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Populism and the Rule of Law

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Abstract

The resurgence of populism in Europe and North America is widely thought to have placed the rule of law under pressure. But how many of the relevant developments are indeed associated with populism? And is any such association a contingent or analytic matter: does populism inevitably threaten the rule of law, or do other conditions intervene to shape its impact? After setting out how I will understand the rule of law and populism, I examine the ways in which contemporary populist discourse has challenged the rule of law through a variety of mechanisms - notably agenda-setting, policy impact, influencing discretionary decisions and convention-trashing - considering the institutional and social conditions which conduce to strengthen or weaken these mechanisms in particular contexts. Finally, I consider the implications of the analysis for contemporary criminalisation, assessing how many of the factors producing 'penal populism' or 'overcriminalization' are truly a product of populism.

Keywords: populism, rule of law, democracy, institutions, criminalisation, penal populism

INTRODUCTION

A wave of populism is sweeping across the advanced democracies in the northern hemisphere. Though in different forms and to different degrees, populism has begun to shape the political life of established democracies including the United States, the United Kingdom, France, Germany, Austria, the Netherlands, Sweden, Greece, Italy, as well as, perhaps most spectacularly in Europe, the more recent democracies of Hungary and Poland. These developments have overturned the conventional sense that, particular social movements aside, populism from the mid 20th Century on has been primarily a phenomenon of countries with personalised, presidential political systems and radical inequalities, with Latin American countries such as Argentina, Ecuador, and Venezuela providing prominent examples. Populism, is, evidently, posing a major challenge to prevailing political systems, placing pressure in particular on established patterns of partisanship and hence on political parties. These factors, along with increasing reliance on ‘directly democratic’ decision-making mechanisms such as referenda raise fascinating – and urgent – questions about some very basic aspects of the rule of law and other features of modern constitutionalism.

There is an emerging political theory and political science literature which engages with the rise of populism, seeking to explain both its origins and its implications for democracy across the globe (Benjamin 2016; Brubaker 2017; Ferrari et al. 2018; Levitsky & Ziblatt 2018; Pankaj 2017; Mounk 2018; Mudde & Rovira Kaltwasser 2017; Muller 2016; Rovira Kaltwasser 2013; Runciman 2018; Urbinati 2014). But until recently, less has been written about its implications for law, or for the rule of law. While political science analyses of populism have invariably noted the tendency of populist regimes to flout or instrumentally exploit the law, and to manipulate legal institutions – notably courts – so as to subvert their capacity to disrupt political will, legal debates have been slower to focus on populism as a potential threat to the rule of law’s integrity. This is reflected in the fact that a recent, influential collection on *Constitutionalism and the Rule of Law* (Adams et al. 2017) features only two references to populism, both in relation to Hungary; while the classic *Nomos* collection (Shapiro ed. 1994) mentions it not at all. Rather, the rule of law has generated a scholarly field dominated by legal and philosophical analysis of the scope and meaning of the rule of law or its cousin constitutionalism, more recently supplemented by a substantial literature on the rule of law as a tool of international relations (Meuwese 2017).

But in the last few years, things have begun to change, as a result of some spectacular, if differing, instances of the capacity of populist politics to put the rule of law under pressure even in countries in which its position had been largely seen as secure (Bogg & Freedland 2018; Freedland 2018; Walker forthcoming). The media and political reaction to the English High Court’s decision (*Miller* [2016] EWHC 2768; later upheld by the Supreme Court [2017] UKSC 5) that the invocation of Article 50 of the Treaty on European Union, giving notice of Britain’s intention to leave the EU, should be subject to a parliamentary vote called forth an infamous headline describing the judges as ‘enemies of the people,’ in a personal attack which was followed by a deafening failure by the then Lord Chancellor to

distance the government from the *Daily Mail's* populist invective. Copious signals from the Trump administration in the US - regular vilification of courts, a recent attempt to exert pressure on Britain to interfere with a standard sentencing decision (Smith 2018) and the President's expressed belief that he would have a legal right to use his executive power to pardon himself should he be successfully indicted as a result of the Mueller inquiry - provide key instances which help to explain lawyers' emerging concern with populism, and with the mentality of populist leaders, as distinctive threats to constitutionalism in general and to courts in particular. This concern has recently found voice in a lecture by Justice Susanne Baer of the German Federal Constitutional Court (Baer 2018), in which she identified a wide range of threats to the rule of law and the independence and integrity of courts across both Europe and North America – with particular emphasis on the recent compromising of judicial independence in Hungary and Poland. Her lecture uttered an impassioned and reasoned rallying cry for citizens to speak up for constitutionalism and to defend the values through which the tyranny which led to the Second World War was laid to rest.

In this paper, I shall try to give some further analytic focus to these emerging concerns by asking three questions. First, how many of the recent worrying developments in terms of apparent erosion of the rule of law in Europe and North America are indeed associated with populism? Second, where such an association can be established, is it a contingent or analytic matter: does populism inevitably threaten the rule of law, or do other conditions intervene to shape its impact? Are some connections analytic but others contingent? And third, what can we learn from this about the scope for minimising the impact of rising populism on the rule of law?

