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ARTICLE

Response to "Public law and populism"

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Abstract

The populist challenge to constitutional democracy—and constitutionalism as its *modus operandi*—is significant and raises deep questions regarding the nature of modern democracy. A crucial question pertains to the challenge that our existing (but eroding) democratic systems faces. The way we perceive this challenge is essential for our descriptive and prescriptive contributions. The first, perhaps most widely embraced view, is to perceive populism as a 'disease', 'deviation', or 'pathology' of existing democracy. A second view understands contemporary 'neo-populisms' rather as one particular instance of a rather profound, complex, and long-term set of transformations of democracy. Where we stand on this matter is of great importance, as the feasibility and potential success of our responses and solutions depend on our description of the problem. Many of the contributions to this special issue clearly go beyond the current state-of-the-art, in which populism and constitutionalism are often seen as mutually exclusive categories. The special issue provides ample reflection on intrinsic problems in constitutional democracy itself, and, taken as a whole, stimulates a self-reflexive and historically informed scrutiny of the modern projects of liberal democracy and constitutionalism, so as to provide due acknowledgement of the political and conflictive origins of the project, as well as of its current deficits.

Keywords: Anti-Populism; Constitutional Imagination; Embeddedness; Legitimacy; Populist Constitutionalism

The populist challenge to constitutional democracy—and constitutionalism as its *modus operandi*—is significant and raises deep questions regarding the nature of modern democracy, a political regime which, not too long ago, was understood as living its ultimate triumph; a historical victory of the unique and singular political regime of liberal, representative democracy. The contemporary challenge to this distinct political regime provokes a whole range of intractable questions, concerning not merely scholarly research and reflection, but clearly also, and much more prominently so, the predicament of 'really existing liberal democracies'.

The special issue at hand offers a wide-ranging and intriguing set of reflections on distinctive and pertinent conceptual matters, specific case-studies, and potential policies. Here, I would like to single out three prominent issues, which most, if not all, the contributions reflect on, and which seem to me crucial for further investigations on the relation between populism and public law. The issues I suggest to focus on are: First, the *diagnosis* of the challenge to constitutional democracy; second, the *legitimacy* of modern democratic systems; and third, the potential *solutions* for or responses to what can by now be clearly understood as the global challenge of populism.[1]

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[1] ROUTLEDGE HANDBOOK OF GLOBAL POPULISM (Carlos De La Torre ed., 2018).

A. The diagnosis of the challenge to constitutional democracy

A crucial question pertains to our existing (but eroding) democratic systems. How is the challenge produced by populism to be understood? The way we perceive this challenge is essential for our descriptive and prescriptive contributions. In other words, what populism is, how it relates to our existing political systems, and how to address the challenge is for an important part in the eye of the beholder. And hence our definitions matter, not least in terms of how we perceive democracy as a modern political system and collective political practice, and what we expect from constitutionalism. Zoran Oklopcic's denunciation of the "anti-populist conjurors" might be too strong for some, but I believe his criticisms are better taken as a healthy shake-up of our scholarly self-righteousness and narcissism. Not unlike Oklopcic's remarks, a prominent Italian constitutionalist, Gaetano Azzariti, recently observed that constitutionalists currently experience a "situation of inquietude determined by an insecurity with regard to their self-identity, and by the perception of an ever larger gap that separates traditional knowledge, necessary to interpret and hence represent the world, from the reality of the represented."[2]

A binary approach to the constitutionalism-populism relation—as in the sacred versus the profane, the rational versus the irrational, or the rule of law versus arbitrariness—oversimplifies the realities of actual political and legal struggles and, moreover, lacks in imaginative power, exactly that creative power we badly need in current times of widespread disaffection with the idea of democracy.

The imaginary dimension also relates, I believe, to what seem to me two prevalent ways of approaching the populist phenomenon. The first, perhaps most widely embraced view, is to perceive populism as a "disease," "deviation," or "pathology" of existing democracy. A second view understands contemporary "neo-populisms" rather as one particular instance of a rather profound, complex, and long-term set of transformations of democracy. Where we stand on this matter is of great importance, as the feasibility and potential success of our responses and solutions depend on our description of the problem. If our position is that existing liberal-democratic regimes were until recently mostly working well, in a relatively satisfactory manner, then our solutions will address the populist challenge by advocating a return to the *status quo ex ante*. Somewhat like Habermas's call for a *rückspülende Revolution* ("rewinding revolution") in the wake of 1989.[3] Hence, the argument is, we need to get back onto the right track, correct the wrongdoings, and return to what is ultimately a virtuous democratic system. In at least some readings, this also means we have a clear and institutionally tested view of democracy, and we already know which is the correct institutional architecture to match. The according institutional approach is that of using checklists to "measure" the rule of law, democratic performance, and "democraticness."[4]

