

ARTICLE

Introduction: Populist constitutionalism: Varieties, complexities, and contradictions

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Abstract

The intense engagement of populists with constitutionalism—a phenomenon originally related to experiences in Latin America—is increasingly evident in some of the new European Union member states. But the populist phenomenon is clearly not confined to more recently established democracies. Populist constitutionalism stands for a number of distinctive tendencies in constitutional politics and practices which frequently are in tension with—and may even threaten—fundamental values, human rights, representative democracy, and the rule of law. The relation between populism and constitutionalism is, however, not necessarily one of anti-thesis, but rather manifests itself in distinctive ways, depending on specific contexts and variations. In this special issue, we argue that populist constitutionalism is best analyzed in a comparative, and historically and contextually attuned manner. The special issue wants to contribute to understandings of populist constitutionalism, which are both theoretically more robust and able to comparatively reflect on a diversity of “really existing” cases. The various contributions discuss central dimensions to the populist phenomenon. These pertain in particular to: (a) The varieties of populist engagement with constitutionalism; (b) a deeper understanding of the populist mindset; (c) the position-taking and reaction of constitutional scholars to populism; (d) the complex relation and overlap of populism with illiberalism and authoritarianism; and (e) the central nature of constituent power in populist projects.

Keywords: varieties of populism; legal; political; democratic; communitarian; transnational constitutionalism

The intense engagement of populists with constitutionalism—a phenomenon originally related to the “neo-populist,” Bolivarian experiences in Latin America from the late 1990s onwards¹—is increasingly evident in some of the new European Union member states.² But the populist phenomenon is clearly not confined to more recently established democracies. In a somewhat astonishing set of developments, populism now even threatens what were widely seen as the most durable,

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¹See, e.g., Carlos De la Torre, *Populist Citizenship in the Bolivarian Revolutions*, 1 MIDDLE ATLANTIC REVIEW OF LATIN AMERICAN STUDIES 4–32 (2017).

²Notably Hungary and Poland, but other members of the notorious Visegrád group equally manifest worrisome tendencies, as well as other countries in the region, such as Romania.

established constitutional democracies of the Western world, that is, the United Kingdom³ and the United States,⁴ even if the constitutional dimension appears so far less explicit in the latter.

Populist constitutionalism stands for a number of distinctive tendencies in constitutional politics and practices which frequently are in tension with—and may even threaten—fundamental values, human rights, representative democracy, and the rule of law. The relation between populism and constitutionalism is, however, not necessarily one of anti-thesis, that is, populism as an erosion of constitutionalism, but rather manifests itself in distinctive ways, depending on specific contexts and variations. In this regard, we argue that populist constitutionalism is best analyzed in a comparative, and historically and contextually attuned manner.

The special issue seeks to respond to such an approach and wants to contribute to understandings of populist constitutionalism, which are both theoretically more robust and able to comparatively reflect on a diversity of “really existing” cases. While legal scholars have only recently started to develop a strong interest in populism and its legal implications,⁵ other disciplines like political science and history have long cultivated rich debates on populism.⁶ With a few exceptions,⁷ current scholarship appears to engage with a largely negative and denouncing approach to the populists phenomenon, highlighting the erosion or abuse⁸ of constitutionalism and the rule of law, often focusing on a singular or a few cases. In contrast, this special issue is intended to put forward a more critical and self-reflexive as well as comparatively informed discussion of “populist constitutionalism,” which is able to bring out the diversity of the phenomenon, its deep entanglement with specific historical and contextual dimensions (such as, for instance, post-communist transformation), and its reactive relation to liberal constitutionalism.

