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## **Populism, authoritarianism and administrative law - reflections in the context of Central and Eastern Europe**

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### **Abstract**

*Administrative law is by its very nature populist, because its main function is to defend the individual against the abuse of power by the state authorities, so it is to act in favour of populis. Recent years have brought major social changes, including growing dissatisfaction with democratic institutions, authoritarian tendencies and the emergence of so-called “illiberal democracy”. These processes have a lot in common with administrative law, and in particular the tensions between the certainty experienced by lawyers in the understanding of administrative justice, and the uncertainty and confusion felt by those individuals and communities whom this system is intended to serve. Translating these dilemmas, appropriate for the application of administrative law, into a language comprehensible to the general public, may therefore have the potential to prevent public authority from slipping into authoritarianism. Administrative law, based on populist assumptions, may therefore become truly populist.*

### **Introduction**

One of the most important, if not the most important, functions of administrative law is the defence of the individual against the abuse of power by the state authorities. The fundamental constitutional principle that public authorities can act only on the basis and within the limits of the law is to protect citizens and ensure predictability of state actions by limiting the possibility of interference with their rights and freedoms. It can therefore be stated, that administrative law by its very nature is populist.

The rise of populism observed in recent years is linked to the fact that so-called “liberal democracy” often did not have any attractive offer to society as a whole, and focused — at least in the perception of a large part of the citizens — on improving the lives of the elites. A

large part of society therefore feels alienated and abandoned by democratic institutions. People are also less and less trusting in experts; disinformation and fake news are spreading.

Social and economic inequalities, tribalism and belief in “alternative facts” are growing, contrary to the rational legacy of the Enlightenment era. Experts are finding it increasingly difficult to explain the complicated reality in a language that is understandable to all and to be convinced of scientific reasons. Growing dissatisfaction with democratic institutions tilts the scale of populism and supports authoritarian tendencies.

These processes have a lot in common with administrative law. What’s more, one might ask whether lawyers have some responsibility for these trends and can they answer them? After all, lawyers are trained to seek answers using a rational method of reasoning, within an independent (and largely self-determined) logical structure. However, the logical process by which answers and solutions to complex problems is found, is not easy to understand for people who do not have the appropriate expertise.

### **Western and Eastern paradigm of public authority**

There are two paradigms of power in Europe, which translates into populism and the shape of democracy — liberal and illiberal. From the 5th to 6th centuries, Europe began to disconnect its two development paths: one is Western Europe, which in the Middle Ages from the 6th to 7th centuries, perhaps even until the 9th century, is actually a collection of policies, not subject to the rule of the central emperor. The emperor moved to Byzantium, therefore the cities and these Roman policies were free to develop. Byzantium did not fall until the middle of the 15th century, so for 1000 years it has developed and established a different model of public authority. What was going on in the East, was illustrated by Tsarist Russia, after that the Soviet Union, and now Putin Russia and some post-Soviet states.

These two paradigms of public authority — Western and Eastern — are defined by certain characteristics<sup>1</sup>. First of all: in the West, citizens have had influence on the shape of central and local authorities; local government have not depended on the centre. Even in those countries where people had no influence on who was to reign (become monarch), in the West the law very precisely determined how central power functioned and what were the relations between the various elements of power. The West has also been characterised by the division of power — legislative, executive and judicial branches, with checks and balances. On the other hand, in the Eastern paradigm of power, citizens have had no significant influence on the shape of central government. They had no such influence either in Byzantium, in Tsarist Russia nor during the Soviet Union times. This was evident, for example, in the appointment of the first secretaries of the party — how they were appointed, what mechanisms worked, how they gained power, was not transparent. What was important was the second element:

<sup>1</sup> Stępień J., *Wschodni i zachodni paradygmat władzy publicznej, Funkcjonowanie samorządu terytorialnego – uwarunkowania prawne i społeczne* Warszawa 2016 Redakcja naukowa A. Gołębiowska i P.B. Zientarski, Warszawa 2016 (Stępień J., *Eastern and Western paradigm of public authority, Function of local self-government – legal and social conditions* Warsaw 2016 Scientific Editorial Board A. Gołębiowska and P.B. Zientarski, Warsaw 2016)

citizens also have had no influence in the East on the shape of local authority — it all depended on the center.