If our position, however, is that things are in flux, that modern democracies have gone and are going through significant processes of change (including those of judicialization and transnationalization) and are exposed to rather incisive forms of societal change and acceleration ("high-speed society") (including rapid technological change, the impact of digital media, the fragmentation and polarization of society), then populism might be rather understood as a distinctive expression of deep-seated problems within existing democratic regimes, also in their capacity to deal with change. In this view, populism is not merely a disease, but rather a signifier of structural deficiencies and tensions within modern democracy, including in its constitutionalist design. This means that we need to understand which are those deeper tensions in our democratic (and capitalist) systems that in some ways provoke populist reactions, and it equally means we cannot do with solutions that simply endorse and "enforce" institutional recipes from the past, as the latter are unlikely to provide structural solutions.

It also means that we need perhaps to be less confident of a singularistic description of democracy as liberal per se (as currently manifest in strong denunciations of "illiberal democracy" as an

[2]Gaetano Azzariti, Il costituzionalismo moderno può sopravvivere? (2013).

[3]Jürgen Habermas, Die nachholende Revolution (1990).

[4]The usefulness of such checklists is viewed with great skepticism, by, for instance, Kim Scheppele (see Scheppele, *The rule of law and the Frankenstate: why governance checklists do not work*, 26 Governance 559 (2013)) as well as by Martin Krygier in his most insightful work on the rule of law.

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oxymoron) and that democracy should be—in an internalistic fashion—approached in its variety, rather than only—in a *grossolano* manner—be counterposed to authoritarian or totalitarian systems. As David Prendergast argues in his contribution, it "is clear that democracy cannot be kept as an uncontroversial constant in the debate. It is common to recognise democracy as an essentially contested concept, that is, a concept about which there is endless philosophical, reasoned dispute about the core or essential features of the concept, not just the margins."

The contributions to the special issue can be approximated to the two (implicit) positions with regard to populism outlined above. N.W. Barber's contribution on political parties, for instance, starts out with an identification of populism as a 'particular type of constitutional pathology' and the emphasis is on how the key function of political parties as a medium between political elites and the people is threatened by populist parties that aggressively promote disintermediation. A significant problem that Barber identifies is that the key functions of political parties—to engage with and represent the electorate in its plural form, while equally providing a check on executive power—are threatened by populist mobilization of the People-As-One, the stifling of dissent, and weaken the meaningful separation of powers. The diagnosis identifies the problem as the lack of opposition in contexts in which populists rule, due to the co-optation of, or even obstruction of, opposition parties. The analysis points to the need for a return to well-functioning party-systems, which includes an understanding of politics as a "team sport" in which different views compete, and hence an official recognition of dissent.

Erik Longo points to the classical problem of democracy on the transnational level, the "democratic deficit" of the European institutions. In his reading, we implicitly sense the idea that populism is a pathological consequence of a democratization process, started with *Maastricht*, gone awry. The diagnosis in his account points to the "evident deficiencies of the European project," and the way these foment populist reactions and reformulations of the European project. His account largely accepts the European integration project as a reality, and identifies its incapacity to develop a meaningful democratic system in terms of parliamentary and administrative accountability, control of government, and citizen participation as an important stimulus for populist counter-projects. Populism on this account is a distinctive expression of a call for the (re-)connection of the citizen and politics, in particular that of the EU, a goal to be achieved by means of a "complete turnaround in the legitimacy underneath European governance," that is, a "reform of processes and structures that would *replicate*, at European level . . . the principles of parliamentary accountability, administrative accountability and citizens" participation, which are the norms in various Member States' (emphasis added).