In tackling these issues, I stray as a criminal lawyer into terrain primarily occupied by political scientists, political and legal theorists, and constitutional lawyers. I do so with a very particular concern, and one which will help me to carve out a manageable patch of territory within an enormous field. In particular, I am concerned with the way in which the design of some forms of political system, under conditions of declining stable partisanship, have rendered the law-making process highly responsive to populist considerations, whether through resort to mechanisms such as initiatives and referenda or simply through politicians' openness to popular concerns in their shaping and conduct of the legislative agenda, irrespective of the commitments made on electoral platforms and hence carrying democratic authority. Legislative populism, if I can put it in that way, has long been notable in relation to criminal law, and there is now a relevant comparative literature which considers how this change itself relates to broad shifts in political economy. A substantial part of this literature on changing patterns of criminalisation and punishment - including a literature on the criminalisation of migrants (Aliverti & Bosworth 2017) - is framed in terms of 'penal populism' or 'populist punitiveness' (Bottoms 1995; Cavadino & Dignan 2005; Lacey 2008a; Pratt 2006; Loader and Sparks 2017). The possibility broached in this literature - that differently configured political systems are more or less responsive to penal populist concerns - in turn opens up interesting general questions about whether these differences affect their capacity to absorb populist pressures without compromising values such as the rule of law and civil liberties.

The paper proceeds as follows. In the first two sections, I set out, respectively, how I will understand the rule of law and populism for the purposes of my analysis. In the third section, I consider the question of whether there are analytic links between populism and an erosion of the rule of law. In the fourth section, I consider a range of contingent links, and examine the institutional and social conditions which conduce to strengthen or weaken them. In the final section, I consider the implications for contemporary criminalisation, assessing how many of the factors producing what scholars have called ‘penal populism’ or ‘overcriminalization’ (Husak 2007) are truly a product of populism.

APPROACHING THE RULE OF LAW

The vast literature on the rule of law has until relatively recently been preoccupied with a cluster of debates about its conceptual contours and scope. We can distinguish four broad approaches. First, some scholars have taken a formal or ‘thin’ conception of the rule of law or legalism – a position most influentially set out by Joseph Raz (1979). In Raz’s conception, the rule of law inheres in a cluster of formal values such as clarity, non-retroactivity, publicity, universality of reach, possibility of compliance and congruence between expressed law and official enforcement. Each of these may be achieved to higher or lower degrees by particular legal systems. In a striking metaphor, he imagined the rule of law as a sharpener of law’s ‘knife’, hence expressing a distinctive and genuine ‘virtue’ of law’s modus operandi of, as Lon Fuller (1964, p. 106) put it, ‘subjecting human conduct to the governance of rules’. It makes the law sharper and hence more effective; but the law’s ‘sharp knife’ may also be used for substantively immoral purposes. This formal conception of the rule of law is also dominant in a substantial public choice literature which ponders the conditions under which the rule of law is in equilibrium and hence a stable socio-political institutional framework and form of association (Holmes 2003). In this literature, the possibility that the rule of law can be used ‘as a political weapon’ (Maravall 2003) is contemplated as one which presents no conceptual tension or contradiction.

Second, some scholars have seen the rule of law in procedural as well as formal terms. For example, in Jeremy Waldron’s view (Waldron 2008; 2011; cf. Shklar 1964), the rule of law expresses not merely formal constraints but procedural commitments which imply a certain interpersonal attitude. A commitment such as equality before the law discloses a normative view of respect for persons as agents who must be not only informed in advance of the content of legal norms so as to have the opportunity to adjust their conduct accordingly but also have a role in speaking and being heard by a neutral tribunal in any legal process in which they are concerned. Waldron here builds on Lon Fuller’s (1964) conception of eight canons of ‘the inner morality of law’ – a set of formal tenets to which Raz also subscribes, but which Fuller saw as carrying moral quality as a mode of governance, as more fully elaborated by Waldron.

Third, others have been inclined to conceptualise the rule of law in much more ambitious, 'thick' or 'substantive' terms. In the view of scholars like Brian Tamanaha (2006; 2012) – but also of influential judges like Tom Bingham (2010) and Susanne Baer (2018) – the rule of law should be seen in terms not merely of the formal and procedural values enunciated by the first two conceptions, but also of a wide range of institutional arrangements rooted in normative commitments, many of them strongly associated with liberal democracy. In this substantive conception, concomitants of a rule of law worth the name include constitutionalism quite generally; a separation of powers or system of checks and balances; human rights – certainly civil and political, perhaps also economic and social; judicial review of at least executive and, perhaps, legislative power; adequate access to justice; and, ideally, an international legal order capable of insisting on the sway of the rule of law and human rights. While these scholars recognise that history presents many examples of evil, unjust or oppressive things being done in the name of law and in conformity with the formal precepts of legalism, in their view these appeals are distortions of the 'true' concept of the rule of law. If law is used merely as a means to an end, the distinctive mode of mutually respectful, agency-recognising association reflected in the ideal of the rule of law is not present; if it is used for ends which are discriminatory, oppressive, arbitrary or otherwise unjust, this counts as 'abusive' or 'discriminatory' 'legalism' or 'autocratic constitutionalism' (Landau 2013; Scheppele 2018) rather than a genuine instance of the rule of law. As will be evident, there is a close kinship between this debate within rule of law scholarship and the longstanding debate about the respective strengths of positivist and natural law conceptions of law (Lacey 2008b).

Fourth, some scholars have resisted the demand to conceptualise the rule of law in terms of either its form or its content. While recognising that many of the procedural and institutional arrangements canvassed in the first three traditions will indeed be central to rule of law ideals and practices, scholars like Martin Krygier (2009; 2017a,b,c; forthcoming) have taken a teleological or functional approach to the rule of law as a set of ideals and arrangements oriented to tempering power. Crucially, this will involve not only arrangements geared to limiting, constraining or rendering power accountable, but also enabling and strengthening power, not least by enhancing its legitimacy. A distinguishing feature of this cluster of approaches is their contextualism: on a functional approach, it is a given that, while genuinely representing an ideal, and recognising the moral value of the rule of law as a 'mode of association' between people (Postema 2014, p. 24), its content, what the rule of law ideally requires, and the institutional arrangements which are needed to give it effect, will vary with time and space, and will be shaped by a range of cultural, institutional and political conditions (see Lacey 2007; Loughlin 2018). These approaches, like substantive approaches, are sensitive to the danger that the rule of law may present a superficial form rather than being fully embedded in conventions and internal attitudes. They accordingly resist any 'idealism/realism' dichotomy (Adams et al. 2017) and insist that the values to which the rule of law aspires can only be met in terms of a close understanding of how particular social and political systems work.

