

The Social and
Political
Foundations of
Constitutions

Populist Constitutionalism and Meaningful Popular Engagement

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Policy Brief

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The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented. Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

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Executive Summary

- Populist constitutionalism challenges liberal constitutionalism on democratic grounds, by invoking *popular sovereignty* and claiming to put the ordinary citizen in the centre of the political system, while reducing the powers of the 'enemies of the people', in particular liberal political elites and foreign institutions that interfere in local affairs.
- Populist constitutionalism comes in many forms, and the relation between populist government, constitutional change, and popular engagement is manifested differently in distinct populist projects. An important distinction should be made between the 'original' cases of populist constitutionalism that manifested themselves in Latin America from the early 1990s onwards and the contemporary cases in East-Central Europe. Popular participation has been widely promoted in Latin American populism, while it is largely absent in East-Central Europe. The populist dimension is expressed in both cases, however, in particular in the top-down manipulation and plebiscitarian nature of forms of participation.
- A key question regards the relative ease with which populists-in-government manage to radically change constitutional institutions and norms. A sociology of constitutions can help to bring out one significant dimension: the *societal embeddedness* of constitutions, indicating the taken-for-granted nature of a successful constitutional order among various political and societal actors. A problematic aspect of liberal constitutionalism is its relative distance from society and hence a potential lack of embeddedness. The latter is exploited in populist constitutional projects.
- However, populist constitutional projects do not resolve the embedment issue and tend to exacerbate a *lack of democratic legitimacy*. Therefore, populist constitutionalism needs to be contrasted by means of societal mobilization and civil society action which seek to strengthen the embedment of democratic-constitutional norms and practices. This may involve the endorsement of civic engagement and civic education; an increased attention for the distinctive (historical and social) problems of societies; and the endorsement of *constitutional resistance*, that is, explicit attempts to protect and restore the preceding (liberal) constitutional order by mobilized citizens, but also by the political opposition, distinctive state institutions, and judicial institutions and actors.

Populist Constitutionalism and Meaningful Popular Engagement

Introduction

Constitutionalism and populism are widely understood as strongly contrasting phenomena. In contemporary times, populism is often seen as the most significant threat to liberal, representative democracy. As stated in a representative and unambiguous manner by Mattias Kumm, ‘populists are a greater threat to liberal-democratic constitutionalism than the minority of religiously fundamentalist immigrants ever could be.’¹ Populist interference with constitutional orders is equally a potential threat to the European Union grounded in the rule of law, as argued by Frans Timmermans, vice president of the European Commission:

*If you are playing soccer and you do not respect the referee's role, rules do not work. We risk to move from the Rule of Law to the Right of Power, and when the first — the one on which the EU is based — comes to an end, Europe itself is destined to vanish.*²

A key menace to (liberal) democracies, current ‘neo-populisms’ nevertheless invoke ideas of popular sovereignty and constituent power, claiming to defend the ordinary or ‘real citizens’ against the enemies of the people, and making strong claims to revitalize popular sovereignty and to return political power to the people. What is more, populists actively take recourse to constitutional reform in order to pursue their political agenda.

But how to evaluate the populist claim to popular sovereignty? One thing that is needed is a *close scrutiny* of populist rhetoric and political practices to shed light on the actual political projects of populists

in government. Key questions included in this FLJS Policy Brief are: what is the *actual* role of the people in constitutional reform undertaken by populists and how much does such reform lead to a tangible increase in the capacity of citizens to engage with political and constitutional matters?

It will become clear below that in the recent political practices in Europe (in relatively stark contrast with experiences of populist constitutionalism in Latin America from the early 1990s onwards), most populists in power do not unequivocally promote actual, meaningful citizen participation in constitutional and political matters. Populists rather invoke the name of the people, first, to centralize power; second, to conflate a distinctive part of the people with its specific (conservative) political-cultural agenda; and, third, to undermine the status of law and of constitutional law in particular. Populists hence engage with the law in a distinctively instrumental manner, using the law to defend a supposedly ‘pure’ and undivided people from its enemies.

Populists challenge liberal-constitutional institutions, in particular in their power-limiting, power-dividing, and power-pluralizing dimensions. In many ways, it is striking to see how fragile such institutions are in the light of the serious challenges raised by the populists. This Policy Brief argues that further effort is needed to understand the reasons behind such fragility. It is contended here that we need to include a societal and sociological perspective in the analysis, to bring out the frequent *lack of embeddedness* of liberal-constitutional institutions in wider society and the absence of a supportive constitutional narrative that is societally rooted.

