Populism and the Courts

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The antagonism of populist governments to apex courts is a matter of historical record, starting with Peronism, the first time that an openly populist movement established its own government. Currently, it is demonstrated by repeated conflicts between populist executive power and constitutional courts, and the often successful attempts of the former to pack and disempower the latter. Recent events in Venezuela, Israel, Hungary, Turkey and Poland indicate the attending harm to democratic government, and even these cases do not exhaust the present salience of the populist challenge that has now reached the United States. I believe that the way to oppose these trends requires a strategy that is both legal and political, based on the mutual support of associations and initiatives of civil society and courts.

What is populism? Given the pervasiveness and loose journalistic use of the term, attempts to define the phenomenon by induction are doomed to fail. It is better in my view to immanently criticize the best ideological attempt to justify populist politics, and thus reconstruct the main dimensions of the phenomenon from a logically coherent systematic argument. I have done this using the work of Ernesto Laclau[1)] *On Populist Reason*; see my "Political Theology and Populism" in *Social Research* (2013) v. 80 # 1, and have derived the following important elements of the phenomenon:

1. Populism identifies popular sovereignty by referring to a part of the population that supposedly incarnates the people as a whole;
2. constructs a rhetorical chain of equivalences, from heterogeneous and incompatible demands of the segments of "the people" so identified;
3. establishes friend and enemy relations, over a frontier of radical antagonism, thereby extricating "the people" from its enemies within the population as well as outside;
4. identifies the will of the extricated genuine "people" with the will of a group, and to avoid the possibility of a division, almost always with the name and will of a single leader.

Populism evidently can have left and right wing forms, depending on which part of society is identified as the whole, and which part or parts are deemed the enemy. Thus it may be difficult to distinguish populism of the right from fascism, and on the left from authoritarian forms of socialist mobilization, all of which seem to more or less satisfy the four criteria offered here, all being pathologies of popular sovereignty.[2)] P. Rosanvallon, *Counter-Democracy* (Cambridge, 2008) 265-7 While the rhetorical stress on democracy in populist movements is absent in fascism at least, the distinction is clear only with respect to populism in power. Populism almost always begins as a social movement, yet Laclau and many others are wrong to neglect the problem of populism in governmental power. It is here that its specific difference from other authoritarian forms reveals itself. As Frederico Finchelstein rightly argued[3)] F. Finchelstein forthcoming, while populism in power is indeed illiberal, it remains tied to electoral and plebiscitary legitimacy. That stress is gone under fascist and authoritarian socialist regimes. Of course the line between dictatorship and plebiscitary populism may be difficult to draw when am elected or re-elected regime is in the process of subverting competitive elections altogether, as in Venezuela currently.

The common neglect of populism in government reveals a very important feature of the phenomenon itself: even when in political power populist leaders (and their supporters) imagine themselves to be still outside and opposed to it, fighting what is now often called a deep state and its inherited institutions: the bureaucracy, the security services, plutocrats and yes, generally the courts as well. We have seen this peculiar self-understanding surface in all the cases mentioned, including recently in the United States. External political actors and institutions can also be cast in

the same role as in the case of many European populists, even before they enter government, focusing their attacks on the EU Commission as well as the European Court of Justice.

The attack on apex courts reveals a great deal concerning the logic of populism as defined here. From a democratic point of view courts at least guard the differentiation (separation and division) of powers none of which having the right to monopolize speaking in the name of the popular sovereign. Their role is linked to notions of popular sovereignty significantly different than the populist interpretation in terms of incarnation, alternatives that have been developed by R. Carre de Malberg with his notion of "national sovereignty" and in Claude Lefort's concept of the empty space of power. From Marshall to Kelsen and beyond, courts have first assumed and then were formally given the role of distinguishing between the democratic constituent power and the constitutionally delegated powers of executives and legislatures. Since the Indian Basic Structure doctrine we are increasingly accustomed to even the differentiation of the amending and constituent powers. Since the South African constitution making process we have come to understand the possible role of courts in the making of new constitutions. In my view in this process the people as an entity is replaced by ascending levels of democratic legitimacy.

