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People, Sovereignty and Citizenship: The Ethnonational Populists' Constitutional Vocabulary

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BOOK REVIEW SYMPOSIUM

PEOPLE, SOVEREIGNTY AND CITIZENSHIP: THE ETHNONATIONAL POPULISTS' CONSTITUTIONAL VOCABULARY

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I INTRODUCTION

Constitution and citizenship are two giant and contested concepts of constitutional law literature. Jo Shaw's contribution to the debate on the understanding of these terms is erudite. Her book, *The People in Question* makes clear that citizenship and constitutions interact; hence, it discusses the core constitutional concepts of the people and sovereignty because 'it is practically impossible to imagine citizenship... without also considering the relevance of fundamental ideas about "the people"'.¹ It is especially true when we want to understand what Shaw calls the 'populist challenge to constitutional citizenship'.² This commentary concentrates on this populist challenge and makes three points. The first relates to populism; the second concerns the way populists apply constitutional vocabulary, including the concept of the people and sovereignty. Finally, the third point focuses on one of the populists' favourite citizenship policies, external ethnic citizenship.

II POPULISM

Anti-democratic forces are in government all around the world, even in Europe, which proudly conceives itself as the region with the highest standard of democracy worldwide. Whether we may describe these governments as populists or not depends on the definition of populism. Scholars of populism differ, of course, in their interpretations of this concept. Shaw refers to populism as 'a style of politics that can operate to close down the discursive space within which citizens can operate as free and equal political agents'.³ According to Jan-Werner

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¹ Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020) 26.

² See *ibid* 181.

³ *ibid* 179.

Müller, populism is an ideological position: the populist claims ‘exclusive moral representation of the real or authentic people’.⁴ For Wojciech Sadurski, populism is more a form of political organisation, in which populists try to build bridges to the people over the heads of the intermediary institutions (parliament and courts) that mediate between the people and the exercise of power.⁵

It seems that the major fault line in the populism debate remains how to understand the relationship between populism and democracy. As Andrew Arato points out, populism does not necessarily cause the breakdown of democracy.⁶ Populism may be a fundamentally democratic phenomenon if we define populism in the Rousseauian sense, as a process of the self-creation of a popular subject. And there are real-world examples that anti-democratism and populism do not always go hand in hand. The Greek Syriza party won the general elections in 2015 with a populist economic program. Nevertheless, while in government, the party remained within the framework of democracy. And as we learn from Shaw’s book, the Syriza government even endeavoured to open up citizenship, beyond the existing ‘national’ range.⁷

Nevertheless, even those who — unlike Müller and Sadurski — argue that populism is not by definition anti-democratic recognise that populism is problematic for democracy if we define populism as something that is based on personification, mobilisation from above, and friend and enemy relations among opponents within the system in the Schmittian sense. Whatever we think about this academic disagreement on the relationship between populism and democracy, we may acknowledge that today’s dominant populist trend, which is ethnonationalist and hostile to institutional pluralism is incompatible with the underlying principles of democracy.

III PEOPLE AND SOVEREIGNTY

As Shaw rightly points out, the concepts of the people and sovereignty are essential elements of democracy.⁸ Ethnonational populists do not abolish these concepts; instead, they reinterpret them. They do so because they accept the inevitability of democracy and speak of ‘managed’ (Vladimir Putin), ‘advanced’ (Recep Tayyip Erdoğan) or ‘illiberal’ democracy (Viktor Orbán).⁹ They adopt the vocabulary of constitutional democracy, but they radically redefine its core

⁴ Jan-Werner Müller, ‘Populism and constitutionalism’ in Cristóbal Rovira Kaltwasser et al, *The Oxford Handbook of Populism* (Oxford University Press 2017) 593.

⁵ Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019).

⁶ Andrew Arato, ‘Three Faces of Populism: Movement, Government and Regime’, *Central European University Department of Political Science* (Web Page, 12 June 2019) <<https://politicalscience.ceu.edu/article/2019-06-12/andrew-arato-three-faces-populism-movement-government-and-regime>>. Mark V Tushnet and Bojan Bugarcic, *Populism and Constitutionalism: An Essay on Definitions and Their Implications* (Working Paper No 20-17, 21 April 2020) <<http://dx.doi.org/10.2139/ssrn.3581660>>.

⁷ Shaw (n 1) 191.

⁸ Arato (n 6); Shaw (n 1) 26.

