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THE POPULIST DISRUPTION: JURIDICO-POLITICAL REFLECTIONS ON DEMOCRACY, LAW AND RIGHTS

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Abstract

In the current conjuncture, populism describes the disruption of the definition of, and connection between, democracy, law and rights. It represents the challenge to both the existing forms of political representation of the people and to the wider juridico-political framework or institutions of democracy. In contrast to predominantly political analyses of this populist phenomenon, which have rendered the relationship of populism to positive law peripheral, the focus will be upon a juridico-political analysis of populism. The analysis will concentrate upon the central aspects of the relationship between populism and positive law (Law and Morality; Law and Rights and Law and Violence).

Keywords

Law, Morality, Populism, Violence

Resumen

En la coyuntura actual, el populismo describe la interrupción de la definición y la conexión entre democracia, ley y derechos. Representa el desafío tanto para las formas existentes de representación política del pueblo como para el marco jurídico-político más amplio o las instituciones de la democracia. En contraste con los análisis predominantemente políticos de este fenómeno populista, que han hecho que la relación del populismo con el derecho positivo sea periférica, la atención se centrará en un análisis jurídico-político del populismo. El análisis se concentrará en los aspectos centrales de la relación entre populismo y ley positiva (Ley y Moralidad; Ley y Derechos y Ley y Violencia).

Palabras clave

Derecho, Moralidad, Populismo, Violencia

Introduction

The following analysis, which places the notion of the juridico-political at the centre of a reflection upon populism, arises from a position of critical distance from central elements of the predominant conceptualization of populism. The adoption of this critical distance is, however, related to the forms of contemporary populism in Europe which are considered to disrupt or challenge the interconnection between democracy, law and rights in an exclusively negative sense: a transformation or modification which constrains or undermines this interconnection.¹ The definition of the limits of the domain of this critical, juridico-political reflection, therefore, relinquishes the intention to engage in an analysis of forms of populism marked by a predominantly positive or inclusionary sense which seek to broaden the existing interconnection between democracy, law and rights. The analysis, therefore, leaves both the tradition of Latin American populism and the comparatively novel instances or pre-figurations of a left populism in Western Europe unexamined. The absence of analysis of the predominantly positive or inclusionary character of Latin American populism derives from its geographical and historical distinctiveness which requires a separate analysis attentive to its particular complexities.² The more recent, tentative emergence of a phenomenon of left populism in Western Europe remains outside the focus of analysis as it is unclear whether it is, as yet, a sufficiently well-delineated phenomenon to enable sustained interrogation of both its particular and general features.³ The analysis is initiated through a critical overview of certain of the central elements of the predominant approach to the conceptualization of contemporary populism. From this critical overview, the pertinence of the juridico-political framework for reflection will be indicated, and the analysis will

1. The analysis leaves aside the phenomenon of populism in the United States of America as it is unclear whether the recent election of Donald Trump, as President of the United States of America, represents a general transformation of the historical origin and character of populism in the United States of America or, alternatively, is confined to an alteration of the character of the Republican Party.

2. For recent analyses of Latin American populism, see, for example, Barr (2017), Munck (2018), Peruzzotti (2017), Sznajder, Roniger & Forment (2012), de la Torre and Arnson (2013). For recent considerations of the emergence of the phenomenon of left populism in Western Europe, see, for example, Hamburger (2018); Kioupkiolis & Seoane Pérez (2018), Mouffe (2018), Olsen (2018); Solar & Rendueles (2018), De Giorgi & Russo (2018).

3. This is something other than the “series of *aporias*” that Krastev formulates to encapsulate a politics of global protest: “The protesting citizen wants change but he rejects any form of political representation. He longs for political community, but he refuses to be led by others. He is ready to take the risk of being beaten or even killed by the police, but he is afraid to take the risk of trusting any party or politician. He is dreaming of democracy, but he has lost faith in elections” (Krastev, 2014, p.32). Rather, it requires a much more fundamental interrogation of the adequacy of, or necessity for, a notion of a left or a progressive populism.

then proceed to examine the relationship between the exclusionary form of populism and positive law.

