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EDITORIAL

Judicial Populism: the Rule of the People against the Rule of Law

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There is a modest but growing scholarly interest in populism in relation to the law and to judicial issues, but until now this interest remains largely confined to legal studies, in particular studies in constitutional law (cf. Blokker 2019; Corrias 2016; Martinico 2018; Halmai 2017; Landau 2018; Scheppele 2018; Sadurski 2019; 2020) and recently also international law (Koskeniemi 2019; Krieger 2019). Few studies in the highly prolific political science studies on populism address matters of public law. When they do, the focus equally tends to be on the constitutional dimension as a core element of democratic political systems and as a significant element in populist projects (cf. Arato 2019; Kaltwasser 2013; Mudde 2013; Müller 2017).

This special issue builds on the existing - but still modest set of - scholarly reflections on the relation between law and populism, making a strong case for the need for more extensive, systematic, comparative, and fine-grained analyses. Our argument is that there is a plethora of interesting and significant dimensions to populism and law that have been largely ignored in current studies on populism. In even stronger terms, it can be argued that the legal and constitutional dimensions are crucial to populism as a political project. Much of the current literature understands populism as an important threat or challenge to constitutional democracy (Müller 2016), human rights (cf. Alston 2017), and the rule of law (Kelemen and Pech 2018), but tends to take a normative and simplistic view in that it pre-empirically postulates a stark contrast or dichotomy, which reduces populism to the antithesis of constitutionalism and the rule of law. In this pejorative, largely binary approach, important dimensions of constitutionalism and public law remain under-exposed and significant nuances, affinities, and complexities are left unexplored.

An interdisciplinary, comparative, and historically sensitive approach to the relation between populism and law is all the more necessary in the contemporary, unusual times of the Covid-19 pandemic. A striking

dimension of the pandemic is the return of the state, and in particular of that of strong government or executive power. The invocation of a ‘state of emergency’ (as happened in a majority of EU member states, see Marzocchi 2020) has in various cases led to a significant concentration of decision-making power in executive hands, and a suspension of divisions of power, monitoring opportunities, and civil and political rights. In particular populist governments, notably those of Hungary and Poland, have taken advantage of the crisis and significantly expanded and further concentrated governmental power by means of emergency legislation, to the detriment of parliamentary prerogatives, the rule of law, and the civic and political rights of citizens (Drinóczi and Bień-Kacała 2020). The Covid-19 crisis comes on top of a series of preceding crises with not dissimilar dimensions, such as the 9/11 - War on Terror, the financial and economic crisis of 2007 (Eurocrisis), the terrorism crisis of 2015-6, and the migration crisis of 2015. In all these crises, the balance between law, human rights and constitutional democracy, on one hand, and security, on the other, has been significantly changed in favour of the latter.

The contributions in this special issue all want to take a critical, and in many ways political-sociological, approach to the relation between law and populism, which recognizes conflict as an intrinsic dimension of democracy, and, in this, explores the populist challenge as part of a broad and multi-faceted critique of the take-for-granted understandings of liberal, constitutional democracy. The contributions hence develop a critical and historical reflection on post-1945 democratic orders and understand current manifestations of populism as forms of critique of and backlash towards the predominant understandings and institutionalization of liberal democracy.

One distinctive dimension the special issue analyses is that of populism as a form of *backlash* against legal constitutionalism, human rights, and judicialization as instances of a larger liberal-legal hegemony that has emerged in post-war times. Populist movements and parties frequently contest judicial power and independence, higher courts (such as constitutional courts), as well as international courts and legal regimes (cf. Nash 2016). So far, no analysis has been done on this latter, very distinctive dimension of populism, which adds to the well-known nationalism-cosmopolitanism cleavage (Norris & Inglehart 2019), but with a specific, legal twist.