In comparative terms, for example, Cheeseman's analysis of the rule of law (and its abuse) in Myanmar (2015, pp. 261-3) presents a distinctive contrast between the rule of law and law and order as conceived by the military regime, and points out that this differs substantially from the opposition with exceptionalism and decisionism prevailing in Thailand, with significant consequences for the space available for the rule of law to operate as an oppositional discursive frame within civil society. And in a historical analysis of the development of the rule of law in England, I have argued (Lacey 2007; 2008b) that we need to appreciate the role of context in illuminating not merely the concept of the rule of law but also its purpose, function or social role, along with the preconditions under which particular conceptions of, or dispositions towards, the rule of law are likely to take hold. For example, in a highly centralized and authoritarian system such as the monarchy of early modern England, it is not clear that the operative concept of the rule of law can intelligibly be read as implying the universal application of law, reaching even to the sovereign. Certainly, a notion that the rule of law proscribed the exercise of arbitrary power by the monarch has roots stretching back far earlier than modern constitutionalism (Loughlin 2018; Palombella 2009; 2010; Reid 2004). But a broader notion of the universality of law's reach— central to modern notions of the rule of law - was the object of long political contestation, and took centuries to be accomplished. We can acknowledge that the Eighteenth-Century conception of the rule of law in England was different to that in the Twelfth Century without concluding that no such conception existed: indeed, as in Cheeseman's (2015) study of contemporary Myanmar, it existed in part as a critical conception which informed the political conflicts which shaped modern constitutional structures.

In other cases, it is not so much the development of political ideas as the practical preconditions for realizing them which underpins the changing contours of the rule of law. An example here would be the tenet, widely shared in today's constitutional democracies, that the law should be publicized and intelligible. Even today, this ideal is difficult to realize. But it would have been a far more distant ideal in societies with very low levels of literacy and without developed technologies of communication such as printing, let alone digital technology. The ideal that official action should be congruent with announced law must have a significantly different meaning in today's highly organized, professionalized criminal justice systems than in a system like that of England prior to the criminal justice reforms of the early Nineteenth Century - a system in which criminal justice enforcement mechanisms were vestigial, with no organized police force or prosecution, and much enforcement practice lying in the hands of lay prosecutors, parish constables and justices of the peace (King 2006; Langbein 2003). Institutional features of Eighteenth Century English criminal justice also had significant implications for the law's achievement of coherence. While the system of precedent conduced to both substantive coherence and even-handedness in enforcement, the relatively disorganized mechanisms for appeal and law reporting gave rise to significant regional variations – particularly in relation to criminal adjudication handled by lay justices rather than assize judges. Hence for many decades, discretionary arrangements, inimical to today's view of adequate levels of coherence and congruence, were regarded not merely as acceptable but as consistent with respect for the rule of law (King 2000). For the rule of law

was embedded within a highly personalized model of sovereign authority; one in which the discretionary power of mercy was a core rather than a penumbral feature (Hay 1975; Thompson 1975).

Ideals themselves are constrained by existing institutional capacities. To take some recent examples, judicial review – now seen as a core component of the rule of law in western democracies – is a relatively new invention in most of them; only the United States constitutionalized this arrangement from the start, with many European countries adding it in their 19th Century constitutional settlements, but the UK assembling it, and in quite a limited way, only in the latter part of the 20th Century. The first steps towards institutionalising an international rule of law emerged only in the Twentieth Century and that of an ambitious, human rights-oriented international law, only after the Second World War. All these conceptions of the rule of law are born of their environment: the ideal takes its complexion both from perceived problems - arising from war, revolution, atrocities or ideological struggles - and from perceived institutional capacities. And this is key to unravelling the complex relationship between populism and the rule of law.

APPROACHING POPULISM

Like the literature on the rule of law, that on populism falls along a spectrum between broadly positive work (mainly in political science, for example Levitsky & Ziblatt 2018; Mudde & Rovira Kaltwasser 2017) and interpretive/normative work (mainly in political and social theory: Ackerman 2015; Mounk 2018; Muller 2016; Urbinati 2014). There are marked differences of view on whether populism is to be feared or applauded; a wide ideological spectrum between both those supporting and those fearing populism, with the former reaching from Carl Schmitt to Ernesto Laclau (Laclau 2005; Laclau & Mouffe 2001; Schmitt 1927); varying approaches to the conditions which spawn populism; and specific disagreements on the strength of what Mudde & Rovira Kaltwasser (2017) call the 'elective affinity' of populism with mechanisms of direct democracy such as referenda. But there is broad agreement on the main conceptual components of populism as a form of political discourse. Essentially, populism is a highly moralized approach to politics which pitches a homogeneous 'we the people,' often conceived in ethnic or national terms, embodied in a leader who speaks for and expresses the will of that undifferentiated collectivity, against a presumptively 'corrupt' – hence the tendency to conspiracy theories in this genre of political discourse - 'elite' (as well as against 'outsider' minorities of various kinds). Populism is

*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 (...) (Mudde & Rovira Kaltwasser 2017, p. 6, emphasis in original).*

This implies that the particular shape of the ‘interpretive frame’ or ‘mental map’ through which social actors comprehend the political world in a society influenced by populist discourse will be determined by a range of contingencies and can incorporate conflicting ideologies. Hence populism may take left or right wing forms; moreover populists may aspire to realise some of the values which also characterize not only democracy but even – as in the case of forms of egalitarianism – liberalism. Yet populism is fundamentally at odds with liberal democracy because – for all that it takes off from a notion of popular power and sovereignty – it is monistic rather than pluralistic, monarchic rather than diarchic, exclusive rather than inclusive, with a vertical rather than a horizontal vision of power. Given that the populist leader, though only a part of the whole, speaks for that whole, it is not even clear that populism tends in a deep sense to popular participation: indeed, most commentators agree that under certain conditions, populist leadership tends towards autocracy. In relation to Europe and North America, a particularly important aspect of populism’s anti-pluralism is its hostility to a conception of politics seen in terms of competition between and compromise among interests. Hence there is a tension between populism and multi-party democracy – indeed between populism and parties as legitimate political actors with discrete power.

