

# POPULISM AND THE RULE OF RECOGNITION: CHALLENGING THE FOUNDATIONS OF DEMOCRATIC LEGAL SYSTEMS

By reference to the impact of populism on the foundational rules of democratic legal systems, the paper explores the interconnectedness of two “essentially contested concepts”,<sup>1</sup> democracy<sup>2</sup> and populism,<sup>3</sup> and their relationship with another ambiguous concept, the rule of law.<sup>4</sup> The main argument is that populism aims to amend the democratic rule of recognition, the most important ‘rule about rules’ upon which a legal system is founded. This has not been rigorously studied so far, despite its significance for a holistic conceptualisation of populism and for the analysis of its relationship with democracy. For, the rule of recognition provides a relatively stable point of reference for measuring the effect of populism on democracy.

Based on Hart’s theory of legal positivism,<sup>5</sup> the paper argues that while democracy and populism purportedly apply similar criteria to determine the validity of laws, populism promotes a different hierarchy and understanding of these concepts and, as a result, undermines the foundations of democratic legal systems. In particular, by reference to the dominant understandings of populism and democracy in political theory and to empirical evidence drawn from current political practice and

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<sup>1</sup> Gallie, W.B. “Essentially Contested Concepts.” *Proceedings of the Aristotelian Society* 56 (1) (1956), 167–98, 169.

<sup>2</sup> For the ambiguities of democracy, see Tilly C. *Democracy* (Cambridge: Cambridge University Press, 2007). For democracy as an essentially contested concept, see Spicer, M.W., “What Do We Mean by Democracy? Reflections on an Essentially Contested Concept and Its Relationship to Politics and Public Administration.” *Administration and Society* 51 (5) (2019), 724-748.

<sup>3</sup> Mudde C. 2017. “Populism: An Ideational Approach.” In *The Oxford Handbook of Populism* eds. C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo, P. Ostiguy (Oxford: Oxford University Press), 27-47.

<sup>4</sup> Waldron, J., “Is the Rule of Law an Essentially Contested Concept (In Florida)?” *Law and Philosophy* 21 (2) (2002) 137; Krygier, M. “Rule of Law.” In *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld and A. Sajó, (Oxford: OUP, 2012), 233.

<sup>5</sup> See Hart, HLA, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994); Carey, S.V. “What is the Rule of Recognition in the United States?” *University of Pennsylvania Law Review* 157 (4) (2009), 1161-1197, 1162.

discourse, it will be argued that populism prioritises an absolute sovereignty of a homogeneous ‘people’ over (a dubious version of) the rule of law as the predominant condition of legal validity, while democracy reserves a prominent position for (a thick) rule of law on a par with qualified popular sovereignty. By virtue of this reconstruction of the rule of recognition, populism promotes a version which resembles authoritarian regimes.

A secondary premise of the paper is that, contrary to the simplistic view that sees democracy as compatible and populism as irreconcilable with the rule of law, it is necessary to elucidate the exact version of these concepts in order for valid conclusions to be drawn.<sup>6</sup> As discussed in this paper, a key distinguishing factor between democracy and populism is that the first can in principle be compatible with all versions of the rule of law, whereas populism possibly comports with its most minimal version (often described as rule *by* law) that can accommodate its putative endorsement of absolute sovereignty. Nevertheless, the ambiguity of the rule of law allows populism to claim that it still forms part of its rule of recognition.

The paper begins with a discussion of secondary social rules as the cornerstones of legal systems, a fact that makes the populist challenge to the democratic rule of recognition of fundamental importance. The next section explains how populism exploits the ambiguity in the *nature* of social rules and introduces a struggle over who is authorised to determine the rule of recognition. At the

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<sup>6</sup> Lacey, N., “Populism and the Rule of Law.” *Annual Review of Law and Social Science* 15 (2019), 79-96 has engaged in a similar, though less ambitious, attempt. Bugaric, B. and Tushnet, M. *Populism and Constitutionalism: An Essay on Definitions and Their Implications*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3581660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581660) offer a nuanced analysis of the relationship between populism and constitutionalism. Political scientists at times overlook the indeterminate nature of the rule of law and argue for its incompatibility with the equally ambiguous concept of populism without further elaboration. See, for example, Urbinati, N. “Political Theory of Populism.” *Annual Review of Political Science* 22 (2019), 111-27, 112, 121; De la Torre, C. and O. Mazzoleni, “Do We Need a Minimum Definition of Populism? An Appraisal of Mudde’s Conceptualization.” *Populism* 2 (1) (2020), 79-95; Rovira Kaltwasser C., “Populism and the question of how to respond to it.” In *The Oxford Handbook of Populism* 489-507, 625; De la Torre, C. ‘Populism in Latin America.’ In *The Oxford Handbook of Populism*, 267-69.

same time, populists provoke uncertainty about legal validity by instrumentalising the *functions* of the rule, aiming for a reconstruction of its *content* in accordance with populist premises. To that end, populism seeks to reorder and promote a new understanding of the conditions for legal validity, placing absolute sovereignty of its ‘pure people’ as the ultimate determinant, while claiming compatibility with a thin version of the rule of law.

## THE FOUNDATIONS OF A LEGAL SYSTEM

A major contribution of Hart in the philosophy of law was to demonstrate that a legal system is the union of *primary* rules of obligation with *secondary* rules which determine the validity of the first.<sup>7</sup> These secondary rules *about* rules are foundational for the legal system and “specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined”.<sup>8</sup> In sharp contrast to a jurisprudential tradition which claimed that law is an act of the sovereign backed by sanctions,<sup>9</sup> Hart proved that the rules make the sovereign and not the other way around.<sup>10</sup> Converting a pre-legal regime based on simple, commonly accepted, primary rules of obligation into a legal system, secondary rules remedy the inefficiencies of the pre-legal world by addressing the *uncertainty* about which rules to follow, the *static* character of the rules and the *inefficiency* of social pressure as a mechanism for their maintenance.<sup>11</sup> Therefore, each legal system is founded on secondary social rules which are backed by social pressure, in the form of a *rule of recognition*, a *rule of change* and a *rule of adjudication*.

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<sup>7</sup> Hart, *Concept of Law*, 94.

<sup>8</sup> Hart, *Concept of Law*, 94.

<sup>9</sup> The main exponents of this tradition are Bentham and Austin whose claims were disproved by Hart in the first four chapters of the *Concept of Law*.

<sup>10</sup> Shapiro, S. “What is the Rule of Recognition (And does it exist)?” In *The Rule of Recognition and the U.S. Constitution*, eds. Adler, M. and K. Himma (Oxford University Press, 2009), attributes this formulation to Jeremy Waldron.

<sup>11</sup> Hart, *Concept of Law*, 91-93.

In their simplest form, these foundational rules act as the unifying factor of a legal system, advancing its cohesion. The rule of recognition addresses the issue of uncertainty by specifying “some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts”.<sup>12</sup> The rule of change remedies the static character and slow progress of rules and “empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules”.<sup>13</sup> Finally, the rule of adjudication “intended to remedy the inefficiency of the pre-law regime’s diffused social pressure, consists of secondary rules empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken”.<sup>14</sup>

Either in opposition or in power, populism seeks to harmonise all three secondary rules with its main premises though, ultimately, targets the democratic rule of recognition as the most important founding rule of the system. For, despite the fact that populists frequently attack the ostensibly corrupt legislators for their enactments which serve ‘special interests’ and the ‘out of touch’ judges whose decisions classify them as ‘enemies of the people’,<sup>15</sup> they do not hesitate, when in power, to retain the same rules of change and adjudication if they manage to dominate the existing institutions by empowering ‘suitable’ officials to perform these roles.<sup>16</sup>

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<sup>12</sup> Hart, *Concept of Law*, 94.

<sup>13</sup> Hart, *Concept of Law*, 95.

<sup>14</sup> Hart, *Concept of Law*, 96.

