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## *Introduction*



# Populism and Law in Hungary – Introduction to the Special Issue

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### Abstract

Populism is a nebulous concept that has almost as many definitions as scholars engaging with the concept that has a paradoxical relationship with law. On the one hand, populist politicians generally oppose the liberal ideal of separating politics and law, i.e. accepting that legal rules should limit political power, claiming that it would impede the expression of the popular will, yet they use legal regulation as their most important instrument to implement their policies. The chameleonic nature of populism and its instrumentalist approach to law presents a special challenge for lawyers that try to assess its impact on the domestic legal system. Populist legislation, after all, is seemingly indistinguishable from legislation adopted under non-populist regimes as populist regimes always claim to strictly adhere to formal procedural requirements and often justify the dramatic overhaul of previous rules invoking foreign examples.

Hungary is a perfect litmus test for the examination of legal changes under populist leaders, because in 2010 the right-wing Fidesz-Kdnp party coalition won two-thirds majority in Parliament – a self-described “revolution in the voting booths” –, which gave it the power to completely overhaul the Hungarian legal system, even changing the constitution. In the past 10 years, virtually every significant branch of Hungarian law was recodified, adopting *inter alia* new criminal, civil, administrative and labor codes. The authors of this special issue attempted to analyze some of the most pertinent changes, in the field of constitutional law, adjudication, tax law, labor law, criminal regulation and asylum legislation.

### Keywords

populism – law – Hungary – adjudication – constitutional law – labor law – tax law – criminal law – migration

## 1 Populism and Law – A General Assessment

Populism is a nebulous concept that has almost as many definitions as scholars engaging with the concept. It has been defined *inter alia* as an ideology,<sup>1</sup> a thin ideology,<sup>2</sup> a style of political communication,<sup>3</sup> as leadership style,<sup>4</sup> or a political strategy.<sup>5</sup> The most well-known recent formulation construes it as “a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, ‘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...”<sup>6</sup>

1 Donald MacRae, “Populism as an Ideology,” in Ghita Ionescu and Ernest Gellner (eds.), *Populism. Its Meanings and Characteristics* (Weidenfeld and Nicolson, London, UK, 1969), 153–165.

2 Margaret Canovan, “Taking Politics to the People: Populism as the Ideology of Democracy,” in Yves Mény and Yves Surel (eds.), *Democracies and the Populist Challenge* (Palgrave Macmillan, Basingstoke, UK, 2002), 25–44.

3 Michael Kazin, *The Populist Persuasion* (Cornell University Press, Ithaca, US, 1995).

4 Torcuato Di Tella, “Populism and Reform in Latin America?” in Claudio Veliz (ed.), *Obstacles to Change in Latin America* (Oxford University Press, Oxford, UK, 1965), 47–74.

5 Kurt Weyland, “Clarifying a Contested Concept: Populism in the Study of Latin American Politics,” 34(1) *Comparative Politics* (2001), 1–22.

6 Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press, Oxford, UK, 2017), 6.

Even though populism is undeniably a contested concept,<sup>7</sup> there is wide agreement concerning its core elements. For the purpose of this special issue, we define populism as a mode of political communication, centered on a Manichean logic of the struggle between ‘the elite’ and ‘the people’. In this antagonistic relationship ‘the people’ represent the ultimate good, whose will the politicians should serve, while ‘the elite’ strive to frustrate popular sovereignty, i.e. the authentic will of the people. The concept of ‘the people’ and ‘the elite’ is thus characterized by both ‘rhetorical usefulness and... conceptual obscurity’,<sup>8</sup> since ‘the people’ can be any part of the population united by some specific characteristics such as economic position, socio-cultural status or political affiliation or it can ultimately be the entire population of the country fighting against foreign influences that attempt to distort popular sovereignty with the help of some domestic collaborators. In this view, ‘the people’ represent the powerless majority and ‘the elite’ hold – unjust – power that has to be reclaimed for the benefit of ‘the people’ and thus only the populist politicians can be the legitimate representatives of ‘the people’.<sup>9</sup> Populist rhetoric, however, can use a wide range of different labels (such as ‘ordinary people’, ‘common people’ versus ‘the establishment’ or the ‘deep state’ etc.).<sup>10</sup> Without a fixed discernible content, populism is extremely adaptable and can be combined with virtually any ideology.<sup>11</sup> Needless to say, this results in the adoption of radically different populist policies in various countries in stark contrast to each other.

