Populist Constitutionalism and the Concept of the Constitution

Fardin Moradkhani[1]

1. Associate Professor, Department of Law, Bu-Ali Sina University, Hamedan, Iran

* Corresponding Author Email: f.moradkhani@basu.ac.ir

Abstract

Constitutionalism is one of the important concepts of legal science, especially in constitutional law. In this regard, this concept has been formed in many interpretations in legal thought. One of the types of this concept is populist constitutionalism, which has attracted the attention of legal scholars in the last decade. The constitution for populists has a different meaning from its common meaning among lawyers. Therefore, some issues included in the constitution, such as constitutional review and elections, and an independent judiciary, are transformed in populist thought. Populist constitutionnail-sm's view of the constitution is instrumental. By relying on the concept of the people, they try to eliminate intermediary institutions such as representation and oppose ideas related to democracy.

This article, using a descriptive-analytical method and relying on the most important sources on this concept as well as a comparative study of the subject in different countries, seeks to answer the question of what populist constitutionalism is and what its characteristics are.

To answer these questions, it is necessary to have an understanding of the concept of the constitution in order to discuss the populist view of the constitution and its elements and content. Regarding the necessity of conducting this research, it should be said that conducting such research in our country is necessary to gain a deeper understanding of constitutionalism and the constitution, and to pay attention to the fact that sometimes some criticisms of the constitution and democracy can lead to the emergence of other phenomena and have unwanted consequences for the legal system. In a country like Iran, which is trying to establish the rule of law by relying on the constitution, understanding such concepts is very necessary, because it can make us aware of the dangers and traps that exist on this path. For example, emphasizing the role of the people is very desirable, but paying too much attention to it may lead to achievements that are contrary to the goal of democracy. Although there is a vast literature on populism, the term populist constitutionalism is new and has only recently attracted the attention of scholars due to new forms of government and some political and legal events. Scholars see populist constitutionalism as a form of constitutional critique and anti-constitutionality rather than an outright rejection of liberal constitutionalism and the rule of law that undermines the democratic potential of constitutionalism. Populists claim to represent the people and their voices and emphasize the primacy of politics over law. Populism opposes judicial supremacy, in which the final interpreter of the

constitution is the judiciary and the Supreme Court. Populists attack judicial oversight as elitist, anti-democratic, and an obstacle to vital policies. Judges, they argue, have elitist educational and financial backgrounds. Historically, they have been predominantly white and male. Granting judicial oversight power to a lifelong judiciary reduces the scope for politics and the power of other political actors.

Populism is a product of democracy and a reaction to it. In other words, on the one hand, populism denies and criticizes democracy, the rules of the democratic game, and the mechanisms set out in the constitution to limit power, and on the other hand, it claims to implement the full and true rule of the people. The heart of populism is the concept of the people, and populists claim the rule of the people, hence they strongly oppose concepts such as representation, majority vote, and constitutional review. Populists accept the rules of the democratic game until they come to power, and as soon as they win the elections and take power, they criticize the system and start violating the rules. To achieve their goals, they first reform the law and try to consolidate their power with changes such as making the presidency permanent. They do not dissolve institutions such as elections and judicial review, but they empty these institutions from the inside by changing the election laws and changing the composition of judges. Concepts such as political constitutionalism and popular constitutionalism, as well as Tushnet's understanding and interpretation of populist constitutionalism, are closely related to populism. There are two points about these concepts. First, populists use these concepts to justify themselves and claim that they are all moving in the same direction and toward the same goal. This is while concepts such as popular and political constitutionalism do not deny democracy and believe in the rules of the democratic game and the issues and concepts of constitutional law and never seek to negate them and in this respect, they are distinct from populists. The second point is that the proponents of these concepts have focused most of their attention on criticizing judicial review and are seeking to both address the realities of politics and the relationship between law and politics more and to highlight the role of the people in it. In Iran, they are sometimes accused of populism regarding the performance of some governments. There is a lot of criticism of democracy from some politicians. Also, the relationship between democracy and populism, and topics such as criticism of the Supreme Court and concepts such as political constitutionalism and popular constitutionalism can be very helpful for discussions of Iran's constitutional law and deeper analysis.