<sup>15</sup> Judicial independence has been central in discussions about the conflict between populism and constitutionalism and, as a result, to the rule of law. Cf. Bugarcic / Tushnet, *Populism and Constitutionalism*, 23-44 who, due to the relativism of these concepts, argue for a cautious approach.

<sup>16</sup> Muller, *What is Populism*, 61-62; cf. Blokker, P. “Populism as a Constitutional Project.” *International Journal of Constitutional Law* 17 (2) (2019), 537 n.5. For example, in an unprecedented move, Donald Trump succeeded in appointing Amy Coney Barrett to the SCOTUS only a few weeks before the US presidential elections; cf. the 2020 Rule of Law report issued by the European Commission, with particular reference to

## THE RULE OF RECOGNITION AND THE POPULIST CHALLENGES

### *Nature of the Rule of Recognition*

According to Hart, the rule of recognition is a *social rule*<sup>17</sup> which sets out a ‘regularity of behaviour’<sup>18</sup> or ‘patterns of conduct’<sup>19</sup> for a given group. Conforming to such group-wide standards of behaviour, the members of the group feel that they are bound to take these standards as guides to their own future behaviour and as standard of criticism for deviations from the rule. Although Hart does not explain how or why social rules bind the group, their existence is attested by the members’ practical attitude of rule-acceptance and their requirements are articulated by the overwhelming behavioural standards accepted by the group.

The rule of recognition is an *ultimate* rule of the legal system. It does not exist in virtue of any other rule; its existence is secured because of its acceptance as a conventional social practice.<sup>20</sup> In that sense “the general conformity of a group... is part of the reasons which its individual members have for acceptance”.<sup>21</sup> Therefore, the fact that officials (in particular, judges)<sup>22</sup> of the system accept and act upon the rule of recognition as a standard of conduct proves its existence. For a social rule to exist, a

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Hungary and Poland: [https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en)

<sup>17</sup> See Hart, *Concept of Law*, 109, 255, 292-93.

<sup>18</sup> Endicott, T., “Are There Any Rules?” *J Ethics* 5 (2001), 199-220; Tucker, A., “Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty.” *Oxford Journal of Legal Studies* 31(1) (2011), 61-88, 65-66.

<sup>19</sup> Shapiro, S., *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011), 100.

<sup>20</sup> Hart, *Concept of Law*, 105.

<sup>21</sup> Hart, *Concept of Law*, 255.

<sup>22</sup> The fact that judges play a prominent role in generating and sustaining the rule of recognition is evident in Hart, *Concept of Law*, 116, 250, 256, 267; cf. Greenawalt, K., “The Rule of Recognition and the Constitution.” *Mich L Rev* 621 (1987), 113-16; Shapiro, S., “On Hart’s Way Out.” *Legal Theory* 4 (1998), 469-507, 474. General conformity by courts, officials and private persons is envisaged in Hart, *Concept of Law*, 108, 110.

majority of the members of the group (i) act according to and intend to conform to the dictates of the rule; (ii) criticise others for failing to conform and do not criticise others for criticising; and (iii) express their criticism using evaluative language ('ought', 'must', 'right', 'wrong'). Those members of the group accepting the rule by reference to conditions (i) – (iii) are taking, for Hart, the *internal point of view*,<sup>23</sup> while members who do not act in accordance with the aforementioned conditions (although insiders) have an external point of view.<sup>24</sup>

Populism seeks to instrumentalise the ambiguities in the nature of the rule of recognition. Acknowledging the indeterminacy in the membership of the relevant social group,<sup>25</sup> populists aim either to extend the group consisting of judges to include the 'pure people'<sup>26</sup> or, even better, to replace the courts as the final determinant of the rule.<sup>27</sup> To achieve this, populists engage in a struggle over who is legitimated to take the internal point of view.

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<sup>23</sup> Hart, *Concept of Law*, 89-90. Cf. Shapiro, S., "What is the Internal Point of View?" *Fordham L. Rev.* 75 (2006), 1157; Perry, S., "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View." *Fordham L. Rev.* 75 (2006) 1171.

<sup>24</sup> Hart, *Concept of Law* 98. Cf. Shapiro, *Internal Point*.

<sup>25</sup> See Adler, M.D. "Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?" *Northwestern University Law Review* 100 (2) (2006), 719-805, 720 n.5.

<sup>26</sup> The pure and homogeneous 'People' as an essential feature of the populist ontology has long been recognised in scholarship. See, for example, Canovan, M., "Taking Politics to the People: Populism as the Ideology of Democracy." In *Democracies and the Populist Challenge*, Y. Mény and Y. Surel (New York: Palgrave, 2002) 25-44, 35; Mudde C. and C. Rovira Kaltwasser, *Populism. A Very Short Introduction*. (Oxford: Oxford University Press 2017), 9; Taggart, P. "Populism and 'unpolitics.'" In *Populism and the Crisis of Democracy*, 79-87, 79-80.

<sup>27</sup> This could be compatible with the variant of 'popular constitutionalism' which suggests that judges and officials should be responsive to the constitutional views expressed by citizens. See Adler, *Popular Constitutionalism*, 721.

For populists, the weak spot of the democratic rule of recognition is that it is primarily determined by the practice of courts and only secondarily by its wider acceptance by private citizens.<sup>28</sup> Decided by judges, the democratic rule of recognition presupposes an independent judiciary and its empowerment with the (arguably, super-legislative) power of judicial review. Taking the internal point of view, judges assess legal validity based on their accepted rule of recognition. This might lead to a judicialisation of political issues, with ‘unelected and unaccountable’ judges ostensibly limiting popular sovereignty in the name of, for example, individual rights.

In well-established constitutional democracies like the United States, where courts are the final arbiters of the law,<sup>29</sup> judges are criticised of taking unilateral decisions to invalidate legislation passed by the elected representatives of the people, purportedly disregarding their will. For example, in the case determining the constitutionality of same-sex marriage, late Justice Scalia called attention to the Court’s “threat to American democracy” whose decision promoted “a system of government that makes the People subordinate to a committee of nine unelected lawyers [which] does not deserve

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<sup>28</sup> This partly explains the populists’ frequent attacks on the judiciary. See, for example, the record of Poland in the recently published 2020 Rule of Law report of the EC, in addition to articles published in the press, e.g. <https://www.politico.eu/article/poland-threatens-a-budget-veto-over-rule-of-law/>. Cf. Bugarcic / Tushnet, Populism and Constitutionalism, 39-44. For an explanation of this phenomenon from a constitutional perspective, see Blokker, *Populism as a Constitutional Project*, 547-48.

<sup>29</sup> <https://www.supremecourt.gov/about/constitutional.aspx>; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 177.

to be called a democracy”.<sup>30</sup> Similar references were made by Donald Trump during the 2016 US Presidential election campaign.<sup>31</sup>

Even in systems which lack a codified constituting document, such as the United Kingdom, the balance between legal powers and legal disabilities of the sovereign body, be it the people or their representatives in Parliament, is again determined by courts. In the case of *Factortame* the court was the forum which deliberated on the content of the UK rule of recognition, reordering the criteria by giving precedence to EU law over national legislation.<sup>32</sup> Similarly in *R (Jackson)*, judges (in *obiter*) questioned the authority of the sovereign UK Parliament to amend the rule of recognition, to whose defence the courts would have to come.<sup>33</sup>

Populism, advocating an extension of the group whose consensus determines the rule of recognition, claims that a ‘correct’ rule of recognition and the corresponding behaviour of judges and officials, must conform to the expectations and beliefs of the people and not the other way around. Viktor Orban, for example, reacting to a recent court decision ordering the Hungarian government to pay compensation for transgressions on school policies, asserted that the decision “is unjust, one sided, exaggerated and destructive” as it “violates the sense of justice in Hungarians”. The decision

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<sup>30</sup> Similar points were made by all dissenting Justices in *Obergefell v. Hodges*, 576 U.S. 644 (2015). It is noteworthy, nevertheless, that Justices of the SCOTUS who recently called for the overruling of *Obergefell* ([https://www.supremecourt.gov/opinions/20pdf/19-926\\_5hdk.pdf](https://www.supremecourt.gov/opinions/20pdf/19-926_5hdk.pdf)) argue that this is a matter to be fixed by the Court. <https://www.nytimes.com/2020/10/05/us/politics/thomas-alito-same-sex-marriage.html>.