Critical Overview of Predominant Analysis of Contemporary Populism

The critical overview, in confining its parameters to the contemporary form of populism which is essentially exclusionary, concentrates upon the character of the predominant analysis of a populism which disrupts or challenges the interconnection between democracy, law and rights. From this negative definition, the predominant approach to the conceptualization of contemporary populism is of a political project centred upon the reconfiguration of the character of democratic political representation (for example, Caramani, 2017; Heinisch & Mazzoleni, 2016; Mudde, 2014).

The further analysis of the political project of contemporary exclusionary populism describes both the emergence of new forms or expressions of political representation of the people and a wider challenge to the existing juridico-political framework or institutions of democracy. In relation to this placing into question and wider challenge, the specific position of positive law and forms of legal argumentation have been a relatively peripheral consideration.

In particular, the predominant analysis of the current phenomenon of exclusionary populism, has led to a type of weakening of the connection between the two terms of the juridico-political combined with an increased primacy accorded to the political. This is evident in the concentration upon the question of the formation or origin of a populist politics which is determined by the categories of political philosophy/theory, psychoanalysis and psychology (for example, Brömmel, König & Sicking, 2017; Bizeul & Rohgalf, 2018; Hoffman, 2018; Marchlewska et. al., 2018; Reynié, 2013; Taguieff, 2007; Taguieff, 2015) which is then accompanied by the concomitant transformation of the juridical into the formation and expression of a populist (collective) will or plurality of wills.

Hence, from a theoretical perspective, there is a tendency for this return to be one which results in a reflection upon the *aporias* of the will of popular sovereignty (in which the will is never fully instantiated in its products or results); and upon the creative or destructive position of this will with regard to the existing framework or institutions of democracy. The reorientation of the focus upon the juridico-political, in the

following analysis, involves something other than the mere restoration of the connection between the two terms as either the reassertion of the primacy of the juridical and/or the reassertion of a liberal legalism or constitutionalism.⁴

The Juridico-Political Analysis of Contemporary Populism and Positive Law

The notion of the juridico-political, which guides the reflection upon contemporary exclusionary populism, restores a particular analytic conjunction between law and politics. The conjunction centres upon the relationship between contemporary exclusionary populism and positive law and, in this manner, identifies the distinctive character of disruptive effect of contemporary exclusionary populism upon the interconnection between democracy, law and rights.

Law and Morality

In relation to the debate within Anglo-American legal positivism (for example, Himma, 2004; Kramer, 1999; Marmor, 2004; Raz, 1994; Waluchow, 1994), contemporary exclusionary populism situates itself outside the question of an inclusive or exclusive relationship between law and morality. It is unconcerned with the determination of the degree of autonomy or independence of law and morality because this autonomy or independence is considered to be an aspect of the obstruction of the expression of the popular will.

The content of this popular will, divisible into a set of beliefs or conceptions of its position in regard to the existing interconnection between democracy, law and rights, becomes the basis for a form of ‘re-embedding’ of morality into law. The term ‘re-embedding’ is used here, in place of a theory of natural law, in order to indicate a broad foundation which potentially encompasses, but is not confined to, the theological or a notion of absolute justice.⁵

4. Thus, the analysis differs from the approaches to contemporary exclusionary populism of Müller (2017) and Mounk (2018).

5. Thus, the analysis differs from that of Mouffe (2018) who considers that, in demarcating the domain of analysis of populism, “although the question of populism is, no doubt, also relevant in Eastern Europe, those countries necessitate a special analysis. They are marked by their specific history under communism and their political culture presents different features” (pp. 9-10).

The broad foundation also acknowledges that contemporary populism is not necessarily synonymous with nor confined to the simple reassertion of conventional forms of morality ('family values' etc.).⁶ It appears to have a marked orientation towards the identification of sources or figures representing external hindrances and obstacles rather than to merely ensuring the solidity of the internal morality of the 'we' of the popular will. The broad foundation is, therefore, considered to flow predominantly from the perception of the character of the limits or obstructions to the full expression of this popular will. The limits or obstructions are viewed as multifarious and are held to be equally present within the interlinked elements of society, law and state.