One more, very important thing, in the West *lex est rex* - the law is king. In the East, the will of the emperor, the first secretary, president Putin prevails over the law. The slogan *lex est rex* was the slogan of the former First Polish Republic (1569-1795), and — in the form of *Rechtstaat* or *rule of law* — it is the slogan of the paradigm of public authority in Western Europe. As Hans Kelsen, the founder of the European concept of constitutional courts, writes, until there is an independent body capable of effectively overturning an unconstitutional law, the Constitution is only a collection of pious wishes — and if something is a collection of pious wishes, it is certainly not a normative act.

Properly implemented decentralisation and local self-government are one of the most important elements of the paradigm of public authority in the West. Local self-government also offers an alternative to populist governments — firstly, because “illiberal democracies” and populist governments tend to centralise power and deprive the self-government of powers<sup>2</sup>, promising the public better effectiveness of central government. Meanwhile, it is at the local level that the effects of properly conducted public policies and changes in public administration are best and fastest seen.<sup>3</sup>

Table 1

The Western Paradigm	The Eastern Paradigm
citizens have an influence on the shape of the central authority and the shape of the local authority;	power is not dependent on citizens at central or local level;
local authority does not depend on the center	local authority depends on the center
division of power, rule of law	unity of power, rule of the individual

Source: own elaboration on the basis of: Stępień J., *Wschodni i zachodni paradygmat władzy publicznej, Funkcjonowanie samorządu terytorialnego – uwarunkowania prawne i społeczne* Warszawa 2016 Redakcja naukowa A. Gołębiowska i P.B. Zientarski, Warszawa 2016 (Stępień J., *Eastern and Western paradigm of public authority, Function of local self-government — legal and social conditions* Warsaw 2016 Scientific Editorial Board A. Gołębiowska and P.B. Zientarski, Warsaw 2016)

<sup>2</sup> Sześciło D. *Is There A Room For Local And Regional Self-Government In The Illiberal Democracy? Struggle Over Recentralization Attempts In Poland*, *Studia Iuridica* LXXIX

<sup>3</sup> Barber B. (2013) *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities*, Yale University Press

### Populism and “illiberal democracy”

Populism is now probably the most popular explanation of the difficulties faced by modern governments. However, despite the great interest in populism as a political phenomenon, very little has been written about assessing the consequences for governance, and even less about the consequences for public administration and administrative law.

The general ideological trend of populist movements was the contrast between the “virtuous people” and the “corrupt elite”<sup>4</sup>. This lead is common in the current political discourse and also has long historical roots<sup>5</sup>. This “corrupt elite” is often identified as big business, but it is also a political establishment that is assumed to have no contact with these “virtuous masses”. Given this fundamental, dichotomic understanding of politics, populist politics revolves around replacing the corrupt elite with representatives of these “noble people.”

Populism therefore refers to political leaders and movements that emphasise the sellability of political leaders (including bureaucracy) and press for more power for the “people”. Moreover, although the rhetoric of populism is democratic, most contemporary populist politics are linked to pressures on illiberal democracy and “democratic deviation”<sup>6</sup>.

One of the features of populist politics is the takeover of power in the form of occupying the state and displacing the influence of its “corrupt predecessors”<sup>7</sup>. But rhetoric about the destruction of bureaucracy or “administrative state” is not accompanied by concrete actions or a consistent emphasis on changing the patterns of governance.

Populism deals with mass politics and the consequences of elections, while analyses of populism focus on the attractiveness of populist politics for voters<sup>8</sup> and the potential effects of voting on populists and influence on governments. But almost all the discussion about governance was limited to activities related to elections, political parties, social movements, and in some cases also legislators and courts. Little information can be found on the impact of populism on public administration, administrative law and even on the state in general.

The degree of disparity between populist literature and public policy research and administration can be seen by analysing the *Oxford Handbook of Populism*<sup>9</sup>. This rather extensive volume (more than 700 pages) does not contain a chapter on populism and public administration, and words such as “administration”, “bureaucracy”, “public governance” and “politics” do not appear in the index. One chapter (Müller, 2017), which contains two observations on the impact of populism, is closest to what the handbook seems to be about administration. First, populists tend to “occupy” the state, and secondly, they engage in mass clientelism.