Keywords: Political constitutionalism, popular constitutionalism, populist constitutionalism, constitution, constitutionalism.

References

Books

1. bellamy, Richard. (2007). ***Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy***. Cambridge University Press.
2. Blokker. Paul, (2018). "Populist Constitutionalism", in ***Rutledge Handbook of Global Populism*** (Carlos de la Torre ed. Rutledge university press.
3. Blokker.Paul, (2013). *New* ***Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia***. Rutledge university pres.
4. Canovan, M. 'Taking politics to the people: Populism as the ideology of democracy', in Yves Mény, Yves Surel (eds), (1998). ***Democracies and the populist challenge***, Palgrave press.
5. Canovan, Margaret, (2002). "Taking politics to the people: Populism as the ideology of democracy", in ***Democracies and the Populist Challenge***. Yves Mény, Yves Surel eds. Palgrave Macmillan.
6. Eisgruber, Christopher L. (2001). ***Constitutional Self-Government.*** Cambridge: Harvard University Press.
7. Espejo. Pierre Ostiguy (ed.) (2018). ***The Oxford Handbook of Populism.*** Oxford university press.
8. Fallon. Richard H. Jr.(2001). ***Implementing the Constitution***. Harvard University Press.
9. Fraenkel. Ernst. E a Shils. (Translator), Edith Lowenstein, (2010). ***The Dual State: A Contribution to the Theory of Dictatorship*** (Lawbook Exchange, Ltd.; Law book Exchange ed. Edition.
10. Fusaro, Carlo & Dawn Oliver, (2011). Towards a Theory of Constitutional Change', in ***How Constitutions Change: A Comparative Study*** (Dawn Oliver & Carlo Fusaro eds. Hart Publishing.
11. Gardbaum, Stephen, (2013). ***The New Commonwealth Model of Constitutionalism: Theory and Practice.*** Cambridge University Press.
12. Gyorfi, Tamas, (2016). ***Against the New Constitutionalism*** (Elgar Monographs in Constitutional and Administrative Law). Edward Elgar Publishing.
13. Kahn, Paul (2011). P***olitical theology: four new chapters on the concept of sovereignty***. Columbia University Press.
14. Kaidatzis. Akritas, Eleni Kalampakou, Ifigeneia Kamtsidou. The People's Constitution: The Populist Transformation of Constitutional Law? (Springer2024)
15. Klug. Heinz, (2000). ***Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction.*** Cambridge University Press.
16. Kramer, Larry D. (2004). ***The People Themselves. Popular Constitutionalism and Judicial Review***. New York: Oxford University Press.