<sup>31</sup> <https://www.washingtonpost.com/news/post-politics/wp/2016/01/31/trump-attacks-supreme-court-decision-legalizing-same-sex-marriage/>

<sup>32</sup> *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85 (HL) and *R v Secretary of State for Transport, ex parte Factortame Ltd* (No 2) [1991] 1 AC 603.

<sup>33</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 2; cf. Tucker *Uncertainty*.



should be reached “*on the basis of the underlying principle...by asking whether Hungarians can feel at home in their own country.*”<sup>34</sup>

Populists and the ‘pure people’ can only take the internal point of view. They, rather than the judges and other officials, are legitimated to use the ‘correct’ rule of recognition as a standard for appraisal and criticism and reject as incompatible or external anything that goes against their version. In one of his frequent attacks on the judiciary, Donald Trump claimed that “Judges must not Legislate Security and Safety at the Border, or anywhere else...We want the Constitution as written!” since the “Obama judges...have a much different point of view than the people who are charged with the safety of our country”.<sup>35</sup> On 25 April 2017, the White House issued a statement, saying that “the rule of law suffered another blow, as an unelected judge unilaterally rewrote immigration policy for our Nation.”<sup>36</sup> These judges, although insiders, cannot have the internal point of view.

In light of the above, despite being endorsed by the courts under the democratic rule of recognition, populists dispute the validity of certain laws which purportedly conflict with their ‘correct’ version of the rule, and challenge the authority of certain institutions or officials to exercise their powers or duties which derive under the ‘incorrect’ version.

### ***Functions of the Rule of Recognition***

The populist challenge to the democratic rule of recognition extends to an instrumentalization of its functions. In that respect, populism:

- i) reviews the rule of recognition as the determinant of the sovereign, by offering its own version of who the sovereign is and inserting a form of absolute sovereignty to replace the qualified democratic;

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<sup>34</sup> <https://hungarianspectrum.org/2020/05/15/orban-lashes-out-minorities-should-be-put-in-their-place/>

<sup>35</sup> Tweet, 21 Nov 2018.

<sup>36</sup> <https://www.whitehouse.gov/briefings-statements/statement-sanctuary-cities-ruling/>

- ii) reconsiders the criteria for the conferment of legislative powers, by substituting democratic institutionalism which guarantees the periodic and mediated expression of popular will with a fixed will of the people which is ostensibly directly discernible by the populist leader;
- iii) aims to undermine the certainty provided by the rule, in order to gradually effectuate its change.

#### **D) Making the Sovereign**

Determining the ‘sovereign’ in any legal system is a fundamental function of the rule of recognition.<sup>37</sup> Being a group-wide standard, which provides the official and authoritative way for determining the validity of legal rules in the community, the rule of recognition precedes the purported sovereign body or person. By delineating the extent of its authority and jurisdiction, the rule makes the sovereign, which emerges as a matter of fact, in virtue of its acceptance by the social group. Regardless of whether this acceptance is the result of coercion (in the case of a violent regime) or tacit agreement (e.g. in the case of a democratically elected parliament), it leads to a regularity of behaviour within the group and to the conviction of an obligation to recognise the validity of the rules of the (now) sovereign.<sup>38</sup>

The sovereignty of the people allegedly is the cornerstone of both populism and democracy and forms part of their rule of recognition as a core determinant of legitimacy; yet the different understandings of this concept allow populism to promote its own version.<sup>39</sup> The ambiguity of popular sovereignty partly lies in the fact that it requires a certain ‘people’ to be based. This ‘people’, in

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<sup>37</sup> See Hart, *Concept of Law*; cf. Dworkin, R. *Law’s Empire* (London: Fontana, 1986).

<sup>38</sup> Hart, *Concept of Law*, 203, 257.

<sup>39</sup> See, for example, Mudde / Kaltwasser, *Populism*, 80; Mudde, C. and C. Rovira Kaltwasser, “Studying Populism in Comparative Perspective: Reflections on the Contemporary and Future Research Agenda.” *Comparative Political Studies* 51 (13) (2018), 1667-93, 1670.

addition to being the ‘constituent power’<sup>40</sup> (the original author and legitimating basis of the constitutional order),<sup>41</sup> is also envisaged as the ever-present and abstract collective agent who has the “power to model the state”.<sup>42</sup> Yet, the idea of an abstract ‘people’ has been seen as a foundational myth according legitimacy to the regime<sup>43</sup> since, consisting of individuals, this ‘people’ can be neither static nor homogeneous.<sup>44</sup>

Secondly, the notion of sovereignty is far from unambiguous.<sup>45</sup> If sovereignty is interpreted as absolute power wielded by the people, then democracy’s qualified version is unappealing and the promise of populism for an ostensibly absolute sovereignty appears attractive. Alternatively, if sovereignty means that the polity is constituted by and power emanates from the people, then the locus of *constituted* power must be left unoccupied and the people need to enter into a fiduciary relationship with trustees who exercise power on their behalf. Nevertheless, this deviates from the original idea of sovereignty as the ‘absolute and perpetual power of a commonwealth’<sup>46</sup> and needs to be revisited.

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<sup>40</sup> Kalyvas, A. “Popular Sovereignty, the *Constituent* Power, and Democracy,” *Constellations* 12 (2) (2005).

<sup>41</sup> Waldron, J. *Law and Disagreement* (Oxford: Oxford University Press, 1999), 255.

<sup>42</sup> Lawson, G. *Political Sacra et Civilis*, ed. Conal Condren (Cambridge: Cambridge University Press, 1992), 47;

Locke, J. *The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1991), 366–7.

<sup>43</sup> Kelsen, H. *Pure Theory of Law* trans. M. Knight (Gloucester, MA: Peter Smith, 1989), 204, 256.

<sup>44</sup> For the problem of who are the people in democracy, see Ochoa Espejo, P. “Populism and the Idea of the People.” In *The Oxford Handbook of Populism*.

<sup>45</sup> On the history of popular sovereignty see Bourke, R. and Q. Skinner, eds. *Popular Sovereignty in Historical Perspective* (Cambridge: Cambridge University Press, 2016).

<sup>46</sup> Bodin, J. *On Sovereignty, Four Chapters from the Six Books of the Commonwealth*, ed. and trans. J. Franklin (Cambridge: Cambridge University Press, 1992), 1.

Democracy is a system which “welcomes and preserves indeterminacy”<sup>47</sup> and is better seen as a dynamic and open-ended process (democratization).<sup>48</sup> It is in this context that the democratic version of both the people and sovereignty must be examined. Promoting equal and universal suffrage, democracy’s aspiration is to encourage inclusivity and expand the public space to include the entire population.<sup>49</sup> The *power of all* as the foundational democratic ideal is simultaneously the power of *anyone* (i.e. of every individual who has the right to have its rights protected and the means to make good on them) and the power of *nobody* (which emphasizes the principle of impartiality and shelters the locus of power from appropriation).<sup>50</sup>

Democratic popular sovereignty is qualified. This stems from the symbolic representation of sovereignty as an empty ‘locus of power’ that was vacated after the mutation of the incarnated and absolute sovereignty of the monarch of the Ancien Regime into a disembodied and qualified sovereignty of the abstract people. While the pre-modern notion assumed the symbolic condensation of power, law and knowledge in the body of the prince, the birth of democracy required the dissolution of these features.<sup>51</sup> An attempt to see democratic popular sovereignty as the re-unification of power, law and knowledge, incarnated into a homogeneous ‘people’ occupying the locus of power, could lead to the degeneration of democracy into a ‘tyranny of the majority’.<sup>52</sup> Therefore, far from being absolute, the democratic sovereignty envisaged by the rule of recognition is checked by, inter alia, constitutional law, judicial review, international law and human rights.<sup>53</sup>

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<sup>47</sup> Lefort, C. *Democracy and Political Theory*, trans. D. Masey (Oxford: Polity Press, 1988), 16.

