

Introduction

Stephan Kirste/Norbert Paulo

I. Introduction

That populism is profoundly changing Western liberal democratic societies is not exactly news. Especially the recent advent of right-wing populism poses a challenge to the rule of law, democracy and related liberal values such as freedom, equality and tolerance. Today, this is common knowledge and has been described and discussed in numerous, often excellent, academic publications. However, the overwhelming majority of these publications looks at populism from the point of view of political theory. With very few exceptions, philosophers and legal scholars have remained bystanders in this debate.

The contributions to this volume analyze the populist challenges from the perspective of legal philosophy. This perspective allows for a more narrow focus on liberal democratic values, structures and procedures, thereby complementing the debate about populism in political theory. It highlights problems such as the effects of populism on the fundamental principles of liberal democracies, populist means of communication, its effects on political processes, and the responsibility of liberal democracies for the spread of populism. The contributions to this volume also address the significance of truth for democracy and the problematic ways populists deal with it – routinely complaining about “fake news” while spreading conspiracy theories. Populism is not only directed against the formal structures of the democratic constitutional state, but also undermines its informal elements such as political culture, democratic ethos, truthfulness, and other challenges to political epistemology that are necessary for the realization of these forms of the rule of law. It also has negative effects on justice in a society. Proposed means to overcome this crisis discussed in this volume include the revival of the political, a critical and reflected liberalism and others. The analyses are illustrated by studies of the situation of populism in individual legal systems in Italy, Brazil and Turkey. As much as empirical research is needed to analyze populism, and to understand it as a challenge to democracy, this volume emphasizes the normative challenges of populism and the responses it warrants.

II. The chapters in this volume

Part I. The first part of this book comprises essays that deal with the fundamental challenge of populism to the rule of law, democracy, and the legal culture that underlies them. They deal with the relationship between democracy and populism. *Bart van Klink* addresses this problem on the basis of Moffit's approach. Populism is understood as a performative style of political communication characterized by certain rhetorical forms exaggerating or using black and white arguments, appeal to negative emotions, exploitation of situations of crisis, simplifications and use of naturalistic metaphors. Not all forms of populism need to be anti-democratic. Van Klink argues that certain forms of democracy can also provide forms of expression for social groups that have been unable to articulate themselves. In this way they contribute to democracy by pointing at dark spots in existing democratic orders. However, he also shows how other means are used to occupy the necessary open space of democracy, threaten the necessary ethos of the rule of law, thereby endangering it.

If populism is defined by an exclusive claim to representation of the self-defined people, by asserting truths instead of their discursive justification, and by attempts to create political dualisms, populism constitutes a challenge to democracy based on the rule of law. *Stephan Kirste* shows in his article that by their political means populists undermine the rationality of deliberative democracy. Populism is then not only a challenge to this or that party, but targets directly the legal prerequisites of democracy and the democratic foundation of the rule of law, which stand in a dialectical unity. In this dialectical unity, it cannot be claimed that more democracy can be achieved by limiting the influence of the courts or the separation of powers, as populist officials have attempted to do by attacking the constitutional courts or the independence of the media. Democracy must counter this by the means of the rule of law, or so Kirste argues.

Oliver Lembcke digs even deeper: Does not populism affect the foundations of our political culture? The author explores this question in an examination of the dictum of the legal philosopher and former Justice at the German Federal Constitutional Court Ernst-Wolfgang Böckenförde about the dependence of the liberal constitutional state on conditions that it cannot guarantee itself without losing its freedom. At the center of this is an "ethos of legality" that every democratic constitutional state must presuppose. With their anti-institutionalism and anti-pluralism, populist parties are destined to come into conflict with this ethos. Lemcke tests this with various models of democracy and the rule of law. The concept of immediacy, which also Kirste emphasizes in his contribution, is opposed to procedural democracy, and the desired rule of charismatic personalities is opposed to the rule of law. How much this affects not only processes and institutions, but also the underlying ethos, is vividly demonstrated by Lembcke. Trust and the inner morality of law, as one could say with Fuller, are lost.

Lando Kirchmair shows that another important point of reference for the analysis of populism is the work of Gustav Radbruch. Radbruch helps to understand how pop-

ulism generates a loss of a sense of truthfulness, which in turn produces the serious consequences for democracy and the rule of law that can be observed today. Kirchmair's main focus is on forms of authoritarian populism. Radbruch has shown very precisely what consequences the loss of a sense of truthfulness had in the Third Reich: When this sense is lost, justice is also missing. The "power is law" principle will then take its place. Although right-wing populism is, of course, not National Socialism, the former's problematic handling of truth also undermines the political and legal culture. The importance of the sense of truthfulness for the political and legal process is not only accentuated by Radbruch. It also underlies the discourse-theoretical foundation of democracy and its analytical justifications. Kirchmair also draws from these approaches concrete constitutional consequences for a "prohibition to lie". Skeptical of a "ministry of truth", he sees transparency and trust as the solution to reinstall the sense of truthfulness.