Populism has a paradoxical relationship with law.<sup>12</sup> On the one hand, populist politicians generally oppose the liberal ideal of separating politics and law, i.e. accepting that legal rules should limit political power, claiming that it would impede the expression of the popular will,<sup>13</sup> yet they use legal regulation as their most important instrument to implement their policies. Hence populists usually deny the substantive concept of the rule of law rooted in

7 Weyland, *op.cit.* note 5.

8 Margaret Canovan, *The People* (Polity Press, Cambridge, UK, 2005), 39.

9 Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press, Pennsylvania, US, 2016), 101.

10 Benjamin De Cleen, “The Populist Political Logic and the Analysis of the Discursive Construction of ‘the People’ and ‘the Elite,’” in Jan Zienkowski and Ruth Breeze (eds), *Imagining the Peoples of Europe: Populist Discourses Across the Political Spectrum* (John Benjamins, Amsterdam, Netherlands, 2019), 19–42, at 30.

11 Kirk A. Hawkins and Cristóbal Rovira Kaltwasser, “The Ideational Approach to Populism,” 52(4) *Latin American Research Review* (2017), 513–528, at 514.

12 Kim Lane Scheppele, “Authoritarian Legalism,” 85(2) *The University of Chicago Law Review* (2018), 547–583.

13 Paul Blokker, “Populism as a Constitutional Project,” 17(2) *International Journal of Constitutional Law* (2019), 536–553, at 539.

normative commitments, focusing instead on formal procedural practices.<sup>14</sup> With an adequate parliamentary majority this attitude can lead to the use of the weapon of exclusionary legalism – rewriting the constitutional framework to establish political hegemony.<sup>15</sup>

The chameleonic nature of populism and its instrumentalist approach to law presents a special challenge for lawyers that try to assess its impact on the domestic legal system. Populist legislation, after all, is seemingly indistinguishable from legislation adopted under non-populist regimes as populist regimes always claim to strictly adhere to formal procedural requirements and often justify the dramatic overhaul of previous rules invoking foreign examples.<sup>16</sup> However, populist legislation is characterized by the repeated emphasis of fulfilling populist ideals, therefore an enquiry of the effects of populism on the domestic legal system requires a contextual appraisal of the publicly declared intention of the legislator since the text of the normative regulation itself does not necessarily reveal whether the adopted laws were supposed to advance the genuine will of the people and/or fight against the unjust power of the elite. In this vein, increased criminalization, such as the introduction of ‘three-strikes’ regulations, i.e. that recidivists receive significantly higher punishment if they commit consecutive violent crimes, or expanded scope of self-defense, meaning for example that people can validly invoke self-defense when causing physical injury even if only property rights were violated, is a typical hallmark of punitive populism.<sup>17</sup> Moreover, such phenomena might be observed in labor law, with the shibboleth of ‘labor-based economy’<sup>18</sup> and the concurrent reduction of unemployment benefits, in tax law with the introduction of sectoral surtaxes,<sup>19</sup> or in immigration policies that severely restrict migration to ‘protect the people’.<sup>20</sup>

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14 Nicola Lacey, “Populism and the Rule of Law,” 15(1) *Annual Review of Law and Social Science* (2019), 79–96, at 81.

15 Kurt Weyland, “Latin-America’s Authoritarian Drift: The Threat from the Populist Left,” 24(3) *Journal of Democracy* (2013), 18–32, at 20–25.