In the absence of a simple reiteration of forms of conventional morality, the marked focus upon limits and obstructions generates the reassertion of a popular sovereignty whose origin is held to arise beyond existing state institutions. The character of these limits and obstructions, although commonly held to inhere in the present, has a certain fluidity depending upon the degree to which the reassertion of this popular sovereignty involves a wider process of historical reinterpretation.⁷ Within this broad relationship between morality and law, the disruptive and negative effect results from a process of 're-embedding' of morality into law which has the capacity to be centred upon both upon the limits and obstructions in the present and to extend or combine this focus with the reinterpretation of the past.⁸

The differing configurations of the 're-embedding' of morality into law in the various forms of contemporary exclusionary populism are accompanied by a common functional conception of law. The relationship between morality and law is one in which the process of 're-embedding' morality accords law the essentially instrumental

6. Hence, the focus, in Poland, upon women's reproductive rights (on the question of women's reproductive rights in Poland, see Mishtal (2015, 2018), is encompassed within this broadly defined relationship between law and morality, as one particular configuration of this relationship. For, since the European "migration crisis" of 2015, in this form of exclusionary populism, the regulation of Polish women's reproductive rights has been combined with the presentation of an "invasion" of Muslim "refugees" who, beyond their supposed propensity for terrorism, have a "natural" propensity to have more children. Thus, creating, on the basis of this presupposition, the eventual possibility for an Islamic majority (see, Goździak & Márton, 2018).

7. The configuration of the relationship between law and morality tends to involve a more pronounced process of historical reinterpretation in Poland, centred upon World War II, with the Holocaust Law and the Museum of the Second World War in Gdańsk (see, Koncewicz, 2017; Kridle, 2018; Clark & Duber, 2018). In Hungary, the emphasis is upon a more general reconfiguration of the meaning of central historical experiences of the Hungarian people of the twentieth century (see, Benazzo, 2017; Seewann, 2018).

8. It is in this sense, perhaps, that it is possible to differentiate, within this analysis, the contemporary forms of exclusionary populism in Western Europe from those in Eastern Europe. The term differentiation is utilized here in order to suggest a difference within a more general identity, as the contemporary forms of exclusionary populism in Western Europe also include an understanding of their relationship to the past.

function of overturning these limits and obstructions. The instrumentalization of law is accompanied by the designation of the comparative importance of specific domains of law which will, in turn, be reflected in the intensity and extent of legal intervention within them.

The emphasis upon both internal and external limits and obstructions leads to the heightened concentration, within the particular national legal system, upon the legal fields of constitutional/administrative law, criminal law, immigration law and, to a lesser degree, family law. The areas of civil law and criminal law which relate to the economy – composed of both the private and public sector – remain relatively undisturbed except insofar as they relate to the intersection between the labour market and state provision for those outside the labour market.⁹ The legal fields which are selected as the primary sites are subject to a radical form of legal intervention which involves significant substantive and procedural transformation.

In the field of constitutional/administrative law, the legal intervention is marked by the hollowing out of the independence of state institutions, with a particular focus upon the provisions of the constitution and the composition and powers of the constitutional court. The legal intervention seeks to reorder the hierarchy of the elements of the state within the juridical framework of the constitution to ensure the primacy of the executive and legislative branches and to reduce the effective capacity of the judicial branch – the constitutional court – to engage in constitutional review of legislation and its application by other state institutions and personnel.¹⁰

The comparative diminution of the judicial branch of the state is an aspect of the broader phenomenon, within contemporary exclusionary populism, of the assertion of the primacy of state sovereignty in relation to the obligations imposed by international legal instruments. The limitation or denial of obligations of international law are centred upon those relating to regular and irregular migrants and are the corollary of the assertion of the primacy of the state's determination of the entry, residence and expulsion of non-nationals.¹¹ This central focus of contemporary exclusionary

9. It is here that the question of the relationship between contemporary exclusionary populism and the preceding neo-liberalism of the existing political parties arises most directly. Although contemporary exclusionary populism in Hungary indicates a strong degree of continuity (Szikra, 2014; Szikra, 2018), this is not manifest to the same degree in other contemporary exclusionary populisms (Afonso & Rennwald, 2018; Otjes et al., 2018).

