

The Social and
Political
Foundations of
Constitutions

Are Populists Friends or Foes of Constitutionalism?

Policy Brief

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The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented.

Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

Executive Summary

- Populism is best defined as a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonté générale* (general will) of the people.
- While populism is essentially democratic, it is not *liberal* democratic. Principally, populism is a form of extreme majoritarianism. Given that constitutionalism limits both popular sovereignty and majority rule, populism is theoretically opposed to constitutionalism.
- In practice, however, populists take an opportunistic approach toward constitutions. While populists-in-opposition cling to the constitutional protection of *their* minority rights, they reject those of other minorities on the basis of the democratic argument of majority rule.
- Populists-in-power have done the same, but, when able, have (significantly) reformed the constitution, most often strengthening majoritarian institutions (like the executive and referendums) and marginalizing counterbalancing powers and extra-political institutions.
- The argument that populism is anti-democratic is unconvincing, and might ultimately reinforce the populist position. Rather, liberal democrats should emphasize the illiberal aspects of populism, while emphasizing the importance of *liberal* aspects of the political culture and system. In essence, they have to explain that minority rights benefit not just the minorities, but also the majority — if only because at one time they could become a minority.
- Opponents of populism should realize that for most (potential) supporters, they constitute a part of the corrupt elite. Consequently, vague and moralizing condemnations of populists, particularly when coordinated between different mainstream camps, will merely serve to confirm the populist message. Instead, populists should be confronted on the terms of the non-populists, based on evidence and rational argument, not hyperbole and moral condemnation.

Are Populists Friends or Foes of Constitutionalism?

Introduction

Populism is fast becoming the favourite bogeyman of the Western elite of the still early twenty-first century. In an interview with *Frankfurter Allgemeine Zeitung* in 2010, in the midst of the worst economic crisis in postwar Europe, European Union (EU) President Herman Van Rompuy called populism ‘the greatest danger’ in Europe. This warning was recently echoed in the *New York Times* (15 October 2013), in both an interview with Italian Prime Minister Enrico Letta and a strong editorial on ‘Europe’s Populist Backlash’. But the ‘threat’ of populism is not limited to Europe. US administrations have warned of the threat of the left-wing populist regimes of Hugo Chávez and Evo Morales in Latin America, while the right-wing ‘populist anger’ of the Tea Party has held the world under its spell in the recent US government shutdown. In short, populism is a (near) global menace.

But while there is an almost universal consensus on the idea that populism is a major threat to democracy, the exact nature of that alleged threat often remains vague. This is in part a consequence of the notoriously slippery concept of populism, which is broadly used, but has many different meanings in the political and public debate. For many it is nothing more than the opportunistic discourse of demagogues, while others see it as a modern form of political extremism, rigid and deeply ideological. This policy brief will reflect on the phenomenon of populism, provide a clear definition, and discuss its relationship with democracy in general, and constitutionalism in particular.

The aim is to provide a clearer understanding of both populism and its alleged threat to democracy. This is of crucial importance for two related reasons. First, populism uses a strongly

democratic discourse in which ‘the elite’ are attacked as being undemocratic. Hence, the support of populist parties is based on support for a (genuine) democracy. Second, given that policymakers and public intellectuals are generally perceived as being part of ‘the elite’ by populists and their supporters, they cannot simply assume to have the moral high ground. Consequently, vague warnings and moralistic condemnations are not going to work on (potential) supporters of populist politicians. They will have to be convinced by clear arguments which demonstrate that, whilst most populists might ask the right questions about their imperfect democratic systems, they often provide the wrong answers.

What is populism?

The term populism is often ascribed to politicians, but seldom claimed by them. This is a reflection of the general negative connotation of the term, which has made it a powerful weapon in the political domain. The label ‘populist’ is often used to exclude groups from the political mainstream: against the democratic and responsible ‘us’ stands the undemocratic and irresponsible populist ‘them’. But what is it that makes certain groups populist? We know it is something political, but is it a political ideology, movement, strategy, or style?

Three meanings of populism are most dominant in the public debate and all three are too vague and too broad. Firstly, populism is described as a form of irresponsible redistributive politics, in which leaders ‘buy off’ their supporters through state programmes, leading to massive budget deficits and economic mismanagement. Secondly, populism is used to describe a certain leadership style, through which charismatic leaders mobilize and govern by directly appealing to the people, without the mediation of political institutions like parties or parliaments. Thirdly, populism is often defined primarily as a specific communication style that is overly

emotional and simplistic, pandering to ‘the common man’ by using *his* language and symbols. While one or more of these features indeed apply to most populist actors, they do not set them apart from non-populists.