16 Ironically, at the same time populist politicians usually resist transnational and international norms as contrary to the will and interests of ‘the people’, which also leads to a decline of the incorporation of such norms in domestic legal discourse by courts. See Tamar Hostovsky Brandes, “International Law in Domestic Courts in an Era of Populism,” 17(2) *International Journal of Constitutional Law* (2019), 576–596.

17 See Miklós Hollán et al. in this special issue.

18 See Sára Hungler in this special issue.

19 See Márton Varju and Mónika Papp in this special issue.

20 See Tamás Hoffmann in this special issue.

## 2 Populism and Law in Hungary

Hungary is a perfect litmus test for the examination of legal changes under populist leaders, because in 2010 the right-wing Fidesz-KDNP party coalition won two-thirds majority in Parliament – a self-described “revolution in the voting booths” –, which gave it the power to completely overhaul the Hungarian legal system, even changing the constitution.<sup>21</sup> With minor interruptions, the coalition managed to hold on to this majority in two successive parliamentary elections, therefore the populist party coalition could go beyond rhetoric and transform the legislation immediately as much as it desired, constantly invoking its moral authorization to fulfil the popular will.<sup>22</sup> With the adoption of the Fundamental Law (the new constitution) in 2011, and nine subsequent amendments, the government majority had the freedom to easily implement into the legal system all the changes that it found necessary to establish a new legal regime reflecting populist considerations. In the past 10 years, virtually every significant branch of Hungarian law was recodified, adopting *inter alia* new criminal, civil, administrative and labor codes. The authors of this special issue attempted to analyze some of the most pertinent changes.

Zoltán Szente examines<sup>23</sup> the impact of populist governance in Hungary on constitutional law since 2010. His chapter investigates whether the comprehensive and radical changes that took place during this time have been characterized by distinctive traits, ambitions and values that legal and political science scholarship attributes to populism and ‘populist constitutionalism’, above all anti-elitism, anti-institutionalism, anti-pluralism, the emphasis on popular sovereignty and direct democracy, and an instrumental conception of law. For this purpose, it examines the major changes in the constitutional rules and practice of sovereignty issues, the system of separation of powers, and fundamental rights. His final question is how the cumulative effects of these changes can be assessed. He concludes that the ambitious transformation of the institutional system followed prevailing political needs, rather than any ideological ends. The same is true for the changing approach of the fundamental rights. The new restrictions of basic rights and liberties did not really aim at realizing a specific political philosophy related to people’s general welfare. Rights that could have interfered with the power or economic goals

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21 Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press, Budapest, Hungary, 2012).

22 On the importance of majoritarianism in populist policy-making see Ben Stanley, “The Thin Ideology of Populism,” 13(1) *Journal of Political Ideologies* (2008), 95–110, at 104–105.

23 In this special issue.

and interests of the new political elite were curtailed while extension of certain rights were offered only to specific social groups rather than to the general public. Szente concludes that notwithstanding the constant invocation of the popular will, the Hungarian constitutional changes since 2010 do not serve the best interest of the general public, but form part of an authoritarian development where the constitutional decisions are taken in order to stabilize political power and support the loyal social and economic groups, the bedrock of the political power of the government.

Mátyás Bencze examines<sup>24</sup> the phenomenon emerging in the adjudication of Hungarian ordinary courts which can be labelled as ‘everyday judicial populism’. Based on empirical scrutiny and a case study he argues that political populism of the Hungarian government has an indirect, but well-detectable impact on the judicial practice. On the one hand, governmental populism may generate a similar attitude on the part of the judiciary, implying that a good judge serves the people rather than being a black-letter lawyer. On the other hand, sometimes the government generate (through its media) huge public outcry in certain court cases, and judges take this outcry, as the ‘*vox populi*’, into consideration in their decision-making. According to Bencze, there are specific characteristics of everyday judicial populism in Hungary: (1) it appears in cases which got nation-wide publicity; (2) the government had a determined and openly communicated position on the legal/political issue at stake in the case; (3) the government represents its position as the ‘will of the ordinary people’; (4) if the court complies with the governmental position, it often uses populist rhetoric in the justification of the judgement. While generally speaking populism is not necessarily an inherently negative phenomenon that must be expelled from adjudication and interpretation, “everyday judicial populism” represents a danger to judicial independence, as a strong political party or a government can manipulate the public mood in many ways according to its own political agenda.

