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## Introduction—Public law and populism

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### Abstract

In an age of profound democratic anxiety, significant academic attention has been paid to the crisis in *constitutional* democracy. Constitutional lawyers, however, are still grappling with the relationship between public law and the current actual and perceived threats facing constitutional democracy in countries worldwide. This Introduction considers how the articles in this special volume address three pressing questions. How should we define the current threats to democracy, and populist challenge? Second, how might public law be a potential cause or contributing factor? Third, how might public law still provide some answers to the contemporary challenges to constitutional democracy? In Prof Dixon's view, constitutional democracy is a good worth preserving and there are models of at least relative "success" in the current constitutional universe. But Prof Dixon shares the view of many contributors to the special volume that the challenge is immense, and urgent, and that there are no easy solutions.

**Keywords:** constitutional democracy; future of democracy; populism

We are living in an age of profound democratic anxiety. The last year alone saw the publication of a range of books on the future of democracy by leading political scientists, philosophers, and constitutional lawyers—including Levitsky and Ziblatt,<sup>1</sup> Runciman,<sup>2</sup> Mounk,<sup>3</sup> and Ginsburg and Huq.<sup>4</sup> And it saw wide-ranging attention to the current crisis in *constitutional* democracy in many countries worldwide.<sup>5</sup>

Constitutional lawyers, however, are still grappling with the relationship between public law and the current actual and perceived threats facing constitutional democracy in countries worldwide. Is constitutional law a bulwark against democratic "backsliding," "retrogression," "rot," or "decay"? Or has it contributed to the current democratic malaise, or the rise of various forms of illiberal and authoritarian populism? This special issue of the Journal—based on a symposium—provides a timely, wide-ranging, and extremely important exploration of these questions, as well as broader questions about the relationship between public law and democracy.

First, this Issue considers how we should define the current threats to democracy, and populist challenge. Second, it examines public law as a potential cause or contributing factor. Third, it explores how public law might still provide some answers to this challenge.

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<sup>1</sup>See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

<sup>2</sup>See DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* (2018).

<sup>3</sup>See YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (2018).

<sup>4</sup>See AZIZ Z. HUQ & TOM GINSBURG, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

<sup>5</sup>See e.g., Mark A. Grbaer, Sanford Levinson, & Mark Tushnet, *Constitutional Democracy in Crisis* (2018).

Nicholas Barber notes the relationship between populism and the decline of political parties—parties that he suggests play a crucial mediating role between voters and institutions in a representative democracy.<sup>6</sup> Yet, parties are also under threat in many constitutional democracies. Lending support to political parties might thus be one way to counter the threats to democracy posed by certain forms of *authoritarian* populism. At a minimum, this involves recognizing the legitimate role played by opposition parties in a functioning democracy. It could also involve express constitutional recognition of the role and status of political parties, and/or increased public funding and other forms of institutional support, such as the devolution or regionalization of political power. All of these ideas will, of course, be quite familiar to German public law scholars, but Barber provides a useful theoretical analysis of their virtues.

Barber also acknowledges the degree to which we must be cautious in drawing inferences about the casual relationship between the rise of populist leaders and the decline in traditional non-populist political parties. Indeed, dissatisfaction with traditional parties may be a cause of populism. But so too might support for populist leaders come first, and effectively undermine the support for traditional parties.

Zoran Oklopčič poses an even deeper challenge to those seeking to identify ways in which public law may be able to help stabilize democracy. He asks whether, in a contemporary democratic context, institutional stability should in fact be taken as a

presumptive good, in the absence of a collective identity—be that as a people, or some other imagined political community? Shouldn't we want only worthy purposeful projects to withstand? Shouldn't we want new polities to be formed around ever more purposeful enterprises? Why help extant ones withstand by constituting them?<sup>7</sup>

Both Erik Longo and Andrea Pin separately suggest that a key contributor to illiberal or authoritarian populist movements in Europe is the rise of non-democratic forms of government at the regional European level, and that many of these movements are themselves sufficiently anti-Europe that they threaten the project of European integration as well as national constitutional democracy.<sup>8</sup> Longo thus argues:

[I]f the EU wants to survive, a complete turnabout in European governance is necessary, namely one that allows a reform of processes and structures which would replicate, at [the] European level, even with the imperfect practice of governmental control, the principles of parliamentary accountability, administrative accountability and citizens' participation, which are the norm in various Member States [and which together create a new] public sphere [that helps the] European project to be more democratic, pluralistic and tolerant.<sup>9</sup>

Pin, in turn, argues that this democratic deficit goes beyond the structure and practice of the European Commission and Parliament, and includes European courts such as the European Court of Justice and the European Court of Human Rights. These courts, he argues, have not only reduced the space for national level deliberation. They have also created a form of reasoning that is inaccessible both to parties and ordinary citizens and creates new forms of hierarchies in democratic politics. He suggests that

<sup>6</sup>See N.W. Barber, *Some Thoughts on Populism and Political Parties*, in this issue.

<sup>7</sup>Zoran Oklopčič, *Imagined Ideologies: Populist Conjurations and the Promises of Constitutionalism*, in this issue.

<sup>8</sup>See Erik Longo, *The European Citizens' Initiative: Too Much Democracy for EU Polity?*, in this issue; Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, in this issue.

<sup>9</sup>Longo, *supra* note 8.