Part II. The authors in this part of the volume focus on the political dimension of populism. While the authors of the first part regard populism, at least in some forms, as a challenge to the rule of law and democracy, there are also views in the literature that suggest that left-wing populism can compensate for democratic deficits in the liberal political model. *Katarzyna Eliaz* is turning to this thesis. To this end, she reconstructs Chantal Mouffe's concept of left populism and confronts it with a number of objections. Although left populism is able to mobilize people to articulate their interests, it has difficulty institutionalizing its politics. This can be seen, for example, in its "counter-majoritarian" assumptions critical towards the limitation of the political process by (constitutional) courts. In the confrontation with right-wing populism, it could prove to be weaker because it opposes the claim to sole representation with openness and plurality. These and other problems could prove to be strategic disadvantages in the fight for democracy against its undermining by right-wing populism, Eliaz argues.

In addition to the formal structures and institutions of the liberal democratic constitutional state, populism is a challenge also to its informal preconditions, as Lembcke and Kirchmair have shown. It undermines the "ethos of legality" on which the willingness to follow the law rests, and it denies the "sense of truthfulness" that is the basis for a rational political process. *Judith Zinsmaier* shows in her contribution that the "ethos of democracy" is also under attack. Her starting point is Jan-Werner Müller's analysis of populism. After first defining populism on the basis of a *pars pro toto* thesis, he deals with the further challenges of populism in his latest book on "Fear and Freedom", which Zinsmaier discusses in her article. The focus is on the challenge of populism for a pluralistic society. At the same time, as Zinsmaier shows from the perspective of Hannah Arendt, this is an attack on the political. This attack cannot be met without resorting to a concept of the good life. The individual person and her rights are at the center of the political process. Right-wing populism reifies them in a way that is not compatible with the tasks of political discourses. The rights of the person must therefore be strengthened as the basis of a democratic ethos. With this republican addition, Zinsmaier extends Müller's call for a different kind of liberalism.

Populism is the result of neo-liberal policies which increasingly sedate and restrict the citizens' scope of political decision-making. This is *Gregor Berger's* thesis. Populism seems to be a wake-up call to the loss of the political as a sphere of controversy, consensus- and identity-building in a "post-democracy" and perhaps even "post-politics". What is needed is the revival of the political as a sphere of positive freedom, as Berger shows, drawing on Hannah Arendt, Chantal Mouffe, Axel Honneth and others. If populism as a form of politics attempts to revive democracy; if it seeks to reclaim the stolen voice of the people, then at least in the attempts of right-wing populism this neo-liberal hegemony continues. For the voice that populists promise to give to the silent majority is their own voice and not that of the people.

In Europe and the USA, the challenge posed by increased migration was a kind of genesis of the currently dominant right-wing populism. However, migration and right-wing populism may point to deeper crises of the liberal model of society and state, as Judith Zinsmaier also shows in her contribution. Against the criticism of rights by Christoph Menke, who calls for a radical republicanism as a remedy, *Karsten Schubert* proposes what he calls a "reflective liberalism". Following Foucault, he wants to understand freedom protected by subjective rights as a critique. This freedom is not simply found, but must be developed by individuals. In place of a right to have rights in the sense of Hannah Arendt, which Schubert criticizes as not differentiated enough, this right should protect self-education as the basis of identity. Instead of understanding migrants as carriers of predetermined human rights, they should be protected in their ability to form critical and self-determined identities.

Part III. The third part of this volume contains three chapters with case studies of forms of populism in Italy and South America, particularly Brazil.

In the first of these, *Lucia Corso & Letteria G. Fassari* provide a fascinating insight into Italy's Five Star Movement (*Movimento Cinque Stelle*). It is well-known that the Movement was founded, and is largely dominated, by the comedian Beppe Grillo. However, the authors argue that knowledge of the ideas of the Movement's co-founder, Gianroberto Casaleggio, is key to understand populism in Italy, and perhaps elsewhere. The late Casaleggio designed the Movement according to his dystopian and futurologist ideas. Following the predictions of science fiction authors such as Isaac Asimov and Philip Dick, Casaleggio assumed that artificial intelligence would surpass human intelligence, which would ultimately lead to human extinction. Against this background, many elements of populism in Italy can be explained. For instance, sooner or later the digital revolution will make representative institutions irrelevant. There is thus no point to protect them. Instead, they should be supplanted by online platforms for direct citizen participation. More fundamentally, the fatalistic kind of moral negligence of populists – their disregard for human suffering and ecological catastrophes, say – can be explained with these background assumptions, or so the authors argue.

