

Introduction

Migrants' Rights, Populism and Legal Resilience in Europe

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We live in an age of populism, with a troubling impact on migrants' rights and on liberal constitutional democracy.¹ Migrants are detained *en masse*, while border walls are erected in Hungary and the United States; migrants lose their lives at sea, while politicians in Europe advocate for the 'Australian model' towards 'boat refugees' in the Mediterranean; and migrants' rights to be reunited with their families are gradually taken away, while a host of countries – including Italy and Austria in Europe – pull out of the Global Compact for Safe, Orderly and Regular Migration.

At the same time, a steady decline in the quality of democracy has spread across the globe.² In 2020, one in three persons in the world lived in a country in which democracy is decaying.³ A decade earlier, in 2010, this was only six per cent of the world's population.⁴ On a global scale, democracy is in crisis.⁵ Or, put differently, we are in the midst of a third wave of autocratization.⁶ Authoritarian populism is an important causal factor in this democratic decline, including in Europe. In countries like Poland and Hungary, authoritarian populists have packed the highest courts with government-friendly

¹ Cf. Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Dangers and How to Save It* (Harvard University Press 2018) 3 ('we are going through a populist moment. The question now is whether this populist moment will turn into a populist age').

² See the data produced by the V-Dem Institute, EIU's Democracy Index, and International IDEA's Global State of Democracy Indices.

³ V-Dem Institute, 'Autocratization Turns Viral: Democracy Report 2021', www.v-dem.net/media/filer_public/74/8c/748c68ad-f224-4cd7-87f9-8794add5c60f/dr_2021_updated.pdf.

⁴ *Ibid.*

⁵ Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

⁶ Anna Lührmann and Staffan I. Lindberg, 'A Third Wave of Autocratization Is Here: What Is New About It?' (2019) *Democratization* 1095.

judges, rewritten electoral rules to sustain (super)majorities, and silenced critical voices through media buyouts and legislation targeting NGOs and universities.⁷

In short, three forces – populism, restrictive migration policies, and democratic decay – have been on the rise in Europe, and the world at large.⁸ There are, moreover, clear linkages between these forces. As the Secretary General of the Council of Europe notes, populists exploit public anxieties over migration by depicting migrants as the dangerous ‘other’, while criticizing ‘the corrupt elite’ for failing to protect ‘the pure people’ from the threat posed by migrants.⁹ Migrants are, in the populist narrative, excluded from ‘the pure people’ that populists claim to *exclusively* represent. As such, the populist turn in European politics appears to have paved the way for ever-more restrictive migration policies, whose compliance with human rights law is questionable.¹⁰

In at least some European countries, the populist turn also presents an immediate threat to liberal constitutional democracy. Some authoritarian populists have seized the momentum created by the confluence of three crises – an economic crisis (post-2008), a terrorism crisis (ongoing since 2001, but accelerated in Europe since 2015) and a ‘migration crisis’ (since 2015) – to undermine structural features of liberal constitutional democracy, including judicial independence, the separation of powers, and the rule of law.¹¹ An opposing force to liberal constitutional democracy – Viktor Orbán’s ‘illiberal democracy’ dubbed ‘Christian democracy’¹² – is gaining ground in Europe.¹³

⁷ See for instance Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 85 *University of Chicago Law Review* 545.

⁸ We define the central concepts – populism, democratic decay and legal resilience – further on in this introductory chapter.

⁹ Council of Europe, ‘State of Democracy, Human Rights and the Rule of Law. Populism How Strong Are Europe’s Checks and Balances?’ (2017); Council of Europe, ‘Ready for Future Challenges – Reinforcing the Council of Europe’ (2019). See also Neil Walker, ‘Populism and Constitutional Tension’ (2019) 17 *International Journal of Constitutional Law* 515.

¹⁰ See also T Alexander Aleinikoff, ‘Inherent Instability: Immigration and Constitutional Democracies’ in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 485.

¹¹ Rogers Brubaker, ‘Why Populism?’ (2017) *Theory and Society* 369. The precise nature of the interrelationship between populism, migration and democratic decay is one of the central research questions of this edited volume and is discussed at length below.

¹² Gabor Halmai, ‘Populism, Authoritarianism and Constitutionalism’ (2019) *German Law Journal* 296, 307–308.

¹³ Scheppele (n 7).