In recent years, an increasing number of scholars have come to define populism as an ideology or discourse. While the various details of the definitions vary, almost all definitions share at least two components: (1) a fundamental opposition between ‘the people’ and ‘the elite’, and (2) populism is on the side of ‘the people’. Many definitions also stress the importance of ‘common sense’ or the ‘general will’ of the people, explicitly or implicitly relating the latter to a Rousseauian understanding of democracy. In line with this growing consensus within the field, I propose the following *minimum* definition: *populism is a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the volonté générale (general will) of the people.*¹ This definition is broad enough to include all major populist phenomena, across region and time, but narrow enough to exclude many other (non-populist) phenomena. Most importantly, populism so defined has at least two fundamental oppositions: elitism and pluralism. Consequently, it excludes most political actors and ideologies that dominated politics before the rise of democracy in the late nineteenth century (e.g., monarchism, theocracy, conservatism) as well as those that have dominated democratic societies since then (e.g., Christian democracy, liberalism, and social democracy).

Populism and democracy

In much of the public debate, populism is seen as a threat for democracy. This is in line with most scholarship on the topic, which had described populism as a ‘democratic disorder’, a ‘pathology of democracy’, and a ‘paranoid style of politics’. A minority sees populism as democratic, and some even as the ultimate form of democracy. For all the public debate, the actual relationship between populism and democracy is, both in theory and practice, highly ambiguous and complex.²

Theoretically, populism is not anti-democratic; it accepts both popular sovereignty and majority rule. It is, however, anti-liberal democratic. The fact that many authors use democracy as a shorthand for liberal democracy might explain the predominance of negative evaluations of populism in the literature. Populism is essentially anti-liberal democratic, because it opposes both the principle of pluralism and the practice of compromise. It is a *monist* ideology, considering both ‘the people’ and the elite’ as homogeneous and undivided. Thus, pluralism is fundamentally opposed, and minority rights are perceived as ‘special interests’ of ‘the elite’, which (in its zero-sum game world) come at the expense of ‘the people’. Populism therefore also rejects the politics of compromise. It argues that politics can and should benefit all people. After all, ‘the people’ are homogeneous and therefore have similar interests and norms. Moreover, being essentially based upon a *moral* divide, for populism, compromise means that ‘the pure’ are soiled by ‘the corrupt’, which leads to the corrupting of ‘the pure’. Consequently, populism supports an extremist majoritarianism, even if the interests and norms of the majority (i.e., the people) are often constructed by the populist leader. However, as the populist leader is part of the (homogeneous) people, unlike the leaders of the other parties (who are part of the elite), *his* interests and norms are the same as those of the people.

Populism puts its finger on the Achilles heel of liberal democracy, that is, the inherent tension between majority rule and minority rights. While democracy is based on popular sovereignty and majority rule, liberal democracy emphasizes restrictions on state power and the constitutional protection of minority rights. Both liberal aspects *can* limit popular sovereignty and majority rule. Populists squarely come out on the side of democracy, which they interpret as ‘the power of the people and *only* the power of the people.’³ Consequently, populism opposes any institutions or procedures that impede the direct and full expression of the people’s voice. In practice, populists have both strengthened the democratic system in their country (e.g., Morales in Bolivia), and destroyed it (e.g., Fujimori in Peru). In line with the theoretical relationship, populists tend to mainly support and strengthen democratic

aspects of popular sovereignty and majority rule, among others by including previously excluded or marginalized groups and supporting or using plebiscitarian political instruments like referendums and people initiatives. At the same time, they tend to undermine liberal features like minority protections and counterbalancing powers of the executive, which are accused of impeding the will of the majority (or 'general will'). But while they might have pushed for an extreme form of majority rule centred on a dominant executive, populists rarely sought the end to democracy as such (i.e., popular sovereignty and majority rule).

Theory: Populism and constitutionalism

In contrast to populism and (liberal) democracy, little attention has been paid to the theoretical relationship between populism and constitutionalism. Most authors emphasize that constitutionalism centres on the idea of legal constraint of coercive state power. The idea that (coercive) state power should be limited is a fundamental element of liberal democracy, which is why several authors prefer the term constitutional democracy. In essence, constitutionalism holds that constitutions are the ultimate formal source of state authority.

It should come as no surprise that populism has a problematic relationship with constitutionalism. Populism deems that nothing supersedes the general will of the people and, consequently, no one should interfere with it. In this, populism subscribes to the classical conception of democracy, in which 'the laws of the republic express the *unrestricted* will of the unified people.'⁴ Essentially a form of extreme majoritarianism, populism accepts no limitations to popular sovereignty and majority rule, as it fundamentally rejects the existence of (legitimate) minorities.