17. la Torre. Carlos de, (2010). ***Populist Seduction in Latin America***. Ohio University Press.
18. Laclau. Ernesto, (2005). ***On Populist Reason***. Verso; Reprint edition.
19. Lefort. Claude, (1986). ***The Political Forms of Modern Society Bureaucracy, Democracy, Totalitarianism***. The MIT Press.
20. Mouffe. Chantal (2019). ***In Defense of Left Populism, translated by Behzad Niaz Azari***, Tehran: QaseedaSara Publication. [in Persian]
21. Mudde. Cas, Cristóbal Rovira Kaltwasser, (2017). ***Populism: A Very Short Introduction***. Oxford University Press.
22. Müller, Jan Werner (2017). ***What is Populism, translated by Babak Vahedi***, Tehran: Bidgol Publications. [in Persian]
23. Müller, Jan-Werner (2016). ***What Is Populism*?** University of Pennsylvania Press.
24. Müller, Jan-Werner (2018). "Populism and Constitutionalism", in: Cristóbal Rovira Kaltwasser.Paul Taggart, Paulina Ochoa Espejo. Pierre Ostiguy (ed.) ***The Oxford Handbook of Populism***. oxford university press.
25. Papastylianos, Christos (2024). ***Populism and Constitution Making Process***. In European Union and Its Neighbours in a Globalized World. Springer Nature. p 29-49.
26. Sajó, András, Renáta Uitz. (2017). ***The Constitution of Freedom: An Introduction to Legal Constitutionalism***. Oxford University Press.
27. Schmitt, carl. (2008). ***Constitutional Theory***. Translated by Jeffrey Seitzer. Duke University Press.
28. Stambulski. Michał. (2024). "Constitutional Populism beyond the Liberal Framework. Adam Czarnota's Program for Sociology of Constitutions". In: ***The Law is for the Citizens, so it Should Serve Them***, ed. W. Zomerski, F. Cyuńczyk, P. Eckhardt, M. Paździora, Scholar.
29. Taggart, Paul (2002). ***Populism, translated by Hassan Morteza***, Tehran: Ashian Publication. [in Persian]
30. Taggart, Paulina Ochoa Espejo. Pierre Ostiguy (ed.). ***The Oxford Handbook of Populism*.** Oxford university press.
31. Thornhill, Christopher, (2017). "A Tale of Two Constitutions. Whose Legitimacy? Whose Crisis? in Brexit: ***Sociological Responses (Key Issues in Modern Sociology)***. William Outhwaite ed. Anthem Press.
32. Tushnet, Mark (2018). "Comparing Right-Wing and Left-Wing Populism", ***Constitutional Democracy in Crisis?***. Mark A. Graber, Sanford Levinson & Mark Tushnet eds. Oxford University Press.
33. Tushnet,Mark. (1999). ***Taking the Constitution Away from the Courts***, Princeton, NJ: Princeton University Press.
34. Urbinati. Nadia, (2014). ***Democracy Disfigured: Opinion, Truth***, *and the People*. Harvard University Press.

35. Urbinati. Nadia, (2018). "Populism and the Principle of Majority", in Cristóbal Rovira Kaltwasser. Paul Taggart, Paulina Ochoa Espejo. Pierre Ostiguy (ed.) ***The Oxford Handbook of Populism.*** Oxford university press.
36. Waldron. Jeremy (1999). ***Law and Disagreement***. Oxford: Clarendon Press.
37. Young, Alison L. (2009). ***Parliamentary Sovereignty and the Human Rights Act.*** Hart Publishing.

Article

38. Alexander, Larry (2005). Lawrence B. Solum Solum, "Popular? Constitutionalism?" ***Harvard Law Review***. 118.991-1006.
39. Ameri. Zahra. masoumeh Ameri (2024). "A Comparative Study of Public Participation Instruments in Determining the Content of the Constitution" ***Contemporary Comparative Law Studies***. 15.(35) 141-167. [in Persian] Doi:10.22034/law.2024.57310.3288
40. Antal, A. (2017). 'The Political Theories, Preconditions and Dangers of the Governing Populism in Hungary'. ***Politologický časopis-Czech Journal of Political Science***, 24(1).
41. Balkin, Jack M. (1995). "Populism and Progressivism as Constitutional Categories," ***Yale Law Journal***. vol 104. 5-20.
42. Berlin, Isaiah, "To Define Populism", (1968) in The Isaiah Berlin Virtual Library.Available: http://berlin.wolf.ox.ac.uk/lists/ibliography/bib111bLSE.pdf. 1-15.
43. Blokker. Paul. (2019). "Populism as a Constitutional Project". Paper presented at the workshop 'Public law and New Populism', ***NYU School of Law***. 296-313.
44. Blokker. Paul. (2019). "Varieties of populist constitutionalism: The transnational dimension". ***German Law Journal***, 20(3), 332-350.
45. Blokker. Paul, (2005). "Populist nationalism, anti-Europeanism, post nationalism, and the East-West distinction" ***German Law Journal***, 6(2) 371-389.
46. Blokker. Paul. (2019). "Populism as a Constitutional Project". ***International Journal of Constitutional Law***, 17(2), 536–553.
47. Brettschneider, Corey. (2006). "Popular Constitutionalism and the Case for Judicial Review". ***Political Theory***. 34. 516-521.
48. Brubaker. Rogers, (2017). "Why populism?", ***Theory and Society***, 46(5), 357-385.
49. Brugger, Winfried, (2003). "Communitarianism as the Social and Legal Theory Behind the German Constitution", ***International Journal of Constitutional Law***, 2(3), 431–460.
50. Chambers. Simone, (1998). "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis", ***Politics & Society***. 26. 143-172.
51. Couso, J. (2012). "Law, rights and social change in Latin America: Competing models of constitutionalism in an era of uncertainty", available at: http://www.derecho.uba.ar/academica/posgrados/2012_javier-couso.pdf.