Populism however, on its own interpretation of popular sovereignty must resist such differentiation, and any agency seeking to enforce it. By identifying the genuine people's will with its own, the populist leader or group inevitably sees the intervention of courts as linked to the secret work of an oligarchical enemy or the deep state or an external power. Once the will is incarnated, there is no reason to move to higher levels of legitimacy and to alternative procedures to test whether it is a genuine democratic will. Even the attempt to defend individual rights by courts becomes superfluous, because, the members of the authentic people supposedly need no rights against themselves, and their enemies must not be given rights to oppose the sovereign will.

It is an interesting research question why populist regimes that do produce new constitutions, like Orban's in Hungary, do not completely abolish constitutional courts that may represent the last important element of the separation of powers. Their surviving role is clearly more significant than that of elections in Soviet type societies, as we see through the surprises that even packed courts offer their packers. My hunch is that the continued existence of constitutional courts in the Venezuelan and Hungarian new constitutions is connected to the relative conservatism of populism, with respect to maintaining both a competitive electoral setup, as well as the predictability and rationality of a capitalist order. Beyond mere formal existence, the occasional flashes of independence of these courts are connected to the important social and now international status of judges. Here we have another significant distinguishing mark of populist from fascist and communist regimes, as well as military dictatorships all of which certainly abolished both judicial independence, and apex courts where they existed previously.

This difference should not deflect us from the already mentioned almost regular attacks on the courts. The goal is to make them pliant instruments of the populist regime, as we have just seen in Venezuela. If one round of packing does not accomplish the job other rounds seem to follow. Indeed, the attack on the courts in several rounds and stages seems to have been characteristic of the populist efforts in Venezuela, Turkey, and Hungary.

In his debate with Kelsen concerning constitutional review, Carl Schmitt depicted a "horse race" (Wettkampf) between constitutional court and the political branches, that in his view a court must lose. He was probably right, but only ultimately. Inspired by depictions of a long ago battle between the South African Appellate Division and the apartheid government concerning the entrenched principles of the constitution[4)]D. Davis and M. le Roux *Precedent and Possibility. The (Ab)use of Law in South Africa* (Capetown; 2009) chapter 2; I. Loveland *By Due Process of Law* (Oxford, 1999), I have come to see the same horse race in terms of several rounds, where the early ones can be won by courts. Something similar can be shown to have happened in Venezuela, Turkey and Hungary.[5)]See my *Post Sovereign Constitution Making* (Oxford, 2016) and the forthcoming *Adventures of the Constituent Power* (Cambridge, 2017 or 2018) Formally speaking, the battle is always between constitutional review and the amending power. The former can attempt to invalidate amendments, and enabling legislation. The latter can amend the membership, composition, form of appointments and jurisdiction of apex courts. There is only one such a contest, the Indian Supreme Court vs. Indira Gandhi, that the executive eventually lost, and this only after a lost election that

in the manner of a genuine populist the PM felt constrained to call. On the contrary, after early setbacks, Chavez, Erdogan, and Orban seemingly managed to tame their apex courts. We do not yet know the final outcomes nor the outcome for Trump, after his very significant early losses. But the interesting question is why courts can win in one phase, and yet wind up losing in the next or in subsequent ones. It may not be simply a matter of early and late phases of the conflict.

