*, in this issue.

¹²Scholtes, *supra* note 2.

¹³Bugarcic, *supra* note 2.

¹⁴Blokker, *supra* note 2.

¹⁵Scheppele, *supra* note 1.

constitutional democracy against populist attack, as part of a public education exercise.¹⁶ In a somewhat similar vein, Scheppele calls on constitutional liberals to rise to their own defense, and the defense of others from populists who, while winning elections, undermine democracy for the future.¹⁷ Implicit in Halmai's account of authoritarian populism is that some reinforcement of the mechanisms of the legal constitution, such as an independent judiciary, is part of the cure.

These suggestions resonate with some of those made by the associated special volume that we have edited. David Prendergast, for example, argues for the legitimacy of judicial review designed to protect, but not perfect, democratic institutions and processes.¹⁸ There are, however, some reasons to be skeptical of cures in which constitutional democracy defends itself against populism by re-emphasizing its constitutional democratic credentials. This may just reinforce the oppositional claims of populism. Gonzalo Candia shows how intervention by supranational organizations feeds the populist rhetoric of a pure people confronting a foreign and corrupt elite.¹⁹ Nick Barber's plea for strengthened political parties is less easily presented as elitist,²⁰ but recent public discourse in the United Kingdom demonstrates how easily political parties fear being accused of thwarting the will of the people. The malaise in political parties spreads far beyond the U.K., of course, as established parties of the center have frequently ceded ground to the far right and the far left.

If populism is not the disease but rather the symptom of a malaise in constitutional democracy itself, then the cure requires a more critical re-examination of constitutional democracy. For Blokker, the cure involves saving constitutional democracy from its legal constitutionalist tendency; instead, a communitarian constitutionalism could align with an inclusive, reformist, transnational constitutionalism. In this regard, he explores the potential of the Democracy in Europe Movement, DiEM25.²¹ For Scholtes, the cure involves the recognition of the decisionist character of constitutions: public law must be defended as a discourse on the street, not in the courts.²² For Bugarcic, the cure involves the promotion of European solidarity and green growth among other measures.²³ Bugarcic's political economy of populism resonates with Zoran Oklopčič's diagnoses of contemporary constitutional democracies.²⁴ An alternative suggestion is provided by Erik Longo, namely the invigoration of the public realm through the enhancement of European popular participatory mechanisms.²⁵ In the related special volume, many authors share this view of populism as symptomatic of a disease within constitutionalism. Andrea Pin, for example, draws attention to how the judicial doctrines of supranational courts may trigger and facilitate populism.²⁶

C. The populist phenomenon

Let us move away from using populism as a framework of analysis and instead refocus on populist phenomena within constitutional practices. The thin ideological account of populism retains some purchase in this regard. Populists claim to speak on behalf of a pure and unitary people, denying the legitimacy of other voices. Even where populists achieve an electoral majority, this claim is

¹⁶Fournier, *supra* note 11.

¹⁷Scheppele, *supra* note 2.

¹⁸David Prendergast, *The judicial role in protecting democracy from populism*, 20(2) GERM. L.J. (2019), forthcoming.

¹⁹Gonzalo Candia, *Regional Human Rights Institutions Struggling Against Populism: The Case of Venezuela*, 20(2) GERM. L.J. (2019), forthcoming.

²⁰Nick Barber, *Some Thoughts on Populism and Political Parties*, 20(2) GERM. L.J. (2019), forthcoming.

²¹Blokker, *supra* note 2.

²²Scholtes, *supra* note 2.

²³Bugarcic, *supra* note 2.

²⁴Zoran Oklopčič, *Imagined Ideologies, Populist Figures, Liberalist Projections, and the Horizons of Constitutionalism*, 20(2) GERM. L.J. (2019), forthcoming.

²⁵Erik Longo, *The European Citizens' Initiative: Too Much Democracy for EU Polity?*, 20(2) GERM. L.J. (2019), forthcoming.

²⁶Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, 20(2) GERM. L.J. (2019), forthcoming.

false: Gabor Halmai is adamant on this.²⁷ But the claim succeeds when it reorients politics around a political cleavage between populists and anti-populists. This divide simultaneously generates controversy and shapes political confrontations. Of course, populists celebrate their uniqueness and present themselves as the only real alternative to the political morass that would otherwise dominate the political community. They claim to defend the real people against the tricks of a corrupt élite that markets its partisan interests as inevitable components of a sound constitutional culture. On the opposite side, anti-populists single out populists as disruptive political forces, whose success threatens the very nature and the future of a country. Who are the anti-populists? According to some, they are the defenders of constitutional democracy: representative democracy, protection of minorities, judicially enforced constitutional rules, and—perhaps—a certain deference to expertise in decision-making. Again we see how those who seek to respond systematically to populism can create for themselves a new identity, as defenders of the *status quo*, thereby reinforcing the populist claim that an unrepresentative elite holds control. This can confirm the view of populist supporters that existing laws, balances of powers, and legal agendas are neither neutral nor even a common framework within which everybody can feel at home.

In the previous section, we constructed a binary choice between populism as a disease and populism as a symptom in order to identify a divergence of approach between the Articles in both volumes. However, this may overstate their differences. The Articles' assessment of the malaise in contemporary democracies may be closer together if we do not try to organize them around a conceptual framework of populism opposed to constitutionalism. Instead, we should more simply treat populism as a real phenomenon within the domain of constitutional practices. Even if they fail in elections, populists reshape the political environment with their narratives of law, economics, and society at large. Where populists have met electoral success, significant change has followed: from political agendas to constitutional amendments, sometimes radically altering the existing balance of powers.