52. Donelly, Tom, (2012). "Making Popular Constitutionalism Work". Wisconsin Law Review. ***Harvard Public Law Working Paper***. 160-193.
53. Gee, Graham (2008). "The political constitutionalism of JAG Griffith," ***Legal Studies***. 28. 20-45.
54. Goldoni, Marco, (2012). "Two Internal Critiques of Political Constitutionalism", ***International Journal of Constitutional Law***. 10. 926–949.
55. Goldoni, Marco, (2014). "Political Constitutionalism and the Question of Constitution-Making," ***RATIO JURIS***. 27. 387-408.
56. Griffith, J.A.G. (1979). "The political Constitution," ***Modern Law Review***. 42(1), 1-21.
57. Halmai, Gabor, (2018). "Is there Such Thing as 'Populist Constitutionalism'? The Case of Hungary", ***Fudan Journal of the Humanities and Social Sciences***. 11(3), 323-339.
58. Halmai, Gábor, (2018). "Is There Such Thing as 'Populist Constitutionalism? The Case of Hungary", ***Fudan Journal of the humanities and social sciences***, 11(3), 323-339.
59. Halmai. Gábor, (2018). "The Abuse of Constitutional Identity. The Hungarian Constitutional Court on the Interpretation of Article E) (2) of the Fundamental Law", ***Review of Central and East European law***, 43(1), 23-42.
60. Halmai. Gábor. (2019). "Populism, authoritarianism and constitutionalism". ***German Law Journal***, 20. 296 – 313.
61. Hayden. Robert, (1992). "Constitutional Nationalism in the Formerly Yugoslav Republics", ***SLAVIC Review***. 51. 654-673.
62. Hiebert, Janet, (2006). "Parliamentary Bill of Rights. An Alternative Model?", ***Modern Law. Review***. 69. 7-28.
63. Howse. Robert, (2017). "Populism and Its Enemies", Workshop on Public Law and the New Populism, Jean Monnet Center, ***NYU Law School***, Sept. 296-313.
64. Kaidatzi. Akritas. (2019). "Populist / popular / political constitutionalism". IVR World Congress, Dignity, Democracy, Diversity, The 29th World Congress of the International Association for the Philosophy of Law and Social Philosophy– Workshop on Alternatives to Liberal Constitutionalism: Popular, Political, ***Deliberative, University of Lucerne***, 11-12.
65. Kaidatzis. Akritas. (2018). "Populist Constitutionalism as a Critique on Liberal (or Legal) Constitutionalism". Paper submitted to the Workshop 'New constitutionalism? New forms of democracy and rule of law beyond liberalism', ***International Institute for the Sociology of Law***, Oñati 12-13.7. 1-18.
66. Kavanaugh, Aileen, (2003). "Participation and Judicial Review: A Reply to Jeremy Waldron" ***LAW AND PHILOSOPHY***. 22. 451-486.
67. Khalilzadeh. Mohammad. Mohammad Jalali "Recall, Case Study of the United States Legal System" ***Contemporary Comparative Law Studies***. 14(33), 33-71. [in Persian] Doi: 10.22034/law.2023.55736.3250