Márton Varju and Papp Mónika’s core thesis<sup>25</sup> is that it is difficult to establish whether the system of special taxes in Hungary consist of populist measures, or are measures which implement the emerging mainstream consensus on corporate taxation (of multinationals). The paper argues that while the taxation policy objectives of the Hungarian measures may often seem reasonable, and may receive approval from legal fora, such as the CJEU, the potential legal hiatuses of their regulation leave the door open for their abusive and/

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24 In this special issue.

25 In this special issue.

26 In this special issue.

or populist application, contrary to the already limited protection rule of law principles might proffer to restrict the taxation prerogatives of states.

Sára Hungler emphasizes<sup>26</sup> that the landslide victory allowed the Fidesz-KDNP coalition to re-codify the social and labor fields as well, catering for more flexibility while removing substantial elements of security. A new vision of ‘illiberal democracy’ marked the end of the welfare state, and one of the central elements of the political discourse was to create a labor-based society. This new direction was anchored in the Fundamental Law of Hungary, stating that “everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and potential. Hungary shall strive to create the conditions that ensure that everyone who is able and willing to work has the opportunity to do so.”<sup>27</sup> The Labor Code adopted in 2012 further paved the road for the ‘workfarist’ regime and brought in a wide range of deregulations and increased labor market flexibility, while severely curtailed collective labor rights.

Even though Hungary’s economic performance has been quite strong in the past years, the populist turn continued to build a new model for the welfare state, characterized by social disinvestment, which is rooted in the neoliberal scheme. Unemployment benefits were minimized, and compulsory public works programs were introduced. The overall social spending has been cut drastically since 2010; social assistance schemes have been terminated. Self-responsibility became the guiding principle in social policy as well, replacing collective protection by individualistic and often punitive schemes. Fundamental elements of democratic control like participation or trade union rights were largely eliminated to cement the executive power of the coalition. Social dialogue in Hungary does not fulfil its role for numerous reasons neither on national, and sectoral, nor on workplace level.

Miklós Hollán, Zsolt Boda, Attila Bartha, and Mihály Tóth describe<sup>28</sup> the impact of punitive populism on the new Hungarian criminal regulation, such as the introduction of “three-strikes”, whole life sentences, the lowering of age limit of criminal responsibility, or the criminalization of homelessness. A representative empirical study conducted by the authors found that there is strongly punitive attitude in the Hungarian public opinion that favors criminalization and consequently the penal populist attitude of the Hungarian government is met with approval. Actually, while several measures of this new Criminal Code are stricter than those of its antecedents, some of the measures are arguably instances of window dressing to satisfy those who demand stricter controls.

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27 Fundamental Law Article XII paras (1) and (2).

28 In this special issue.



Finally, Tamás Hoffmann demonstrates<sup>29</sup> how the *par excellence* populist portrayal of migrants as a threat to the Hungarian people and Western civilization itself led to drastic restriction of the asylum procedure, eventually almost completely denying asylum-seekers from international protection. While these changes are arguably contrary to international and European law obligations, the government always emphasizes Hungary's strict adherence to international standards and implements international judicial decisions but concurrently introduces new constraints that lead to the same result. This attitude could only be countered by European Union institutions, if they proclaimed that the Hungarian legislation is contrary to the principle of good faith as it clearly aims at denying the right to asylum, however, the Hungarian attitude ultimately conforms with the general European asylum policy of restricting irregular migration into the EU and thus the current situation is actually reconcilable with European asylum policies.