[t]he disconnect between the Courts and the Europeans, combined with the replacement of parliamentary deliberation with judicial justification and the ideal of progress, may trigger a sense of inferiority or superiority that can exacerbate social tensions . . . the narrative of progress may not just disempower the popular will, but it can also harm social cohesion by prompting a sense of superiority or resentment, depending on whether one's claim has been judicially affirmed or denied.<sup>10</sup>

For Pin, responding to populism therefore means limiting the role of European courts, and regaining greater scope for national-level democratic decision-making.

Gonzalo Candia explores the role of regional human institutions in Latin America in both stabilizing and accelerating democratic erosion. In countries such as Venezuela, he suggests, deferential decisions by institutions such as the Inter-American Court of Human Rights and the Commission on Human Rights have arguably reduced the barriers to “abusive” constitutional change.<sup>11</sup> But equally, stronger forms of regional human rights enforcement have also had counter-productive effects—for Chávez they have served as a focal point for mobilizing increased populist support.<sup>12</sup>

Prendergast focuses on the potential role for courts in *protecting* democracy against the threat of populist erosion.<sup>13</sup> Like Pin, however, he notes that this kind of role for courts can undermine the scope of majoritarian decision-making and create legitimate concerns about democratic erosion. He thus suggests that courts should limit their role to some relatively thin form of procedural protection of democracy, rather than the perfection of democracy in a thicker, more substantive sense. He invokes John Hart Ely's notion of the role of the judiciary in support of both this idea of democracy-protection as well as a relatively thin or narrow role of the judiciary.

Oran Doyle explores theories of constitutional change, and specifically “constituent power” and their relationship to democracy, and notes that many recent illiberal or authoritarian populist movements have invoked notions of constituent power to legitimize the erosion of the substance of constitutional democracy.<sup>14</sup> Doyle thus proposes a shift in the dominant understanding of constituent power, to a lesser known but more normatively preferable understanding of Carl Schmitt's ideas, which emphasizes the idea of power exercised by a particular “entity,” rather than as itself—“an entity that exists through time.”<sup>15</sup> Such an understanding, he suggests, maintains a commitment to the “importance of the people to constitutional decision-making,” but is less susceptible to populist subversion—because it means there is no notion of “continuing unitary people” that the constitutional order should be designed to serve.<sup>16</sup>

The articles in the special issue are also diverse in both their theoretical and jurisdictional focus: Together, they consider the state of democracy in the UK, Hungary, Poland, Ireland, Taiwan, Japan, and Venezuela. This raises some challenges for the reader in terms of comparison or comparability across cases. But it has the virtue of providing examples of both left and right-wing forms of populism, and a useful baseline for thinking about the necessary ingredients for constitutional democratic stability, as opposed to erosion. Ireland, Taiwan, and Japan, for example, are arguably cases of relative democratic stability. Doyle also provides an interesting comparison of the Irish and Taiwanese experiences as a lens both into what underpins this

<sup>10</sup>Pin, *supra* note 8.

<sup>11</sup>See Gonzalo Candia, *Regional Human Rights Institutions Struggling Against Populism: The Case of Venezuela*, in this issue (citing David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013)).

<sup>12</sup>*Id.*

<sup>13</sup>See Prendergast, *The Judicial Role in Protecting Democracy from Populism*, in this issue.

<sup>14</sup>See Oran Doyle, *Populist Constitutionalism and Constituent Power*, in this issue.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

stability, and how different understandings of and attitudes toward constituent power can evolve over time.

The lessons of the Japanese experience in this context, however, are ultimately far from promising for those committed to the protection of constitutional democracy. Satoshi Yokodaido suggests that a framework-style constitution, combined with judicial restraint, has provided one important means of constitutional updating, or promoting constitutional stability.<sup>17</sup> But ultimately Yokodaido argues that the Japanese constitutional order has remained stable in only a negative sense of losing relevance for many Japanese people, rather than remaining a site of agreement and identification. In this context, Yokodaido cites evidence challenging the dominant view that the Japanese Constitution enjoys broad popular support. Instead, he suggests, its lack of being amended is the product of the formal difficulty for amendments under Article 96 of the Constitution, and the fact that proponents of change to Article 9 of the Constitution have been able to engage in an effective form of constitutional “workaround” or informal constitutional change.<sup>18</sup> In this sense, Yokodaido’s argument is reminiscent of Runciman’s recent analysis of how democracy ends—for example via a gradual loss of faith in its relevance and vitality.<sup>19</sup>

For my own part, I am more sanguine that constitutional democracy is a good worth preserving, and that there are models of at least relative “success” in the current constitutional universe, which suggest greater grounds for optimism than this account might suggest.<sup>20</sup> But I share the view of many contributors to the symposium that the challenge is immense, and urgent, and there are no easy solutions—though some of the solutions surely include those identified by contributors to this symposium.

<sup>17</sup>See Satoshi Yokodaido, *Constitutional Stability in Japan Not Due to Popular Approval*, in this issue.

<sup>18</sup>For my own engagement with this debate, see also Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments* (UNSW Law Research Paper No. 17–74), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3057199](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3057199).

<sup>19</sup>See RUNCIMAN, *supra* note 2.

<sup>20</sup>See Rosalind Dixon & Anika Gauja, *Australia’s Non-populist Democracy? The Role of Structure and Policy*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 395 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).