CHAPTER 32:
POPULISM AND LAW

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Introduction

Although research on populism and how it relates to judicial institutions and the rule of law is a marginal concern in political science and sociology, there is a growing awareness that these themes are becoming crucial for the future of democratic regimes. In Europe, but also in the US and other countries, constitutional law, the judicial system, and its rules and actors are facing populist contestation. In the European Union, Hungary and Poland are increasingly undermining the doctrines of the separation of powers and judicial independence. In the US, President Trump's administration often struggled with the judicial system on a range of issues, including immigration and border policies. Trump also vocally contested the 2020 presidential election, describes it as corrupt and sought to circumvent the rule of law in order to stay in power.

In general, one might argue that constitutionalism, law and the justice system deal with some of the core dimensions of populism. For many scholars, populism is a form of attack on pluralism and is supportive of majoritarianism (e.g. Urbinati 2019). It embodies criticism of the elites in the name of the people. In research literature on populism, the elites in question are usually members of the political establishment. However, as an ideology, discourse or style, populism addresses a variety of elites, including journalists, intellectuals, experts and members of the judicial system (Mazzoleni and Voerman 2020; Merkley 2020; Panarari 2020). Judicial elites are framed as being detached from the people and unable to promote justice in line with the people's true interests. This does not mean that populists do not care about the judiciary and that they never respect judicial decisions, but they want the latter to reflect the will of the people. Thus the opposition between the power of the people and the rule of law becomes further entrenched.

This chapter's main objective is to present an up-to-date overview of existing literature on this topic, with particular attention paid to three domains: The first regards constitutionalism and the rule of law. The relationship between constitutional democracy and populism is scrutinised based on both theoretical reflections and empirical analysis (Mudde 2013; Müller 2018; Blokker 2020a). The second aspect is the relationship between politicians, parties and citizens, and judicial power in the context of the so-called judicialisation of politics (e.g. Hirschl 2011). The third aspect is the specific dimension of 'law and order', in particular criminal law, in which a distinctive emphasis is placed on the concepts of populist punitiveness and penal populism as framed by criminologists. The chapter is organised on the basis of these three aspects and highlights contributions from political science, sociology, constitutional law and criminology.

Constitutionalism and Liberal Democracy

The relationship between populism and constitutionalism is an extensively debated and critical topic. Since it has recently been framed almost exclusively by constitutionalist theorists and philosophers, a normatively oriented approach has become widespread. Most contributions tend to view populism as antithetical to constitutional democracy (see, Müller 2016; Halmai 2017; Landau 2018; Müller 2018; Scheppele 2018; Dixon 2019; Roznai and Hostovsky Brandes 2020) and a factor eroding the idea and fundamentals of constitutionalism. This approach to populism is grounded in a normative and distinctive, deductive understanding of constitutionalism – that is, grounded in liberalism and liberal theory in general and liberal legalism in particular. In this approach, populism is considered a clear threat to liberal, constitutional democracy, and the approach raises important and genuine concerns about the potential erosion of, among others, civic and political rights, judicial independence, the separation of powers and political pluralism, especially in democracies where populists wield major influence either on or inside the government. The emphasis in this section is on the relationship between populism and constitutional norms, on the one hand, and constitutions *in toto*, on the other hand. This includes the constitutional politics of populists, which relates to constitutional amendment and constitutional replacement, as well as unconstitutional behaviour by populists. In some of its dimensions, the constitutional politics of populists touches on the basic dimensions of constitutions, that is, populist politics affects the fundamental rules of democracy and, in some cases, even leads to a transformation of the constitution, thus invoking so-called *constituent power*. The emphasis will be less on the dimensions of ordinary politics and policymaking, which is the subject of the following section. It should be noted here, however, that the general direction of populist politics is to reduce the difference between constitutions as higher law and policymaking as an expression of political majorities.