### 3 Conclusion

The last few years have seen a significant rise in publications which analyze the legal effects of political populism. So far, however, descriptive and comparative studies have dominated the field, with relatively few independent theoretical works focusing on the European experience.<sup>30</sup> Recently, a number of new studies have been published which are aimed at the protection of liberal democracy, or examine its prospects, or recommend ways to stop its erosion.<sup>31</sup> Different terminologies were proposed to describe the state, in addition

<sup>29</sup> In this special issue.

<sup>30</sup> Zoltán Sente, "Populism and Populist Constitutionalism," in Fruzsina Gárdos-Orosz and Zoltán Sente (eds.), *Populist Challenge to Constitutional Interpretation in Europe* (Routledge, London, UK, 2021), 3–28. David Landau, "Populist Constitutions," 85(2) *University of Chicago Law Review* (2018), 521–543; Bojan Bugarcic, "The Two Faces of Populism, Between Authoritarian and Democratic Populism," 20(3) *German Law Journal* (2019), 390–400; Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, London, UK, 2014), 1–216; Jan-Werner Müller, "Populism and Constitutionalism," in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds.), *The Oxford Handbook of Populism* (Oxford, Oxford University Press, 2017), 590–606; Gábor Halmai, "Populism, Authoritarianism and Constitutionalism," 20(3) *German Law Journal* (2019), 296–313; Gábor Attila Tóth, "Constitutional Markers of Authoritarianism," 11(2) *Hague Journal on the Rule of Law* (2019), 37–61; Tímea Drinóczi and Agnieszka Bień-Kacała, "Illiberal Constitutionalism: The Case of Hungary and Poland," 20(8) *German Law Journal* (2019), 1140–1166.

<sup>31</sup> See e.g. Tom Ginsburg and Aziz Z. Huq, *How to Save Constitutional Democracy?* (University of Chicago Press, Chicago, US, 2018).



to populist state or illiberal state, the so-called ‘hybrid regime’ introduced by Steven Levitsky and Lucan A. Way;<sup>32</sup> concentrating primarily on the aspect of democratic change.

Populist claims emerge within a constitutional democracy. Although scholarship usually contrasts liberal claims with illiberal ones,<sup>33</sup> and populist claims with non-populist claims etc., the elements of the populist legal system are difficult to identify, because even in states like Hungary, where the populist government has had a two thirds constitution making majority since 2010 – the solutions are sometimes apparently invisible. Populist constitutionalism and populist legislation are not written on a blank piece of paper but often appear between the lines of written constitutional and other legal texts. It is not always obvious what constitutes a new element of the new populist legal system. As the concept develops within the framework of liberal democracy and transforms it step by step, the analysis needs time before we can describe the entire legal change in a specific country. This methodological difficulty could be solved by restricting the analysis to some elements and assessing whether it is plausible (suitable to the legal system) in a constitutional democracy governed by the rule of law. By building a structure from the elements that do not appear to be plausible in an established constitutional democracy’s legal system, we will finally be able to define populist legality as something different from classical rule of law constitutionalism. Using this methodological approach this special issue examines the very different segments of the legal system, from penal law through labor law to constitutional law and specifically the interaction of the different segments and cumulative effects.

In spite of its uncertain content, populism is a good framework for the analysis of the criticism levelled at the rule of law state,<sup>34</sup> because it refers to a claim to alter or to change the classical concept of the rule of law based legality. Populists want to make a difference, no matter in what direction; right or left,<sup>35</sup>

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32 Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism, Hybrid Regimes after the Cold War* (Cambridge University Press, Cambridge, UK, 2010); Lucan A. Way, *Pluralism by Default, Weak Autocrats and the Rise of Competitive Politics* (Johns Hopkins University Press, Baltimore, US, 2015).

33 Attila Bartha, Zsolt Boda and Dorottya Szikra, “When Populist Leaders Govern: Conceptualising Populism in Policy Making,” 8(3) *Politics and Governance* (2020), 71–81.