For populism everything is political, at least potentially. Nothing should be above the will of the people: not economics, not individuals, and not laws. Hence, populism fundamentally opposes the essence of constitutionalism, i.e., the constraint of state power. The idea that certain things are non-political, in the sense that they are outside of the

scope of majority rule, is alien to populism. In short, populism takes democracy to the extreme, or brings it back to its classical conception, by arguing that the people can decide on everything by majority rule.

Practice: Populists and constitutions

While the relationship between populism and constitutionalism is fairly clear in theory, populists have taken a broad variety of approaches to constitutions in practice. In general, populists-in-opposition approach constitutions opportunistically; when the constitution supports their point, they will revere it, but if it opposes their idea, they will deny its importance. Similarly, their position towards constitutional judges is purely opportunistic. Depending upon the usefulness of their ruling, a judge is branded as one of 'the people' or a member of 'the elite'. Populists-in-power are similarly opportunistic, clinging to the 'sacred' constitution whenever it serves their purpose, and criticizing or even changing it when it does not.

The opportunistic position of populists-in-opposition toward constitutions is nowhere as visible as in the United States, where the Constitution is both an instrument and a symbol. This is perfectly exemplified by the Tea Party, which presents itself as the true defender of the US Constitution. For example, the *Declaration of Tea Party Independence*, one of the few documents that virtually all Tea Party groups, Astroturf and grass roots, can agree on, identifies just three concrete 'sound policies' that have made the United States 'a land of prosperity and liberty': fiscal responsibility, constitutionally limited government, and a belief in the free market. More concretely, Tea Partiers believe that 'The Constitution can solve all of the problems plaguing our nation today.' Tea Party groups advocate an originalist interpretation, which takes the Constitution literally, that is, as the Framers intended.

However, whenever the Constitution stands in the way of their desired goals, they have no problem with calling for changes to that same Constitution.

Take Senator Mike Lee (R-Utah), one of the main voices of the recent government shutdown and attempt by Tea Partiers to force a government default, who promised voters at a rally in 2010: 'I hereby pledge to you that I will not vote for a single bill that I can't justify by the text and original understanding of the Constitution.' Yet, he has also publically criticized the Seventeenth Amendment and called for a change to the Fourteenth Amendment. Asked how to square these positions, Lee said: 'The Constitution was made to be amended from time to time. Sometimes we have to change it to make it more true to the American dream' (CNN, 7 September 2010).

Similar opportunistic positioning can be found among populists in other countries. The Belgian populist radical Right party Flemish Bloc (now Flemish Interest, VB) explicitly defended 'constitutional democracy' in its 2003 party programme, arguing that 'Flanders should not only be a democracy, it should also be a *state of law*. *This means that those in power are subject to the law* (in the broadest sense) and that they cannot take decisions that go against the law and the Constitution.' However, its passionate defence of constitutionalism seemed mainly self-serving, part of an (unsuccessful) attempt to prevent its conviction on the basis of the anti-racism law, as the VB has consistently rejected similar constitutional protections for 'Muslim fundamentalists'.

Populists-in-power are as opportunistic toward constitutions as populists-in-opposition are, and those in power have more opportunities to challenge the constitution — as well as the principle defenders of the constitution, the judges. Given that few populists ever have a constitutional majority in parliament, changing the constitution is often not an option. Instead, they ignore constitutional provisions and try to either change or intimidate the judges on the constitutional court. However, constitutional courts have frequently proved much more independent and powerful than populists had expected. In fact, in some cases judges were more formidable adversaries than the opposition

politicians (for example, in the cases of former Italian Prime Minister Silvio Berlusconi and Slovak Premier Vladimír Mečiar).

If they do have the political power, populists will use it to change the constitution. This has been most common in Latin America, where populist presidents are often political outsiders, who come to power rather suddenly and without well-organized political organizations. Lacking political supporters in other branches of government, their efforts are often frustrated by the national legislature, subnational bodies, extra-political agencies, and the constitutional court. The quickest way to marginalize these oppositional forces is by directly appealing to the people in a constitutional referendum.⁵ Left-wing populist presidents in Bolivia, Ecuador, and Venezuela have successfully argued that the old constitution protected the power of the corrupt (former) elite and obstructed the real rule of the people. The new constitutions, established through so-called 'constituent assemblies,' centralized political power in the office of the president and created new bodies that undermined the power of the existing countervailing powers, such as the national legislature and the constitutional court.