In Oran Doyle's discussion, the gaze is turned onto constitutional democracy itself, that is, he points to a problem that seems intrinsic to our understanding: the idea that the ultimate source of the modern constitution is the people. This idea is equally at the heart of populism, as populists have a propensity to invoke constituent power, and constitutional projects are presented as necessary "revolutions" in the name of a true embodiment of popular sovereignty. Also in Doyle's reading, populism appears as a deviation of the normal state of constitutional democracy's affairs, in that populism in a way uses or abuses a distinctively democratic understanding of the people as the source of constituent power. In Doyle's account, the diagnosis indicates the dangers that modern constitutional democracy harbours within itself, in particular in the form of an understanding of constituent power as relating to a "fictive entity" of the people, that endures over time. The argument is that both mainstream constitutional theory and empirical claims of populist constitutionalism fall into the trap of reifying the people as an actually existing entity that needs to defended and promoted. Rather than returning to a pre-existing state of affairs, Doyle points to the need of a reinterpretation of the relation between constituent power and the idea of the people. Constitutions should not be understood as made *by* the people, but as made *for* the people. The idea of the people as an entity that operates as a pre-political basis of the constitutional order should be abandoned, in favour of the idea of the constitutional order as a vehicle for serving the common goods or the needs of the citizens. This in itself would weaken the populist insistence on a unified people, and its friend-enemy strategy. The modern constitutional-democratic

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narrative should hence be reinterpreted, and cleansed of one of its most problematic aspects, that is, the reification of the people. Whether this will really do the trick is not at all clear, as observed by Zoran Oklopcic. As Oklopcic rightly points out "[b]eyond the fictive populist 'people' there can only be another fictive entity: another sovereign people" (one correctly understood).

Also in Andrea Pin's account of transnational courts, the challenge of populism is understood as an intrinsic problem of modern constitutional democracy. Pin emphasizes the process of judicialization or the increased power and prominence of courts in modern, post-1945 politics. In Pin's view, populism is an "alert for some diseases that contemporary constitutionalism may have contributed creating." Pin questions the "deep-seated political culture" which understands courts—in Pin's account the focus is on pan-European courts—as the vehicles of an optimistic narrative of progress and equality. In my reading, Pin's account strongly questions the typical *modernist*narrative or imaginary[5] of human rights expansion, increasingly deepened and stabilized democracy, and an ever more robust rule of law. This modernist narrative understands democracy—and constitutionalism's role within it—as part of a broader telos of the pacification of society, but fails to actually include society into the project.

B. The legitimacy of modern democratic systems

If modern democracies are in disarray, one crucial conceptual tool to grasp such a predicament is that of *legitimacy*. All contributions acknowledge a profound problem with legitimacy. What, however, legitimacy means for different authors, differs significantly. To simplify matters here, we may distinguish between *procedural, normative*, and *sociological legitimacy*. Procedural legitimacy rests on a Weberian understanding which identifies a legitimating force in the formal rationality of law, based on its generality, abstract nature, and calculability, which contribute to the predictable, transparent, and stable nature of the law.[6] Normative legitimacy emphasizes a right or rational set of abstract principles (arrived at through public reason) as the basis of a just and legitimate constitutional order. Normative legitimacy understood in this way consists in many ways in a deductive exercise, starting from abstract principles to arrive at concrete constitutional arrangements. In many studies on constitutionalism, there is an unbalanced attention to the procedural and normative legitimacy of constitutional orders. That is, an order is legitimate when the rules are being followed, rules which themselves are ultimately seen as deriving from self-evident ideas of public reason or principles of a higher order. In this reading, this means that—in the face of the challenge of populism—legitimacy can be regained if the existing rules are strengthened (e.g. in terms of EU law and its key principles, or in terms of international human rights standards) and/or if the higher values and principles on which the legal edifice is based are communicated and/or explained better to the wider public.

In this, the sociological or empirical embedding of constitutional orders, or their sociological legitimacy, in terms of the wider societal acceptance of constitutional norms, and/or the correspondence of such norms with beliefs held in society, is often overlooked or even reasoned away. This sociological dimension relates to the question of how much and what kind of support for the constitutional arrangements actually exists in a polity and also what kind of role constitutional norms play in social interaction. In this way, it induces from actually existing perceptions and understandings whether a gap or tension (or not) exists between formal institutions and wider society. Sociological legitimacy is understood here as a "matter of justifications of rule empirically available, one that the citizens, groups, and administrative staffs are likely to find valid, under the given historical circumstances."[7]

[5]Paul Blokker, *The Imaginary Constitution of Constitutions*, 3 Social Imaginaries 167–192 (2017).

[6]Klaus Eder, *Critique of Habermas's Contribution to the Sociology of Law*, 22 Law & Society Review 931 (1988).

[7]Andrew Arato, *Regime Change, Revolution and Legitimacy in Hungary*, *in* Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law 40 (Gábor A. Toth ed., 2012).