Two articles in this special issue contribute to a more systematic analysis of populist attitudes and criticisms towards judicial institutions and legal regimes. Mazzoleni and Voerman’s contribution offers an analysis of how populist parties address judicial issues and approach judicial institutions. The article is particularly focused on how Western European right-wing populist parties target apex judicial powers at the national and supranational levels. By means of a comparative analysis of the Dutch and Swiss cases, in particular the Dutch Freedom Party (PVV) and the Swiss People’s Party (SVP), the article highlights how right-wing populist parties in these two countries endorse the limitation of the independence and autonomy of judges and judicial institutions, favouring popular, national and political sovereignty instead. In Blokker’s contribution, the emphasis is on the ideological dimensions of the right-wing populist critique on liberal legalism as expressed by populists in both Eastern and Western Europe, including the *Forum voor Democratie* in the Netherlands, the *Rassemblement National* in France, the *Lega* in Italy, *Fidesz* in Hungary, and the *Law and Justice* party (PiS) in Poland. The similarity of arguments made against liberal understandings of the law - criticizing the status of human rights as well as the non-representative and autonomous positions of judges and courts – is striking, even if important differences between national manifestations remain. Various manifestations of right-wing populism show that a significant, but in political science not much discussed, dimension of (right-wing) populism is its highly skeptical attitude towards liberal-legal understandings and judicial institutions.

The article by Blokker also contributes to an understanding of populism as entailing *ideological dimensions* (cf. Freedman 2017), which goes beyond the thin-ideological description endorsed by Cas Mudde. A significant dimension, shared by various instances of right-wing populism throughout Europe - ranging from illiberal liberalism (Moffitt 2017), to sovereignty and conservative, religious populism - understands liberal legalism as the hegemonic discourse of the ruling classes and establishment political parties, and to which populist parties counterpose a nationalist, sovereigntist, and majoritarian ideology (cf. Kovács 2020). This dimension includes the relaunching of an alternative idea of European integration, that is, as a ‘Europe of the Regions’, or now rather ‘Europe of the Peoples’ (Becchi 2019).

In this, populist parties equally seek to shape a new political agenda and campaign strategies around judicial issues, including those related to *penal law* and “law-and-order” measures. Marked issues, especially those related to migration, have been frequently addressed by scholarship on right-wing populist parties. Little has, however, been done with regard to legal dimensions. In the growing party-based populist literature, the judicial theme remains marginal and little attention is paid to legislative aspects (e.g. decree laws) or to legal norms. Key questions regard the ways in which populist parties develop their political agendas with regard to citizenship, criminal and penal law, and in relation to judicial institutions. Dealing with these questions, Mazzoleni and Voerman focus on party ideologies and the discourses of populist leaders with regard to judicial institutions and the position of judges within democratic systems. Related to populist understandings of the judiciary is the emergence, or strengthening, of particular policies and policy fields, such as penal law and policy, in which legal issues are politicized by populists in government. In various European countries, such forms of policy-making have rendered security, restrictive citizenship policies, and punitiveness core dimensions of populist rule. Anastasia and Anselmi’s contribution discusses the interplay between penal populism, a concept developed by criminological literature (Pratt 2007), and manifestations of political populism, as ordinary research in political sociology and political science. Bridging these two strands of literature, the authors develop the concept of populist punitiveness. The article focusses in particular on a number of criminal laws as adopted by the Italian, populist yellow-green coalition, in government between mid-2018 and mid-2019. Anastasia and Anselmi show how the Italian populist coalition developed a “general pattern that corresponds to a punitive vision of society”.

A final, crucial aspect of the populism-law nexus is that of constitutionalism. The constitutional dimension is of great relevance for the discussion of populism and public law not least because constitutional reform and change seem to constitute an intrinsic part of populist political projects (Blokker 2018), but, in an even more significant manner, because *constituent power* is a distinctive part of populist claims (Arato 2017; Blokker 2019; Müller 2017). The contribution by Felipe Burbano de Lara and Carlos de la Torre analyses the crucial context of Latin America for this purpose. While cases such as Hungary and Poland abundantly show the centrality of constitutional reform for populist projects, it is the Latin American experience that provides the richest historical context for analysing the link between populism and constitutionalism. One dimension is that populist parties in power have a clear propensity to seek to change the existing constitutional status quo law and related judicial institutions. De la Torre and Burbano de Lara analyse this in the extensive experiences of Latin America since the 1990s, and show how populist leaders and parties have been using laws, referenda, and constitution-making in order to bring about institutional change, in particular by appealing to the constituent power of the (previously marginalized parts of the) people. The emphasis is not least on the main features of the Peronist legacy in Latin America, and while the Latin American experiences of the neo-Bolivarian kind have had a clear left-wing imprint, the developments with regard to the centralization of power, the obstruction of opposition, civil societies actors, and the media, as well as the

approach towards judicial institutions has striking similarities to developments in (Eastern) Europe (see de la Torre 2017).

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