<sup>48</sup> Dahl, R., *Polyarchy. Participation and Opposition*. (New Haven, CT: Yale University Press, 1971).

<sup>49</sup> Whitehead, L. *Democratization. Theory and Experience* (Oxford: Oxford University Press, 2002).

<sup>50</sup> Rosanvallon, P. “Populism and Democracy in the 21<sup>st</sup> Century.” In *Rethinking Open Society* eds. M. Ignatieff, and S. Roch, (Central European University Press: 2018) 227-242, 237-39.

<sup>51</sup> See Lefort, *Democracy*, 16-18.

<sup>52</sup> de Tocqueville, A. *Democracy in America*. (New York: Vintage Books, 1954).

<sup>53</sup> The compatibility of (popular) ‘sovereignty’ with law is disputed. See Eleftheriadis, P., “Law and Sovereignty.” *Law and Philosophy* 29 (2010), 535-569.

Populism, conversely, as a phenomenon which depicts society divided between the “pure people versus the corrupt elite, but also claims that politics is about respecting popular sovereignty at any cost”,<sup>54</sup> promises absolute sovereignty to its ‘people’. This ‘people’ is a static and homogeneous singular collectivity with continuous existence over time, capable of action, of having common interests and a fixed general will.<sup>55</sup> This is an artificial construction, at best referring to a specific interpretation (and simplification) of reality.<sup>56</sup>

The populist cosmology reserves for its ‘people’ the occupation of the locus of power and the embodiment of sovereignty as in “one supernatural body driven by one superhuman, irresistible general will”.<sup>57</sup> The ‘people’ is envisaged as the incarnation of sovereignty in a pre-modern, authoritarian sense (condensing power, law, and knowledge)<sup>58</sup> and as the ultimate measure of political justice and legitimacy.<sup>59</sup> By virtue of its fiction of the People-as-One claiming unlimited and perpetual sovereignty, populism is in a liminal state between democracy and totalitarianism.<sup>60</sup>

In light of the above, the populist rule of recognition, promoting absolute sovereignty for its ‘people’, suggests that law is subordinate to popular will and is valid when it protects and perpetuates its reign.<sup>61</sup> Both as a sovereign-in-command and as the constituent power of the polity, the populist

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<sup>54</sup> Mudde / Kaltwasser, *Studying Populism* 1669.

<sup>55</sup> Canovan, *Taking Politics* 35.

<sup>56</sup> Mudde / Kaltwasser, *Populism* 9.

<sup>57</sup> Arendt, H., *On Revolution*, (London: Faber and Faber, 1963), 60.

<sup>58</sup> “The moment the people is legitimately assembled as a sovereign body, the jurisdiction of the government wholly lapses, the executive power is suspended, and the person of the meanest citizen is as sacred and inviolable as that of the first magistrate; for in the presence of the person represented, representatives no longer exist” Rousseau, J.J. *The Social Contract*, trans. G. Cole (London: Everyman, 1973), 264.

<sup>59</sup> Urbinati, *Political theory* 113.

<sup>60</sup> Cf. Blokker, *Populism as a Constitutional Project*, 536.

<sup>61</sup> As Krygier suggests, “when I look at what bad guys in power do, today, in Poland, Hungary, Turkey, for example, I find they often take the law pretty seriously. They like to use it but they don’t want it to get in their

‘people’ have the absolute authority to legitimate the higher norms of the constitution. In that sense, populism appears to insert a primitive view of absolute sovereignty in its rule of recognition and – inaccurately – suggests that it is the ‘sovereign’ that creates the rules, instead of the rules making the sovereign.<sup>62</sup>

This is best illustrated by the reactions to the decision<sup>63</sup> of the UK Supreme Court following the Brexit referendum, that the UK Government does not have the legal power to initiate withdrawal from the European Union without the authorisation of an Act of Parliament. As the court declared, where “implementation of a referendum result requires a change in the law... [this] must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation” (para.121). Prominent constitutional lawyers observed that “many people have found the decision surprising” although the reasoning “rests on a clear line of case-law going back four hundred years and turns on a foundational principle of constitutional law”.<sup>64</sup> This surprise is best understood by reference to the insertion of ‘absolute sovereignty of the pure people’ in the populist version of the rule of recognition. The vitriolic commentaries in part of the press against the decision and the judges aimed to convince the public that neither parliament and the constitution are supreme, nor could they restrain the absolute sovereignty of the ‘pure people’.<sup>65</sup> The latter, limited to the 51.9% who voted for

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way, and they devote energies to making sure it is apt for what they want, and not what they do not”. Krygier, M. “Why the rule of law matters.” *Jurisprudence* 9 (1) (2018), 146-158, 152.

<sup>62</sup> Cf. Beckman, L. “Popular Sovereignty Facing the Deep State.” *Critical Review of International Social and Political Philosophy* (2019).

<sup>63</sup> *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5 (24 January 2017).

<sup>64</sup> Barber N. and J. King, ‘Responding to Miller’, U.K. Const. L. Blog (7th November 2016) (available at <https://ukconstitutionallaw.org/>) also commented that “The only remarkable thing about the judgment is how such quality was produced under such extraordinary time and political pressure”.

<sup>65</sup> *The Daily Mail* (4 November 2016) ran the headline ‘Enemies of the People’, underneath pictures of the judges; ‘The judges vs. the people’ was the front headline of *The Daily Telegraph*, whilst *The Daily*

Brexit,<sup>66</sup> being the absolute sovereign, should be able to override any obstacles posed by judges even when they apply the constitutional principles of the system.<sup>67</sup>

## II) Conferring Legislative Powers

The rule of recognition confers powers on persons qualified in certain ways to legislate by complying with certain procedural and/or substantive criteria.<sup>68</sup> Both democracy and populism ostensibly accept that these powers should be exercised in accordance with their respective versions of popular sovereignty. Hence, the legitimacy of the power to legislate arguably depends on its conformity to the will of the people. To achieve this, while democracy mainly focuses on the quality of the institutional and procedural setting which guarantees that the will of the people is discerned,<sup>69</sup> populism prioritises

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*Express* enjoined its readers to rise up and ‘fight, fight, fight’. An editorial published in the last newspaper, entitled “After judges' Brexit block now your country really needs you: We MUST get out of the EU”, described the judgment as a decision by the “the highest legal minds in the land [...] to hand back to that Westminster cabal the very power the people believe they should not be trusted with”. For the Brexit coverage in *The Daily Mail* see Breeze, R. “‘Enemies of the people’: Populist performances in the Daily Mail reporting of the Article 50 case.” *Discourse Context Media* (2018), <https://doi.org/10.1016/j.dcm.2018.03.008>

<sup>66</sup> As Freedman, M. “After the Brexit referendum: Revisiting Populism as an Ideology.” *Journal of Political Ideologies*, 22 (1) (2017), 1-11, 7 notes: “Brexiters, too, invoke the referendum as the ‘will of the people’, a phrase understood as a singular homogeneous monolith, conveniently ignoring that 62.5% of the electorate (‘remainers’, and those who abstained from participating) did not vote to leave the EU but are ‘automatically’ included in that will.” For the fact that referendums can oversimplify complex policy options, with particular reference to Brexit, see Bugarcic / Tushnet, *Populism and Constitutionalism*, 46-55 and 74-87.

<sup>67</sup> Sajid Javid, then Communities Secretary, declared that the High Court case was ‘an attempt to frustrate the will of the British people and it is unacceptable.’ Question Time, BBC 1, 3 November 2016, available at <http://www.bbc.co.uk/iplayer/episode/b081wrzp/question-time-03112016>

<sup>68</sup> Hart, *Concept of Law*, 70, 77.

<sup>69</sup> Habermas, J. *Between Facts and Norms*, trans. by W. Rehg (Cambridge: Polity Press, 1996), 450: “The democratic legitimation of law is not exhausted by the authentic expression of a people’s will but presupposes

the compatibility of these laws with an artificial, fixed popular will as interpreted by the populist leader.