34 David Art, *Inside the Radical Right: The Development of Anti-immigration Parties in Western Europe* (Cambridge University Press, Cambridge, 2011).

35 Mark Tushnet and Bojan Bugarcic, “Populism and Constitutionalism: An Essay on Definitions and Their Implications” (April 21, 2020). *Harvard Public Law Working Paper* No. 20-17.

for<sup>36</sup> or against the classic democratic values.<sup>37</sup> Building populism step by step, we will see in this special issue what kind of populism was created in Hungary by analyzing significant fragments of the legal system to get the full picture at the end is, of course, already applied in legal scholarship and in political science, but has never been used to assess the populism case of Hungary.

As Balaguer Callejon aptly explains, there is an unresolvable tension between the populist idea and constitutionalism, because constitutionalism is based on the idea of pluralism with regard to the nation – the people -, and on the inherent limitation of majority opinion, while populists usually demand that the will of the majority triumphs, and if populists obtain authority over the state they implement this will in the forms of constitutions, constitutional amendments and other legal norms.<sup>38</sup> Even if we fully agree with this approach, it is a further question whether the legal change in its effect or at least in a normative sense furthers the interests of the voting majority, or populism remains an empty slogan of the populist elites in power.

The reinterpretation of the general ideas of the republic is often mentioned as a *per se* populist phenomenon. One might invoke the famous aphorism of Abraham Lincoln: ‘A Government of the people, by the people, and for the people’<sup>39</sup> to reflect on the notion of popular sovereignty as the basis of the democratic order. In relation to this, the phrase ‘Give the Government back to the people’ is often heard as a criticism of liberal democracy during constitutional transformations. However, even if we might accept the legitimacy of this classical populist claim, our contributors to this special issue explore the misuse of this idea in order to build such a centralized regime where all branches of the state power are deferent to the Government majority’s goals and where the regulation of certain sectors as the labor market, economic market are transformed in order to serve specific, particular interests often independently from the voting majority’s concerns.

In relation to Hungary, Prime Minister Viktor Orbán, in a speech in July 2014 openly expressed his views about the policy objectives of the government. While praising Singapore, China, India, Turkey, and Russia as ‘making [their] nations successful’, and as the new “stars of international relations, he said that

36 John Batt, “American Legal Populism: A Jurisprudential and Historical Narrative, Including Reflections on Critical Legal Studies,” 22(3) *Northern Kentucky Law Review* (1995), 651–762.

37 Paul Blokker, “Populist Constitutionalism,” in Carlos de la Torre (ed.), *Routledge Handbook of Global Populism* (Routledge, London, UK, 2017), 113–127.

38 Francisco Balaguer Callejon, “Constitutional Interpretation and Populism in Contemporary Spain,” in Fruzsina Gárdos-Orosz and Zoltán Szente (eds.), *Populist Challenge to Constitutional Interpretation in Europe* (Routledge, London, UK, 2021) 217–232.

39 See the text at [https://www.history.com/topics/american-civil-war/gettysburg-address#section\\_4](https://www.history.com/topics/american-civil-war/gettysburg-address#section_4).

‘the new state that we are building is an illiberal state, a non-liberal state’.<sup>40</sup> The articles of this special issue clearly demonstrate that the transformation of the Hungarian legal system was an important instrument to achieve this goal. By analyzing specific branches of the Hungarian legal system it can be concluded that the even though the Government undertook this complete reconstruction in the name of the people, the new constitutional and legal system not only favors specific social groups as opposed to others and the new elite against the old one, but ultimately destroyed trust in the state’s protection of the democratic values based on equal human dignity and the rule of law.

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<sup>40</sup> The entire speech is available at <http://hungarianspectrum.wordpress.com/2014/07/31/viktor-orbans-speech-at-the-xxv-balvanyos-free-summer-university-and-youth-camp-july-26-2014-baile-tusnad-tusnadfurdo/>.