The populist challenge exposes the absence of a widely supported and embedded constitutional culture in many European societies. In the concluding remarks, it will be suggested that in order for such a culture to emerge, citizens need to find meaningful ways of engaging with constitutional politics and institutions.

Populist constitutional reform

Populism is a threat to liberal constitutionalism, but populists in power equally and frequently engage with constitutionalism and constitutional reform. How can we understand the populist usage of constitutions? Is it one of 'abuse', as, for instance, argued by David Landau, or a case of 'anti-constitutional backsliding', as claimed by Wojciech Sadurski? Both scholars appear to be right, since much of populist constitutional politics — in particular in the European context — is about the strong concentration of power, the subjection of the law to politics (and hence the elimination of judicial independence), and the reduction of oppositional voice (both in Parliament and in society). At the same time, populists claim to engage in constitutional and judicial reform in order to promote the 'ordinary citizen' against the 'enemies of the people'. According to populists, a 'counter-revolution' is necessary to defend the people.

Populist political projects reflect a form of realism and power politics, exposing inequality and corruption in society as well as elite rule. To counter the latter, populists reduce judicial and constitutional counter-powers, centralize political power, and entrench majoritarian/partisan rule. Populists claim in this to defend the ordinary citizen and to enhance popular voice, for instance, by means of participatory and direct democracy.³ Much constitutional action of populists relates to the way in which democracy is institutionalized and to the role of the people in such a system. Clearly, populism is to be understood as driven by a *critique* on liberal, representative democracy. Populists claim to be able to present a political alternative to liberal democracy, as expressed in Hungarian Prime Minister Viktor Orbán's 'illiberal democracy' or Polish populist party leader

Jarosław Kaczyński's 'Fourth Republic'. This was equally the case in many Latin American countries, where, since the 1990s, populists have been pursuing 'participatory democracy' or '*verdadera democracia*' ('true democracy'). The broad claim all populists appear to make is that they are able to institutionalize a political regime in which citizens are more fully and more extensively included than in liberal, representative democracy.

In the context of constitutional reform and constitution-making, a significant dimension pertains to, first, the *practice of constitutional reform* engaged in by populists (which actors and social groups are involved in reform, what kind of procedures and democratic instruments are used), and, second, the *objectives and outcomes* which are achieved through constitutional reform or redesign.

The populist critique of liberal, representative democracy, elitism, and elite corruption often translates into the endorsement of a more *direct* involvement of the people in government and rule-making, in some cases including in the change of constitutional rules. Many populists, even if certainly not all, invoke forms of bottom-up participation as a response to the 'representation deficit' (the lack of representation of the ordinary people or the marginalized in existing democratic regimes). This understanding of participation often pits a mythical, unitary people (since in reality, any society is made up of highly diverse groups) against the old governing elite, promoting in this a form of unified representation of highly disparate parts of society. Citizen participation may, however, be realized in very different and even contrasting ways. The populist attitude to citizen involvement seems frequently to take a *plebiscitarian* form, i.e., an appeal to legitimize the populist leader and/or government. It is only in the more radical, left-wing versions of populism (most prominently in the various experiences in Latin America) that substantive and innovative forms of citizen involvement have been endorsed and institutionalized, including forms of *deliberation* and *popular initiative*, even if, admittedly, participation has been frequently manipulated for populist ends.

Practices of constitutional reform

Indeed, more substantive forms of citizen involvement have been most pronounced in various constitution-making projects in Latin America since the 1990s. A particularly conspicuous and relatively unprecedented phenomenon has been the promotion of *constituent assemblies* in the region. In, for instance, Bolivia, Ecuador, and Venezuela, bottom-up calls for citizen involvement and populist endorsement of ‘participatory democracy’ resulted in the establishment of constituent assemblies, which were highly inclusive towards marginalized minorities and indigenous peoples.⁴ Populist leaders, such as Hugo Chavez in Venezuela in the late 1990s, and Rafael Correa in Ecuador in the latter half of the 2000s, endorsed radical change by means of the mobilization of the constituent power of the people, most conspicuously, even if not only, in constituent assemblies. In all cases, however, personalistic plebiscitarian behaviour by populist leaders eventually gained the upper hand, which in practice meant the exclusion of oppositional parties and of independent forces in civil society, the dismantling or neutralization of intermediary institutions with a counter-democratic function, and the frequent mobilization of a largely disorganized, heterogeneous mass of people.⁵