Yet while, as Urbinati (2014) puts it, populism ‘disfigures’ democracy (cf. Muller 2016, p. 34), it arguably arises out of some irresolvable tensions within the liberal democratic ideal itself. Populism is, as Urbinati observes (2014, p. 135) in some sense ‘parasitical’ on representative democracy, from which it takes its image of the sovereign people; but it reacts against the inevitable tension within liberal representative democracy between the ideal of popular representation and the rules and conventions, such as constitutional arrangements, human rights, judicial review, which constrain the power of popular sovereignty. Indeed, as Norberto Bobbio (1984; cf. Canovan 1999; Rovira Kaltwasser 2014; Walker forthcoming) put it, populism arises in part from the ‘broken promises’ of democracy itself: ‘the people’ can never truly rule; precisely because of heterogeneity and conflicts of value and interest, some voices always prevail. Hence ‘[p]opulism exploits the tensions that are inherent to liberal democracy, which tries to find a harmonious equilibrium between majority rule and minority rights. This equilibrium is almost impossible’ (Mudde & Rovira Kaltwasser 2017, p. 82). But this also implies a contradiction at the heart of populism, and one which further illuminates its tendency towards authoritarianism and against democracy. For in order to preserve its highly moralized symbolic fantasy of a pure homogenous ‘we the people,’ the real voices of dissent and variation must not be heard too loudly. Hence while populists are not against constitutions as such, and a populist leader can indeed colonise the state and the legal system by enacting a ‘populist constitution,’ the stability of such a settlement is constantly threatened by both the risk that it will produce the ‘wrong outcomes’ from the populist leader’s point of view, and the risk of pluralism reasserting itself, leading to constitutional conflict (Muller 2016, pp. 37-39).

Moreover, the perceived deficits and failures of liberal democracy to represent an adequate range of interests have been a significant spur to populism, particularly in Europe, where the impulse of the reconstruction of democracy after the Second World War was to build structures to limit the sway of popular will, not least in its capacity to encroach on

minorities (Muller 2016, Chapter 3; see also Bogg & Freedland 2018; Kochenov 2017; Lindseth 2017). As Mudde & Rovira Kaltwasser put it, '[i]n a world that is dominated by democracy and liberalism, populism has essentially become an illiberal democratic response to undemocratic liberalism' (2017, p. 116). The populist resurgence has undoubtedly been exacerbated by two further large facts. First, the fundamental restructuring of advanced political economies since the 1970s in the wake of de-industrialisation and under conditions of intensifying globalization has implied a dramatic decline in the relative economic and social standing of a large group, and a form of polarization and economic exclusion which has fostered widespread resentment and found expression in forms of identity politics such as nationalism and nativism. Second, elected governments have proved ineffective in countering these trends, and indeed are widely seen as having encouraged or exacerbated them by developing 'neoliberal' economic policies focused on market competition in a globalizing economy. As the case of Latin America shows, long-running radical social and economic inequalities, when combined with a history of democratic governments, can fuel populism by undermining the perceived legitimacy of governing elites – a situation which now prevails in both Europe and the US. The financial crisis of 2008 further damaged the standing of politicians because austerity policies and retrenchment of public services furthered polarization between 'winners and losers in the knowledge economy' (Iversen & Soskice 2018). In the EU, these developments were further exacerbated by the imposition of the rigid Euro system on economies with markedly varied institutional structures and, hence, comparative advantage, implying fiscal constraints across the EU which had originally been conceived in terms of the political imperatives of Germany (Carlin & Boltho 2013; Hall 2014) – prompting the economic crises of the Southern European nations, followed by bailouts which were perceived as punitive and discriminatory. The refugee crisis added a further impetus to what was already a growing projection of resentment among those who had lost out onto outsiders, fueling a vituperative and widespread populist nativism and anti-immigration sentiment.

It is important to remember, of course, that widespread though the emergence of populist political discourse, parties, leaders and agenda in both Europe and North America has been, the number of countries in which we can genuinely talk of a populist system of government remains, for the moment, small. The multi-party, parliamentary systems of Europe provide some protection, as compared with presidential systems (Mudde & Rovira Kaltwasser 2017, p. 75); and the orientation to consensus and bargaining of the sectoral Proportional Representation (PR) systems of the coordinated market economies (Hall & Soskice 2001; Lijphart 1984; 1999) provide further protection. As Bogg & Freedland (2018) put it, while the popular-democracy limiting and technocratic tendencies of the EU and the highly integrated post-war constitutional settlements of countries like Germany may themselves have indirectly stoked populist resentment, they have also, as compared with the decentralized systems of liberal market economies like the UK (Hall & Soskice 2001) provided some protection for the rule of law, for example through constitutional courts (Bogg & Freedland 2018; cf. Ackerman 2015). But the economic changes canvassed above have begun to erode the structure of the party system by fragmenting the sectoral interests or

'pillars' on which the political systems of these countries depended. The limited extent to which the model of party competition, compromise and pluralism, along with the liberal democratic constitutionalist mentality which institutionalizes it, in the post-communist regimes of Central and Eastern Europe (Krygier 2017a) perhaps explains why the starkest European examples of populism come from that region. The Orbán regime in Hungary is one example; the Polish government has also moved in a substantially populist direction; and the signs accumulate that, limited though US presidential powers over domestic policy have often been taken to be, Donald Trump's populist style of leadership is having a significant effect on US institutions beyond the presidency.