The special issue examines various manifestations of “populist constitutionalism,” often, but not only, of an “illiberal” or “authoritarian” kind. The various contributions discuss central dimensions to the populist phenomenon. These pertain in particular to: (a) The varieties of populist engagement with constitutionalism, which may in a preliminary way be analyzed as one between left-wing and right-wing populism,⁹ but further distinctions are necessary;¹⁰ (b) a deeper understanding of the populist mindset in its approach to liberalism, the rule of law and constitutionalism;¹¹ (c) the position-taking and reaction of constitutional scholars to populism;¹² (d) the complex relation and overlap of populism with illiberalism and authoritarianism;¹³ and (e) the central nature of constituent power in populist projects.¹⁴ Particular attention will be paid to “populist constitutionalism” in the new democracies of East-Central Europe, but a number of

³Christopher Thornhill, *A Tale of Two Constitutions. Whose Legitimacy? Whose Crisis?*, in BREXIT. SOCIOLOGICAL RESPONSES (William Outhwaite ed., 2017).

⁴Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA LAW REVIEW 78 (2018).

⁵North-American constitutional scholarship is a distinctive, but important exception here. In the last 30 years, it has provided a rich body of literature on populist, or as some call it, popular constitutionalism. For an interesting overview of the US literature, analyzed through a European lens, see Lucia Corso, *What Does Populism Have to Do with Constitutional Law? Discussing Populist Constitutionalism and its Assumptions*, 3 RIVISTA DI FILOSOFIA DEL DIRITTO 443–470 (2014).

⁶See for recent additions, see THE OXFORD HANDBOOK OF POPULISM (Cristóbal Rovira Kaltwasser, Paul A. Taggart, Paulina Ochoa Espejo, & Pierre Ostiguy eds., 2017), and ROUTLEDGE HANDBOOK OF GLOBAL POPULISM (Carlos de la Torre ed., 2018).

⁷Paul Blokker, *Populist constitutionalism*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM (Carlos de la Torre ed., 2018); Mark Tushnet, *Comparing Right-Wing and Left-Wing Populism*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson, Mark Tushnet eds., 2018); Neil Walker, *Populism and Constitutional Tension*, 17 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (forthcoming, 2019).

⁸David Landau, *Abusive constitutionalism*, 47 UCDC REV. 189 (2013).

⁹See the contributions of Blokker, Bugarcic, Halmai, and Tushnet, each in this issue.

¹⁰As in the case of transnational populism, see Blokker.

¹¹See Scheppele, in this issue.

¹²See Scheppele, Tushnet, Blokker, each in this issue.

¹³See Bugarcic, Fournier, Halmai, Scheppele, each in this issue.

¹⁴See Blokker, Scholtes, each in this issue.

other significant cases are equally discussed.¹⁵ The special issue further aims to address the broader theoretical question of whether populism is reconcilable with constitutionalism.

In Gábor Halmai's contribution, he diversifies different populist manifestations with regard to their stance towards liberal democracy. Following Isaiah Berlin's work on populism, he introduces the notion of "true" and "false" populism, which is not dissimilar from Robert Howse's notions of "good" and "bad" populism. The true or good forms of populism remain true to an original democratic thrust, in defense of ordinary citizens who have been exploited or maltreated by elites. False forms, in contrast, mobilize populist ideas as a rhetoric for wholly different—mostly authoritarian—ends. Halmai's focus in the contribution is in particular on the latter—authoritarian populist rhetoric—as not least manifested in the case of Hungary. He indicates that despite the authoritarian thrust, these "bad" populists still invoke democratic elections and other institutions related to liberal democracy, making them distinct from "non-populist autocrats," while frequently enjoying widespread popular support as is the case in Hungary, and to a lesser extent in Poland. Despite the populist recourse to institutions that resemble democratic ones, however, Halmai rejects any relation of authoritarian populism to any robust form of constitutionalism: Not even the political versions of constitutionalism, often invoked by populists in both Hungary and Poland. After the discussion of further elements of authoritarian populism, that is, its invocation of religion and the nation, Halmai concludes that authoritarian populist constitutionalism forms an oxymoron, not least because its deep absence of any democratic dimensions.