In contrast, in the post-2010 populist constitutional projects in East-Central Europe, actual citizen participation is largely absent, and possibilities for participation are often further curbed in constitutional norms and practice. Popular mobilization has consisted predominantly in citizen participation in elections, top-down orchestrated referenda, and plebiscitarian forms of consultation. With the centre-right Fidesz party winning an absolute majority in the Hungarian elections of 2010, its illiberal, counter-constitutional project became a realistic possibility. Subsequent constitution-making consisted in a hasty and largely non-participatory, majority-driven drafting of a new Fundamental Law by the Fidesz government in 2011.⁶ The populist government shunned existing rules that called for

inclusive constitutional change: the necessity of consensual constitution-making that was enshrined in a four-fifths rule on the adoption of a new constitution⁷ — which imposed collaboration between government and opposition — was eliminated by Fidesz by means of an amendment. The actual constitution-writing process was carried out in a highly non-transparent and majority-driven manner by as yet unidentified Fidesz elites, and rushed through Parliament in March and April 2011. Admittedly, in an earlier stage, in 2010, a public consultation procedure had been started, in which the views of the public, non-governmental organizations, and opposition parties were solicited. This procedure did not, however, involve any direct engagement with draft proposals, nor were its results taken into account in the actual drafting in March 2011.

The thrust of much of the counter-constitutional project in Hungary has been against the post-1989 democratic-constitutional order, as the Fidesz leaders tapped into the widespread discontent that had built up with regard to the liberal democratic system. Fidesz justified its populist constitutional project by means of reference to an alternative idea of constitutionalism, the unwritten ‘historical constitution’. The conservative project identifies in liberalism its primary enemy, and consists in a critique of liberal individualism, individual human rights, and the liberal understanding of the ‘neutral state’. Illiberal constitutionalism emphasizes *community interests*, strictly equated with the existing political majority, and the active promotion of a distinctive vision of communal life. In Hungary (and now also Poland), civil society and civic participation have therefore been mobilized and exploited by ultimately illiberal and potentially authoritarian forces against the existing liberal-democratic order. The government’s engagement with citizens is one of mass mobilization and plebiscitarian forms of consultation, while potential channels for bottom-up civic association and contestation (the public sphere, media, education) have been systematically reduced.

Outcomes of populist constitutional reform

Participation is not only relevant in the procedures of constitutional reform, but is equally an important dimension in the outcomes of such processes. Experts have described the procedures of drafting new constitutions in Latin America as participatory and open to social movements and civil society, with final drafts approved in popular referenda. Also the constitutional documents themselves reflect an inclusionary agenda, expanding rights, notably socio-economic ones, and claim to establish a different form of democracy, the aforementioned '*verdadera democracia*'. The latter emphasized more vertical accountability by means of frequent elections, referenda, and plebiscites, whereas horizontal accountability was strongly reduced. The populist political projects in Latin America sought recourse to constitution-making to bring about a 'refounding' of specific states, which meant '*un nuevo comienzo*' (a new beginning), both in terms of a new independence from external, neoliberal powers, and the internal re-empowerment and inclusion of marginalized groups. As already indicated, the Latin American experiences enhanced both bottom-up participation and the concentration of political power in the presidential function. The radical forms of populism in Latin America used constitution-making processes 'as a means of channelling civil discontent, mobilizing extensive citizen participation, and representing democratic change', but at the same time led to 'an alarming expansion of presidential powers'.⁸

In the recent East-Central European experiences, the centralization of political power is equally prominent, but, in some contrast to the Latin American experiences with populist constitutionalism, possibilities for meaningful citizen participation have been progressively reduced. The 2011 Fundamental Law of Hungary continued to sustain a good part of the institutions of direct democracy in place since 1989, but at the same time significantly modified ways in which direct democracy can be exercised. This has resulted in restrictions on the opposition and civil society's use of referenda (e.g., the quorum for referenda was increased to 50 per cent of eligible voters). Also, as stipulated in Article 8, Section 3 of the Fundamental Law, no matters related to constitutional

amendment can be put to referendum. In 2013, the Fidesz government adopted a new referendum law, which further 'drastically hindered the chance for the certification of referendum questions in topics uncomfortable to the government'.⁹ In addition, a new instrument has been introduced, the *national consultations*, invoking a popular participatory dimension, but in practice consisting of a government-driven instrument, without any constitutional basis, and remaining highly under-regulated, non-transparent, and inconsequential on the level of policymaking. Observers have argued that direct democracy instruments in Hungary have turned away from a counter-democratic logic serving opposition and civil society forces, towards an 'instrument of populist majoritarian politics'.¹⁰