In much of the recent, normative literature, populism is understood as a political manifestation that erodes or negates – or at the very least threatens – constitutional democracy. Populists are seen as impatient with procedures and institutions and loath towards intermediary bodies as they prefer an unmediated relationship between the populist ruling party and the people. In other words, populists prefer direct 'natural' or 'pure' forms of politics instead of indirect and artificial ones (Urbinati 1998, 111). Constitutional norms, in particular those hindering majoritarian politics, as in the form of a judicial review, are viewed with suspicion. In Wojciech Sadurski's words, '[p]opulist regimes are impatient with freedom of speech for minorities […] they dislike slow, patient deliberation in parliaments, preferring a "winner-takes-all" plebiscitary model of politics, under which the leader (usually a charismatic leader) obtains a carte blanche for the period of his or her parliamentary or presidential term' (Sadurski 2020, 8). According to many observers, this means that constitutionalism stands in stark contrast to populism. In the view of Gabor Halmai, '[t]hose who perceive democracy as liberal by definition also claim that populism is inherently hostile to values associated with constitutionalism: checks and balances, constraints on the will of the majority, fundamental rights, and protections for minorities' (Halmai 2017, 8–9). In Halmai's opinion, the term 'populist constitutionalism' – like 'illiberal' or 'authoritarian constitutionalism' – is an oxymoron, in that constitutionalism refers to the 'legally limited power of the government', and populist (just like allegedly illiberal or authoritarian) versions fail to live up to the 'requirements of constitutionalism' (ibid., 9).

The anti-populist position, which tends to understand the relation between populism and constitutionalism as an anti-thesis, ultimately builds on a rather distinctive understanding of constitutionalism, that is, the post–Second World War paradigm of constitutionalism or 'legal constitutionalism' (Gyorfi 2016; Sajó and Uitz 2017, 9). This understanding regards constitutionalism more distinctively as an anti-totalitarian project that aims to safeguard representative, liberal democracy from radical threats from both left-wing and right-wing forces. The concerns of such 'anti-populist' positions are legitimate and real: Many established constitutional democracies are facing strong pressure (the US, the UK), while more recently established democracies, such as Hungary and Poland, are turning against the anti-totalitarian project (as also embodied by the European Union) and constructing alternative, self-identified 'illiberal democratic' systems (Drinóczi and Bień-Kacała 2019). However, the anti-populist scholarly account has three major problems. First of all, it tends to regard legal forms of constitutionalism, with an emphasis on the judicialisation of politics (see below), as the only historically available manifestation of constitutionalism, which is a highly debatable claim. Second, it often conflates populism with (radical) right-wing, conservative populism, while largely ignoring major differences between populist parties, populist political projects and distinctive societal contexts. Third, the anti-populists are inclined to endorse a normative understanding of legal constitutionalism, which does not particularly seek to engage with and analyse the potential problems and tensions inherent in such a model.

Comparative empirical perspectives contrast the normative view with a more analytical and empirically driven focus. Comparative approaches usually highlight the varieties of both constitutionalism and populism that can be observed and acknowledge the intrinsic problems of liberal constitutionalism and liberal democracy (Kaltwasser 2013; Isaac 2016; Alterio 2019; Arato 2019; Blokker 2019; Bugaric and Tushnet 2020; Koch 2020), such as the 'democratic deficit' and the 'welfare deficit' (Arato 2019). Hence, in this approach, the complexity of the relation between populism and constitutions is made explicit and addressed with an analytical commitment that is sensitive to historical and contextual differences. In this regard, comparative analytical approaches acknowledge that constitutionalism (and not only populism) is a contested phenomenon and that populism frequently engages in criticism of the allegedly hegemonic liberal, legalistic understanding of constitutionalism. Comparative perspectives emphasise that populism as a phenomenon manifests itself in a variety of ways, displaying diverse guises depending on distinctive ideological (i.e. left-wing or right-wing) positions but also showing variety in terms of its positioning of characteristic issues, such as sovereignty, the definition of the political community or relations to constituent power (i.e. the sovereign power to make significant changes to the constitution). Comparative empirical approaches attempt to offer an empirically grounded and nuanced take. Despite the threat against liberal constitutional democracy in many countries, such approaches hold that it is equally important to detect and reveal specific in-built tensions in the post-war legal–constitutional project (Alterio 2019; Koch 2020). Such insights might shed light on the thrust and mobilising force of the current wave of populist 'counter-constitutionalism' and – rather than re-proposing an unlikely return to the *status quo ex ante* – may help us to think in more fruitful and innovative ways about constitutional democracy.