Whether populists are right or wrong, contemporary democracies cannot ignore their critiques or simply content themselves with criticizing the critics. If democratic regimes are to accommodate their citizens, they must respond to the deep challenges of this time. A focus on populism highlights the formidable problems that confront constitutional democracies and their supranational counterparts. They cannot be dismissed as naive, deprived of any foundation, or totally unrelated with the reality of contemporary constitutionalism. This Volume's Articles ably illustrate how the recent upsurge in populist politics has caused constitutional scholarship to reconnect with the most primal questions of constitutionalism: who are constitutions for? In many ways, the exploration of populism has brought to the fore the ambiguities and contradictions within constitutionalism itself.

D. Constitutional cinderellas

Scheppele notes the disconnection between real people and the “fictions that provide a normative foundation for consent-based regimes: the social contract, the veil of ignorance, constituent power.”²⁸ They are certainly fictions, as “[i]n any given real political regime, there was never a factual agreement or an actual moment when people did not know who they would be when deciding whether or not to support a constitution.”²⁹ The fictions, however were appealing, as long as the institutions and the bodies of law that they legitimized pleased the overwhelming majority of their citizens. Now vast parts of public opinion have experienced a sea-change; many are not pleased with the institutions and the bodies of law, and have repudiated most or all of the fictions.

²⁷Halmai, *supra* note 2.

²⁸Scheppele, *supra* note 2.

²⁹*Id.*

Raised in an atmosphere that trusted the passing of time to ease conflicts, secure more prosperity and perfect institutions, liberal constitutionalism is now confronted with citizens for whom the past was better than the present, and for whom the present may be still better than a grim future. Having associated themselves with globalization, supranationalism and international law, constitutional democracies are challenged by nationalist narratives that oppose immigration and the assignment of power to supranational institutions. Their boards of experts and the institutional bodies that they have set up to avoid politicization are delegitimized as being technocratic and politically unaccountable. In response, constitutional democracies seek to protect their identities and products from cultural assimilation and economic competition.

It is as if midnight had come and passed for constitutional democracies believing they were living the fantastic life of Cinderella: Liberal constitutionalism can also behave as Cinderella (borrowing from Gabor Halmai's recollection of Isaiah Berlin's metaphor). Constitutional democracies have proved surprisingly weak to political forces that were able to seize power in several countries. The theory of constraints on constitutional amendments seems incapable of preventing democratic backsliding. Nor has EU membership proved a check on aspirant autocrats. Supranational institutions oversee democratic institutions but find it hard to mobilize citizens through the democratic process (as Erik Longo shows). The lack of success of these initiatives derives also from the unwillingness of supranational institutions to inculcate the spirit of participatory democracy into the E.U. The Citizens' Initiative is a small innovation that does not meet the scale of the challenge. Ultimately, whether populist forces gain or lose powers, they have exposed the fragility of constitutional democracies and of the international legal order they have participated in creating.

E. Conclusion

The authors in both volumes disagree with one another on the relationship between liberal constitutionalism and populism. Is populism a threat to liberal constitutionalism or a necessary corrective to an abstracted constitutionalism that has left its moorings? For the same reasons, the authors disagree on how to respond to those challenges. Taken together, however, the articles identify many of the hidden or obvious social, institutional and legal components that make up constitutional democracies but that can no longer be taken for granted. They call on us to think deeply about how to secure the benefits of constitutional democracies without ignoring the problems identified by populist challenges. If it is hard to square some national changes in the judiciary with the principles of checks and balances, it is much harder to see how EU membership could enforce those principles. Political parties' malfunctioning within populist regimes tells the necessity of some social pre-requisites for the well functioning of democracies, as Nick Barber demonstrates in his piece. The attempts to reinvigorate the democratic component of the EU through popular initiatives do not seem to have succeeded for reasons that are deeply rooted in the European political culture.

While this piece is being written, elections await EU citizens. Populist parties' momentum does not seem to wane, and fears that populists could stop, or even bury the EU integration process, are on the rise. But, to some extent, populism feeds on issues stemming from the European deep-seated political culture. It would be wise for constitutional democracies to address such issue squarely, instead of simply flagging the perils of populism. If populism has fed on constitutional democracies, the reverse would just make constitutional democracies more partisan and divisive, thereby fulfilling populism's criticisms and discrediting constitutional democracies' capacity to reconcile even fierce disagreement.

At the very least, populist phenomena have given us the opportunity to take a fresh look at the mythology, mechanisms, and outputs we have lived by within liberal democracies.³⁰ The focus on populism has reminded us that democracies are founded on the idea of “freedom for all.” Human society should be an association for the welfare of all. Western constitutionalism is intrinsically inclusive and pluralistic, a specific manifestation being the welfare state promised after World War II. Constitutionalism and liberal democracies have in the past proved themselves capable of reinvention through reforms and changes. Populism warns constitutionalism not to be conservative but to respond to challenges in the real world rather than follow a utopian teleology. The Articles in this volume have given impressive shape and coherence to the populist critique, pushing us not to take for granted what we once saw as our inevitable legal and political horizon.

³⁰TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 7 (2018). (“An effort to understand democratic decline must start with a threshold question that is more difficult than first appears: What, precisely, do we mean by democracy?”); ANDRÁS SAJÓ & RENÁTA UÍTZ, THE CONSTITUTION OF FREEDOM 3 (2017) (“it became imperative to explain what constitutionalism means for the constitutional legal order and the political community which is meant to live by it.”).