
Populist Governments and International Law: A Reply to Heike Krieger

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Abstract

The article by Heike Krieger, published in this issue, is an important contribution to the debate on populism and the law, not least because of its emphasis on a distinctive populist approach to the law. Krieger's account lacks however in providing sufficient attention to three dimensions: popular sovereignty, constituent power and a shifting imaginary of the law. The relation of populism with popular sovereignty (and populism as a reaction to unresponsive institutions) is little discussed, and, hence, the explicit democratic claim of populists is downplayed. Constituent power is equally little touched upon, meaning that the populist understanding of the law as an obstacle but equally as a means to institutionalize a different democratic order is overlooked. The most important argument in the paper, which remains however too implicit, is that of a potentially shifting imaginary of the law. Krieger's argument points in the right direction, but it could be developed further by stressing the essentially and historically contested nature of the progressive international system and its weak spots in terms of legitimacy and accountability.

Heike Krieger's article is a most timely contribution,¹ as the debate on the phenomenon of populism, and of populists in government, still lacks an extensive discussion from the legal perspective. Even if the emergence of an extending literature can now surely be identified,² many of the existing approaches understand populism more or

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¹ Krieger, 'Populist Governments and International Law', 30 *European Journal of International Law (EJIL)* 971–996.

² See, *inter alia*, C. Mudde, 'Are Populists Friends or Foes of Constitutionalism?', Foundation for Law, Justice and Society Policy Brief (2013); J.-W. Müller, *What Is Populism?* (2016); Halmaj, 'Is There Such Thing As "Populist Constitutionalism"? The Case of Hungary', 2 *Fudan Journal of the Humanities and Social Sciences* (2017) 1; Müller, 'Populism and Constitutionalism', in C. Rovira Kaltwasser *et al.* (eds), *The Oxford Handbook of Populism* (2018) 590; Lane Scheppelle, 'Autocratic Legalism', 85 *University of Chicago Legal Review (UCLR)* (2018) 545; Landau, 'Populist Constitutions', 85 *UCLR* (2018) 521.

less exclusively as a threat to liberal constitutionalism,³ without systematically enquiring into the distinct understanding of constitutional and international law by populists. Krieger's article 'Populist Governments and International Law' is clearly an exception and provides a very welcome and comprehensive discussion of how populist governments relate to international law and international institutions.

At the same time, however, Krieger's contribution overlooks a number of aspects that are crucial to an understanding of the complex relation between law and populism. First, the relation of populism with popular sovereignty (and populism as a reaction to unresponsive institutions) is little discussed. This also means that populism is understood in a rather limited fashion – that is, as confined to right-wing, nationalist manifestations. A second dimension that needs more reflection, particularly in connection with international law and international rights regimes, is that of constituent power. In my view, a third dimension – that of a potentially shifting imaginary of the law – is the most significant one. Krieger's argument points in the right direction, but it could be developed further by stressing the essentially contested nature of the progressive international system and its weak spots in terms of legitimacy and accountability.

1 Populism and Sovereignty

In 'Populist Governments', an important emphasis is put on the need to discern the 'unique characteristics of populism which may lead to ruptures in the international legal order' (at 5), in contrast to, as argued by the author, an understanding of populism as a form of nationalist-conservative ideology or as a thin ideology. In my view, this is an important suggestion as it allows us to focus on a distinctive populist mindset regarding the law, which may take different guises in different contexts (domestic as well as international). At the same time, however, I believe the emphasis on following Jan-Werner Müller's 'formal' approach leaves something to be desired, not least because populism ultimately is conflated with nationalist, anti-democratic practices (against Krieger's own intention of avoiding a reduction of populism to nationalist ideology).

First of all, the by now standard claim in studies on populism is that the term of populism is slippery, difficult to define and subject to a wide variety of (incompatible) usages. This apparently obligatory introduction to the topic, however, is largely false. As argued by Andrew Arato – and I fully agree with him – in reality, the opposite is the case.⁴ There is a widespread consensus on the main dimensions of populism in scholarly literature (even if the actual manifestations of populism obviously differ importantly). Virtually all definitions include the friend–enemy or anti-establishment view, the anti-pluralist thrust, the generally critical stance towards liberal democracy and

³ See, e.g., the recent special issue on 'Public Law and Populism' of the *German Law Journal*, 20(2).