⁹ Sergei Markov, ‘The Future of Managed Democracy’, *The Moscow Times* (online, 27 January) 2004 <<https://www.themoscowtimes.com/archive/the-future-of-managed-democracy>>. UPI, ‘Erdogan: Turkey has “advanced democracy”’, <https://www.upi.com/Top_News/World-News/2012/10/01/Erdogan-Turkey-has-advanced-democracy/25981349101108/?ur3=1>. Viktor Orbán’s speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, Tusnádfürdő (Băile Tușnad) Romania http://2010-2015.miniszterelnok.hu/in_english_article/_prime_minister_viktor_orban_s_speech_at_the_25th_balvanyos_summer_free_university_and_student_camp.

constitutional concepts in light of their political goals to claim legitimacy in the international arena.

What makes this redefinition possible is the fact that ‘the people’ is an abstract term that lacks canonical meaning.¹⁰ As Shaw mentions in her introductory chapter, the concept of the people could refer to at least six different sets of ideas that have emerged historically and politically.¹¹ Yet I would add that we can further differentiate between the so-called constitutionalist and populist understandings of ‘the people’. In constitutionalist concepts, the common denominator is that the notion of ‘the people’ serves as a criterion to judge whether the totality of citizens and voters is a legitimate source of authority.¹² In this scheme, the ‘people’ are those who are the subjects of legal rights and obligations; that is, who fall under the scope of the acts adopted by parliament, and who bear the consequences of political decisions. By contrast, ethnonational populists speak of the people as a political power that is located outside the legal order and that, as such, cannot be limited by law. This group is fully formed before the adoption of a constitution and independent of the constitutional order or the creation of the state. Usually, it is an ethnic community that the populists perceive as a naturally given, living and willing entity that is based on genetic affiliation and has existed since time immemorial. Ethnonational populists speak of the people as a homogeneous group within the population who recognise themselves and are recognised as being on the friend side in the Schmittian sense. In order to form such a homogeneous group, populists fabricate citizens out of thin air and exclude others. This mechanism is well-illustrated by the case of Hungary where a ‘people’ was construed through an invocation of trans-border co-ethnics and, in parallel, an exclusion of refugees and ethnic minorities.¹³ Thus, the ethnonational populist version of the people is ‘people-as-a-part’ instead of ‘people-as-a-whole’.¹⁴

This type of population understanding has consequences for the meaning of popular sovereignty. In the constitutionalist tradition, sovereignty is understood in a legal sense, and popular sovereignty is ‘sleeping’,¹⁵ or ‘dormant’¹⁶ after the constitutional framework is created, and the constitutional state is functioning. Ethnonational populists, however, perceive popular sovereignty as national sovereignty, and they understand national sovereignty as the sovereignty of the ‘people-as-a-part’. For them, the ‘will of the people-as-a-part’ is always above legal and even constitutional rules and procedures. For instance, the 2011 constitution of the Hungarian Orbán regime — officially named the ‘*Fundamental Law of Hungary*’ — invokes the mythical concept of the nation instead of the people as the originator of the constitution. This nation includes ethnic Hungarians living beyond the state, even without an effective link to it, but there is no place in this concept of the nation for national and ethnic minorities living within the

¹⁰ For more on the narratives of peoplehood, see Johanna Hase, ‘The Constitutional Citizen in Narratives of Peoplehood’ (2020) 2(2) *Statelessness & Citizenship Review* 372.

¹¹ Shaw (n 1) 27.

¹² János Kis, *Constitutional Democracy* (Central European University Press 2003) 65–66.

¹³ Kriszta Kovács and Gábor Attila Tóth, ‘Hungary’s Constitutional Transformation’ (2011) 7(2) *European Constitutional Law Review* 183.

¹⁴ See Patricia Mindus, ‘On Population Design — Using Law to Dismantle Constitutional Democratic Institutions’ (Manuscript, 10 February 2020) (on hand with the author).

¹⁵ Richard Tuck, *The Sleeping Sovereign. The Invention of Modern Democracy* (Cambridge University Press 2016), citing Thomas Hobbes, *De Cive* (Privately Printed, 1642).