Democracy envisages majority rule as the method for popular will to be expressed. Yet, majority rule often represents a coincidental majority which, depending on the populace's inclusion and participation in the decision-making processes, might be narrow.<sup>70</sup> To redress this, a viable democracy relies on the creation of an efficacious public space.<sup>71</sup> The democratic condition of (mediated) compatibility between law and the will of the (indeterminate) sovereign people requires knowledge of the latter. That knowledge, not being reserved as anyone's prerogative, is discernible as the periodic outcome of an open debate taking place in the public space. For this to be meaningful, the endorsement of pluralism, inclusivity and public contestation in a system of political competition which implies the possibility to oppose the government and to offer alternative points of view, is essential.<sup>72</sup> Democracy is "a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate"<sup>73</sup> - a debate which, since the locus of power remains empty and no one can take the place of the supreme judge, is necessarily indefinite.

Populism, on the other hand, stretches the democratic rules towards extreme majoritarianism; pluralism is curtailed and the infallibility of an ostensibly fixed will of the people, purportedly discerned by the populist leader, allows little room for public contestation.<sup>74</sup> Populism's Manichaeistic approach to politics, which envisages that a corrupt collectivity<sup>75</sup> (Elite, Establishment, 'out-group')

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and privileges the procedural conditions of democratic opinion-and-will-formation as the sole course of legitimation".

<sup>70</sup> Rosanvallon *Populism and Democracy*, 230.

<sup>71</sup> Habermas, *Between Facts and Norms*, 486.

<sup>72</sup> Rovira Kaltwasser, C., "The ambivalence of Populism: Threat and Corrective for Democracy", *Democratization* 19 (2) (2012), 184-208, 196.

<sup>73</sup> Lefort, *Democracy*, 39.

<sup>74</sup> See Urbinati, N. "Populism and the Principle of Majority." In *The Oxford Handbook of Populism*.

<sup>75</sup> Mudde / Kaltwasser, *Populism* 16; cf. Mudde, *Ideational approach*, 4.



restricts or negates the sovereignty of the ‘people’ and ostensibly engages in a domineering attitude over them,<sup>76</sup> accepts no dissent, especially from the establishment that occupies the present institutions. Populism does not score high in terms of inclusiveness either; despite being only one part of the population, its ‘people’ symbolically appropriates the whole and claims for itself absolute and exclusive legitimacy.<sup>77</sup>

Populism bases itself on a conception of incarnation as the best form of representation in which both the ‘pure people’ incarnate the sovereign and the leader is their embodiment.<sup>78</sup> Ostensibly being in a privileged position to know their true will,<sup>79</sup> the populist leader is the voice of the ‘people’ (*vox populi*) and offers the supremely authoritative correct interpretation of the common good, to the exclusion of other institutions, notably constitutional courts and independent authorities.<sup>80</sup> It is this ‘authentic’ will of the people, rather than a distorted version suggested by the institutional setting designed by the elite, which ought to be inserted in the rule of recognition as the ultimate source of legislative powers.

Panos Kammenos, for example, leader of the ‘Independent Greeks’ (AN.EL.), the far-right junior coalition partner in both Syriza governments between 2015-2019, while in opposition, frequently called the Greek people to drive out the “foreign occupation forces” and “democratically lynch” their local representatives, such as the former Prime Minister Antonis Samaras, despite being democratically elected. Applying his own rule of recognition, he repeatedly urged the ‘honest’ judges

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<sup>76</sup> Urbinati, *Political Theory*, 119.

<sup>77</sup> Urbinati, *Political Theory*, 120; Espejo, *Idea of the People*, 783-84.

<sup>78</sup> Rosanvallon, *Populism and Democracy*, 234.

<sup>79</sup> Bugarcic / Tushnet, *Populism and Constitutionalism*, 14-15 identify ‘reliable determination’ of the majority’s preferences as a key concept of populism.

<sup>80</sup> Müller, J.-W. *What is populism?* (Philadelphia, PA: University of Pennsylvania Press, 2016), 25-33.

to strike down the laws which ostensibly violated the true will of the people.<sup>81</sup> Unsurprisingly, such allegations had already been scrutinised and rejected by the courts which defended the democratic version of the rule.

### III) Preventing Uncertainty

The rule of recognition provides the characteristics the possession of which renders a rule (or a legal principle)<sup>82</sup> legally binding in a given system.<sup>83</sup> In that respect, the rule of recognition, as a widely accepted social rule, aims to remove uncertainty and contributes to the justification of the coercion of law by excluding one moral objection to it.<sup>84</sup>

Populism manipulates this function and challenges the democratic version of the rule by reintroducing moral objections to justify disobedience.<sup>85</sup> Using aggressive rhetoric, populists fiercely criticise the acts of political elites (and unelected judges), questioning the legitimacy of their decisions in moral terms.<sup>86</sup> For instance, Alexis Tsipras, not recognising the validity of laws passed under the

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<sup>81</sup> <https://www.tanea.gr/2014/09/10/politics/kammenos-o-laos-tha-lintsarei-dimokratika-ti-simerini-kybernisi>;

For similar assertions from Syriza, see <https://www.tribune.gr/politics/news/article/37992/tsipras-den-mas-desmevi-kamia-simfonia-pou-tha-ipograpsi-samaras.html> and <https://www.syriza.gr/article/id/59169/Binteo---Omilia-toy-Proedroy-toy-SYRIZA-Aleksh-Tsipra-sthn-Lamia---Perifereiakh-Programmatikh-Syskepsh-toy-SYRIZA-gia-thn-STEREA-ELLADA-.html>.

<sup>82</sup> Hart, *Concept of Law*, 259-60.

<sup>83</sup> Hart, *Concept of Law*, 100, 103.

<sup>84</sup> Hart, *Concept of Law*, 250.

<sup>85</sup> The distinction between the pure People and the corrupt 'out-group' is predominantly moral, not situational. Mudde / Kaltwasser, *Populism*, 16.

<sup>86</sup> See Mudde / Kaltwasser, *Studying Populism*, 1669.

Economic Adjustment Programmes, called the Greek people to abstain from making any payments under the *unjust and immoral* regime imposed by the creditors and their local minions.<sup>87</sup>

In order to prevent uncertainty in the system, the rule of recognition imposes a duty on officials to apply the valid rules.<sup>88</sup> Being used as the standard for the appraisal of their own and others' behaviour,<sup>89</sup> the rule governs general conduct because it guides the behaviour of a system's courts and, as a result, of its citizens.<sup>90</sup> However, Hart acknowledges the possibility of partial disagreement and lack of uniform official consensus.<sup>91</sup> When there is a division within the official world (or a division among the judiciary)<sup>92</sup> or when the official sector becomes detached from the private sector, in the sense that there is no longer general obedience to the rules which are valid according to the rule of recognition,<sup>93</sup> it is likely that the latter has shifted.<sup>94</sup>

Since the rule of recognition is determined as an empirical question of fact, widespread distrust of official decisions and general disobedience, may trigger partial disagreement within the official level as to the correct version of the rule. Pressure on the judiciary might potentially lead to

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<sup>87</sup> <https://www.tanea.gr/2013/03/06/politics/syriza-syntrofoi-adeiazoyme-to-den-plirwnw/>;  
<https://www.iefimerida.gr/news/201416/29-voyleytes-toy-syriza-synistoyn-na-katargithoyn-oi-poines-gia-osoys-den-plironoyn>; <https://www.nonpapernews.gr/download-now/2012-08-14-15-41-31/item/26724-o-protergatis-tou-kinimatos-den-plirono-diodia-dioristike-sto-grafeio-tou-tsipra>.

<sup>88</sup> Hart, *Concept of Law*, 258.

<sup>89</sup> Hart, *Concept of Law*, 98.

<sup>90</sup> Greenawalt, *Rule of Recognition*, 113-16.

<sup>91</sup> Hart, *Concept of Law*, 123.

<sup>92</sup> Hart, *Concept of Law*, 122.