⁴ A. Arato, 'How We Got Here? Transition Failures, Their Causes, and the Populist Interest in the Constitution' (2017), available at <https://ssrn.com/abstract=3116219> or <http://dx.doi.org/10.2139/ssrn.3116219>.

the holistic approach to the people (bringing to mind Claude Lefort's 'people-as-one') or the representation of a part of society as the people (Lefort's idea that the people must be 'extracted' from the people).⁵ This general approach towards populism argues that it displays a friend–enemy logic in its political mobilization of ordinary citizens, engages in the construction of a unified people and criticizes the liberal–democratic *status quo* in the people's name. According to populists, liberal democracy is ultimately inadequate in promoting popular sovereignty. This broad definitional consensus does not mean, however, that significant aspects are not overlooked in the analyses of populism. In the case of Krieger's argument, there is an insufficient attention to the crucial, core notion of popular sovereignty.

Krieger emphasizes the dimensions of anti-establishment, anti-pluralism and a holistic identity but fails to put the democratic or popular sovereignty dimension sufficiently upfront. This is a problem since popular sovereignty is of great significance for the populist legal mindset, and much of its (domestic) thrust is grounded in the claim of truly representing the ordinary people against non-representative, self-interested elites. Populists frequently claim to bring the law closer to the people and to engage in the only legitimate way of making law – that is, through political majorities. While it is then true that populists often 'hijack' democratic institutions, not least (apex) courts, and restrict the controlling functions of various state institutions (for example, ombudsmen, constitutional courts, judicial councils), it is crucial to realize that they claim to do so in the name of the people 'taking back control' of allegedly unaccountable institutions and on the alleged basis of a firm legitimacy grounded in the political majority. Most of the time, this means, in practice, a strong centralization of power around a leader and/or party, but, notwithstanding such tendencies, the populist claim of 'liberation' is an attempt to tap into both democratic legitimacy (law is to be made by the majority) and sociological legitimacy (society does not want to be controlled by external forces).

This also means that varieties of populism need to be taken into account, also in the context of international law. Not all populists pursue a nationalist, sovereignist approach to law, endorsing a 'closed' form of statehood, and some even actively promote (the active reform of) international and transnational (including judicial) institutions, as is the case with Syriza and Podemos and, recently, with DiEM25 in Europe.⁶

2 The Constituent Dimension in Populism

A second dimension that is not sufficiently highlighted in Krieger's article, or in most of the other relevant literature for that matter, is the constituent dimension in populism. Populist governments are frequently interested in, and clearly engaging with,

⁵ C. Lefort, *Democracy and Political Theory* (1988).

⁶ Della Porta, Hara Kouki and Fernández, 'Left's Love and Hate for Europe: Syriza, Podemos and Critical Visions of Europe during the Crisis', in M. Caiani and S. Guerra (eds), *Eurocepticism, Democracy and the Media* (2017) 219.

constitutional and constituent dimensions in the name of radical change. In some cases, such radical change may mean the endorsement of a drastic return to a *status quo ex ante* or of a return to some glorious past (for example, both Hungary and Poland display such attitudes in the idea of the ‘historical constitution’ and the Fourth Republic, respectively), but it may also mean the promotion of inclusive, bottom-up, participatory instruments, including in the processes of constitutional reform. The constituent dimension, and the populist interest in such a dimension, is thus highly relevant for the populist legal mindset, as it strongly opposes the internationalist, post-sovereign, technocratic-managerial trend in practice, which is normatively/theoretically reflected in many scholarly attempts to describe the post-national development of the law. But, again, the populist critique on post-sovereign legal developments may not only come from a nationalist angle but also, equally, from a democratic, progressive angle. In a distinctive manner, as admitted to in ‘Populist Governments’, populists frequently reject an international dimension to the law, but they do so – and this is not sufficiently elaborated – in the name of popular sovereignty and constituent power.

The constituent dimension becomes important, not least because various scholars have suggested a post-constituent state of constitutional democracy, which finds its heart in the idea of a post-national legal regime firmly grounded in human rights and international courts.⁷ On this ‘cosmopolitan’ or ‘free-standing’ account, constituent power is now superfluous, as crucial functions of politics – in particular, in the constituent vein – have now been taken over by judicial institutions and human rights regimes (I will return to this below). Populist governments, however, put the constituent dimension firmly back on the political agenda and claim a political constituent role in re-instituting national sovereignty.

The general debate on populism also frequently leaves out this crucial emphasis on constituent power in populist projects, which involves populists turning the constitutional structure or the state against elites, supranational agreements, international judicial institutions or economic powers. As I have argued on other occasions,⁸ it appears to me that the populism–constitutionalism nexus hinges on this populist prioritization of constituent politics. The way constituent politics is addressed, and, in turn, the manner in which it addresses the existing constitutional *status quo*, depends profoundly, however, on the distinctive constitutional imagination of the populist force at hand. All populist projects perceive legal and constitutional institutions as obstacles in some manner. In particular, the populist critique perceives such institutions as hindering actual and meaningful popular sovereignty.⁹

⁷ E.g., Kumm, ‘Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called’, 54 *American Journal of Comparative Law* (2006) 517; C. Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure* (2016), at 381.