But the limited number of cases in which the hold of populism on political actors and institutions would justify our speaking in terms of a populist regime does not imply that populism has only limited relevance for politics and, potentially, for the rule of law in Europe and North America. For – and in spite of its capacity to have, as one political discourse on the democratic scene, positive as well as negative effects on the quality of democracy – populism can affect the conduct and integrity of liberal democratic politics in a range of ways short of capturing the governing regime. The power of populism should therefore not be counted merely in terms of the electoral votes a populist party or leader obtains, but also in terms of 'the ability to put topics on the agenda (...) and the capacity to shape public policies' (Mudde & Rovira Kaltwasser 2017, p. 98). The briefest survey of recent political developments in Europe and North America provides ample evidence of these agenda-setting and policy impact effects. In Britain, while the genesis of the referendum on EU membership cannot exclusively be laid at the door of populism, both the result and the impact of Nigel Farage's populist, nativist UKIP party on the conduct of the campaign, particularly in terms of stirring up anger with political elites, distrust of experts, and hostility towards migrants, has all the hallmarks of populism. More generally, British immigration policy since (at least) 2010 has been hugely shaped by populist anti-immigration sentiment. The threat to some (particularly Conservative) parliamentary seats from UKIP, alongside the longstanding anti-EU sentiment of a small core in the Tory Party, helped to shoehorn a range of populist policies onto the government's agenda, as well as influencing the tone of political discourse, and engendering a pervasive distrust in transnational and international governance which is a natural concomitant of nationalist resurgence. Across the channel in Western Europe and the Nordic region, where some countries' PR electoral systems may facilitate the constitution of small, issue-rather than sectoral- or interest-based parties, nationalist, anti-immigrant, anti-outsider parties such as the Front National in France, the Danish People's Party, the AfD in Germany, and equivalents in the Netherlands, Austria and Sweden, have begun to put pressure on the established parties, with the FN leader Marine Le Pen reaching the second round of the last French presidential election. Further east, in countries like Hungary and Poland, we have arguably seen a transition from populist agenda-setting and policy impact to – at least in the case of Hungary – a fully populist regime. As we shall see in the following sections, it is these diffuse agenda-setting and policy impacts of the growth of populism which pose some of the most urgent threats to the rule of law in Europe.

ANALYTIC LINKS BETWEEN POPULISM AND THREATS TO THE RULE OF LAW

Populism, then, is an ambivalent political discourse: it emerges from one set of values central to the aspirations and origins of liberal representative democracy; and under certain circumstances, the infusion of populist discourse into democratic debate can have positive effects in inter alia encouraging participation from groups alienated from politics or, in its left wing form, facilitating egalitarian social policies, as in several Latin American cases, notably Brazil. There is, nonetheless, a straightforward analytic connection between the populist style of politics and an impatience with the rule of law (Urbinati 2014, pp. 13, 129, 153). This is quite simply because a populist leader claims, in him- or her-self, to express the will of the 'pure' people, and any institutional structure which questions that political expression, tends to place constraints on its execution, or divides 'the people's' power via checks and balances, is liable to come into conflict with the populist leader. Carl Schmitt is a familiar point of reference here (Mudde & Rovira Kaltwasser 2017, p. 18). The populist leader's claim to express the people's will does not brook any system of checks and balances such as that envisaged by modern constitutionalism, for the latter is premised on a pluralist view of politics. Moreover the polarized and moralistic, friend/enemy, 'pure us/corrupt them' tenor of populism tends to erode the usual norms of civility - 'to flaunt the law... to revel in norm-breaking, coarseness and incivility' (Ostiguy & Roberts 2016, p. 43) within political discourse. Accordingly, both constitutional rights and the institutions which protect them – notably the judiciary, but also the media – are often targets of populist criticism (Mudde & Rovira Kaltwasser 2017, p. 95; Muller 2016, p. 36). Muller (2016, p. 8) sees populism as a form of exclusionary identity politics which tends to undermine democracy and identifies three distinct manifestation of its logic:

a kind of colonization of the state, mass clientelism as well as what political scientists sometimes call "discriminatory legalism," and, finally, the systematic repression of civil society (Muller 2016, p. 28).

Populists do not necessarily eschew constitutionalism altogether. But populist constitutionalism is a tricky matter, since the creation of separate and mutually checking governmental institutions necessarily gives rise to the possibility of conflict between them – a conflict which is inconsistent with the populist monarchic claim to express the people's will. Hence courts in particular are liable to populist suspicion, the hostility stemming from their capacity to constrain political power being reinforced by their standing as elitists or experts and their distance from 'the people'. Here, the availability of a purely formal conception of the rule of law – the rule of law not merely as useful 'knife' (Raz 1979) but even as 'weapon' (Maravall 2003) may become a tool in the hands of the populist constitutionalist. For the rule of law not only constrains but enables governmental power, and populist governments need

law as much as any other regime. Hence courts and other checking institutions need to be co-opted – as they may be by court-packing, intimidation of the judiciary or other mechanisms such as those we have recently seen deployed in Poland and Hungary. And once institutions such as the judiciary have been commandeered or co-opted, we see what scholars have called, variously, forms of ‘abusive constitutionalism’ or ‘discriminatory’ or ‘autocratic legalism’ (Maravall 2003; Muller 2017; Scheppele 2018) in which the law itself is used to persecute minorities, to punish dissent, and to enforce executive power discursively legitimized as the people’s will. This can take the form of not only a corrupting politicization of the law and the judiciary but also of a ‘judicialisation of politics,’ where the courts or other legal processes such as impeachment are used for political purposes (Muller 2016). For not only adherents of substantive, thick conceptions of the rule of law but also those who take a functional view of the rule of law as inherently concerned with tempering power (Krygier 2009; 2017a,b,c), this amounts to a corruption of the rule of law: what we might call rule by law rather than the rule of law, albeit that the specific form which that subversion takes will vary across time and place (Cheeseman 2015; Lacey 2007).