1.1 CONTEXT, OBJECTIVES AND RESEARCH QUESTIONS

Against this complex and troubling backdrop, this edited volume seeks to analyse the interrelationship between populism, democratic decay and the restriction of migrants' rights in Europe. The need for such analysis is evident from the tragic trajectory in Hungary,¹⁴ where anti-migration discourse and policies have sustained support for Fidesz during and after the 'migration crisis' of 2015, in turn emboldening the populist party to further undermine liberal constitutional democracy to consolidate Orbán's hold on power.¹⁵ Poland has been on an analogous, albeit somewhat different route towards democratic decay, in which the perceived or constructed threat of migration has also played a predominant role.¹⁶

It is tempting to dismiss Hungary and Poland as isolated cases. To assume that 'we' (i.e. the rest of Europe) can somehow quarantine 'them' so they will not infect 'us'.¹⁷ In resisting that urge, this edited volume seeks to consider – in earnest – to what extent the 'we' are also at risk of suffering from democratic decay, what role populism and restrictive migration laws and policies play in this regard, and what – if anything – can be done to avoid this trajectory.

In the past few years, disquiet has grown over potential onset of democratic decay in countries like Romania, Bulgaria, Slovakia, Italy and Austria. Similarly, concern has increased about the resurgence of radical-right parties in countries like Germany, France, Belgium, the Netherlands and Sweden. Aside from populism, migration is a central theme running as a red thread through these processes, which occur across the entire European continent.¹⁸ Yet unlike populism, the precise role of migration remains underexplored. The contributors to this edited volume, therefore, tug on the red thread of migration in an attempt to unravel the interrelationship between populism, democratic decay, and migrants' rights. But they do not stop at the level of diagnosis. Instead, they also seek solutions by identifying strategies of legal resilience against restrictive migration laws and policies, in particular.

¹⁴ See for instance Gábor Halmai, 'A Coup against Constitutional Democracy: The Case of Hungary' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 243.

¹⁵ This autocratization process has accelerated further under the guise of the need for extensive emergency powers to combat COVID-19. See Chapters 6 and 8 by Wouters and De Ridder and by Kovacs and Nagy.

¹⁶ See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019). See also Chapter 9.

¹⁷ The activation of the article 7 TEU mechanism against Poland and Hungary could be understood in this sense.

¹⁸ See, for instance, Mounk (n 1); Aleinikoff (n 10).

To achieve the above objectives, we have brought together scholars of migration law and scholars of constitutional law. The first group of scholars has been analysing ever-growing restrictions of migrants' rights for a long time.¹⁹ Scholars of migration law have drawn attention to how curtailment of migrants' rights has become 'the new normal' in Europe, as well as to how such restrictions are often incompatible with fundamental legal principles, including human rights and the rule of law. In doing so, they have noted a link with the rise of populism in Europe. Scholars of constitutional law, by contrast, have – with important exceptions – only started focusing on the threat of populism to liberal constitutional democracy over the last few years, once authoritarian populists began using the law to incrementally dismantle constitutional structures in countries like Hungary and Poland.

Thus far, however, scholars of migration law and constitutional law have not engaged in concerted dialogue on these issues, which is remarkable since they are studying closely related phenomena. More important, dialogue is also necessary because examining separately (as has been done so far) migration and restriction of migrants' rights, on the one hand, and constitutional democracy and its stability, on the other, can keep us from identifying and understanding the actual problems. At the same time, dialogue can better equip both migration law and constitutional law scholars to contextualize the phenomena that they study.

To address the existing gap in the literature, we have gathered scholars representing both sub-disciplines and from across Europe at a two-day workshop at Lund University, organized in February 2020. We were, and remain, convinced that these scholars have much to gain from sharing each other's perspective, in terms of diagnosing problems, identifying lasting implications and finding possible solutions. Our shared objectives at the workshop, and in this volume, have been to piece together a nuanced picture of the interrelationship between populism, democratic decay and the restriction of migrants' rights; as well as to identify strategies of legal resilience against (overly) restrictive migration laws and policies.

Further on in this introductory chapter, we briefly explain the origins and structure of the edited volume (Section I.4). The bulk of the Introduction,

¹⁹ See, for example, Gregor Noll, *Negotiating Asylum. EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000); Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015); Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016); Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum System' 53 (2016) *Common Market Law Review* 607.

however, is intended as a road map to contextualize the volume's objectives and explain its research questions (Sections I.2 and I.3).