<sup>93</sup> Hart, *Concept of Law*, 118.

<sup>94</sup> Hart, *Concept of Law*, 120.

such an uncertainty in the rule of recognition within the official sector.<sup>95</sup> Bolstering detachment between the official and the social spheres, populists often aggravate it to the extent of disruption.<sup>96</sup>

The social pressure brought to bear upon those who deviate or threaten to deviate from the rule is the primary factor for it giving rise to obligations.<sup>97</sup> Deliberately or instinctively exploiting the dependency of the rule on social acceptance and pressure, populists, in addition to the sphere of officials, seek to undermine consensus on the level of society. The challenge consists in adjusting and redirecting the social pressure behind its enforcement in accordance with the populist interests.<sup>98</sup> The populist narrative of ostensibly anti-popular enactments of corrupt elites might be used as a justification for lack of obedience and, thus, decrease the social pressure within society which contributes to law-abidingness. Their next step is for the social pressure to be forcefully redirected towards the officials and the political establishment.<sup>99</sup> If the populist version is verified by the popular vote, then it is likely that the official and judicial sectors will follow and a shift to the rule of recognition will be a fact, either through a formal constitutional amendment or an infusion of a new

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<sup>95</sup> See, for example, Donald Trump's attacks on the judiciary: <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts>.

<sup>96</sup> Tsipras, for example, referred to the duty of Greek people under Art. 120(4) of the Constitution to resist by all means against its violent abolition by the elites: <https://www.youtube.com/watch?v=SBvvUt44C04>.

<sup>97</sup> Hart, *Concept of Law*, 86-87.

<sup>98</sup> For such activities by Syriza see Katsambekis G., 'Radical Left Populism in Contemporary Greece: Syriza's Trajectory from Minority Opposition to Power.' *Constellations* 23 (3) (2016), 391-403.

<sup>99</sup> In the early years of the Greek crisis, attacks against state officials were common:

<https://www.keeptalkinggreece.com/2011/03/17/greeks-hurl-yogurt-at-deputy-prime-minister-video/>; <https://www.telegraph.co.uk/news/worldnews/europe/greece/8203980/Former-Greek-minister-attacked-by-mob-as-riots-break-out-in-Greece.html>). Court decisions were attacked by anti-austerity parties and were questioned by officials and academics, provoking uncertainty in the rule of recognition. See <https://www.reuters.com/article/eurozone-greece-pensions-judge/top-greek-judge-resigns-over-pension-cut-leaks-idUSL5N1SN51J>; <https://apostolisfotiadis.wordpress.com/2014/07/10/highest-judge-warns-of-pro-austerity-media-propaganda-against-greek-constitutional-court/>.

legal culture<sup>100</sup> or ethos to the constitution.<sup>101</sup> The populist attempt to alter the democratic rule of recognition and, as a result, make its ‘people’ sovereign, will succeed.

### ***Content of the Rule of Recognition***

The rule of recognition is a living rule whose content is indeterminate and evolving.<sup>102</sup> The rule might provide both positive criteria for the identification of the law in the form of certain characteristics that a rule must have, and disabilities in the form of constraints to the powers of those qualified to legislate.<sup>103</sup> Where there is conflict between those criteria, provision may be made for their arrangement in an order of relative subordination and primacy.<sup>104</sup> Changes in the content of this social rule might be deliberate, when the practice of legal officials shifts due to a constitutional

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<sup>100</sup> Blokker, *Populism as a Constitutional Project*, 548.

<sup>101</sup> Tsiftoglou, A. “Greece after the memoranda: a constitutional retrospective.” GreeSE papers (132). The London School of Economics and Political Science, London, UK.  
[http://eprints.lse.ac.uk/100400/1/GreeSE\\_No132.pdf](http://eprints.lse.ac.uk/100400/1/GreeSE_No132.pdf)

<sup>102</sup> Hart, *Concept of Law*, 109, 148, 251; cf. Tucker, *Uncertainty*; Raz, J. “On the Authority and Interpretation of Constitutions: Some Preliminaries.” In *Constitutionalism: Philosophical Foundations*, ed. L. Alexander, (Cambridge: Cambridge University Press, 1998). Cf. Hubbard, P. “Power to the People: The Takings Clause, Hart’s Rule of Recognition, and Populist Law-Making.” *University of Louisville Law Review* 50 (2011) 87, 125: “the rule of recognition cannot be stated in full...it is not necessary to state all the rule in order to apply it in a practical sense and to use it in a theoretical sense to develop the important underlying concept of a single unified rule for determining validity”.

<sup>103</sup> Hart, *Concept of Law*, 70.

<sup>104</sup> Hart, *Concept of Law*, 95, 101.

amendment<sup>105</sup> or to a landmark judicial decision<sup>106</sup> or they may be triggered by political turmoil (such as a revolution or a foreign occupation).<sup>107</sup>

The general characteristics according validity to a primary rule vary. These might concern both the *manner* in which laws are adopted or created by legal institutions and their *substance* (principles of justice or substantive moral values may be necessary characteristics and take the form of constraints to law-making).<sup>108</sup> In a simple system, the fact that a rule has been enacted by a specific body might be enough to accord legal validity to it,<sup>109</sup> whilst in more complex systems these criteria might include, *inter alia*, references to an authoritative text; to legislative enactment; to customary practice; to past judicial decisions or even to issues of substantive or political morality.<sup>110</sup>

#### **I) Democratic v populist rule**

The democratic rule of recognition aims to harmonise the actions of officials and to unify the legal system by reference to a widely accepted, democratic shared plan which provides for the main goals and values that the system should pursue and realise.<sup>111</sup> Its precise content varies between jurisdictions, but the overarching conditions of legal validity would include a properly elected legislature whose enactments are recognised as valid law in virtue of acting as the representative of the electorate;<sup>112</sup> an authoritative text which provides for procedural and, possibly, substantive

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<sup>105</sup> Edlin, D. "The Rule of Recognition and the Rule of Law." *The American Journal of Comparative Law* 64 (2) (2016) 371.

<sup>106</sup> See Tucker, *Uncertainty*.

<sup>107</sup> Hart, *Concept of Law*, 118.

<sup>108</sup> Hart, *Concept of Law*, 247, 248, 250, 269.

<sup>109</sup> Hart, *Concept of Law*, 95.

<sup>110</sup> Hart, *Concept of Law*, 100.

<sup>111</sup> Shapiro, *Rule of Recognition*.

<sup>112</sup> Hart, *Concept of Law*, 102, 107 envisages that the phrase 'What the Queen in Parliament enacts is law' is the UK rule of recognition.

conditions and also specifies the order of precedence of the rules;<sup>113</sup> and principles such as respect for the rule of law, international obligations and the protection of fundamental human rights.<sup>114</sup> The rule of law, in particular, is of paramount importance and is on a par with a qualified version of popular sovereignty as the ultimate criteria of legal validity in the democratic rule of recognition.<sup>115</sup> This is evident in the rule of recognition of the United States where the Constitution, being its main exponent, provides for the validity and hierarchy of rules by reference to both qualified democratic institutions and procedures and to substantive constraints, posed by a Bill of Rights and determined by the courts.<sup>116</sup>

Populism aims to amend the democratic rule of recognition and replace it with a version that purportedly reflects a return to ‘real’ democracy. By placing popular sovereignty and the general will of the people as the supreme criteria of validity, populism alters the order of precedence and subordination of the rules of the system. This reordering is paramount for the attractiveness of populism; while it appears corrective of democracy, it fundamentally alters the rule of recognition on which the whole system is founded. This change would provide for decisions in popular referenda to

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<sup>113</sup> Shapiro, *Rule of Recognition*, 84.

<sup>114</sup> See Bingham, T. *The Rule of Law*. (London: Penguin, 2011).