CONTINGENT LINKS BETWEEN POPULISM AND THE SUBVERSION OF THE RULE OF LAW

The analytic tensions between populism and the rule of law which I canvassed in the last section realise themselves primarily in populist regimes. Yet they are also of relevance to the much larger range of countries in which populists do not control government, but in which populist political movements have some significant presence: within the government – as in the case of the US under the Trump presidency; as nationalist or otherwise populist parties, as with the French Front National or the German AfD; or as powerful factions within major parties, as with the vehemently anti-EU wing of the British Conservative Party; or even as popular social movements such as the Tea Party, Vote Leave or Occupy. And in these countries, whether and how the links between populism and erosion of the rule of law announce themselves depends on many contingencies. Hence any full understanding of these links must be system- and context- specific. The vulnerability of any system to populist-inspired erosion of the constraints on power offered by the rule of law will depend on the factors such as the structure of its political system – notably the electoral system and the internal rules of its political parties which govern matters such as candidate selection and the election of a leader; the standing and the strength of the professional culture of its judiciary; the capacity of its legal, political and economic institutions to resolve social conflicts and to command reasonable levels of respect – itself shaped by the geopolitical and macro-economic environment. As Bogg & Freedland aptly put it, ‘we need to explore the *complementarities* between political and legal institutions in the domain of fundamental rights, rather than to view the problem in terms of a simple institutional trade-off between ‘democracy’ and ‘liberalism’ (Bogg & Freedland 2018, pp. 11-12, emphasis in original). It

hence becomes possible to say something at a general level about the ways in which these very common, increasing, and partial forms of political populism may affect the robustness of the rule of law even in countries whose systems are fundamentally shaped in terms of liberal democratic values. In this section, I distinguish four different mechanisms, giving examples of each from Europe and the United States.

We have already mentioned the first two: those of agenda-setting and policy impact. A small populist faction within a large party, a small populist party, or a powerful populist who holds elected office, may be able to have a decisive impact on a country's political agenda and in specific policy terms. Probably the most spectacular example here is Donald Trump's power to set an isolationist agenda through trade and other aspects of foreign policy, in the name of 'Making America Great Again' - not to mention to shape immigration policy and practice in decisive and human-rights-threatening ways (Levitsky & Ziblatt 2018; Litman 2018). Perhaps yet more worrying is the diffuse, yet hard to measure, impact of his populist and court-disrespecting rhetoric on practices at state and local level in relation to matters such as voter registration, redistricting, judicial appointments and indeed general law interpretation and enforcement (Zengerie 2018; Scheindlin 2018). The US constitutional structure which also happens to give him a constitutional right to nominate Supreme Court Justices and hence to shape the political complexion of the Court for the next three decades – as illustrated by the appointments of Justices Gorsuch and Kavanaugh - exemplifies a very particular vulnerability in the US system. Recent US politics reveal how much the rule of law depends on self-restraint, on the diffusion of a culture of respect for law, and of respect for the institutional integrity and independence of legal institutions, which it is impossible to fully to embed within a constitution itself.

In Europe – both in the EU as a transnational political entity but also in particular nations – the inability to find a stable solution or even a broad consensus about the refugee crisis is another good example of both the agenda-setting and policy impact of populist politics via erosion of the authority of the main political parties. And in Britain, the fear among MP's of the threat from UKIP in leave-voting constituencies has almost certainly shaped the Westminster Parliament's difficulty in reaching a compromise agreement on how to redefine Britain's relationship with the EU. Such impacts come about in part through corrosive attitudinal changes. For example, evidence mounts that the Leave campaign exhibited a characteristically populist contempt for the electoral laws within which it should have been working (Graham-Harrison 2018), while senior members of the Government, including the former Foreign Secretary, have cast doubt on whether it will be Government policy to respect all aspects of existing Treaty obligations – notably financial obligations – on exit from the EU (Freedland 2018).

Two further potential and diffuse impacts of what we might call partial populism on the rule of law are also worthy of consideration. These are, first, the capacity of populism to affect the exercise of discretionary powers and, second, the upshot of what I will call 'convention-trashing'. Taking the example of discretionary powers, it is perhaps most useful to focus on judges. It is widely recognized that judges enjoy a range of discretionary powers and considerable interpretive latitude. They are also, to state the obvious, human beings

who are subject to the usual range of pressures, albeit that their institutional role and their professional training and culture equip them, ideally, with some very particular capacities for independent judgment. It is hard not to worry, nonetheless, that incidents such as the infamous British *Daily Mail* 'Enemies of the People' headline mentioned above, or Donald Trump's personal attacks on judges and law officers, will not have some impact in inhibiting the full exercise of that independence. This sort of impact on discretionary powers is, admittedly, hard to track empirically (though see McCarthy 2018); but there is some evidence from the more discretionary aspects of judicial decision-making which gives it both indirect and direct support. One example might be thought to be the upward travel of sentencing severity in both the US and the UK during the era of so-called 'penal populism' (Garland 2001a,b) – a not inconsiderable amount of it taking place in the absence of any change in sentencing guidelines or statutory maxima. Another is a recent study (Brandes forthcoming; see also R. Girard, unpublished doctoral dissertation chapter) of the discretionary practice of domestic courts' citing international or transnational law, which suggests that in countries where populist hostility to supra-national legal orders is strong, we may see a decline in such citations – a matter of particular concern because of the capacity of international and transnational law to provide extra protection for the rights of minorities, to strengthen pluralism and to counter polarization. This argument applies, a fortiori, to the wide discretionary powers of a range of law enforcement and regulatory agencies.