68. Knowles, Helen J. & Julianne A. Toia, (2014). "Defining 'Popular Constitutionalism': The Kramer versus Kramer Problem," ***Southern University Law Review***. 118(5), 1594-1640.
69. Kramer, Larry D. (2004). "Popular Constitutionalism," ***California law review***. 92.959-1012.
70. Kramer, Larry D. (2005). "Undercover Anti-populism," ***Fordham Law. Revew***. 73. 1343-1359.
71. Kramer, Larry D.(2001). "The Supreme Court 2000 Term Forward: We the Court," ***Harvard Law Review***, 115. 4-169.
72. Landau, David, (2013). "Abusive Constitutionalism" ***UC Davis Law Review***. 47(1) 189-260.
73. Landau, David (2018). "Populist Constitutions", ***University of Chicago Law Review***, Vol. 85(3) 521-544.
74. Law, David S. & Mila Versteeg, (2013). "Sham Constitutions", ***California Law Review***. 101. 863-952.
75. Moyn, Samuel (2021). "On Human Rights and Majority Politics", ***Vanderbilt Law Review***. 52
76. Mudde & Crist´obál Rovira Kaltwasser (2013). "Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America", ***Government and Opposition***, 48(2) 147 – 174.
77. Mudde, C. (2013). 'Are Populists Friends or Foes of Constitutionalism?', The Foundation for Law, Justice and Society in association with the Centre for Socio-Legal Studies and Wolfson College, University of Oxford. http://www.fljs.org/-sites/www.fljs.org/files/publications/Mudde_0.pdf. 1-7
78. Nash, K. (2016). "politicising human rights in Europe: Challenges to legal constitutionalism from the Left and the Right". ***The International Journal of Human Rights***, 20(8).
79. Norris.Pippa, (2017). "Is Western Democracy Backsliding? Diagnosing the Risks", ***HKS Working Paper***. No. RWP17-012.1-26.
80. Parker, Richard D. (1993). 'Here, the people rule': A constitutional populist manifesto," ***Valparaiso University Law Review***. 27.531-584.
81. Postt, Robert & Reva Siegelt(2004). "Popular Constitutionalism, Departmentalism, and Judicial Supremacy". ***California La W Review***. 92.1027-1044.
82. Pozen, David E. (2010). "Judicial Elections as Popular Constitutionalism," ***Columbia Law Review***. 110. 2047-2134.
83. Roach, Kent, (2004). "Dialogic Judicial Review and its Critics", ***Supreme Court Law Review***, 23(49) 49-104.
84. Scheppele, Kim Lane (2004). 'Counter-constitutions: Narrating the Nation in Post-Soviet Hungary', ***paper given at George Washington University, Washington DC,*** 2 April 519 – 543.

85. Scheppele, Kim Lane (2018). "Autocratic Legalism", ***University of Chicago Law Review***. 85. 545-584.
86. Siegel, Jonathan R. (2012). "The Institutional Case for Judicial Review," ***Iowa Law Review***. 97.1147-1199.
87. Tushnet, Mark (2003) "Alternative Forms of Judicial Review", ***MICHIGAN Law. Reniew***.101.2781-2802.
88. Tushnet, Mark (2015). "Constitutional Law: Critical and Comparative" ***Harvard Public Law Working Paper***.15-09.1-11.
89. Tushnet, Mark (2013). "The Relation between Political Constitutionalism and Weak-Form Judicial Review", ***Journals German Law Journal***. 14(12).2249-2263.
90. Tushnet. Mark, (2017). "The Possibility of Illiberal Constitutionalism", ***Florida law review***. 69.1367-1384.
91. Tushnet.Mark. (2006). "Popular constitutionalism as political law", ***Chicago-Kent Law Review***. 81. 991-1006.
92. Urbinati, N. (1998). 'Democracy and populism,' ***Constellations***, 5(1) 110-124.
93. Waldron, Jeremy (2006). "The Core of the Case Against Judicial Review", ***YALE Law. Journal***. Vol115.1346-1406.
94. Waldron. Jeremy, (2010). Constitutionalism-A Skeptical View http://scholarship.-law.georgetown.edu/hartlecture/4. 1-46.
95. Werhan. Keith. (2012). "Popular Constitutionalism, Ancient and Modern". ***University of California***, Davis. 46.65-131.