<sup>115</sup> The rule of law has been beautifully described as “one star in a constellation of ideals” by Waldron, J. “Rule By Law: A much Maligned Proposition.” In NYU School of Law, Public Law Research Paper No. 19-19, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3378167](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378167)

<sup>116</sup> For example, *Marbury v. Madison* inserted judicial review in the rule of recognition which was subsequently accepted by officials and citizens. Cf. Carey, *What is the Rule of Recognition*.

override parliaments<sup>117</sup> and ‘national consultations’ to inform the decisions of the judiciary.<sup>118</sup> In virtue of this reordering of the criteria for validity, rules conflicting with the will of the people (and their standards of morality as discerned by populists)<sup>119</sup> should be set aside, even if these reflect a commitment to the rule of law or provide for the protection of fundamental human rights.

In addition to the reordering of the criteria, the populist reconstruction of the democratic rule of recognition involves a revision of the meaning of fundamental concepts. While promoting a different understanding of popular sovereignty as discussed above, populism claims compatibility

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<sup>117</sup> In addition to the British referendum on the EU, one can indicatively refer to the statement by Zoe Konstantopoulou, then President of the Hellenic Parliament, on the night of the announcement of the Greek referendum in July 2015, who reified the will of the people as the constituent power in contradistinction to “those who seek to abolish the constitution and the democracy through blackmail and force”.

(<https://www.tanea.gr/2015/06/27/politics/epiklisi-toy-114-ekane-i-zwi-kwnstantopoyloy-eksw-apo-to-maksimoy/>)

<sup>118</sup> ‘National consultations’ are organised by the Hungarian government, in the form of e.g. a survey of citizens’ views on the issue of segregation of schoolchildren, in response to a recent court decision. Following a similar ‘national consultation’ the “Stop Soros” laws survived domestic judicial review, despite their alleged violation of EU law and fundamental human rights. (<https://freedomhouse.org/country/hungary/freedom-world/2020>.) However, ‘national consultations’ per se could – under certain circumstances – be considered as “creative populist institutions consistent with constitutionalism”, as described by Bugarcic / Tushnet, *Populism and Constitutionalism*, 60.

<sup>119</sup> The Hungarian national consultation will be “about restoring moral order”.

(<https://www.irishtimes.com/news/world/europe/national-consultation-looms-as-court-defeats-anger-orban-1.4174030>).



with the rule of law provided that the meaning of this concept is modified.<sup>120</sup> For the soundness of this statement to be examined, an analysis of the various versions of this ambiguous concept is necessary.

## II) Democracy, Populism and (which) Rule of Law

The rule of law theory is divided between teleological and anatomical approaches.<sup>121</sup> The first suggests that the rule of law is a means to an end, so the objectives that it aspires to serve must be clearly stated (and scrutinised) at the outset<sup>122</sup> in order to evaluate its effectiveness and merit.<sup>123</sup> For example, regardless of its substance, if its main objective is to protect individuals against the potential of arbitrary exercise of power,<sup>124</sup> then the rule of law is incompatible with absolute sovereignty.<sup>125</sup> Similarly, if law is instrumentalised to attain the perpetuation of popular sovereignty, there is hardly anything that prevents the ‘rule *by* law’ to be rephrased into a ‘rule *of* law’ for those who see this as a valid objective and understand the term in minimal, purely formalistic, terms.<sup>126</sup>

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<sup>120</sup> Shortly after the publication of the 2020 Rule of Law report by the Commission, Hungary and Poland announced the set-up of their own rule of law institute. <https://www.politico.eu/article/poland-and-hungary-charge-brussels-with-double-standards-on-rule-of-law/>

<sup>121</sup> For a concise exploration of ‘anatomical’ and ‘teleological’ theories of rule of law, see Krygier, *Rule of Law*.

<sup>122</sup> Krygier, M. “The Potential for Resilience of Institutions to Sustain the Rule of Law”, *Hague Journal on the Rule of Law* 12 (2020), 205–213, 206.

<sup>123</sup> Ginsburg, T. “Difficulties with Measuring the Rule of Law.” In *Handbook on the Rule of Law*, 48-56.

<sup>124</sup> Krygier, M. “Tempering Power.” In *Constitutionalism and Rule of Law: Bridging Idealism and Realism* eds. Adams, M., E. Ballin and A. Meuwse (Cambridge: Cambridge University Press, 2017), 34–59; Krygier M. and A. Winchester, “Arbitrary Power and the ideal of the rule of law.” In *Handbook on the Rule of Law*, 75-95.

<sup>125</sup> Tamanaha, B.Z. *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 92.

<sup>126</sup> Peerenboom, R., “Varieties of rule of law: An introduction and provisional conclusion.” In *Asian Discourses of Rule of Law*, ed. R. Peerenboom (London: Routledge Curzon, 2004); Cf. Krygier, *Why the Rule of Law Matters*, 152; Fuller, L., “Positivism and Fidelity to Law: A Reply to Professor Hart.” *Harvard Law Review* 71 (1957-8) 630, 650.

On the other hand, most legal theorists follow an anatomical approach.<sup>127</sup> Determining its typology by reference to content, ‘formal’ versions of the rule of law are often contrasted to ‘thick’ or ‘substantive’. Formal theories focus on the proper sources of and procedures for legality whilst the Substantive include requirements about the content of the law (usually that it must comport with justice or moral principles).<sup>128</sup>

It has been suggested<sup>129</sup> that the thinnest Formal version is ‘Rule *by* Law’ in which all utterances of the sovereign, because they are utterances of the sovereign, are law and all government action is authorised by law. However, understood in this way, the rule *of* law has no real meaning as it collapses into the notion of rule by the government, a feature that every modern state has.<sup>130</sup> In this narrow sense, the law exists not to limit the state but to serve its power.

The second version, ‘Formal Legality’ is dominant among legal theorists.<sup>131</sup> This requires the presence of formal criteria (e.g. generality, clarity, public promulgation, stability over time, non-

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<sup>127</sup> Krygier, *Why the rule of law matters*, 147-48.

<sup>128</sup> Tamanaha, *Rule of Law*, 92. Substantive versions are dominant in the continental legal theory and have influential adherents in the Anglo-Saxon world (e.g. Bingham, *Rule of Law*); for the German approach: Pierot, B., “Historische Etappen des Rechtsstaats in Deutschland.” *Jura* 10 (2011); for France: Heuschling, L. ‘Etat de droit.’ In *L’influence du droit européen sur les catégories juridiques du droit publique* ed. Auby, J.B. (Dalloz, 2010), 549.

<sup>129</sup> See, for example, Neumann, F. “The Change in the Function of Law in Modern Society.” In *The Rule of Law Under Siege* ed. Scheuerman, W. (Berkeley: Univ. of California Press 1996), 104; This view was discredited by Raz, J. *Authority of Law* 212–13; Waldron, J. “Rule by Law: A much Maligned Preposition.” NYU School of Law, Public Law Research Paper No.19 ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3378167](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378167)) presents the complexities of the distinction between rule *of* law and rule *by* law and offers a nuanced analysis of whether the denigration of *rule by law* is warranted or desirable.

<sup>130</sup> Tamanaha, *Rule of Law* 92; cf. Krygier, *Rule of Law*, 234.

<sup>131</sup> E.g. Tamanaha, *Rule of Law*; disputed by Bedner, A. “The Promise of a Thick View.” In *Handbook on the Rule of Law* 34-47.

retroactivity)<sup>132</sup> promoting the certainty and predictability of *rules* as opposed to ad hoc *orders*.<sup>133</sup> Having no content requirements and saying nothing about how the law is to be made, by tyrants or democratic majorities, this thin account of the rule of law is susceptible to abuse.<sup>134</sup>

The thickest formal version is concerned with how the content of law will be determined<sup>135</sup> and adds ‘Democracy’ to ‘Formal Legality’. These are mutually constitutive for without formal legality, democracy can be circumvented (because government officials can undercut the law) and without democracy formal legality loses its legitimacy.<sup>136</sup> Nevertheless, these democratic participatory mechanisms do not guarantee expedient and benevolent but only legitimate laws, by allowing an equal opportunity to participate and securing everyone’s consent.