Moving to the fourth potential upshot of partial populism for the rule of law, convention-trashing, we return to the a theme which arose in our discussion of the rule of law: that the fullest expression of its aspiration – and, we might add, of constitutionalism more generally – depends upon a set of attitudes and an accepted mode of association which cannot be captured or completely enforced by rules, however elaborate. This implies that the internalization of the normative ideals associated with the rule of law by those who exercise power is key to its robustness. This is particularly evident in relation to the elaborate conventions which surround the operation of any constitution. Populist attitudes are, however, as we have seen, impatient of constraints. And where conventions or understandings are casually broken by populists, these can be very much harder to repair, and the relevant actors very much harder to discipline or restrain, than in the case of more blatant breaches of established constitutional norms. Recent examples include Donald Trump's brazen flouting of the long-established conventions about conflicts of interest and nepotism, by failing effectively to separate himself from his business interests; his incontinent invective on Twitter; and his decision to move a large part of his family into the White House in positions of very significant executive power (Litman 2018). They also include the revelation arising from recent events in Hungary and Poland that while compliance with the rule of law is one of the conditions of accession to the EU, continued compliance is a convention in the sense that it depends on self-restraint, with the EU possessing only relatively blunt tools to discipline countries which dismantle key aspects of it, notably the independence of the judiciary (Kochenov 2017; Scheppele 2017). The Article 7 infringement procedure recently invoked against Hungary and under consideration in relation to Poland could lead to sanctions, but may be liable to feed the very populism which underlies the

problem it seeks to address. In the international perhaps yet more than the national sphere, the robustness of norms of legality, as of norms such as human rights, is substantially dependent on voluntary compliance.

BEYOND POPULISM: CRIMINALISATION AND THE RULE OF LAW

The growth of populist sentiment and of populist political actors in Europe and North America has, then, presented a number of challenges to the rule of law, and Justice Susanne Baer (2018) is right that extreme vigilance is needed to protect legal institutions and in particular independent judiciaries in this climate. In this context, it is interesting to consider whether the election of judges which prevails in many US jurisdictions the criminal justice system provides protection for independence via the democratic legitimacy which elected judges claim, or implies vulnerability to populist influence via electoral pressures (as suggested by case studies on sentencing: Bogira 2005). However, as Baer (2018) also notes, it is important to acknowledge that not all threats to the rule of law and to judicial independence come from populist politics. So it is relevant to ponder the question of how relatively important populism has been in the development of criminalisation in recent years, given that scholars concerned with a perceived upward trend in penal severity and an ever more extensive legislative resort to criminalisation, particularly in the competitive, liberal market political economies of Britain and the United States (Lacey 2008a), have often referred to this as a form of ‘penal populism’ (Pratt 2006; cf. Bottoms 1995).

Certainly, we can find examples which fit the conception of populism adopted in this paper. For instance, we could see the origins of California’s ‘three strikes and you’re out’ law, which was a product of California’s system of direct democracy via citizen-initiated propositions (Zimring et al. 2001), as exemplifying a certain aspect of populism as direct responsiveness to popular will. And we could see a range of legislative initiatives in England and Wales – the increasing tendency to resort to ever more specific criminal prohibitions to address particular social problems, from corporate manslaughter to anti-social behavior via dangerous dogs – as expressing a concern to show responsiveness to popular demands. Indeed, one might even see criminal law as increasingly responsive to the fragmented demands of a diverse collection of identity politics around single issues, each of them constituting a discrete ‘outsider’ or ‘enemy’ (Hall et al. 1978). More obliquely, we might see the concern with security which underlines the popularity of criminalisation (Loader & Walker 2007; Neocleous 2008; Ramsay 2012; Zedner 2009) as itself a product of a certain kind of disenchantment with the efficacy of government.

But ‘penal populism’ of course predates the populist resurgence which has been my main focus, and it has deep historical and institutional roots. Much of the drive for criminalisation and penal severity comes not from populism as discussed in this paper, but rather from fear and insecurity attendant on crime, that fear and insecurity being projected onto ‘outsiders’ in the form of offenders. There is a structural analogy with populism here, but

the outsiders are not necessarily the same as the enemy outsiders on which populism currently has its focus. Indeed, they are disproportionately members of the groups whose economic dislocation and exclusion has fed the populist surge of recent years. So it is probably more accurate to see overcriminalization (Husak 2007) and penal severity as themselves products of some of the larger economic, social and political forces which have created populism itself: perceived weaknesses in national state sovereignty, prompting a resort to criminalisation as one of the few tools of governance still within nation state control; social conflict; a failure to ensure that an adequate majority feel that they have a stake in the prevailing order (Hochschild 2016; Wuthnow 2018); and persistent inequality. Likewise, in a self-reinforcing cycle, the failures of political leadership which stoke populism via distrust in government are in part a product of the erosion of party strength produced by populism itself. The causal linkages here are complex. For example, arguably one of the most urgent threats to the rule of law in the field of criminal law in England and Wales lies in the steady erosion of access to justice implied by swingeing cuts to court services, to the police and the Crown Prosecution Service, and to legal aid, which have been an offshoot of austerity policies (Bingham 2010; Secret Barrister 2018). And austerity politics have both stoked populism by exacerbating economic exclusion and polarization and been fed by populist resentment of the reach of welfare benefits to ‘outsiders’.