¹⁶ Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015).

country. The document enshrines an ethnic vision of the ‘we the people’ concept because it is not the people in a constitutionalist sense but those belonging to the ‘Hungarian nation’ who are the sovereigns.¹⁷

IV CITIZENSHIP

The way people are ‘composed’ determines the content and scope of citizenship. People are born into a particular group, but that does not mean that they identify automatically with that group. People can choose their identities, but they are rarely in a position to choose the state they want to belong to. Citizenship is a legal concept and, as Shaw put it, ‘it is for each state — according to its sole discretion — to determine issues of legal membership *within* that state’.¹⁸ I share Shaw’s opinion that this ‘Westphalian’ system, whereby states allocate membership, is not going to collapse anytime soon.¹⁹ International law requires that a citizen should have an ‘effective link’ to her state²⁰ and refers to citizenship as a legal bond between a person and a state that does not indicate the person’s ethnic origin.²¹ Certainly, that does not mean that states cannot take into account ethnic origin when designing their citizenship politics and differentiating between applicants who seek to acquire citizenship. And indeed, when ‘granting’ citizenship, most states employ some form of cultural affinity-based criteria,²² which often relates to ethnic identity. However, whether considering ethnicity is default or exception in a country’s citizenship politics is a decisive factor. In constitutional democracies, applying preferential rules for those with a certain cultural affinity towards the country is just one element in the toolkit of citizenship politics, and such preferences are often coupled with other requirements; taking up residency and passing naturalisation tests, among others. For ethnonational populists, however, ethnicity is a determining factor, and non-residential ethnic citizenship is a constitutive element in their citizenship politics. They deploy it to reemphasise a form of national sovereignty of the closed and Westphalian kind and to apply national (constitutional) law beyond state borders.

Act XLIV of 2010, as it amends *Act LV of 1993 on Hungarian Citizenship* illustrates this point remarkably well. In 2010, the very first move of the Orbán government was to facilitate naturalisation.²³ The regulation they introduced offers citizenship to those whose Hungarian origin is probable or who are descendants of a Hungarian citizen provided that they prove their knowledge of the Hungarian language. These persons are fully exempted from the condition of residency. The applicants can be naturalised without having any effective link to

¹⁷ Zsolt Körtvélyesi, ‘Nation, Nationality, and National Identity: Uses, Misuses, and the Hungarian Case of External Ethnic Citizenship’ (2020) 33(3) *International Journal for the Semiotics of Law* 771, 777.

¹⁸ Shaw (n 1) 13 (emphasis in original).

¹⁹ *ibid* 14.

²⁰ *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase) (Judgment)* [1955] ICJ Rep 4, 24.

²¹ *European Convention on Nationality*, opened for signature 6 November 1997, ETS 166 (entered into force 1 March 2000) art 2(a) (‘ECN’).

²² Szabolcs Pogonyi, Mária Kovács and Zsolt Körtvélyesi, *The Politics of External Kin-State Citizenship in East Central Europe* (Report, RSCAS/EUDO-CIT-Comp 2010/6, European University Institute, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory 2010).

²³ *Act LV of 1993 on Hungarian Citizenship*, art 4(3) (Hungary), as amended by *Act XLIV of 2010*, art 2(2) (Hungary).

the country, proving the means of subsistence or taking the naturalisation test.²⁴ To speed up this process in Romania, so-called ‘Democracy Centres’ were set up with the active support of the Orbán government. These centres represent Hungary beyond its borders and implement this system of preferential naturalisation.²⁵ Due to this institutional support and the simplified, three-month routine administrative procedure, the rule has led to the naturalisation of more than one million people, mostly from Romania and Ukraine. All this is happening in a country where the resident citizenry had already fallen below ten million and counting. Since 2014, the more than one million new citizens have been entitled to vote in the national elections and helped the Orbán government to stay in power.²⁶

Although facilitated naturalisation based on cultural affinity is not *per se* outlawed by international law, the rule should be justified by the established standards of non-discrimination.²⁷ The principle of non-discrimination²⁸ is part of virtually all human rights instruments at the international, European and national levels. For instance, the *European Convention on Nationality* applies this principle to all questions arising from citizenship, including distinctions based on ‘national or ethnic origin’.²⁹ The non-discrimination requirement in itself does not exclude differentiation based on ethnicity *per se*, but places a heavy burden on the government to justify its policies when it applies ethnic criteria. And since ethnic discrimination is a form of differentiation based on an immutable characteristic, heightened scrutiny should reasonably be applied to filter out illegitimate state goals and measures. The heightened scrutiny test requires that there should be no less discriminatory way to achieve the otherwise legitimate end. This standard seems to form a solid basis against which we can measure policies of external ethnic citizenship, and it may work well since it can press the government to come forward with its justification, a legitimate end that is in line with fundamental rights standards.³⁰ And as leading constitutional scholars remind us, a substantially over-inclusive or under-inclusive classification tends to undercut the legislator’s claim that the classification serves a legitimate end.³¹

The Hungarian regulation on preferential naturalisation demonstrates this point powerfully. It is substantially over-inclusive because it generally applies to all trans-border co-ethnics and not just to the descendants of those former Hungarian citizens who became citizens of another country because of political boundary changes they could not control. And since no time frame restricts the tracing of Hungarian ancestry, the rule extends the citizenry through an indefinite number of

²⁴ Article 4(3) only requires them to have a clean criminal record. Besides, the naturalisation must not threaten public policy or national security.