⁸ Blokker, ‘Varieties of Populist Constitutionalism: The Transnational Dimension’, 20(3) *German Law Journal* (2019) 332.

⁹ As noted, the way populists imagine to correct, utilize or overcome such institutions differs importantly between populist movements.

Populist governments, hence, are often eager to engage with constitutional reform and change from a 'revolutionary' perspective, heavily drawing on ideas of constituent power, frequently seeking to rebalance the relation between domestic constitutional and international law. As Andrew Arato aptly notes, in fact, it is 'logical for populist governments to reach for the constituent power, and try to produce new documentary constitutions'.¹⁰ And Simone Chambers further argues:

[C]ontemporary populism has often progressed and gained ground through embracing and claiming ownership over national constitutions. Thus, constitutional reform has been the preferred means to consolidate the central authoritarian power in Hungary, Poland, Turkey and Venezuela. European and American populist movements have adopted a similar rhetoric even if they have not had a similar institutional success.¹¹

From this perspective, populism can be understood as both a rejection of the post-war liberal understanding of constitutionalism and as a political force of competition regarding the meaning, justification and realization of constitutional democracy.¹² Populist engagement with constitutionalism is not least about an attempt to displace taken-for-granted meanings of what domestic constitutions are, and it offers in this a form of 'counter-constitutionalism'.¹³

3 Shifting Imaginaries of the Law?

But let us now turn to the most significant argument in Krieger's article – that of the contestation of the '1990s narrative of international law'. A crucial question with regard to 'global populism' is whether it is part of, and partially responsible for, a larger shift in collective understandings of (international) law.¹⁴ Such collective understandings can be fruitfully referred to as legal and constitutional 'imaginaries'. The crucial question of our times is whether the legal imaginary of 'new constitutionalism' and the related 'international legal imaginary' of an international order firmly grounded in human rights, the rule of law, 'open statehood' and independent judicial institutions and subject to processes of constitutionalization are giving way to something else. The post-war expectations – which came to a high point in the 1990s – were based on the idea that key legal concepts, such as the rule of law, democratic governance and universal human rights, were evolving constantly and into a singular direction. In relation, the idea was that the contestation over such concepts was fading. 'Populist Governments' points out convincingly, however, that much of this was based on a chimera.

¹⁰ Arato, *supra* note 4.

¹¹ Chambers, 'Afterword, Populist Constitutionalism v. Deliberative Constitutionalism', in R. Levy *et al.* (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (2018) 370, at 370.

¹² N. Urbinati, *Democracy Disfigured* (2014).

¹³ Scheppele, 'The Social Lives of Constitutions', in P. Blokker and C. Thornhill (eds), *Sociological Constitutionalism* (2017) 35.

¹⁴ C. de la Torre (ed.), *Routledge Handbook of Global Populism* (2018).

This points to a deeper, intrinsic tension in the post-war international legal order between democratic self-government, on the one hand, and a universalistically understood international regime, on the other. In the contemporary age of intensified internationalization and globalization, the linkage between a democratic imaginary and a practical commitment to (collective) autonomy appears to many as less and less self-evident. If, as argued, amongst others by Christoph Möllers, an ‘adequate functioning’ of domestic constitutional democracy would need both the universalist/legal and the democratic/popular-sovereign dimensions,¹⁵ it may be argued that constitutional democracy in many (Western) societies has seen, at least since 1945 and perhaps even since the advent of modern constitutionalism as such, an increased predominance of the juridical rule-of-law dimension, at the expense of the democratic, self-governing one. This latter trend of juridification is intimately tied up with the growth and expansion of international law and international institutions, based on a cosmopolitan view of global order. In this, it should be clearly recognized, but this is less stressed in Krieger’s contribution, that the post-war development of international law and a related domestic constitutional model was never without contestation, despite claims of an ‘end of ideologies’. This is perhaps most evident in the case of international human rights regimes, which are frequently the object of populist critiques.

The observation of an unbalanced nature to modern constitutional-democratic polities is crucial for an analysis of the state of contemporary democracy but equally for the nature of the system of international law, not least because the latter’s contestation is frequently based on notions of national and popular sovereignty. The crisis of domestic liberal democracies appears to be intimately related to a potential crisis on the international level. In the light of domestic contexts, Yaron Ezrahi has pointed towards the erosion of the collective political imaginaries of modern constitutional democracy,¹⁶ while others, such as Sheldon Wolin, have in the past expressed concern with the submission of democratic power to corporate power and the infiltration into politics of the market logic; in Wolin’s terms, leading to forms of ‘managed democracy’.¹⁷ Both critiques – which indicate an erosion of popular sovereignty – affect both the domestic and the international domains. The contemporary populist projects can then be understood, at least in part, as a reaction to such an imbalanced state of affairs.