Comparative empirical approaches are still emerging, but important contributions can be identified and include the following dimensions. First, there is an acknowledgement of the important differences between manifestations of populism. Alterio, for instance, distinguishes be-

tween different forms of the constitutionalisation of populist politics by emphasising differences in the form (top-down or bottom-up) and the substance of constitutional reforms enacted by populists, as well as distinctive attitudes of populists (Alterio 2019, 276–9). Koch distinguishes between ideological orientations (inclusionary versus exclusionary; cosmopolitan versus communitarian; left versus right) and types of populist contestation in his discussion of 'global constitutionalism' (Koch 2020). Second, populism manifests itself at different stages, ranging from a form's bottom-up mobilisation to organised movements, governmental participation, populist governments and populist regimes (Arato 2019). The state in which the populist manifestation finds itself has important implications for its relationship to constitutionalism and constituent power. Third, some approaches put the comparative dimension to use in both a synchronic and a diachronic sense by studying populist phenomena over time within singular societies or contexts. The case of Italy is of great interest in this respect in that it has experienced not only populism-in-government for longer than many of its peers elsewhere in Europe but also a variety of dissimilar manifestations (Martinico 2021). Moreover, the emergence of populism in Italy coincided with a prolonged 'season of constitutional reform' (Blokker 2020b).

Politicisation of the Judiciary

A second strand of the literature on populism, predominantly produced by political scientists, emphasises how political actors' and citizens' interests deal with constituent power, ordinary laws, courts and judges. These issues are related, directly or indirectly, to the so-called judicialisation of politics. In the past few decades, constitutional courts have become increasingly powerful in almost all democratic regimes (Stone Sweet 1999a; 1999b; 2000; Hirschl 2004; Landfried 2019). This implies an increasing role of the judiciary in interpreting (ordinary) law, with implications for many policy areas relating to religious freedom, equal rights, privacy, reproductive freedom, criminal justice, property, trade and commerce, education, immigration, labour and environmental protection (Hirschl 2011, 253–254; see also Hirschl 2004a, 103–18). The expanding role of the judiciary in fixing political conflicts implies a process of depoliticisation, that is, placing a limit on the power of the government and parliament. However, this 'judicial activism' does not go unchallenged, which creates tension between the judicialisation of politics and the politicisation of the judiciary. The role of populism is relevant in different ways, as is identified by the literature on this subject. First of all, scholars in comparative studies have pointed to the relationship between governmental policymaking and the rule of law once political parties become part of government (Maravall and Przeworski 2003; Morlino and Palombella 2010) and when politicians try to become more independent from the judicial system, for instance once penal legislation is at stake (Weingast 1997; Maravall 2003). Secondly, scholars underline the role of populist rhetoric in governments' retreat from the jurisdiction of international human rights courts (Voeten 2020). This line of research also addresses conflicts concerning the power of judges at EU level in specific domestic arenas, especially in Central and East European democracies (Castillo-Ortiz 2015a; Pócza 2018). In addition, and more in general, debates in international law now focus on how populists frequently mobilise against international institutions, international legal (human rights) regimes and global elites in the name of the common people, claiming that globalism and cosmopolitan forces

are too distant from the common people, do not have a democratic mandate and engage in abstract, technocratic governance in the name of the international elites themselves, ignoring the common people's or nation's problems (Koskenniemi 2019; Krieger 2019; Thornhill 2020).

