

Populist Constitutions – A Contradiction in Terms?

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The meaning of “populism” is deeply contested. It is striking, though, that many observers appear to agree on one point: whatever else it is, populism is inherently hostile to the mechanisms and, ultimately, the values commonly associated with constitutionalism: constraints on the will of the majority, checks and balances, protections for minorities, and even fundamental rights as such. Populists are supposedly impatient with procedures; they are even said to be against “institutions” as such, preferring a direct, unmediated relationship between the personal leader and the people. Connected with this supposed anti-institutionalism is the charge that populists dislike representation and opt instead for direct democracy (as exemplified by referenda). Hence also the impression—widespread both among political philosophers and social scientists—that populism, despite some serious flaws, might under some circumstances serve as a “corrective” to a liberal democracy that has become too remote from the people.

This hope is misplaced. But one can see how it arose, when one considers how the debate about constitutionalism and populism suffers from several unfortunate characteristics. First, the discussion often becomes conflated with the controversy about the merits of majoritarianism (and, conversely, judicial review). Second, there is no clear or even discernible distinction between *popular* constitutionalism on the one hand, and *populist* constitutionalism, on the other. And third and most importantly, “populism” frequently serves as a vague placeholder for “civic participation” or “social mobilization” (and, conversely, for weakening the power of judges and other elites).¹ Witness for instance Elizabeth Beaumont writing “I take the liberty of suing the terms civic and popular loosely and interchangeably as laymen’s terms meaning largely ordinary people, citizens, or nonofficial” in *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy* (New York: Oxford UP, 2011), 4. Or think of Tom Donnelly claiming that for all their differences, advocates of popular constitutionalism share a “populist sensibility” – which comes down to nothing more than “a common belief that the American people (and their elected representatives) should play an ongoing role in shaping contemporary constitutional meaning.” Tom Donnelly, “Making Popular Constitutionalism Work”, in: *Wisconsin Law Review* (2012), 159-94; here 161-2. Quite apart from the vagueness of the notions used (or perhaps because of this vagueness), there’s the fact that debates about populism and constitutionalism—especially in the U.S.—quickly turn emotional, with accusations of elitism and “demophobia” flying about, and theorists accused of having bad “attitudes toward the political energy of ordinary people” or, alternatively, of promoting “ochlocracy.”² Richard D. Parker, “‘Here the People Rule’: A Constitutional Populist Manifesto,” in: *Valparaiso University Law Review*, vol. 27 (1993), 531-84; here 532.

However, populists are not generally “against institutions,” and they are not destined to self-destruct once in power, as a widespread view among liberals naively assumes. They only oppose those institutions that, in their view, fail to produce the morally (as opposed to empirically) correct political outcomes. Populists in power are fine with institutions—which is to say: their institutions.

To make this claim plausible, let me say what I mean and what I do not mean by populism. Contrary to what is often said and written today, not everyone who criticizes elites should automatically count as a populist. After all, any civics textbook would instruct us to be vigilant with the powerful; keeping a close eye on elites can in fact plausibly be seen as a sign of democratic engagement. Of course, when in opposition, populists criticize governments. But they also do something else: they claim that they and they alone represent what populists often call “the real people” or “the silent majority.” As a consequence, they denounce all other contenders for power as fundamentally illegitimate. At stake is never just a disagreement about policy, which is of course completely normal and in fact healthy in a democracy; rather, populists immediately personalize and moralize political conflict: the others, they insist, are corrupt and do not work for the people.

Less obvious is the fact that populists also constantly insinuate that citizens who do not share their conception of “the people” and hence do not support the populists politically, might have their status as actually belonging to

the people put into doubt. Think of Nigel Farage claiming that Brexit had been a “victory for real people” – clearly implying that the 48 per cent who voted to stay in the EU might not be quite real – which is to say: might not properly form part of the British people at all. Or think of Donald Trump announcing at a campaign rally last year: “The most important thing is the unification of the people – because the other people don’t mean anything.” In other words, the populist decides who the real people are; whoever does not want to be unified on the populist’s terms is excluded, even if they happen to have an American passport.

