



# Special Issue of the Hague Journal on the Rule of Law on Populism, Democracy, and the Rule of Law in Central and Eastern Europe

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On March 6–8 2020, scholars and graduate students gathered in Victoria, Canada, for a conference on *Democratic Constitutionalism in the Age of Populism*. The attendees came from different points of the globe to discuss the history, current state and future of democracy and the rule of law under the influence of populist movements and governments, rapidly growing in number, size, and power. While some speakers were forced to cancel their travel due to the breaking news about a new virus, more than 125 people from Canada, Hungary, Poland, Germany, the United Kingdom, Spain, and Australia participated in an intensive three-day discussion. Little did we know that this would be the last in-person conference for years and our academic and personal life would change entirely...

The conference originated in a joint project between the Faculties of Law of the University of Victoria, Canada and ELTE Eötvös Loránd University, Budapest, Hungary. During the planning phase, it became evident that our discussions would benefit from delving deeply into a limited number of national contexts. Populist movements often emerge from specific political and historical backgrounds, draw upon those histories, and are shaped by their unique origins. Thus, we aimed to ground our theoretical work in a comprehensive understanding of these cases. Consequently, we decided to focus primarily on the rise of populism in Central and Eastern Europe (CEE) as our principal empirical reference point.

The discussion resulted in three special issues with different foci. A special issue in *Social and Legal Studies* concentrates mainly on the theoretical aspects, delving into the nature of populism, exploring its implications for democratic

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constitutionalism, and determining appropriate responses to address the challenges it poses.<sup>1</sup> A volume in the journal *Social Sciences* broadens the geographical scope for examining the link between populism and democracy through case studies from Argentina, Italy, Spain, and Turkey, and a comparison between overtly populist movements and popular movements supporting Indigenous peoples in Western Canada.<sup>2</sup>

In this issue, we explore the intricate interplay between populism, constitutionalism, and the rule of law in the CEE region, focusing especially on those governments that combine populist forms of political mobilization with, when in power, nationalistic policies based on an exclusionary definition of who constitutes the nation.<sup>3</sup> The papers focus primarily on how those governments have engaged with constitutional norms, either challenging or leveraging them to further their political agendas. An examination of the implications of these actions for the vitality of constitutionalism and the rule of law will contribute to our theoretical understanding of the relationship between democracy, constitutionalism, and the rule of law.

Particularly contentious has been the integrity of the rule of law and democratic constitutionalism in certain CEE states, most notably Hungary and Poland. Critics argue that populist-nationalist regimes have undermined constitutional norms and the rule of law based on a particular notion of illiberalism and popular sovereignty. In response, populists assert the democratic legitimacy of their governments, contest judicial overreach, present alternative views on law and human rights, and strategically utilize constitutional mechanisms to their advantage, such as appointing sympathetic judges and implementing hard-to-repeal policies. They reject claims of opposing the rule of law and, at times, put forth their own conceptions of the relationship between democratic governance and constitutional structure.

These complex developments and debates are of immense importance. They are central to the political landscape in various CEE countries, in particular Hungary and Poland, and to varying degrees Romania, Slovakia, the Czech Republic, and Serbia. Additionally, these dynamics have significantly impacted the relationship between CEE countries and the European Union, resulting in one of the most significant crises in the EU's recent history. Of course, we do not claim that populism or exclusionary nationalism are restricted to CEE. Clearly, we see similar tendencies in Western Europe and liberal democracies around the world.

This special issue comprises six contributions, analyzing the topic from different angles, bringing in several examples from the region, both geographically and thematically.

The rule of law, courts, and their operation in populist-nationalist regimes are the focus of three contributions to this special issue. The first article, that of *Fruzsina Gárdos-Orosz*, explores constitutional justice in Hungary following the populist-nationalist transformation of its politics after 2010, which led to the construction of a

<sup>1</sup> Special Issue: Democratic Constitutionalism in a Populist Age (2023) *Social and Legal Studies* 32(6): 841–1010.

<sup>2</sup> Available at [https://www.mdpi.com/journal/socsci/special\\_issues/The\\_Resurgence\\_of\\_Populism](https://www.mdpi.com/journal/socsci/special_issues/The_Resurgence_of_Populism).

<sup>3</sup> For in-depth discussions of how one should understand populist forms of political mobilization and the relationship between these forms and appeals to an exclusionary nationalism, see the special issue in *Social and Legal Studies* (2023).

self-consciously “illiberal” constitutional regime. Gárdos-Orosz focuses particularly on the implications of the new constitution adopted by the Hungarian parliament in 2011 under the leadership of the Fidesz–Hungarian Civic Alliance government and on that regime’s changes to the Constitutional Court’s status and competencies. Gárdos-Orosz shows that those changes have resulted in the Constitutional Court playing a substantially different role from that previously played in the Hungarian constitutional order, even though the structure and position of the Court remain similar. She emphasizes that formal structures, powers, and expectations are not sufficient to understand constitutional courts’ roles within liberal as opposed to populist systems. Rather, one needs to understand those institutions within their political and constitutional context. She specifically concludes that the Constitutional Court “is not a limit on public power in a populist constitutionalism such as exists in Hungary, but a body specialised in the enforcement of the Fundamental Law in line with the political imagination of the time.”