(Dis-) embedded constitutionalism

A key question remains as to why the populist forces have been able to — in a relatively uncomplicated manner — set aside liberal-constitutional institutions. In East-Central Europe, radical constitutional change was pioneered by Fidesz in 2010. A significant dimension to this is how

*[d]iscontent with politics in Hungary translated into discontent with a constitution that seemed to legitimate this dreadful state of affairs [of a malfunctioning democracy and economy].*¹¹

In reaction, alternative representations of a constitutional order, often referring back to notions of a 'historical constitution', have steadily gained ground in the post-1989 decades in Hungary. In a not dissimilar manner, Poland has also borne witness to competing visions of constitutionalism in the post-1989 era, including a conservative understanding of the constitutional order, which is at the heart of the contemporary populist project of the Law and Justice party (PiS).

Much has been said and written about the populist abuse of legal norms and instruments as well as the autocratic leanings of the populists-in-government. Relatively little attention has, however, been paid to the fragility of the protection offered by liberal-constitutional institutions in the first place.

A sociology of constitutions provides precious instruments to do so, as constitutional sociology places emphasis on the ‘social life of constitutions.’¹² Constitutional orders are successful when taken for granted by a range of relevant actors, including judicial and political actors, but equally so by the wider public. Constitutional ideas and practices become part of the sociopolitical expectations and understandings of society at large — they become socially ‘embedded’.

The post-1989 trajectories of constitution-making in the former Communist societies were strongly grounded in the ideas of legal constitutionalism and a liberal understanding of the rule of law. This means that the emphasis was on formal constitutional institutions, such as written documents identified as higher laws and understood as hierarchically prior to ordinary law, strong protective and independent institutions in the form of apex courts and judicial review powers, entrenched fundamental rights, and relatively high hurdles and constraints with regard to the amendment of constitutions. Post-Communist transformation hence saw the emergence of an extensive set of formal institutions, which was, however hardly *embedded* in wider society. Apart from (constitutional) judges, neither key political players nor the wider public took constitutions for granted, nor were they willing to strongly defend such institutions in case of counter-constitutional action by populists.

(Re-)embedding constitutions

From a democratic-participatory point of view, a key matter regarding populist constitutionalism is the question of how to either prevent the rapid ‘backsliding’ of liberal-constitutional orders or, in countries in which backsliding is already well underway, how to prevent such retrogressions from advancing further and perhaps even to turn them around. The argument here is that such reflections need to prominently involve the idea of the sociopolitical embedment of constitutions and legal norms, that is, the extent to which citizens, civil society groups, as well as political actors take constitutions and constitutional norms for granted.

Countries in which populist constitutionalism makes important strides tend to display a relative weak societal embedment of constitutional ideas and norms. It is crucial that the attitudes and values of both elites (governing as well as oppositional forces) and of citizens and civil society organizations are addressed. I suggest that the societal embedment of constitutions requires in-depth engagement — in both conceptual and practical terms — in three areas: civic engagement, local societal problems, and constitutional resistance.

Civic engagement

Regarding the legitimacy of and commitment to the rule of law, key attention needs to be paid to how the law and the constitution matter in distinctive cases, in what specific ways, and for whom. While current proposals to contrast the populist assaults on liberal-constitutional orders predominantly focus on persuading and correcting governments by means of formal-legal instruments and procedures (as is evident in the EU approach), it is crucial that the societal dimension is equally addressed. The civic awareness of legality, constitutionality, and rights is crucial for a functioning constitutional democracy. Without important *civic engagement*, it is difficult to see how enduring social and political attachment to the law and ‘constitutional patriotism’ might emerge, and how populist constitutionalism may be defeated or at least curtailed. Citizen awareness of the critical nature of citizens’ direct participation in constitutional debates and reforms (not least as a democratic right) ought to be raised (practical inspiration can be derived from recent innovative practices and reforms in various European countries, including citizen deliberation in the Irish Constitutional Convention or public debates in prominent cities in the Romanian *Forumul Constituțional*). In addition, it is of great importance that citizens perceive human rights as protective instruments for all citizens, not only for marginalized or minority groups, and understand civil society organizations as pivotal parts of democratic society in their quality of counter-democratic or civic-democratic institutions. Civil society organizations themselves can play a significant role, using

distinctive techniques and narratives to explain constitutional norms and human rights in terms that are closer to citizens (for instance, by means of the usage of social media and personalized stories of ordinary citizens). One significant instrument to enhance awareness is *civic education*, which is best not limited to school curricula (often controlled by populist governments), and may need to include a bottom-up dimension, initiated by civil society organizations. A highly relevant source of inspiration is the tradition of ‘flying universities’, as existed under Communism and before, as, for instance, in nineteenth-century Poland.