10. This field of law is a primary focus of the contemporary exclusionary populism in Poland and Hungary (Kelemen, 2017; Konciewicz, 2018; Sadurski, 2018).

11. The limitation and/or denial potentially involves the European Convention of Human Rights, European Union Law, the International Covenant on Civil and Political Rights, the UN Convention Against Torture, the Law of the Sea and norms which have attained the status of customary international law. There will also be a differentiation between the forms of

populism overlaps with a broader challenge to the European Union – the transnational framework of contemporary European liberal and social democracy – if the assertion of the primacy of state sovereignty is combined with a project of juridico-political transformation which limits or denies the Member State’s positive and negative obligations arising from Article 2 of the Treaty of the European Union.¹²

Law and Rights

The fields of law which are the focus of the legal intervention of contemporary exclusionary populism, animated by the ‘re-embedding’ of morality into law, are subject to a transformation which affects the existing structure and foundation of legal rights. The modification of legal rights, resulting from this transformation, is uninterested in responding to the question ‘what is a right?’, and, therefore, substitutes the presupposition of an already existing ‘we’ for any further questioning of the foundation of legal rights. Thus, contemporary exclusionary populism conceives the structure and foundation of rights in a manner which cannot be thematised by either an interest theory or a will theory of rights derived from contemporary Anglo-American legal positivism.¹³ For, the consideration of rights, and their expression as norms of positive law within a domestic legal system, is unconcerned with the determination of the function of a right or the character of the individual legal subject upon which right is conferred.

The focus of contemporary exclusionary populism is solely upon who is to be attributed with rights and, in this process of attribution, the determination of the comparative strength of rights and their correlative obligations. The position is more complex than a mere reduction or destruction of the notion of rights. Rather, it is the modification of a spectrum or field of legal statuses, defined by the existing framework of positive law, within which it seeks to translate the values/morals of this ‘we’. This focus opens the further question of the extent to which the process of modification

contemporary exclusionary populism derived from the effect of this limitation and/or denial on the status of already established immigrant communities together with historically older minority communities.

12. Article 2 of the Treaty of the European Union, states that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. This is considered, by the European Union, to be the situation with regard to the forms of contemporary exclusionary populism in Poland (Wyrzykowski, 2018) and Hungary (Halmay, 2018).

13. For the contrasting positions of Anglo-American discussion, see Kramer, Simmonds & Steiner (2000), Kramer & Steiner (2007), Van Duffel (2012), Kramer (2013), Steiner (2013).

involves the creation and/or maintenance of legal statuses which do not attain the level of complete rights and obligations.

The process of modification of the spectrum of existing legal statuses will potentially result in both the introduction of new or additional rights and the modification/reduction/abolition of existing rights. In this process of transformation, the people is conferred with its expression in legal rights and the existing legal statuses of those who are considered to oppose, obstruct or undermine this expression in rights of the people will be modified, reduced or abolished. The alteration of existing legal statuses establishes a firm juridical distinction between those are within the people and those are outside the people. The firmness of the distinction is established by both the inferior legal status of those defined as outside the people – exemplified by the legal status and rights accorded to regular and irregular migrants – and the severing of the notion of a duty or obligation to those deemed outside the people. The interruption of the relationship between rights and duties is particularly marked in relation to migrants where the notion of a duty or obligation, in relation to individual or civil society assistance, has been severed through criminalization.¹⁴

This process immediately raises the question of the conflict of rights at two levels or stages. The first concerns the conflict which is associated with the process of transformation itself: the insistence upon the continued validity/legitimacy of the existing legal statuses and the recourse to institutional (e.g., judicial review/constitutional court) and non-institutional forms of challenge (demonstrations, civil disobedience, etc.), which themselves involve further questions of the scope of legal rights and freedoms. The boundary between the people and those outside the people established by the process of legal transformation remains essentially unstable as it is subject to potential contestation from those whose legal status is altered and to perpetual revision, by contemporary exclusionary populism, of the definition of the people.