In the second article in this issue, *Michał Stambulski* focuses on the operation of the Polish Constitutional Court under the Law and Justice (PiS) government. He is unlike many constitutional scholars writing in this area in that he generally accepted the PiS government’s claim to democratic legitimacy together with its entitlement to reshape Poland’s institutions in a manner responsive to the government’s policies. In this article, he examines how the judges appointed by this government exercised their decision-making authority, seeking to determine whether they simply did the government’s bidding or whether they employed reasoning that was autonomous from that of the government, grounded in legal principles which might genuinely claim to be constitutional in character. He finds that their argumentation was significantly autonomous from that of the government, although their conclusions did accord with and ultimately advanced, instrumentally, the government’s aims. He observes that the “populist constitutional court”, akin to a chameleon, adapts to its institutional context, in these cases using the language of liberal constitutionalism to restrict rather than advance what had previously been considered to be citizens’ rights. But, according to Stambulski, this instrumentalization of constitutional adjudication also led to a relative delegitimization of the court as international and national judges, citizens, and legal scholars withdrew recognition.

*János Mécs*’ article, like that of Gárdos-Orosz, investigates the recent activity of the Hungarian courts, in Mécs’ case focusing on the adjudication of disputes over elections law—an area that brings into sharp focus the relationship between democratic legitimacy and constitutionalism. He suggests that a constitutional doctrine regarding electoral law in Hungary has been lacking, allowing significant scope for a populist-nationalist government to alter the structure of political representation, redefining what counts as the voice of the people in ways more congenial to a populist-nationalist regime. The Hungarian Constitutional Court, especially after its composition had been modified by the Fidesz–Hungarian Civic Alliance government, accepted these changes without subjecting them to constitutional control. Mécs shows that the government’s actions nevertheless generated tensions with established conceptions of the rule of law. These tensions became particularly evident in decisions of the ordinary courts, which (with some irony) took a less deferential approach than the Constitutional Court had done.

As Mécs' article suggests, the relationship between populist governments and constitutional norms inevitably poses difficult challenges for the doctrine of the separation of powers. *Zoltán Pozsár-Szentmiklós*'s article argues that, in addition to the formal checks and balances generally associated with that doctrine in the constitutional literature, informal elements (e.g. referenda, the application of certain doctrines in constitutional interpretation, the exercise of political rights) also play a role in controlling political authority. In fact, in countries with populist governments, the operation of informal checks can be more effective than formal ones. He explores the implications of this observation, examining recent experience in CEE countries, particularly Hungary.

Eternity clauses—clauses that purport to make certain constitutional principles exempt from constitutional amendment so that ostensibly they must endure forever—are sometimes perceived as a 'lock on the door' that can prevent the erosion of constitutional democracy, at least temporarily. They have, in particular, been proposed as a defense against the actions of populist governments. *Silvia Suteu*'s article challenges such assumptions about the nature and effectiveness of eternity clauses, both generally and in the context of populism. She contends, citing concrete examples, that populist governments have been just as adept at using unamendability as their opponents, the populists seeking to impose constitutional rigidity once they had gained control over state institutions. Eternity clauses can, in short, be used to entrench precisely the populist projects that proponents of unamendability seek to prevent.

The final paper in the collection, by *Jeremy Webber*, examines a theoretical question that runs through all of the papers in this collection, namely: How should we characterize the appropriate relationship between democracy and the rule of law? The literature on the rule of law, especially in the context of the rise of populism, tends to treat democracy and the rule of law as opposing values. The rule of law is understood as imposing limits on democracy—as imposing constraints on what democratic majorities ought to be permitted to do. Webber argues that this opposition is misconceived. It is misconceived in theoretical terms, for it fails to account adequately for the ways in which each principle depends upon the other for its integrity and efficacy. This interdependence is fundamental to each principle, not merely circumstantial. The opposition is also misconceived strategically, for it frames the argument for constitutionalism as an argument against democracy, surrendering claims to democratic legitimacy to the populists. Drawing upon examples from the CEE, the paper notes that populist governments often ignore the principles and institutions that maintain *democracy's* integrity. In their neglect for the legal infrastructure that sustains democratic responsibility, populists are not simply bad constitutionalists; they are bad democrats.

Each of the six contributions in this issue offers valuable insights into the operation of constitutionalism, the rule of law, and democracy in the CEE. Collectively, they express a shared concern with contemporary challenges to constitutional democracy and explore ways of understanding and responding to those challenges. A single special issue cannot explore all the facets presented by these questions, but we do hope that it will enrich existing debates over democracy and the rule of law,

and advance readers' comprehension of the interaction of populist politics and constitutional norms in the CEE.

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