I.1.1 *Research Questions*

The burgeoning literature on democratic decay has been dominated by scholars of constitutional law and political science. This has brought with it a somewhat skewed perspective on the role of migration, which is often considered to be 'merely' a contributing factor to democratic decay, in the sense that (authoritarian) populists have seized on the 'migration crisis' to further undermine liberal constitutional democracy. Yet, in our estimation the relationship between the three forces is likely to be more multifaceted and complex. We, therefore, put these two research questions to our contributors:

1. To what extent do restrictions of migrants' rights represent a form of democratic decay in populist times? Or, put differently, what is the conceptual and empirical relationship between restrictive migration laws and policies, populism and democratic decay?
2. What are the possibilities for and limitations of legal resilience to safeguard migrants' rights against (further) erosion in populist times?

Throughout this introduction, we explicate both research questions. We first define and explain the central organizing concepts: populism, democratic decay, and legal resilience. Having defined the organizing concepts, we discuss the state of the art in relation to each research question, before deducing potential positions on each question from the literature. We finally identify, in broad terms and general categories, the different approaches our contributors have taken to each research question.

I.2 POPULISM, DEMOCRATIC DECAY AND MIGRATION: THE INTERRELATIONSHIP

Our first research question concerns the interrelationship between three forces – populism, democratic decay and migration – that are exerting enormous pressure on Europe's liberal constitutional democracies.

1. To what extent do restrictions of migrants' rights represent a form of democratic decay in populist times? Or, put differently, what is the conceptual and empirical relationship between restrictive migration laws and policies, populism and democratic decay?

In conceptual *and* empirical terms, there are undeniable linkages between populism and restrictive migration policies, on the one hand, and between (authoritarian) populism and democratic decay, on the other hand.²⁰ But do systemic restrictions of migrants' rights introduced by populist parties – or by mainstream parties in an effort to 'outbid' the populists – inevitably follow Hungary's tragic trajectory towards democratic decay? Put differently, might the drastic curtailment of migrants' rights act as a sort of 'canary in the coalmine' that foreshadows future attacks on democratic structures?

It is tempting to reject this suggestion as overly reductive, but we should arguably not dismiss it out of hand. Across Europe, authoritarian and nativist populists have taken to criminalizing migrants *and* targeting those who resist restrictive migration policies. Migrants are often a primary target, but courts, civil society and the media are a close second. Populists attack the media for being 'leftist' or bringing 'fake news' on migration, brandish judges who rule in favour of migrants as being 'estranged' from the will of the people and undermine NGOs and independent agencies by labelling them 'biased' in favour of migrants at best and 'enemies of the people' at worst. This worrying pattern is not confined to just a few countries. It is replicated in a wide range of constitutional democracies in Europe.²¹

Could, in that respect, a confluence of *all three forces* be posited, in the sense that systemic restrictions of migrants' rights, introduced by or under the influence of populists, could be considered a mark of democratic decay? Or are both phenomena – the undermining of migrants' rights and the decay of liberal constitutional democracy – conceptually and empirically distinct? Moreover, what is the exact relationship between populism and restrictive migration laws and policies? Is populism a causal factor in systemic breaches of migrants' rights or 'merely' an accelerant in processes that were well underway before the populist surge?

These are some of the questions that preoccupy the contributors to this volume (see Section I.2.3), as they seek to untangle the complex relationship between populism, democratic decay and migration (see Section I.2.2). But before we are in a position to unpack these questions, a clear understanding of the structuring concepts of populism and democratic decay is in order (see Section I.2.1).

²⁰ These linkages were discussed (briefly) in Section 1 and are explained further on in this section, on the basis of a literature review and the contents of the volume's chapters.

²¹ See Chapters 8–13 in Part III of this volume.

1.2.1 *Defining Populism and Democratic Decay*

Two central concepts in our first research question – populism and democratic decay – require a definition and initial explanation. It could be argued that the same holds true for the third central concept: migration. Patricia Mindus, however, takes on the difficult charge of pinpointing what migration is, exactly, in Chapter 2. We, therefore, leave that concept aside here. As to restrictions of migrants' rights, we understand this to not only include limitations of human rights as guaranteed in a relatively general way in the European Convention on Human Rights and the EU Charter of Fundamental Rights, but also curtailment of rights as formulated more concretely in EU law (e.g. the EU instruments forming the Common European Asylum System) or national legislation.