In a related way, the tension with the judiciary – in both domestic and international arenas – has focused on movements which assert that judges are 'judicial activists' lacking independence and neutrality (e.g. Engel 2011; Shapiro 2019). This is particularly the case in those instances where constitutional courts have been summoned to decide on the future of political leaders, for example in relation to impeachment or disqualification trials, which has happened in several countries in recent decades (Hischl 2011). Simultaneously, some politicians try to delegitimise judges by branding them as 'partisan' (Guarnieri 1995). Overall, attempts to delegitimise the judiciary are influenced by the argument that judges are 'unelected, unaccountable' elites. In recent years, theoretical discussions and empirical assessments of these phenomena have emerged, both in terms of research on particular cases, especially the US, and regarding comparative analysis (Russell and O'Brien 2001; Clark 2012). A complementary strand in the literature on this subject focuses on the legitimacy, effectiveness and independence of courts and trials. In this regard, scholars in political and law studies have analysed judicial elections by citizens and examined the impact of such processes, especially in terms of the respect for minority rights (Dubois 1988; Lewis, Wood and Jacobsmeier 2014) but also regarding the public's perception and assessment of judges and the judiciary in European democracies (Castillo-Ortiz 2015b; Navarrete and Castillo-Ortiz 2020) and in the US (Kessel 1966; Caldeiry 1991; Olson and Huth 1998; Ura and Higgins Merrill 2017; Krewson 2018). All these strands of literature show how the (re-)politicisation of the judiciary presents a window of opportunity to different kinds of populists in contemporary democracies.

Punitivism and Penal Populism

One angle from which to assess the populist impact on judicial power is to focus on law-and-order and criminal justice issues. Unfortunately, political science and sociology have rarely considered law-and-order policies in a systematic way (but see Wenzelburger 2014; 2020). There is also a lack of analysis of the role of populist parties, especially those with a right-wing ideology, in influencing law-and-order policies. Moreover, the only comparative analyses that are available focus on Western democracies (Wenzelburger and König 2019). At the same time, because of the large-scale spread of forms of political populism, especially in its right-wing form (Moffitt 2016; de la Torre 2018), attention to populism's relationship with criminal and penal issues has increased in recent years. However, it is criminologists who provide the most relevant insights, thanks to their specific interest in punitive criminal policies.

From a sociological perspective, influential scholars have analysed the rising crime rate and the shift towards a repressive and exclusionary culture of crime and punitive justice, as witnessed by many Western countries from the 1970s onwards (Garland 2001; Monterosso 2009). These changes have led to new politicised forms of justice and crime (Lacey 2008, 22). This has taken place on various levels: the media, with the effects of spectacularisation and the manipulation of public opinion (Mason 2006); political communication, which has generated a central focus on law-and-order issues, thereby reinforcing the idea that crime should merely be re-

pressed rather than comprehensively tackled through rehabilitation policies (Simon 2007); and the promotion of policies enhancing mass incarceration (Bottoms, Rex and Robinson 2004) and the criminalisation of social minorities (Monterosso 2009). These punitive tendencies have been conceptualised not only as 'popular punitivism', which 'commonly refers to how "tough-on-crime" efforts are the result of an intersection between politics, public sentiment, and the media's portrayal of crime' (Campbell 2015, 181), but also as 'populist punitiveness' and 'penal populism'.

Antony Bottoms' concept of populist punitiveness refers to the increase in the number of 'politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance' (Bottoms 1995, 40; see also Anastasia and Anselmi 2018). Some doubts have been raised about the claim that the Western public univocally supports harsher punishments (Hutton 2015). Nonetheless, election campaigns frequently see the endorsement of an instrumental use of justice and the penal system, as well as tougher sentences and criminal policy. This reveals a tendency towards 'a disproportionate use of sanctions and consequently a deviation from the principle of proportionality' (Matthews 2005, 179), which enables 'governing through crime' (Simon 2007). From this perspective, other authors have introduced the concept of penal populism. Julian Roberts and colleagues call penal populists those who 'allow the electoral advantage of a policy to take precedence over its penal effectiveness' (Roberts et al. 2003, 3). Daniel Salas defines penal populism as 'a discourse that is characterised by a call to punish in the name of the victims' (Salas 2005). For his part, John Pratt has a broader theory of penal populism. Focusing especially on the case of New Zealand, Pratt also includes the role of political parties in his analysis to show how the decline in public confidence in the country's traditional left and right parties in the early 1990s led to the spread of the populist far-right New Zealand First Party (NZ First). This decline was accompanied by the spread of penal populism, not only during election campaigns but also in governmental policies (Pratt and Clark 2005).