The Substantive version of the rule of law is an amalgam of democracy, formal legality and individual rights.<sup>137</sup> In that version, individual rights do not merely form the content of positive law, but they are the wider background and integral aspect of its fabric.<sup>138</sup> This version reserves a central place for an independent judiciary. As the meaning and reach of moral and political principles are

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<sup>132</sup> Raz J. *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 211; Møller, J. “The Advantages of a Thin View.” In *Handbook on the Rule of Law* 21-33.

<sup>133</sup> Rijpkema, P. “The rule of law beyond thick and thin.” *Law and Philosophy* 32(6) (2013), 813.

<sup>134</sup> Raz, J., ‘The Rule of Law and its Virtue’ *Law Quarterly Review* 93 (1977) 197, 214; Raz, *Authority of Law*, 211; Fuller, *Morality of Law*, 153; Summers, R.S. “A Formal Theory of the Rule of Law.” *Ratio Juris* 6 (2) (2007), 127 – 142, 136.

<sup>135</sup> Habermas, *Between Facts* 449, 189; Tamanaha, *Rule of Law*, 99

<sup>136</sup> Tamanaha, *Rule of Law*, 99-100.

<sup>137</sup> Allan, T.R.S. *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press, 1993), 21–22; However, many rule of law definitions do include human rights but exclude the procedural element of democracy.

<sup>138</sup> Dworkin, R. “Political Judges and the Rule of Law.” *Proceedings of the British Academy* 64 (1978), 259, 262.

often unclear and go beyond the ‘rule book’ applied by judges, the latter are authorised to resolve controversies (by reference to the values of the community).<sup>139</sup>

The aspiration of democracy is to be compatible with all versions of the rule of law. Provided that the system comports with the procedural requirements envisaged by formal legality, implement sophisticated and rigorous accountability processes and have a system of separation of powers and checks and balances which allows for an independent judiciary, democracy and the rule of law are ‘mutually constitutive’.<sup>140</sup> Democratic law is binding not as an ‘utterance of the sovereign’ but as the product of public space. To prevent arbitrary rule, the will of the people is checked both by reference to individual rights and by shifting from a vote-based to a consent-based legitimation of decisions.<sup>141</sup> The commitment of (liberal) democracy to individual liberty makes its potential to attain the thickest versions of the rule of law realistic.<sup>142</sup>

Populism in power, conversely, as extreme majoritarianism, is possibly the ‘rule by law’ system *par excellence*.<sup>143</sup> Its laws are legitimated as ostensibly grounded on popular sovereignty and majority rule. Populists, manipulating the (thinnest version of the) rule of law, are then free to rule *by* law, for the laws of the system are utterances of the ‘sovereign people’, especially when these are direct expressions of their will as, for example, in referendums.<sup>144</sup> In that respect, not only government

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<sup>139</sup> Dworkin, *Political Judges*, 268.

<sup>140</sup> Habermas, J., “On the Internal Relation between the rule of law and democracy.” *European Journal of Philosophy* 3 (1) (1995), 12-20.

<sup>141</sup> Tamanaha, *Rule of Law*, 100.

<sup>142</sup> Hutchinson, A. and P. Monahan, “Democracy and the Rule of Law.” In *The Rule of Law: Ideal or Ideology*, eds. Hutchinson A. and P. Monahan (Toronto: Carswell, 1987), 100.

<sup>143</sup> Waldron, *Rule by Law*, 14-17 described the ways in which *rule by law* deserves to be called as such (e.g. the rulers accept the formal discipline of legality, observe due process, choose to govern by law that is properly publicised, not retrospective or unduly vague rather than by arbitrary decrees, accept to be constrained by formal and procedural requirements) and, as a result, narrows the gap with the formal versions of the *rule of law*.

<sup>144</sup> Cf. Bugarcic / Tushnet, *Populism and Constitutionalism*, 44-60.

action will be authorised by law but obedience to the (populist) law is essential for the perpetuation of popular sovereignty.

In principle, populism might be compatible with most criteria of Formal Legality but in practice it appears to fall short of attaining the prevention of arbitrariness, which is the fundamental aim of the rule of law. In populist systems, the objective of legal certainty might become unattainable due to ambiguous laws, frequent constitutional interventions, and rapid and unpredictable shifts of popular opinion.<sup>145</sup> Alternatively, if the populist leader interprets and enacts the general will of the homogeneous people as fixed and petrified, legal certainty might be attained, however detrimental to the out-groups.

The putative aspiration of populism is the attainment of the “Democracy + Formal Legality” version of the rule of law, notwithstanding the caveats concerning the compatibility of popular sovereignty with legal certainty and an independent judiciary. Regarding the ‘Democracy’ component, populism promises a return to its purest form in which sovereignty is absolute and politics is an expression of the general will of the people. However, as already discussed, problems arise with populism’s curtailment of pluralism, public contestation and inclusivity. Despite its pledge for a revival of real democracy, populism’s anti-pluralist ontology and antagonistic cosmology are incompatible with the ‘Democracy’ and the Substantive elements of the rule of law.<sup>146</sup> Unless there is a strong communal belief in natural or divine law, any legal enactment of rights would be selective, fragile, tendentious and vulnerable to shifts in popular opinion.

To conclude, the relationship of democracy and populism with the rule of law depends on two variables: the purpose that the rule of law is envisaged to serve, and the version applied. Democracy often prioritises its liberal aspect which subordinates popular sovereignty to individual rights and, thus, aspires to attain a thick, substantive rule of law as the ultimate criterion of legal validity. Populism, on the other hand, gives precedence to an absolute popular sovereignty and opts to

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<sup>145</sup> Blokker, *Populism as a Constitutional Project*, 546.

<sup>146</sup> This has raised a concern over subjecting questions about individual rights to referendums. See Bugaric / Tushnet, *Populism and Constitutionalism*, 55 with n. 94.

instrumentalise a thin, formal version of the rule of law to serve that end. While the rule *by law* might still be part of its rule of recognition, the Democratic formal and substantive versions of the rule of law are incompatible with populism, as they appear to be incompatible with any ideology envisaging unlimited sovereignty. Although the populist instrumentalisation of law has been discussed in pejorative terms, it can still “be a rule of law success story in formal terms, while systematically violating the underlying values of the rule of law”.<sup>147</sup>

## CONCLUSION

A robust conceptualisation of populism is inseparable from a rigorous examination of its relationship with democracy and the rule of law. Democracy and populism are both grounded on popular sovereignty and majority rule. Yet, democracy’s pluralism finding expression in a dynamic public space clearly opposes it to populism which suggests that the will of the people is fixed and indisputable. Similarly, democracy’s commitment to the protection of individual rights is in stark contrast to populism’s view of an absolute and unlimited sovereignty. A novel conceptualisation of populism, in addition to acknowledging the malleability of this phenomenon, has to take into account its possible compatibility with thin versions of the rule of law. Democracy’s adherence to a substantive version of the rule of law is certainly a distinguishing factor with populism, though what predominantly determines their relationship is the extent of the latter’s challenge to the foundational rules of the system.

The impact of populism on democracy largely depends on and should be measured by reference to the severity of its attempt to alter the democratic rule of recognition, reconstruct its content and, thus, subvert the social foundations of the democratic constitution. By virtue of this, populism seeks to instrumentalise the rule of recognition to make its ‘people’ sovereign. While a thin rule *by law* can still be part of the populist rule of recognition, it has to be subordinated to the will of the people, which is the ultimate criterion of legal validity. The insertion of moral considerations as

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<sup>147</sup> Krygier, *Potential for Resilience*, 210.

additional criteria allows populism to sustain and, when in power, implement its narrative that politics ought to be the expression of the will of the pure people as opposed to the corrupt elite.

The populist impact on the democratic rule of recognition provides scholars with a relatively stable point of reference for measuring the effect of populism on democracy. By making its recommended set of ideas and definition of concepts part of the rule of recognition, which as a social rule relies on widespread acceptance, populism has the potential to gradually acquire the status of a full ideology. Further empirical study is necessary along these lines, this time having a concrete basis to test this contested concept.