The second concerns the extent of the recognition or acknowledgement, by contemporary exclusionary populism, of the continued inherence of conflict within the process of the translation of the people – the ‘we’ – into legal rights. For, the passage from the people to legal rights involves the differentiation and individualization of the morality

14. The character of criminalization differs with the criminalization in Denmark, under the Aliens Act, specified as assistance in the form of transportation of undocumented migrants which is defined as the criminal offence of human trafficking. In contrast, the 2018 legislation and constitutional amendment in Hungary creates a criminal offence of “promoting and supporting illegal immigration” which encompasses the criminalization of assistance by lawyers and individuals to asylum seekers in the Hungarian border zone together with the wider activities of NGOs of monitoring of the Hungarian border, producing or disseminating information and network building.

which contemporary exclusionary populism re-embeds in law. In this differentiation and individualization, the pre-existing unity of the people – the ‘we’ – is fragmented into a set of separable values which, as legal rights, individuates the ‘we’ into a plurality of distinct legal right holders. The individuation creates a set of formally equal rights which contain the potential for a conflict of rights with the assertion of one of these rights against another. Thus, contemporary exclusionary populism, in the passage from the ‘we’ to legal rights, reinforces the instability of the ‘we’ and is required to consider the institutional mechanisms which it will utilize in order to resolve them.¹⁵

Law and Violence

The potential for the emergence of a conflict of rights within the process of legal transformation of contemporary exclusionary populism leads to the further question of the relationship between law and violence. This question relates both to the manner of the modification, by this form of populism, of the existing spectrum of legal statuses and institutions and to the populism’s wider conception of the connection between norm and enforcement.

In regard to the existing spectrum of legal statuses, the relationship between law and violence arises from the radicalism of project of modification. The radicalism becomes the symbolic violence of the legislative formulation of the character of the modification which is to be undertaken.¹⁶ This relates both to the type of legislation – new law or amendment of existing law – which is utilized to effect the modification and to the content of the legal norms, created by the legislation, which alter the existing spectrum of legal statuses. The degree of violence which arises is further qualified or reinforced depending upon the extent to which the juridical branch of the state retains the capacity to review the legislative provisions.

The symbolic violence of the preparatory stages of the drafting and introduction of the legislative modification is transformed, with the passage of the legislation, into a violence inscribed in the legal statuses which result from this modification. The inscription

15. This potential conflict will be more immediately evident in situations where the political parties of contemporary exclusionary populism form a coalition, or the coalition is between a political party of contemporary exclusionary populism and a political party from the pre-existing political system.

16. It should also be emphasized that the radicalism of the project of legislative modification will be shaped by the presence of preparatory violence in the discourse of adopted by contemporary exclusionary populism. The attribution a of causal connection between the violence of this discourse and the incitement to violence – an immediate and, in many cases, lethal violence without legislation – is, however, always denied by a contemporary populism which seeks to remain within the framework of the existing political system (see, Leezenberg, 2015).

of the violence is produced by the creation and reproduction of a legal status, within the spectrum of legal statuses, which entails the permanent precariousness or uncertainty of the individuals who are ascribed this status. The precariousness or uncertainty relates predominantly to the legal statuses ascribed to those individuals or groups considered by contemporary exclusionary populism to be outside the 'we'. Within those held to exist outside the 'we', the primary focus for the ascription of these perpetually precarious or uncertain legal statuses are irregular and regular migrants seeking entry to, or present on the territory of, the state whose juridico-political framework is directed by contemporary exclusionary populism. The precarity and uncertainty relates to the possibility of entry and continued residence together with the type of socio-economic existence that migrants experience within the territory of the particular state.

The violence embedded in the definition of these legal statuses is compounded by the enforcement of these statuses. The essential precarity and uncertainty of the legal status is the corollary of the range of coercive actions of state institutions accompanied by minimal procedural protection utilized to maintain individuals within the parameters of a particular legal status. The state's recourse to arrest, detention and deportation is subject to minimal regulation by either judicial or administrative proceedings.