According to Pratt (2007), penal populism has three main characteristics that contribute to increasing punitive trends in policymaking. First of all, with glamourisation, as a communication style, penal populism expresses an altered modality aimed at achieving a pleasant sense effect through the representation of criminal facts and events, in particular trials, often by using the mass media. In recent years, there have been mass media programmes based on the spectacularisation and dramatisation of real facts where the public is often involved in resolving or attempting to resolve cases. As it is presented, the criminal fact is cloaked in a media appeal (glamour) aimed at satisfying the user/spectator according to a narrative of a more fictional than a real phenomenon. Secondly, penal populism entails forms of de-statisticalisation in rhetorical discourse. This expression indicates the characteristic of a systematic disregard for any reference to real statistical data and any concrete reference to crimes in the public and political debate on justice. De-statisticalisation uses social *clichés* and widespread beliefs, and it shapes the frame of justice discourses in the public debate through emotion and fear. Third, penal populism embraces punitive judicial goals by appealing for restorative and reparative penalties. The goal is to produce verdicts with restorative aims rather than the reintegration and recovery of the transgressor. Violating the norm is conceived as an injury inflicted on the community, and the penalty must correspond to a certain form of social reparation. In this logic, one of the foundations of the Western legal order is lost: the re-educational purpose of a penalty.

Conclusion

By discussing the emerging literature on this subject, this chapter highlighted the relationship between populism and law. It showed how the topic of populism and law implies a large set of themes and a multidisciplinary commitment involving a variety of approaches, including political theory, constitutional law, political science, political sociology and criminology. Under pressure from the increasing success of populist leaders and parties, especially once they prevail in government and policymaking, the debate on populism, the rule of law and constitutionalism is rapidly expanding and reflects a kind of 'reality check' of liberal legal models, liberal constitutionalism and representative democracy. In response to populism's different forms and strengths, an in-depth comparative work can usefully underline the role of contextual and historical dimensions.

Recent emerging topics in law and justice also open up new opportunities in terms of a research agenda. First, a crucial and rapidly expanding collection of literature deals with the sociological and imaginary dimensions of constitutions and constitutionalism. It emphasises how perceptions of law and constitutionalism are embedded in deep-seated societal understandings that are now being called into question, not least by a populist contrary set of ideas (Ezrahi 2012; Priban 2018; Oklopcic 2019). Second, there is a very interesting set of issues regarding authoritarian constitutionalism and illiberalism (Zakaria 1997; Ginsburg and Simpser 2013; Tushnet 2014; Jeffrey 2017), constitutional mobilisation (Bui 2018; 2019), and more generally judicial resistance and 'lawfare' (Prendergast 2019). The latter reflects societal, judicial and academic actors' resistance to populist and authoritarian 'reforms' or 'abuse' of constitutional orders. Third, perhaps the most promising ongoing debate concerns the relationship between populism, on the one hand, and international and transnational law, on the other hand (Koskenniemi 2019; Krieger 2019; Thornhill 2020).

Such new orientations may shed new light on populism's relation to constitutionalism, the judiciary and law-and-order issues. As discussed, the recent literature in political science and political sociology places particular emphasis on the criticism of the judicialisation of politics and the (excessive) power of independent courts *vis-à-vis* political institutions. However, many of the studies focusing on the role of political parties and citizens leave an important question unanswered: To what extent are sceptical views towards the judiciary and constitutional rules specifically led by populist rhetoric or include a broader group of actors, including mainstream parties and leaders. On the specific topic of criminal issues, it is worth mentioning the contribution of criminologists, who have developed the concept of populism in relation to punitiveness and penal sanctioning. As the concepts of populist punitiveness and penal populism are not yet part of populism-oriented scholarship in sociology and political science, integration would be heuristically useful. This could include, for instance, a focus on how emotion and fear are transformed into political weapons in right-wing discourse (e.g. Wodak 2020). In this respect, several crucial questions arise: To what extent does the success of right-wing populist parties and leaders stem from their law-and-order strategies? And how might the crisis of the rule of law and trends towards punitiveness be a condition for and a consequence of their success (Lacey 2019)? Generally speaking, although many so-called populist parties and leaders have been framed as anti-immigrant and nativist, perhaps their strategies over the judiciary, constitutional law and crime have been underestimated (Todd-Kvam 2019), given how right-

wing populist movements have managed to frame immigration as not only a cultural and economic but also a criminal threat (Ackermann and Furman 2014).

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