1.2.1.1 Populism: Simpliciter, Authoritarian or Nativist?

Populism, so it is said, is an essentially contested concept.²² Ordinarily, this qualification implies deep-seated 'contestation at the core' about the 'content and implications' of the concept at issue, with 'people advancing and defending (and criticizing and modifying) rival conceptions of the concept'.²³ Yet in the case of populism it is not so much its *content* that is contested, but the *form* it takes.²⁴ Some view populism as a discursive practice,²⁵ others claim that it is a political strategy,²⁶ and others still consider it to be a (thin) ideology.²⁷ But regardless of how populism is understood – as a discourse, strategy or ideology²⁸ – there appears to be widespread agreement on its

²² Brubaker (n 11), 358; Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 2.

²³ Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) *Law and Philosophy* 137, 149–150. See also, and originally, Bruce Gallie, as cited in David Collier et al, 'Essentially Contested Concepts: Debates and Applications' (2006) 11 *Journal of Political Ideologies* 211, 214 (stating that the essentially contested nature of concepts 'inevitably involve[s] endless disputes about their proper uses on the part of their users').

²⁴ For an overview, see Mudde and Kaltwasser (n 22).

²⁵ Benjamin De Cleen, 'Populism and Nationalism' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 342, 345; Jan-Werner Müller, 'Populism and Constitutionalism' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 590, 591.

²⁶ See Mudde and Kaltwasser (n 22) 4 (describing this 'more recent approach' as being 'particularly popular among students of Latin American and non-Western societies', without endorsing this conception of populism themselves).

²⁷ *Ibid.*, 6.

²⁸ Other viewpoints may exist. Yet these are probably the most pertinent ones for our purposes.

constitutive elements: populism relies on a constructed image that divides society, in antagonistic terms, between ‘the (pure) people’ and ‘the (corrupt) elite’.²⁹

How does one get from this general understanding of populism to describing its role in the incremental undermining of liberal constitutional democracy, on the one hand, and its contribution to the enactment of evermore restrictive migration laws and policies, on the other hand? In making that bridge, legal scholars often find it useful to draw on one of the most widely endorsed conceptions of populism: the ideational approach of Cas Mudde and Cristóbal Rovira Kaltwasser.³⁰ In the ideational approach, populism is understood as

a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the *volonté générale* (general will) of the people.³¹

Some contributors to this edited volume clearly draw on this understanding of populism, either explicitly³² or implicitly.³³ As will become clear, however, a ‘thicker’ understanding of populism as inherently anti-pluralist, proposed by Jan-Werner Müller, might actually be more pertinent in the migration context, given that most contributors seem to consider anti-pluralism a highly salient factor in their analyses.³⁴

Under the ideational approach favoured by some contributors to this edited volume, populist parties and politicians can hardly be populist and nothing more, since as an ideology populism is too thin to support an electoral programme. It, therefore, tends to be combined with other ideologies such as nationalism or xenophobia, and lends itself extremely well to such combinations.

²⁹ See Mudde and Kaltwasser (n 22) 5–6; Cas Mudde, ‘Populism: An Ideational Approach’ in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 27, 32; De Cleen (n 25) 345.

³⁰ Mudde and Kaltwasser (n 22) 2; Mudde (n 29) 28.

³¹ Mudde and Kaltwasser (n 22) 6.

³² See, for instance, Chapter 1 by Stoyanova.

³³ See, for instance, Chapters 6 and 12 by Wouters and De Ridder and by Desmet and Smet.

³⁴ See, among others, Chapters 2, 8, 9 and 13. A minority of authors favours a somewhat looser understanding of the concept. In Chapter 11 on Austria, Ammer and Kirchmair, for instance, view populism ‘as a phenomenon constituting an important challenge to discursive and institutional pluralism’. This suggests an understanding of populism as a political strategy or practice intent on undermining democratic essentials, which seems to be particularly instructive to understand the peculiarities of the Austrian case (see also 2.2).

In Western, Northern and Southern Europe, populism indeed tends to go hand in hand with nationalism and/or xenophobia.³⁵ It thus takes the form of *right-wing* or *nativist* populism. Some contributors to this edited volume seem to understand populism in these terms.³⁶ They note that populists construe the people as a 'bounded collectivity' that is being threatened by the 'other'.³⁷ Mindus, for instance, notes that '[p]opulism exploits the blurring of the [...] distinction [between People-as-a-part and People-as-a-whole]: the populist framing of anti-migration policies pitching "them" versus "us" is a case in point'. Migrants are, on this understanding, depicted by populists as the enemy of the people, threatening the homogenous collective.³⁸ This explains why, in the populist imagination, migrants are *excluded* from the bounded collectivity. Kovacs and Nagy seem to rely on a similar understanding of populism, when they claim that

today's populist authoritarian nationalists concentrate on the concept of identity as a tool for determining who belongs to the mass that may be defined in ethnic, religious or linguistic terms. They use the language of the malign 'other', in which the other is a group considered not to belong to the mass because it differs in some key characteristics.