I offer a hypothesis initially based on the already mentioned South African example. In 1952 the Appellate Division (Harris I) invalidated a statute that sought to by-pass the limited entrenchment clauses of the constitution. The government responded first by trying to turn the legislature into a higher court, and after another defeat (Harris II) by packing the senate to achieve the majority required by the entrenched clause. For good measure the apex court itself was packed, but it had another opportunity to declare the senate packing unconstitutional. Not only the new members, but most of the judges responsible for the two earlier decisions now went along with the government. (Collins v. Minister of the Interior, 1956) What happened? Dennis Davis and Michelle le Roux point to the dramatic decline of social mobilization that initially supported the court decisions.[6)]In *Precedent and Possibility* pp. 32-33

My two hypotheses then are the following, First: that courts can win their battle against authoritarian populists as long as they have the strong support of initiatives within civil society. And second: civil society initiatives against populist regimes not only can re-enforce the role of courts, but can gain new strength for themselves in such effort.

Populism in my view is particularly susceptible to civil society challenge, obviously more so than classical Fascist or Stalinist regimes. This is so because of both the link and the fundamental difference between civil society based and populist movements. Here Rosanvallon[7)]*Counter Democracy* has offered the most interesting argument. Representative democracy he rightly stresses has fundamental legitimation problems, to which alternative democratic inputs respond, what he calls counter-democracy and we have earlier stressed as the influential politics of civil society.[8)]*Civil Society and Political Theory* (Cambridge, Mass. 1992) One of the most important counter-democratic channels are according him the courts, that can be and are often utilized by civil society based initiatives. At the same time, the anti-political trends within civil society can be radicalized by populism.

The politics of civil society as against populism is inevitably and self-consciously plural. Yet many of its forms (e.g. at times the working class movement) can view itself as monolithic, as the incarnation of the people as a totality. Just as there are anti-party parties in politics, we also have anti-civil society movements in civil society. Nevertheless, if and when such a populist segment emerging from civil society becomes the government, the plurality of civil society can survive, or re-emerge both because of the conservative limits of populism, and especially when the chain of equivalences proposed by populism falls apart, as it must. Unlike under fascism or authoritarian socialism except for the latter's stage of dissolution, we have everywhere seen strong civil society based challenges to populist regimes.

Populism is a pathology of civil society, or of Rosanvallon's counter-democracy. The question is whether this pathology effects pluralistic initiatives of civil society as well. Given the conservative and oligarchy defending histories of many courts, it is very possible that especially left oriented initiatives will be hostile to courts. Indeed, populist regimes themselves are shielded by many packed courts. And yet, court oriented action remains potentially an important channel for civil society initiatives. When representation through elections fail, courts potentially yield a second democratic channel that becomes all the more important under a populist regime. It is an important task therefore to organize on behalf of judicial independence, and to engage in forms of discourse to which courts can positively respond. Conversely, the survival of courts as serious institutions depends on their openness to civil society demands and challenges.

Let me end with an example. In Hungary the just enacted lex CEU has been the occasion of significant civil society mobilization. When the law reaches the Constitutional Court, as it inevitably must, that body will have ample opportunity as its former President Sólyom has stressed to declare the law unconstitutional. In my view the continuation of protest and pressure from below may very well play a role in such a positive outcome, that would not

only improve the status of Hungarian constitutional judges in European and American legal public opinion, but would contribute to the institutional survival and recovery of such a court in a hostile populist environment.

References [+]

1. ↑ *On Populist Reason*; see my "Political Theology and Populism" in *Social Research* (2013) v. 80 # 1
2. ↑ P. Rosanvallon, *Counter-Democracy* (Cambridge, 2008) 265-7
3. ↑ F. Finchelstein forthcoming
4. ↑ D. Davis and M. le Roux *Precedent and Possibility. The (Ab)use of Law in South Africa* (Capetown; 2009) chapter 2; I. Loveland *By Due Process of Law* (Oxford, 1999)
5. ↑ See my *Post Sovereign Constitution Making* (Oxford, 2016) and the forthcoming *Adventures of the Constituent Power* (Cambridge, 2017 or 2018)
6. ↑ In *Precedent and Possibility* pp. 32-33
7. ↑ *Counter Democracy*
8. ↑ *Civil Society and Political Theory* (Cambridge, Mass. 1992)

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