<sup>4</sup> Mudde C. *Populism in the Twenty-First Century: An Illiberal Democratic Response to undemocratic Liberalism*, 2018, [www.sas.upenn.edu/andrea-mitchell-center/cas-Mudde-populism-twenty-first-century](http://www.sas.upenn.edu/andrea-mitchell-center/cas-Mudde-populism-twenty-first-century)

<sup>5</sup> Taggart, P. (2000). *Populism*. Buckingham, UK: Open University Press

<sup>6</sup> Yesilkagit, K. (2018). *Bureaucracy under authoritarian rule: Autonomy and resilience of administrative institutions under conditions of democratic backsliding*. Leiden University, The Netherlands

<sup>7</sup> Thompson, 2017

<sup>8</sup> Kaltwasser, Taggart, Espejo and Ostiguy, 2017

<sup>9</sup> Kaltwasser et al., 2017

The difference between democracy and “illiberal” democracy can be summarised as short as comparing a chair with an electric chair. Democracy, in the most simplified way, is the rule of the majority with respect of minority rights, together with appropriate mechanisms to control power. “Illiberal democracies” (e.g. in the sense of F.Zakaria<sup>10</sup>) retain certain elements of democratic governance, especially free elections, but seek to limit civil liberties and lift restrictions on power. “Illiberal democracy” undermines the value of institutional pluralism, in which local authorities — together with the private and non-governmental sectors, the judiciary and independent control bodies — limit the power of the central government and prevent the consolidation of public authority.

However, research on “illiberal democracy” and a new type of populism is at an early stage of development, with few empirical studies whose results can be extended to general conclusions. A more in-depth understanding of the attitude of “illiberal democracy” to the practice of populist governments could provide better preventive mechanisms that could effectively prevent populist authoritarianism from falling into populist authoritarianism. In Hungary, for example, illiberal democracy has become an official state doctrine. Prime Minister Viktor Orban said in his most famous speech: “We must say that democracy is not necessarily liberal. Just because something is not liberal, it can still be a democracy. Moreover, it can and should be expressed that it is likely that societies based on the principle of liberal state organisation will not be able to maintain their global competitiveness in the coming years and are more likely to fail unless they are able to make a fundamental reform<sup>11</sup>. These words show the challenge posed by the classical understanding of democracy and the context of sacrificing at least some rights and freedoms in the name of better competitiveness (whatever that means), greater efficiency of the state, strong-handed governments to provide citizens with a sense of security. The abandonment of the achievements of “liberal democracy”, the construction of another type of “democracy” (if it is still a democracy), reforming the state towards a unitary model of power and its transmission, the introduction of political, administrative and information monopolies, inevitably leads to authoritarianism. Its brightest, totalitarian example can be seen not only in North Korea, but now also in Russia and Belarus.

### Populism and Administrative Law

Who are “populists” and what is “populism”? It can be defined as a specific political style, a popular perspective and type of leadership, as well as an ideology or a political program. Populists have some common features, gathered here in the Weberian ideal type: a set of empirically perceptible properties of political leaders and their styles of governance. These common features include:

- anti-elite and anti-establishment rhetoric and orientation; populists portray existing ruling elites as corrupt, selfish, arrogant, exploitative, and often treacherous;

<sup>10</sup> F. Zakaria, *The rise of illiberal democracy*, “Foreign Affairs” 1997, issue 22

<sup>11</sup> <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>

- portraying yourself as the only legitimate “servants of the nation”; populists claim to be the only democrats, the only authentic representatives of “ordinary people.” All others are represented as unlawful representatives;
- the use of a language filled with emotions; populists specialise in vicious attacks on opponents — seen more as “enemies” than “rivals”; they refer to emotions rather than reason and fuel these emotions — especially fear, resentments and hope — skillfully using a wide set of mass media, especially social media;
- promise fast, simple and easy solutions to key problems and challenges facing the country; populists promise to “clean” politics (“swamp dehumidification”), introduce “true justice”, defend the “will of the nation”, national sovereignty, and restore dignity to the “nation.”<sup>12</sup>

At the core of the populist perspective is the notion of political power perceived as a tool of domination. This concept describes political struggles as “people against power”. Political power in this sense is mobilised “bottom-up” and performed legitimately only by “faithful servants of the nation” (a sarcastic term invented by Max Weber). Thus, the main political goal of the populists is to overthrow the “power of the elite” (oligarchic domination) and to ensure the “power of the nation” and the “universal will.” Populist leaders argue that this will is known only by them, and expressed by public opinion, mass referendums and popular plebiscites.<sup>13</sup>