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Populists clearly challenge the normative and procedural understandings of legitimacy, and pretend to have a strong claim towards sociological legitimacy. In a version of "hermeneutics of suspicion," they frequently decry the liberal understanding of the rule of law and international human rights norms as in reality reflecting the interests of powerful minorities and as in tension with local practices, norms, and traditions.

The normative understanding of legitimacy, and its tension with populist practices, comes through in particular in Gonzalo Candia's account of Latin America, and the Inter-American Court of Human Rights. Candia cites a judgment of the IACtHR in which it argues that "[t]he democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties . . . the protection of human rights constitutes a impassable limit to the rule of the majority, that is, to the forum of the 'possible to be decided' by the majorities in the democratic instance."

The role of international courts in safe-guarding local democracy and protecting these local realities from the abuse of human rights is often emphasized and endorsed, but, as Candia points out, the actual capacity of international courts to counter or even just temper human rights violations on the ground—in this case the IACtHR was faced with Hugo Chavez's repetitive violation of human rights—is limited. One factor, as Candia points out, is the conundrum of the participating states' perception of legitimacy vis-à-vis the international human rights regime (the legitimacy of which cannot be reduced to a self-explanatory legitimating capacity of higher principles as in normative legitimacy). This conundrum is equally manifest in Europe, where in various societies, manifestations of scepticism towards the pan-European courts, in particular the ECtHR, has become more prominent in recent years.

Doyle makes a strong case for a strengthening of forms of legitimacy, which in my view are ultimately grounded in a more normative version of legitimacy. His claim is that the "legitimacy of a constitutional order depends not on the question of who made it but rather on the extent to which it serves the common good of those who are subject to it." In other words, the actual input of the citizens or the people in the creation of constitutional arrangements is deemed as ultimately not relevant. Rather, what provides legitimacy to the constitutional order is whether it has the "ability to coordinate human affairs in the interests of the common good." In Doyle's view, "[e]xercises of constituent might are prospectively justified only where, all things considered, the new constitution would be such an improvement on the existing constitution that it overrides the risk of ending up without any constitutional framework for the pursuit of the common good." Such a view of legitimacy of the constitutional order, can, in my view, ultimately only work if its falls back onto a predefined idea of what "improvement" entails, and hence, needs a set of universal standards and principles that allow us to identify what improvement is and when the interests of the concerned are served well.

The challenge posed by populists frequently puts the very language of liberal constitutionalism and core liberal ideas such as the rule of law and universal human rights to the test. One implication of this might entail that the idea of universalistic, normative legitimacy as such is challenged, and that in distinct ways the modernist narrative of constitutional democracy is put to the test. This means, I believe, that more attention should be paid to how to reconnect the normative and sociological dimensions of legitimacy, rather than engaging in a one-sided endorsement of the irrelevance of the latter.

C. Solutions for or responses to the global challenge of populism

Different solutions to the populist phenomenon are proposed in the special issue, and all of these have relevant and constructive dimensions to them, which ought to be carefully considered. Barber's call for "learning to love political parties" might be a bit too much to swallow for those who are witnessing the astonishing incompetence of the current ruling classes in Brexit UK or for

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those familiar with the deeply corrupted, clientelistic, and navel-staring political elites in a country like Italy, but his invocation of a historical recurrent cycle of putting the blame on political parties is well-taken. A call for the strengthening of political parties seems warranted, not least due to great problems with the internal democracy of political parties, the problematic selection processes of leadership, and issues of public funding. These are matters that in principle might be solved. But Barber's call is also important in its emphasis on the various crucial functions of political parties. Such functions would need to be re-imagined and find institutional expression, even in a post-party democratic landscape.

Prendergast's call is rather for a rebalancing of the relation between judicial review and politics, and he emphasizes a restricted form of judicial review, which is engaged with protecting democracy but not with *perfecting*democracy. Whether this nuanced and well-contemplated proposal for a more modest role of judicial review will be able to temper agressive critiques on court activism, as articulated by for instance the Law and Justice (PiS) part Poland, is a different matter.