The understanding of populism favoured by Mindus and by Kovacs and Nagy, among others, appears to bake the relationship between populism and migration into the very concept of populism itself, thereby potentially conflating

³⁵ See De Cleen (n 25) 348–349. Since we are interested in the relationship between populism, on the one hand, and democratic decay and migration, on the other, we leave aside left-wing varieties of populism in this introductory chapter and throughout much of the edited volume. The reason is that left-wing populism tends to be linked to economic recession and claims of distributive justice. As such, it does not come within the purview of our analysis. This is not to say that these are unimportant instances of populism, nor to claim that they cannot pose dangers to liberal constitutional democracy. The case of Venezuela shows that they can. See David Landau, 'Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 161; Steven Levitsky and David Ziblatt, *How Democracies Die* (Broadway Books 2018) 4–5; Günter Frankenberg, *Authoritarianism: Constitutional Perspectives* (Edward Elgar 2020), *passim*.

³⁶ See, apart from the example discussed in the text, also Chapters 3, 7 and 10 (the latter chapter analyses the Italian case through the lens of what the authors call 'PopSovism', a contraction of populism and sovereignism, in which '[t]he populist component [...] puts itself on the side of "the people", defined as a country's native ethno-cultural group(s), which must be defended against both national and transnational "elites" and against other "outsiders" such as immigrants.').

³⁷ Brubaker (n 11) 363.

³⁸ Mudde and Kaltwasser (n 22) 34.

populism and nationalism.³⁹ Benjamin De Cleen has claimed, in this regard, that labelling the construction of an insider-outsider perspective of society as a core feature of populism *simpliciter* ‘misses the point [...] for these parties [which propagate this view] cannot be understood through the notion of populism alone’.⁴⁰ It is, by contrast, their right-wing or nativist ideology that is doing the work of constructing the insider-outsider dichotomy.⁴¹ Strictly speaking, on a narrow understanding of the concept, populism *exclusively* targets ‘the elite’ – not just the political elite, but also the media, the academy and the cultural elite – for instance chastising these elites for choosing the plight of migrants over the concerns and the will of ‘the people’.⁴²

Yet, somewhat ‘thicker’ understandings of populism, such as proposed by Jan-Werner Müller, accommodate the seeming conflation of nationalism and populism by insisting that populists are *per definition* anti-pluralist.⁴³ Since populists label a constructed homogenous collective as ‘the people’, Müller notes, they inevitably draw insider-outsider boundaries in plural societies (which all European countries are to a greater or lesser extent).⁴⁴

Mindus, in Chapter 2, draws on Müller’s understanding of populism ‘as an exclusionary form of identity politics’. Thorburn Stern and Lind do the same when they identify two common denominators of populism: criticism of elite and anti-pluralism. At least some contributors to this volume thus seem to consider ‘thicker’ understandings of populism more germane to understanding the interrelationship between populism and migration in Western, Southern and Northern Europe. Thorburn Stern and Lind, for instance, emphasize that

Another factor central for populism is *crisis*, real or perceived, which acts both as a hotbed for populism, creating a space for its emergence [...] and as a tool for populists to create a situation in which ‘the people’ can be united against a threatening Other, and be more susceptible to arguments in favour

³⁹ De Cleen (n 25) 342. Note that Stoyanova at times seems to do the same in Chapter 1, for instance when she claims that ‘[p]opulists who perceive membership as static and the polity as culturally homogeneous, not only tip the balance as to how migrants are treated, but also compromise more generally democratic ideals by perpetuating fictions of internal homogeneity and promoting nativist narratives of belonging.’ (internal citations omitted) and argues that ‘[t]his compromises the values of the community because “identitarian assumptions” about who belongs to the “the pure people” quickly lead to the targeting of other groups who do not fit within these assumptions’. See Chapter 1.

⁴⁰ De Cleen (n 25) 349.

⁴¹ Brubaker (n 11) 363; Mudde (n 29) 33; De Cleen (n 25) 344.

⁴² Mudde and Kaltwasser (n 22) 14; Mudde (n 29) 33. Cf. also Brubaker (n 11) 364.

⁴³ Müller (n 25) 590.

⁴⁴ *Ibid.*