Kim Lane Scheppele provides an in-depth analysis of the populist theoretical approach to liberal constitutionalism. Her analysis is not least stimulated by the question of why constitutional scholars have become obsessed with populism. Scheppele's view is that populists exploit debates that liberal constitutionalists have had about the vulnerabilities and tensions with regard to the normative foundations in liberal constitutionalism. Populists respond to the complexities and contradictions of liberal constitutionalism by offering a simpler theory. This populist theory of constitutionalism is however hardly populist, in that "the people" themselves hardly play a role in it. Much of populism is rather autocratic, endorsing a strong leader. Scheppele provides an intriguing discussion of the populist critique of liberal constitutionalism, in particular by discussing the views of the "philosopher" of the Hungarian regime: András Láncki. She subsequently shows that by peeling back the cover of populist ideology, it becomes possible to see that the new breed of autocrats has a remarkable similar program of constitutional deconstruction. Autocrats seek to concentrate all power in their hands, regardless of the superficial ideology that swept them into power. Scheppele argues that populism is simply a cover for something else going on: Which is the destruction of constitutionalism as such. Hence, her conclusion offers a poignant observation that a closer analysis of these "populists" reveal that few are really committed to populism in any serious sense. Instead, these new leaders have a history and practice of opportunism and they have used the current popularity of populism to ride a wave of political discontent with stagnating "politics as usual" to a position where they can begin to dismantle checks on power.

Paul Blokker's contribution argues that varieties of populism should be understood in relation to different understandings of constitutionalism. Blokker argues that populism includes the frequently referred to dimensions of a friend-enemy distinction, the construction of a unitary people, and the criticism of liberal democracy, but he argues that to these three dimensions, a fourth dimension, that of constituent politics, should be added. The invocation of the people by populists frequently means the invocation of constituent power. Different populist projects imagine such constituent power, and its application, in different ways. Blokker first prepares the terrain by identifying next to the hegemonic legal constitutionalism, three contender versions of constitutionalism, that is, political constitutionalism, communitarian constitutionalism, and democratic constitutionalism. Historically, constitutionalism cannot be reduced to the legal understanding, and all three contending versions inform forms of critique, including that raised by populists.

¹⁵For instance, France, Turkey, and transnational populism.

Blokker further discusses three distinguishing factors in populist constitutional projects: Inclusion/exclusion; past versus future; and national and transnational manifestations. In the final part, Blokker explores transnational populism as a not yet widely discussed version of populist constitutionalism, by taking as a case-study the Democracy in Europe Movement (DiEM25). While the DiEM25 project contains various populist dimensions—anti-elitism, reference to the people, critique of liberal democracy—it does so in a strongly democratizing manner. The main focus of critique in DiEM25 is not on legal constitutionalism, but rather on the incomplete realization of constitutional principles at the European level.

Julian Scholtes' essay explores the concept of constituent power in the light of recent constitutional developments in countries with populist governments. Scholtes emphasizes how populists are deeply at odds with constitutionalism, in that they reject the authority of law and favor the popular will. The populist claim is that only the latter bestows legitimacy on political institutions, not the idea of constitutional legality. In a discussion of the contrasting cases of Germany and Turkey, Scholtes points to the fact that in and by itself eternity clauses and doctrines of "militant democracy" are not sufficient to protect constitutional realities from succumbing to populist pressure. Some form of constitutional patriotism—as in Germany—is needed to embed constitutional principles in wider society. Scholtes pays distinct attention to contrasting conceptions of constituent power as inherent in constitutionalist and populist thinking, respectively. While constitutionalists draw heavily upon Kelsenian normativism in framing the way political power is generated, populists juxtapose this with a concept of constituent power that is inspired by Carl Schmitt's "decisionist" view. While constitutionalists stress the self-contained nature of the law, populists challenge this by drawing attention to the necessity for the social embeddedness of any legal order. In doing so, populists expose a core tension inherent in constitutionalism: How do constitutionalists reconcile their democratic aspirations with the simultaneous preclusion of certain political choices from the democratic realm? Populists, Scholtes argues, can attack constitutionalism because of the deficient conception of constituent power that underlies the latter.