Populist leaders are therefore mainly interested in rhetoric and gaining power. Their ability to perform it effectively is usually limited, because for complex problems there are usually no simple solutions that in their rhetoric so effectively mobilise the electorate in elections. Thus, the legal instrument of populist politicians oscillates around tools that centralise competences and decision-making processes, depriving the task and financial independence of local government, looking for legal custodians ensuring activity and making an impression on voters. The governments of a strong hand are supposed to arouse respect, admiration, trust, and above all a sense of security — which in turn is supposed to keep themselves in power. Against the opposition that can criticise their actions — whether this opposition will be competitive politicians, courts and judges, media or non-governmental organisations — will inevitably be attempted to be disposed of or eliminated to “do not interfere”.

Administrative law therefore has a very important role to play here. As a guarantor of civil rights and liberties, it should prevent abuse of power and the danger of falling from democracy to tyranny. It is in the interest of citizens to enforce electoral promises and to demand the effectiveness of state action, but not at the cost of centralising powers and moving towards illiberal democracy and authoritarianism. They must therefore be guarded by an effective law and the ability to enforce it, together with an independent judiciary and independent judges, as well as effective control mechanisms for the actions of the authorities.

<sup>12</sup> Jan Pakulski, *Populizm i perspektywa elity (Populism and Elite Perspective)*, Concilium Civitas, <http://conciliumcivitas.pl/populizm-i-perspektywa-elity/>

<sup>13</sup> Ibid.

## Populist Administrative Law (?)

The role of administrative law evolves with changes and subsequent paradigms of administration. During the period of dominance of the legalistic bureaucracy, administrative law served to delimit the spheres of freedom of the state and the freedom of the citizen, protecting the latter from abuse of power by the administration. Later, in the New Public Management model, administrative law was supposed to interfere with the effective functioning of the administration and emphasised the excess of regulation. The current populist tendencies, however, point to the need to return the protective function of administrative law, but not only to the sovereign actions of the administrative apparatus of the state, but to inequalities or restrictions on access to public services, which are inevitable in conditions of marketing the process of performing public tasks<sup>14</sup>.

There seems to be a considerable tension between the certainty experienced by lawyers in the understanding of administrative justice, and the uncertainty and confusion felt by those individuals and communities whose system is intended to serve. There is no doubt that reason and consistent application of principles are better than arbitrary whims of authoritarian power, but the important question remains, how are the courts to express justice, integrity and equity in a way that is accessible and appropriate to the layman?

Translating these dilemmas, appropriate for the application of administrative law, into a language comprehensible to the general public, seems to be the only appropriate way for the future of this branch of law in a democratic state. It also has the potential to prevent public authority from falling into authoritarianism. Administrative law, based on populist assumptions, may therefore become truly populist.

## Summary

Populism is perhaps the most important phenomenon in modern politics and administration. In different countries and in different ways, they are trying to give the "people" a more central and direct role in governing, and to reduce the power of elites who allegedly have no contact with them. Populist movements caused significant distortions in established political practices and required a rethink of the governance of the state. The disruption of the old order seems to have been successful, but replacing it with effective management mechanisms seems to be much less effective.

But the populists themselves seem to think less about government than about rhetoric and winning elections. Populist politicians do not have much to say about public administration and make the state more citizen-friendly, and often use them in a less sophisticated way in seeking the effectiveness of the instruments of power. Responsibility for this often falls on the administrative apparatus, but it is he and his expertise that has the chance to act as a real brake on the dangerous ideas of populist politicians.

<sup>14</sup> Sześciło D. , Od Juristenmonopol do marginalizacji. O zanikającym paradygmacie prawniczym w administracji publicznej (From Juristenmonopol to marginalisation. On the disappearing legal paradigm in public administration), Państwo I Prawo 4/2019

Administrative law, in turn, has a very important role to play in protecting civil rights and liberties, in particular against attempts to abuse public authority, so frequent in the case of populist power. The more buffers removed, the more brakes, the greater the ability of democracy to move towards so-called illiberal democracy and authoritarianism. Looking for an antidote to populism, it is necessary to reach for the instruments of well-established and applied administrative law, and in particular to educate citizens how the functioning of a democratic rule of law guarantees their rights and freedoms from the temptations of the authoritarian populists.

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