In the second chapter, *Juliana Neuenschwander & Marcus Giraldes* situate the current debate about populism in Latin America in the broader debate about the decline of

democracy in the face of globalization. In Latin America, the notion of populism has been used for extremely diverse forms of governments from Argentina to Mexico and from the 1930s until today. The authors criticize Ernesto Laclau's attempts to incorporate these forms of government into his theory of populism as overinclusive. Instead, they draw on Franz L. Neumann's classic analysis – inspired by Freud and Marx – of political manipulation through anxiety. Through this lense they also briefly look at “Bolsonarism” in Brazil as a particular form of populism that works through anxieties.

In the third chapter in this part, *Marcos Maliska* narrows in on Bolsonaro. Basically working within the framework of Laclau's analysis of populism, Maliska identifies the long-standing difficulties of Brazil's traditional political system to meet the demands of significant segments of Brazilian society as one major enabler of what he calls the “conservative wave” that happened in the 2018 Brazilian general election. Besides Bolsonaro becoming president, this wave also led to a significant conservative turn on the state level and in the federal legislative branch. Maliska remains neutral with regards to the particular contents of Bolsonaro's political agenda; he highlights its outright denial of politics and explains the ways in which this denial risks democracy and the rule of law. The chapter closes with the warning that Bolsonarism might lead to authoritarianism.

Part IV. The fourth and final part of this volume contains investigations of epistemic questions in the context of populism.

In the first chapter, *Gottfried Schweiger* draws on Miranda Fricker's account of epistemic injustice to analyze elements of right-wing populism. He argues that three fundamental changes of recent decades lead to hermeneutic epistemic injustice, that is, they block the victim from properly understanding herself. These fundamental changes are the capitalist change (with its alienating effects), the cultural change (especially migration leading to xenophobia), and emerging political elitism, which also has elements of testimonial epistemic injustice. Schweiger argues that the epistemic injustices that result from these changes promote support for right-wing populism, and that they block the development of a “democratic ethos” that is often taken to be a bulwark against populism.

In the second chapter, *Gülriiz Uygur* also uses the notion of epistemic injustice. But she employs it in order to analyze a particular problem, namely how authoritarian populism makes the legal subject more vulnerable. While populism is understood as the pitting of “the people” against “the elite,” authoritarian populism also seeks social homogeneity through the domination of others and the stabilization of unjust power relations. Uygur argues that epistemic injustice goes hand in hand with authoritarian populism in the context of the legal subject. For example, authoritarian populist regimes allow or even encourage the judiciary to make subjects more vulnerable by blocking ways to even recognize institutional prejudice. Along these lines, the author shows that the rule of law does not necessarily protect democratic values, but can be abused by populists. It can thereby be read as a challenge to some of the papers in the first part of this volume.

In the third chapter of part four, *Adriano Mannino* focusses on the very epistemic commitments of populism. He argues that a key problem of populism is its basic assumption that political truths are simple and easy to attain, not complex and hard to understand. This political epistemology leads populists to disregard pluralism and means of consensus finding, which is of course problematic for pluralist liberal democracy. But it also leads populists, once in power, to make serious mistakes, because they are bound to react irrationally to empirical and normative disagreement and to assume a form of political infallibility. These epistemic mistakes can be very dangerous when populists have to make political decisions in the context of catastrophic risks (such as climate change or a global pandemic), or so the author argues.

In the fourth chapter, *Norbert Paulo* addresses a problem that is relevant for all understandings of democracy (including populist ones). It rests on the assumption that the people are able to govern themselves and others, which implies that the people are smart, rational and informed enough to legitimately exercise political power. Based on empirical research the author discusses what he calls the “epistemic challenge” for democracy as popular sovereignty. Voters in general seem to know little about particular policy issues and about the political system, and voting decisions are generally made in a non-rational manner, namely by a form of deference to their respective social group. This challenges the idea that the people can legitimately govern. The chapter discusses four democratic responses to the epistemic challenge and concludes that, under certain circumstances, social group membership can be an epistemically valuable heuristic for voting decisions and that it can thus be a legitimate exercise of political power.

Ahmad Bostani concludes this volume by examining the logic of populism with the metaphysical categories of an updated, “horizontal” political theology of Carl Schmitt, which leads to an imaginary account of embodiment. Bostani shows how populism can thus be understood as a kind of collective imagination in contrast to a mere cult of personality.

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