Longo focusses on yet another crucial matter for contemporary democracy, that is, the extension and vibrance of the public sphere. Longo calls for the creation of a "pluralistic, civic space of dialogue among people and representatives" as well as the call for new instruments for the "channeling of anger towards Europe" to be turned into "democratic forms of dialogue within European institutions." This idea points to an essential problem within the European context: the absence of a comprehensive and well-informed public debate on European integration. In a not unrelated manner, Pin endorses a reconnection between European courts and the European people, and a simplication of the legal-technocratic language used in the legal field. As Pin argues, the "distance between democratically elected bodies and the judiciary is aggravated because of the language factor. The technicalities of the law, the sharpness and precision of legal concepts are features both of legislation and case-law. But parliamentary deliberations can host narratives that are more easily accessible to the people, and with which individuals and groups can entertain a dialogue." He further argues that

> [t]he gap between the people and the Courts creates a disconnect on the very meaning of justification. If justifications are often inaccessible even for those who are directly involved in the proceedings, then the judges, albeit model reason-givers, are nonresponsive—not just to the population, but, more narrowly, to the parties that seek to resolve their dispute. The two Courts' advantage in being composed of selected experts with highly sophisticated skills runs the risk of being useless if individuals feel disenfranchised by the overriding judgments of two Courts that they hardly understand.

Pin proposes here what I tried to invoke earlier, that is, the need for a reconnection of normative/judicial justifications with the sociological justifications available in wider European society.

Taken together, these more pragmatic solutions offered by the various contributors, together with Oklopcic's strong call for a self-critical stance of constitutional scholars (the "anti-populist conjurors"), make up a very strong set of sensible proposals. Many of these clearly go beyond the current state-of-the-art in constitutional studies with regard to the populist phenomenon, and are hence a very welcome contribution to current debates.

Novel, imaginative proposals, suggested from a range of angles, are particularly important if one considers—as its appears to me at least—that the main thrust in legal scholarly literature as well as action is towards a simple reinforcement of the existing legal and political institutions, and a protection of, and attempt to return to, the *status quo ex ante*. In particular in the European context, the entire debate around the EU's article 7 procedure as well as various institutional responses to "backsliding" within the EU (systemic infringement procedure, Copenhagen Commission, and so on) emphasize a return to the *status quo ex ante*, and fail to critically approach the existing institutions and democratic systems themselves. As in particular Pin argues, such an approach may merely exacerbate existing tensions and (popular) reactions of resentment,

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as it does not question a narrative of progress and equality, which does not correspond to the material/socio-economic and political reality.

As Pin explains, this seems to be particularly evident in the European context. The postwar project of European integration through law may be understood as having taken the distinctive form of a diversified legal-constitutional project, in which national judicial institutions have been enforced, while powerful new supranational institutions have been created as "guardians" of a de facto pluralistic European constitution. According to many observers, this has resulted in a European order, which is to be understood as a protective framework for European democracy, grounded in a "common heritage of the European constitutional tradition as it has emerged in the second half of the 20th century."[8] As for instance Mattias Kumm argues, it consists in the "idea that legally constraining the relationship between Member States is an effective remedy against the great evils that have haunted the continent throughout much of the 19th and first half of the 20th century" and that:

> legal integration can be seen as a mechanism which tends to immunize nationally organized peoples from the kind of passionate political eruptions that have led to totalitarian or authoritarian governments and/or discrimination of minorities that have characterized European history in the 19th and 20th century.[9]

European integration through law can, on this view, continue as a legal project, without needing any societal legitimation by means of a more robust democratic, participatory dimension. A not dissimilar view is endorsed by Chris Thornhill in his carefully argued, historically sensitive, and comparatively grounded recent work. According to Thornhill, the lack of a sovereign people in the European context is compensated for by a "legal/political system," which is able to "produce principles of inclusion ex nihilo, at a high level of inner, auto-constituent abstraction."[10] Human rights substitute for constituent power, in this view, allowing European integration through law to proceed without the need for either extensive, collective input from society nor for full-blown democratically legitimated politics.

As a number of the contributions to this special issue show, this legalistic approach towards the challenges contemporary democracy faces is not without significant problems and scholarly biases. In other words, the theoretical denial of the need for sociological and democratic legitimacy in constitutional democracies may be more or less robust, but needs to be able to withstand the test as constituted by historical and political trends that have by now (anno 2019) become of such force, that they cannot be dismissed as mere temporary interruptions of an otherwise forward-moving project of democratic and legal integration, grounded in public reason and benign neutrality. The modern projects of liberal democracy and constitutionalism have to be scrutinized in a self-reflexive and historicized manner, so as to provide due acknowledgement of the political and conflictive origins of the project, as well as of its current deficits.

[8]Matthias Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called*, 54 American Journal of Comparative Law 517 (2006).

[9]Kumm, *supra* note 8, at 514–15.

[10]Chris Thornhill, A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure 381 (2016).

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