The only European example of constitutional reform by populists-in-power directly is an extreme case: contemporary Hungary under the Hungarian Civic Party (Fidesz) of Prime Minister Viktor Orbán. Since having come to power for the second time, in 2010, Orbán has unleashed a level of majoritarian rule previously unseen in postwar Europe. The main target was the Constitution, attacked as a remnant of Hungary's Communist past. Helped by a parliamentary supermajority and some strategic new appointments, Orbán steamrolled a new Constitution through parliament. While Deputy Prime Minister Tibor Navracsics heralded the new Constitution as 'a foundation for the spiritual and intellectual renewal of Hungary' (*Wall Street Journal*, 19 April 2011), most national and international observers do not share his enthusiasm. In fact, experts agree that the new Constitution has

significantly weakened alternative centres of power and entrenched Fidesz into power well beyond its current legislative term.

Conclusion

I have argued that populism is best defined as a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonté générale* (general will) of the people. This definition is broad enough to include most phenomena generally termed populist, yet precise enough to exclude the vast majority of political phenomena that are normally not associated with the term. Populism is a phenomenon closely associated with the rise of mass democracy, dating back to the late nineteenth century, and comes in many guises.

While populism is essentially democratic, it is not *liberal* democratic. In fact, with regard to the inherent tension within liberal democracy between democratic majority rule and liberal minority rights, populism is squarely with the former. Essentially, populism is a form of extreme majoritarianism. Given that constitutionalism limits both popular sovereignty and majority rule, populism is fundamentally opposed to constitutionalism — despite recent attempts to merge the two into a doctrine of populist constitutionalism. In practice, populists take an opportunistic approach toward constitutions. While populists-in-opposition cling to the constitutional protection of *their* minority rights, they reject those of other minorities on the basis of the democratic argument of majority rule. Populists-in-power have done the same, but, when able, have (significantly) reformed the constitution, most often strengthening majoritarian institutions (like the executive and referendums) and marginalizing counterbalancing powers and extra-political institutions.

Given the complex relationship between populism and democracy, it is crucial for opponents of populism to criticize the actual weak points of populism. The argument that populism is anti-democratic is unconvincing, and might ultimately reinforce the populist position. After all, it is the populists who defend majority rule much more radically than liberal democrats. Rather, liberal democrats have to emphasize the importance of *liberal* aspects of the political culture and system — such as freedom of religion and speech; independence of the judiciary; institutional checks and balances. In essence, they have to explain that minority rights benefit not just the minorities, but also the majority — if only because at one time they could become a minority.

Moreover, opponents of populism should realize that for most of the (potential) supporters of populism, mainstream voices in the media and politics are part of the corrupt elite. Not only do they no longer hold the moral high ground, they are instinctively distrusted. Consequently, vague and moralistic condemnations of populism, particularly when coordinated between different mainstream camps, will merely serve to confirm the populist message. This coordinated effort is cited by populists as 'proof' that the elite is homogeneous, merely faking internal division for electoral gain. This is used to bolster the populists' own claims to being in the right and wielding influence, against which, the whole of the elite must unite to oppose them. More importantly, they strengthen the populist argument that the political is essentially moral, which undermines the possibilities for compromise. In other words, populists should be confronted on the terms of the non-populist, but based on evidence and rational arguments, rather than hyperbole and moral condemnation.

Notes

- 1 See Cas Mudde, 'The Populist *Zeitgeist*', *Government & Opposition*, Vol. 39/3 (2004), 542-63.
- 2 For a collection of case studies on the relationship between populism and democracy, see Cas Mudde and Cristóbal Rovira Kaltwasser (eds.), *Populism in Europe and the Americas. Threat or Corrective for Democracy?* Cambridge: Cambridge University Press, 2012.
- 3 On populism and the tension of liberal democracy, see Yves Mény and Yves Surel, 'The Constitutive Ambiguity of Populism', in Yves Mény and Yves Surel (eds.), *Democracies and the Populist Challenge*. Basingstoke: Palgrave, 2002, pp. 1-21, at 9.
- 4 Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Paradoxical Principles?', *Political Theory*, 29/6 (2001), 766-81, at 766.
- 5 At the same time, populists have often introduced or extended direct democracy through constitutional reform.



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Cas Mudde is an Assistant Professor in the Department of International Affairs at the University of Georgia in Athens (USA). He is an internationally recognized expert on extremism and democracy in Western democracies, focusing particularly on populism and the far Right. Among his publications are *The Ideology of the Extreme Right* (Manchester University Press, 2000), *Populist Radical Right Parties in Europe* (Cambridge University Press, 2007), and (with Cristóbal Rovira Kaltwasser) *Populism in Europe and the Americas. Threat or Corrective for Democracy?* (Cambridge University Press, 2012). He has recently started a new project on the radical environmentalist and animal rights movement and state repression in Western democracies.

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