This is duly noted in ‘Populist Governments’. The increased emphasis on ‘closed statehood’, the protection of sovereignty and the usage of notions such as ‘constitutional identity’ by various governments reflect – varying from case to case – a critique of the loss of governing capacities of states and of societies in a universalistic and open international order. Hence, it might not be far from the truth to argue that post-war constitutional and legal imaginaries, and the intimately related ideas of a universalistically understood international order and of open constitutional democracies in the

¹⁵ Möllers, ‘Pouvoir Constituant – Constitution – Constitutionalisation’, in J. Bast and A. von Bogdandy (eds), *Principles of European Constitutional Law* (2010) 177.

¹⁶ Y. Ezrahi, *Imagined Democracies, Necessary Political Fictions* (2012), at 8.

¹⁷ S. Wolin, *Democracy Inc. Managed Democracy and the Specter of Inverted Totalitarianism* (2008).

domestic domain, are losing momentum. As Martin Loughlin and Petra Dobner have argued, for instance, with regard to the idea of constitutionalism as an imaginary of order, stability and self-government, it is ironic to observe that the heydays of modern constitutionalism seem to be accompanied by the erosion of just such an imaginary:

[T]his period of maturation of constitutionalism coincides with the erosion of some of the basic conditions on which those achievements have rested. Foremost amongst these conditions are those of statehood and a concept of democracy generated from the claim that 'we the people' are the authorising agents of the constitutional scheme. Constitutionalism is increasingly being challenged by political realities that effect multiple transgressions of the notion of democratic statehood. It is in this sense that constitutionalism can be understood to be entering a twilight zone.¹⁸

In the domestic domain, democratic politics appears then to be torn between technocratic, expert approaches, often focusing on legal, economic and technological progress grounded in the idea of 'open statehood' and international legal integration, on the one hand, and populist approaches, frequently claiming the retrieval of some idea of self-government and collective self-representation, on the other. The technocratic-managerial approach, according to some observers, has been an essential part of post-war constitutionalism, and its centrality to understandings of constitutionalism has intensified from the 1970s and 1980s onwards. The populist understanding of politics, on the other hand, has emerged in a more visible manner in recent times, not least in the wake of the 2007–2008 global financial crisis, and appears to be grounded in a specific, in some ways radical, interpretation of a democratic imaginary of constitutionalism.

The post-war project of international law – and I will refer here to European supranational integration through law as a more dense manifestation – may be understood as having taken the distinctive form of a diversified legal-constitutional project, in which national judicial institutions have been enforced, while powerful supranational institutions have been created as 'guardians' of a supranational legal order. According to many observers, this has resulted in a European order, which is to be understood as a protective framework for European democracy, grounded in a 'common heritage of the European constitutional tradition as it has emerged in the second half of the 20th century'.¹⁹

This affirmative understanding of European legal integration (and one supposes equally the ideas of international law as cooperation and open statehood), based on this view, ought to continue as a legal project, without being in need of any major corrections on the basis of ideas of democratic or participatory legitimacy. In this reading of post-war legal development, the lack of a sovereign people or the marginalization of popular sovereignty in the European context is compensated for by a 'legal/political system', which is able to 'produce principles of inclusion ex nihilo, at a high level of inner, auto-constituent abstraction'.²⁰ In this narrative, human rights substitute for

¹⁸ P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010), at xi.

¹⁹ Kumm, *supra* note 7, at 517.

²⁰ Thornhill, *supra* note 7, at 381.

constituent power, allowing European integration through law to proceed without the need for either extensive, collective input from society nor for full-blown democratically legitimated politics.

Krieger clearly casts doubt on this narrative and ends on a very significant invitation to consider the idea that ‘international law is currently in a state of crisis’, even if most of the challenge of populism appears to be confined to ‘rhetoric’ and does not necessarily consist in political action. The populist challenge to international law needs to be considered, however, in close relation to the structural tensions within domestic constitutional democracies themselves (and which are by no means limited to the populist challenge). One lesson might be that a robust international legal order, grounded in ideas of human rights, open statehood and cooperation, needs to be embedded in an equally robust and balanced domestic constitutional order, in which law interacts with democratic, and even constituent, forces rather than being reduced to an external framework of governance based on alleged global standards.

Heike Krieger continues the debate with a Rejoinder on our [EJIL: Talk!](#) blog.