Théo Fournier approaches populism from the perspective of a common political strategy which may, however, involve (the implementation of) different political ideologies. Fournier interestingly analyses the populist phenomenon by comparing two very different cases, France and Hungary, and more specifically, by analyzing Marine Le Pen's constitutional program drafted at the occasion of the 2016 French elections and Viktor Orbán's constitutional amendments since the Fidesz party came in power in 2010. For Fournier, the populist relation to the constitution is one in which the manipulation of the rule of law and majoritarianism are upfront. The populist constitutional strategy is paradoxical as the populist reforms—when populists manage to obtain political power—take place in settings that can still be regarded as constitutional. In other words, populists use constitutions to undermine the liberal understanding of the rule of law, and force a different, illiberal constitutional situation. What lacks in the populist strategy, according to Fournier, is in particular an appreciation of democratic values. Rather, the populist approach to constitutions is one of instrumentalism, which ultimately leads to the negation of the democratic spirit of liberal constitutionalism and the attempt to perpetuate populist power.

Following the historical diversity and complexity of populism, Mark Tushnet offers a critical legal perspective. Tushnet argues that recent scholarship on populism tends to obscure important differences between manifestations of populism, and more specifically compares right-wing and left-wing populism. He importantly starts with identifying a distinctive, inclusionary dimension to the Bolivarian experiences in Latin America, that is, the "transformation of subjects into citizens." In this regard, such experiences can be understood as a form of "transformative" populism. Tushnet argues that right- and left-wing versions of populism typically start with a similar diagnosis, consisting in a critical evaluation of what Tushnet calls "international social welfare constitutionalism." This manifestation of constitutionalism, to be found in post-1945 Western Europe, as well as Central and Eastern Europe after 1989 and Latin America in the 1990s, combined a promise of extending social welfare with an international integration of national

economies. When political elites started to fail in delivering on the promise of the extension of social well-being of such constitutional democracies, populist reactions are likely to emerge. In Tushnet's view, right-wing populism tends to push constitutional democracies away from liberalism, towards an economic project that serves to "people" or the "nation", whereas left-wing populism rather criticizes neoliberalism as a means to social welfare, and purports to offer a more solidary alternative. In general, in Tushnet's view, the substantive differences of left-wing and right-wing populisms matter.

The final contribution by Bojan Bugaric makes a strong call for the appreciation of the political economy of the populist revolt. In Bugaric's view, the predominance of "authoritarian populism," both in theory and practice, draws attention away from other manifestations of populism, which may involve versions of a "democratic and anti-establishment populism." Bugaric argues that the main tendency in populism studies is to reduce populism to a single set of universal elements. In this reading, populism is reduced to a menace to constitutionalism. In Bugaric's view, such an approach is both historically and normatively difficult to uphold. His suggestion is that populism is Janus-faced and is pointing into different directions simultaneously. Bugaric's admits to the fact that many contemporary manifestations of populism appear of the authoritarian kind, but points to the political-economic underpinnings of the emergence of such populism. Invoking Polanyi, he understands populism as part of the "double movement," in which societies react to situations in which the capitalist market has become too "dis-embedded." An important dimension to populism is hence the failure of center and center-left parties to provide a convincing alternative to the domination of neoliberal capitalism. It is the populists that currently seem to offer the only real alternative to the widespread marketization of constitutional democracies. Bugaric hence concludes that the only robust alternative to populism is one that emphasizes solidarity and equality, which in the European context would necessarily have to be launched on the European level.

The special issue ends with a set of reflections by Paul Blokker on the highly stimulating contributions to the accompanying special issue on populism and constitutionalism, edited by Oran Doyle, Erik Longo, and Andrea Pin.