There are, however, two areas in which developments in criminalisation might be thought to have been shaped by populism in the sense under consideration here. The first of these is anti-terrorism law, which in the UK as in several other countries increasingly deploys the very notion of an alien ‘enemy within’ on which populism feeds (cf. Jakobs 1985). Over the last two decades, we have seen a vivid case of the normalization of powers previously seen as exceptional, with a substantial amount of legislation directly or indirectly geared to the criminalisation of terrorism. The extraordinary events of September 2001 are, of course, an important part of the genesis of this new legislative concern with the criminalisation of terrorism. The anti-terror reaction has created a wave of criminalisation—particularly of what we might call preliminary or pre-inchoate activities—which significantly expands the boundaries of criminal law. In doing so, it adds to police and prosecutorial power, weakens defence lawyers, curtails the scope of judicial discretion and, in some of its more radical ‘adjustments’ to normal standards of procedure, directly undermines the rule of law by deploying some of the methods of terror itself. And beyond domestic criminalisation, evidence accumulates that a certain lawless mentality increasingly pervades US, British and many other countries’ conduct of foreign policy, notably in terms of the use of drone attacks and practices of rendition (Scheppelle 2013; Waldron 2010).

Implicit in the structure of many of these terrorism offences we see something akin to ‘enemy criminal law’ (Jakobs 1985) or character responsibility (Lacey 2016, Chapter 5): the idea that, on top of committing or planning acts of violence, there is something additionally and intrinsically wrong about being a certain kind of person, engaged in a certain kind of activity—an aggravation of blameworthiness which justifies a special criminalisation regime. Notwithstanding the House of Lords’ finding that one of the most egregious, and populist, aspects of the legislation (the application of indefinite detention exclusively to foreign

nationals) contravened the Human Rights Act (*A v Secretary of State for the Home Department* [2004] UKHL 56), much of the counter-terrorism legislation of recent years—notably the control order, implemented as a result of the House of Lords’ decision—is redolent of the criminalisation of status. The implicit assumption is that there is a finite number of ‘bad people’ who are ‘terrorists,’ and if we can simply detain or ‘take out’ enough of them, the world will be a safer place for those of ‘good character,’ who alone deserve the full protections of the rule of law. But while these themes are reminiscent of aspects of populist discourse, they can hardly be said to have been driven by populist politics alone: after all, they have been enacted, albeit with differing forms of intensity, widely across the world in response to the perceived threat of transnational terrorism.

The other – and related - area of criminalisation which on the face of it has been shaped by populism is so-called ‘crimmigration’ (Strumpf 2006). This refers to the increasing resort to criminalisation or to quasi-criminalisation (e.g., via administrative detention) as a way of disciplining, excluding and indeed expelling migrants or those seen as presumptively unentitled (Aas & Bosworth 2013; Ackerman & Furman 2014; Aliverti 2013; Aliverti & Bosworth 2017; Anderson 2013). The blurring of the boundaries between administrative and criminal law, notably in the case of immigration detention, and of the boundaries between civil and criminal law, as in the use of a range of civil, typically preventive orders whose breach nonetheless implies criminal or quasi-criminal liability, is of particular concern in terms of the threat to migrants’ and asylum seekers’ human rights but also of erosion of the rule of law quite generally (Bogg & Freedland 2018; Zedner 2016). Yet even here, the causation may be somewhat more complex than at first appears. As Vanessa Barker has argued in a powerful recent analysis of the emergence of ‘penal nationalism’ in relation to migration in Sweden, ‘problems with pluralism, ethnic diversity and immigration are much more mainstream, long lasting and institutionalized than the current focus on populism allows’ (Barker 2018, p. 53). So while the emergence of penal nationalism in countries such as Hungary and Poland may be genuinely drive by populism (Haney 2016), this is not necessarily so: each case requires careful interpretation. In the case of Sweden, the clue to the remarkable reversal of the country’s traditionally open immigration policy represented by the closing of the border with Denmark in late 2015 is to be found in a concern to protect the Nordic welfare state, whose well known generosity is seen to be economically and politically sustainable only for insiders, hence producing a kind of ‘welfare chauvinism’ (Kitschelt 1995). And while, as Barker (2018) shows, these exclusionary dynamics of the Nordic welfare system undoubtedly threaten a range of real harms and represent what we might think of as the less appealing underside of the communitarian dynamics of solidaristic Nordic conceptions of membership and belonging, they are nonetheless significantly different from the forms of racist, anti-migrant populism which characterize extremist parties in, for example, Austria, France or the Netherlands. Penal nationalism, seen as ‘a form of state power that relies on the coercive tools and moral weight of criminal justice to respond to unwanted mobility in the service of national interests’ (Barker 2018, p. 89) may most certainly threaten aspects of the rule of law including generality, publicity and congruence, as well as the

robustness of human rights. It may even produce a democratic deficit (Barker 2018, p. 138). But it is not necessarily a straightforward result of populism.

CONCLUSION

In short, populism is currently creating significant risks to the rule of law in Europe and the United States through agenda-setting, policy impact, the shaping of discretionary decisions and convention-trashing. However, the specific force of these populist dynamics is mediated by a range of contingencies in particular countries and regions: contingencies relating to social, political and economic history and the cultural mentalities which this history has engendered; legal and political and economic institutional framework; as well as the specific form which populism takes. The analytic tendency of populism in an anti-rule of law direction, then, can only be the start of any inquiry into the actual sway of populism in particular times and places, through a careful comparative study of the interaction between institutional structures and national and international context.

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