Those populists who have enough power may well seek to establish a new, populist constitution—both in the sense of a new socio-political settlement and a new set of rules for the political game (what some scholars of constitutionalism have called the “operating manual” of politics). It is tempting to think that with the latter, they will seek a system that allows for the expression of an unconstrained popular will, or somehow reinforce the direct, institutionally unmediated relationship between a leader and the proper people.

Things are not so simple. The claim for an unconstrained popular will is plausible for populists when they are in opposition; after all, they aim to pit an authentic expression of the *populus* as un-institutionalized, non-proceduralized *corpus mysticum* against the actual results of an existing political system (such as an election outcome where the populists don’t win). Yet, when in power, populists tend to be much less skeptical about the machinery of constitutionalism as a means of creating constraints on what they interpret to be the popular will—except that the popular will (never given empirically, but always construed morally and symbolically) has first to be ascertained by populists, then constitutionalized, and then constrained constitutionally. Or, picking up a distinction developed by Martin Loughlin: positive constitutionalism here needs to be followed by negative constitutionalism.³ Martin Loughlin, “The Constitutional Imagination,” in: *Modern Law Review*, vol. 78 (2015), 1-25. Populists will seek to perpetuate what they regard as the proper image of the fully virtuous people (the proper constitutional identity, if you will) and then constitutionalize policies that supposedly conform to their image of the people. Hence, populist constitutionalism will not necessarily privilege popular participation; nor will they try somehow to “constitutionalize the charisma” of a popular leader, in the way that Bruce Ackerman has suggested.⁴ Bruce Ackerman, “Three Paths to Constitutionalism – and the Crisis of the European Union,” in: *British Journal of Political Science*, vol. 45 (2015), 705-14.

Apart from these features—which are explained yet again by the underlying, anti-pluralist moral claims of populism—there is a more mundane goal that constitutions might achieve for populists: they can help to keep populists in power. Of course, one might say that even this goal still has a moral dimension related to the underlying populist imagination: as the only legitimate representatives of the people, populists should perpetually be in office.

A recent example of populist constitutionalism is the constitution—officially named the “Fundamental Law”—of Hungary, which came into effect at the beginning of 2012. The constitution had been preceded by a non-binding “national consultation” to which, according to the government, about 920 000 citizens responded.⁵ Renáta Uitz, “Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary,” in: *International Journal of Constitutional Law*, vol. 13 (2015), 279-300; here 286. The outcome of that consultation could be freely interpreted by the constitution-makers to fit their general conception that the 2010 parliamentary elections had resulted in what the winning party called a “revolution at the voting booths,” because it had received a two-thirds majority in parliament (but only 53 percent of the actual vote, which meant 2.7 million voters out of 8 million eligible ones). This “revolution” had supposedly yielded an imperative mandate to establish what the government termed a new “national system of cooperation” as well as a new constitution. Victor Orbán explained:

*The people ... gave good advice, good command to the Hungarian Parliament [in adopting the basic law], which it carried out. In this sense, when the Hungarian constitution is criticized...it is not meant for the government but for the Hungarian people...It is not the government the European Union has a problem with, much as they want us to believe ... the truth is they attack Hungary.*⁶ Quoted in Agnes Batory, “Populists in government? Hungary’s ‘system of national cooperation’”, in: *Democratization*, vol. 23 (2016), 283-303.

These equations—whoever attacks the government attacks the Hungarian people—are breathtaking. And pedagogically quite helpful. For they demonstrate how populists argue with rare clarity.

The preamble of the new constitution, or “National Creed,” ended up constitutionalizing a very particular image of the Hungarian people as a nation committed to survival in a hostile world, as good Christians, and as an ethnic group that could be clearly distinguished from minorities “living with” the proper Hungarians. In the construction of the more technical constitutional machinery the perpetuation of populists in power was clearly the goal.⁷⁾ Uitz, “Can you tell when an illiberal democracy is in the making?” Age limitations and qualifications for judges were introduced so as to remove professionals not in line with the governing populist party; the competences and structure of the constitutional court (a crucial check on government power before the introduction of the Fundamental Law) were re-engineered; and the terms of office-holders chosen by the governing party were made unusually long (9 years in many cases), with a view, apparently, toward constraining future governments.