The relationship between law and violence in contemporary exclusionary populism extends beyond that involved in the modification of the spectrum of legal statuses to encompass the wider question of the existing institutions of liberal democracy and the welfare state. The radicalism of the modification of the spectrum of legal statuses is an aspect of the transformation of the existing juridico-political framework and indicates the disruptive force of the particular form of contemporary exclusionary populism. The disruption and reconfiguration of the existing institutional system is accompanied by the weakening of the conventional conceptualization of the relationship between law and violence: the return to the personalization of forms of authority and the accompanying personification of juridico-political concepts.¹⁷

The increasing emphasis of contemporary exclusionary populism upon personification remains a weakening, rather than a supplanting of the existing relationship between law and violence, as it is simultaneously bound to the continued affirmation of the 'we' of popular sovereignty. The forms of contemporary exclusionary populism involve the continuous passage between forms of personal authority and popular sovereignty in the

17. The ascendancy of personification will also be reinforced to the extent that the practice of personal patronage becomes a central mechanism in the institutional practices of a form of contemporary exclusionary populism.

weakening of the existing juridico-political framework or institutions of democracy.¹⁸ The predominant effect of weakening is itself the reflection of the dependence upon the different internal dynamics of the passage between personal authority and popular sovereignty. The difference is determined by the relative position of the leader, party and movement within a form of contemporary exclusionary populism.¹⁹

The return to the personalization of forms of authority and the accompanying personification of juridico-political concepts is the manner in which contemporary exclusionary populism reformulates the relationship between law and violence. It is a reformulation which, in place of all conceptualizations of the regulation and diminution of violence by law, assumes their essential reversibility as the counterpart of the disruption of the existing relationship between democracy, law and rights.²⁰ The presumption of reversibility is the expression of the inherent instability of the juridico-political framework of contemporary exclusionary populism which is subject to the perpetual upheaval of reproducing popular sovereignty within positive law.

Conclusion

The profound disruption, by contemporary exclusionary populism, of the juridico-political framework, revealed through its effect upon positive law, requires that, if one is to proceed from the critical analysis proceed to a critical response, this is to be undertaken through a reconceptualization of the juridico-political. The combination of reflection and reformulation involved in this reconceptualization detaches the critical response from both the delineation of a progressive, inclusionary populism and the purely defensive posture of the revalorization of the institutions of liberal constitutionalism and the welfare state.

The reflection and reformulation concentrate upon the conceptualization of a life-in-common, beyond the perpetual passage between forms of personal authority and popular sovereignty of contemporary exclusionary populism, through the juridico-political notions of solidarity and the common. The foundation of the reflection and re-

18. See, for example, the analysis of the Austrian Freedom Party (FPÖ) in Ajanovic, Mayer and Sauer (2018).

19. For Minkenberg (2018) the different internal dynamics indicate a distinction between the dominance of parties over movements in Western European forms of contemporary exclusionary populism and the Eastern European forms marked by mutual interaction between parties and movements.

20. Thus, the conception of the relationship between law and violence of contemporary exclusionary populism never attains the level of a self-reflection of law on its own violence as thematised by Menke (2018).

formulation in the concept of a life-in-common displaces the construction of the ‘we’ of contemporary exclusionary populism resulting from the ‘re-embedding’ of morality into law. The further internal differentiation and distinction within this concept of a life-in-common are elaborated through the connection to the notions of solidarity and the common.

In this elaboration, the domains of private law – property and the economy – and public law – the state and the constitution – together with their conceptual traditions are rethought in order to provide for the expression of the notions of solidarity and the common in categories of law.²¹ The distinctive universalism of these notions encompasses the distinction between national and international law as an integral part of the process of rethinking and rearticulation of domains and categories of law.

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21. See, for example, the approaches of (Brunkhorst, 2005); (Capra & Mattei, 2015); (Chignola, 2012); (Dubet, 2014); (Lucarelli, 2013); (Marella, 2012); (Mattei, 2018); (Negri, 2010); (Paugam, 2015); (Rodotà, 2013); (Rodotà, 2014); (Supiot, 2015); (Teubner, 2010); (Teubner, 2016).

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