Local societal problems

It is crucial to identify, map, and assess distinctive local, contextual issues and problems concerning the rule of law and democracy. These may include problematic or incomplete forms of social and political integration and value conflicts around constitutions, problematic legal-constitutional legacies, and/or the local ‘translation’ of legal transplants. In the case of East-Central European societies, such problems should at least be partially understood as part of complex processes of post-Communist transformation. Crucial issues are distinctive political problems, such as deeply embedded forms of corruption, the status of minority groups, problematic judicial legacies related to Communism, or acute social problems, such as poverty, inequality, and exclusion. A highly salient issue is the incomplete *Vergangenheitsbewältigung* or confrontation with the past in various societies (in particular with regard to transitional justice). Constitutional norms and practices ought to strike the public as relevant and useful instruments in dealing with such specific and complex societal problems. Political and constitutional institutions would gain significantly in legitimacy if people perceive political and legal institutions and practices as offering decisive

practical solutions for the most pressing problems in their societies.

Constitutional resistance

Civic empowerment and the counter-democratic functions of civil society are of great importance, as are the dimensions of political engagement, opposition, and resistance by a variety of political, juridical, and societal actors. Support for and empowerment of distinctive actors, such as local actors, civil society groups, and an (independent) media is crucial. Important here is the extent to which citizens and oppositional forces are able to monitor and publicize the behaviour of political elites, to mobilize resistance to policies and political projects, and to use institutional channels and legal instruments to counter such policies and projects. In particular, in countries in which democratic deviation is the result of an explicit political programme (and abuse of dominant position) of an incumbent government, the socialization and empowerment of societal counterforces is of great significance. An important dimension is *constitutional resistance*, meaning explicit attempts to protect and restore the preceding (liberal) constitutional order by mobilized citizens, but also by the political opposition, distinctive state institutions (such as the Commissioner for Human Rights in Poland), and judicial institutions and actors. In the context of deeply entrenched populist constitutionalism, innovative forms of constitutional resistance — public protests, occupation and manipulation of public space, informing citizens about rights and ongoing constitutional abuse, mobilizing through social media, using legal instruments (as, for instance, manifested in the Polish case, regarding among other things the reform of the Supreme Court, or in Romania, against the loosening of legislation on corruption) — enhance popular, bottom-up organization and may put significant constraints on power holders.

Notes

- ¹ See <https://bibliothek.wzb.eu/artikel/2017/f-20821.pdf>. Last accessed 28 November 2018.
- ² See <https://www.ufficiostampa.provincia.tn.it/Comunicati/The-future-of-European-Union-in-Frans-Timmermans-vision>. Last accessed 28 November 2018.
- ³ In early 2018, the Polish President Andrzej Duda, for instance, called for a consultative referendum on the Polish Constitution, see <https://verfassungsblog.de/a-constitutional-referendum-to-delegitimize-the-constitution/>. The plan was subsequently buried, as the Senate failed to endorse it.
- ⁴ C. De la Torre, 'Populist Citizenship in the Bolivarian Revolutions', *Middle Atlantic Review of Latin American Studies* 1(1) (2017): 4–32, 8.
- ⁵ K. Weyland, 'The Threat from the Populist Left', *Journal of Democracy* 24(3) (2013): 18–32.
- ⁶ R. László, 'Dismantling direct democracy: Referenda in Hungary', Friedrich Ebert Stiftung, 19 January 2017, <https://www.fes-connect.org/reading-picks/dismantling-direct-democracy-in-hungary/>. Last accessed 28 November 2018.
- ⁷ Art. 24(5) of the 1989 Constitution, introduced in 1995.
- ⁸ A.M. Bernal, 'The Meaning and Perils of Presidential Refounding in Latin America', *Constellations* 21(4) (2014): 440–56, 443, 440.
- ⁹ László, 'Dismantling direct democracy', p. 3.
- ¹⁰ Z. Pozsár-Szentmiklósy, 'Direct Democracy in Hungary (1989–2016): from Popular Sovereignty to Popular Illusion', *Acta Universitatis Sapientiae: Legal Studies* 6 (2017): 109–18, 115.
- ¹¹ K.L. Scheppele, 'The social lives of constitutions', in P. Blokker and C. Thornhill (eds), *Sociological Constitutionalism*, Cambridge: Cambridge University Press, 2017, p. 60.
- ¹² Scheppele 'The social lives of constitutions', p. 62.



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