The Hungarian government, then, essentially designed what Dieter Grimm has called an “exclusive constitution,” or what one might also term a partisan constitution: the constitution sets a number of highly specific policy preferences in stone, when debate about such preferences would have been the stuff of day-to-day political struggle in non-populist democracies (to be sure, a worry one can also have about EU treaties).⁸⁾ Dieter Grimm, “Types of Constitutions”, in: Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford UP, 2012), 98-132. Opposition was excluded in at least two sense: opposition parties did not take part in writing or passing the constitution, and their political goals can only with extreme difficulty be realized in the future, since the constitution highly constrains room for policy choices. In other words, under the new regime the constitution-makers can perpetuate their power even after losing an election. It bears noting that the Hungarian Fundamental Law was never put to a referendum. So much for the claim that populists, while a bit uncouth in their rhetoric, might really be advocates of direct democracy.

Are populism and constitutionalism then necessarily in contradiction? My claim is that the picture is far more complicated than clichéd invocations of Rousseau and the general will, or simple schemas that put populism on the side of democracy and constitutionalism on the side of liberalism, would suggest. It is crucial to understand populism’s anti-pluralist core moral claim to distinguish between the discourse of populists in opposition – where they indeed see the authentic popular will as being obstructed – and populists in power crafting constitutions that are intended to reflect their image of the people (and seek to perpetuate populists in power). In particular, such constitutions might put constraints in place that will preserve the product of a highly partisan constitution-making process, all in the name of remaining faithful to a supposed authentic “founding will.”

So, in the end, populists are indeed hostile to normative constitutionalism and, in the end, democracy itself. Democracy must be pluralist – which is not to say that pluralism is itself anything like a first-order value (along the lines of: more diversity is always better); and proper, normatively justifiable constitutions are pluralism-enabling and pluralism-preserving devices (this is not their only function, to be sure; but in the context discussed here, it is indeed crucial). In that sense, populists can write constitutions and display the machinery of constitutionalism (and these can be “real constitutions” in the sense of involving real checks and constraints). But populists certainly aren’t constitutionalists in a normatively meaningful sense.

This post is adapted from my What is Populism? (Philadelphia: University of Pennsylvania Press, 2016) and my “Populism and Constitutionalism”, forthcoming in the Oxford Handbook of Populism.

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1. ↑ Witness for instance Elizabeth Beaumont writing “I take the liberty of suing the terms civic and popular loosely and interchangeably as laymen’s terms meaning largely ordinary people, citizens, or nonofficial” in *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy* (New York: Oxford UP, 2011), 4. Or think of Tom Donnelly claiming that for all their differences, advocates of popular constitutionalism share a “populist sensibility” – which comes down to nothing more than “a common belief that the American people (and their elected representatives) should play an ongoing role in shaping contemporary constitutional meaning.” Tom Donnelly, “Making Popular Constitutionalism Work”, in: *Wisconsin Law Review* (2012), 159-94; here 161-2.

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 4. ↑ Bruce Ackerman, “Three Paths to Constitutionalism – and the Crisis of the European Union,” in: *British Journal of Political Science*, vol. 45 (2015), 705-14.

 5. ↑ Renáta Uitz, “Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary,” in: *International Journal of Constitutional Law*, vol. 13 (2015), 279-300; here 286.

 6. ↑ Quoted in Agnes Batory, “Populists in government? Hungary’s ‘system of national cooperation’”, in: *Democratization*, vol. 23 (2016), 283-303.

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 8. ↑ Dieter Grimm, “Types of Constitutions”, in: Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford UP, 2012), 98-132.
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SUGGESTED CITATION Müller, Jan-Werner: *Populist Constitutions – A Contradiction in Terms?*, *VerfBlog*, 2017/4/23, <http://verfassungsblog.de/populist-constitutions-a-contradiction-in-terms/>.