²⁵ Kriszta Kovács, Zsolt Körtvélyesi and Alíz Nagy, ‘Margins of Nationality: External Ethnic Citizenship and Non-Discrimination’ (2015) 7(1) *Perspectives on Federalism* 85, 108.

²⁶ *ibid* 109.

²⁷ *ibid* 91.

²⁸ For more on discrimination in citizenship, see Natalie Baird, ‘Constitutions, Citizenship and the Shadow of Statelessness’ 2(2) *Statelessness & Citizenship Review* 377; Julija Sardelić, ‘Citizenship, Constitutions and People on the Margins’ (2020) 2(2) *Statelessness & Citizenship Review* 384.

²⁹ *ECN* (n 21) art 5(1).

³⁰ It would be a considerable achievement in the case of secrecy and non-contestability of naturalisation, as is the case with Hungary. Although arts 11 and 12 *ECN* (n 21) guarantee the right to written reasoning and to review, Hungary applies reservation to these clauses. Kovács, Körtvélyesi and Nagy (n 25) 111.

³¹ Geoffrey R Stone et al, *Constitutional Law* (Aspen Publishers 1996) 568.

generations, which hardly seems to be normatively justifiable.³² So even if there were a legitimate end, the rule would not be likely to succeed on a non-discrimination test. However, in the Hungarian case, the rule would immediately fail the heightened scrutiny test because a legitimate end cannot be identified. What is working in the background is a nation-building project: a project that is based on the post-territorial concept of the nation, which seeks to revisit history to the extent possible (i.e. by indirectly questioning existing state borders),³³ and that establishes the desired past through the means of citizenship policies.

As Shaw's book demonstrates, the idea of granting citizenship to trans-border co-ethnics is not unknown in the democratic world;³⁴ it is still a part of the repertoire of the internationally recognised kin-state politics. However, national populists reinterpret the concept of citizenship and make non-residential ethnic citizenship central to their citizenship politics. Thus, the populist understanding of citizenship remains different from constitutional citizenship. For example, the Hungarian policy de-territorialises citizenship and strengthens a nationalistic idea of sovereignty by ethnoculturally redefining peoplehood. In this, the Hungarian policy is more similar to the Russian extraterritorial measures rather than to its democratic counterparts applied in many European countries. Historically, Hungarians were dominant nationalities in the Austro-Hungarian Empire and Russians were dominant nationalities in the Soviet Union. Hence, they both were viewed as 'imperial minorities' in the successor states of the Austro-Hungarian Empire and the Soviet Union.³⁵ Today, both have large 'external kin' populations. Russia offers non-residential citizenship in the post-Soviet region, and in the recent past, the 'protection of fellow trans-border citizens' served as a pretext for Russia's intervention in its neighbouring countries. The Hungarian citizenship rule offers non-residential citizenship for all transborder co-ethnics, and there is a danger that, in the long run, this policy may serve as a tool to reclaim 'lost' Hungarian populations and, ultimately, to reclaim the land.

³² Given the size of Austro-Hungarian Empire, contemporary citizens of Slovakia or Croatia would formally be eligible to apply for Hungarian citizenship. Paul Blokker and Kriszta Kovács, 'Hungarian Citizenship and Franchise Politics and Their Effects on the Hungarian–Romanian Relations' in Dimitry Kochenov and Elena Baseska (eds), *The Principle of Good Neighbourly Relations in Europe: Theory and Practice* (Brill Nijhoff 2015). As Zsolt Körtvélyesi puts it, the rule is meant 'to cover Csangos in Romania whose ascendants are supposed to have been left what was then the Kingdom of Hungary centuries ago'. Körtvélyesi (n 17) 784.

³³ János Kis argues that the Fundamental Law's commitment to 'preserve our nation's intellectual and spiritual unity, torn apart in the storms of the last century' is an irredentist claim because there is no reference to the recognition of the current state borders. János Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law' in Gábor A Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 1.

³⁴ Shaw (n 1) 31.

³⁵ Zsuzsa Csergő and James M Goldgeier, 'Kin-State Activism in Hungary, Romania, and Russia: The Politics of Ethnic Demography' in Tristan J Mabry et al (eds), *Divided Nations and European Integration* (University of Pennsylvania Press 2013) 89, 93.