

Hart, Kelsen, and the Static Nature of Populist Legal Theory

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Abstract

How should legal theory address populist governance? This article assesses recent efforts to align populist legal theory with H.L.A. Hart's positivism, particularly the claim that populists embrace a democratic version of the rule of recognition. It argues instead that the alliance is deceptive: Populists selectively rely on Hart, given that both endorse a static legal theory. It presents two arguments in support. The first, negative argument shows that populist aspirations to immediate popular sovereignty are at odds with Hartian grounds of legal authority. The second, positive argument draws on Hans Kelsen's distinction between static and dynamic legal orders to reveal their deeper structural similarity: Populism and Hartian positivists likewise minimize official discretion and conceptualize law as a conduit for external political decisions. Clarifying this affinity exposes the risks of static legal theories in legitimating populist distortions and underscores the normative urgency of a dynamic understanding of legal order.

Keywords: *Hart; Kelsen; Populism; Positivism; Dyzenhaus*

Introduction

Although political theorists have long grappled with the challenges of populist governance, legal theorists have tended to lag behind. Whereas several accounts of a political theory of populism have deepened our understanding of the phenomenon, a comprehensive attempt to delineate the relationship between populism and legal order has yet to emerge. Some commentators focused on a claimed incompatibility between liberal elements in modern legal systems—notably, constitutionalism or the rule of law—and the populist credo. Others zeroed in on the interaction of authoritarian populists and the law. But while helpful, both strands remain inescapably partial. The first fails to explain how *the law, qua* the legal ordering of political society, relates to populism; the second falters in capturing how populism itself, across its authoritarian and more benign manifestations, operates in legally ordered societies. Thus, despite the vast

literature on the subject, we still lack a systematic explanation of the general relation between populism and legalism.¹

Against this backdrop, a more comprehensive attempt at elaborating a populist legal theory recently gained traction. Several theorists have argued that populists entertain a view akin to H.L.A. Hart's theory. Populists, the argument runs, employ Hart's rule-of-recognition-based scheme to argue that instead of the convergent behavior of officials, it is the will of the people that should govern the criteria of legal validity. The populist theory of law thus arises as a 'democratic' version of Hartian positivism.

The purpose of this article is to critically examine this argument and, by clarifying the relation between populism and legal order, contribute to our understanding of both populism and the limits of Hart's theory. Its central claim is that Hartian positivism and the populist stance towards the law do resemble one another, but for different reasons—and with different implications—than those prevalently assumed. To substantiate this claim, I propound two main arguments.

The first is negative. Despite its incredible variety, I argue that populist governance exhibits a core aspiration to immediate popular sovereignty. This tendency might manifest itself in different ways,² but its crux lies in a lingering suspicion populists display for authoritative decisions, norms, or institutions that, while insulated to some degree from popular pressure, nonetheless mediate the people's will by refining or second-guessing it. Hart's theory, however, assumes that at least some norms cannot respond *immediately* to popular will, and so Hartian positivism and populist governance are not easily reconcilable. Thus, the negative argument first furnishes a shared fulcrum for discussing populism itself as a political tradition, then shows why populists cannot really commit themselves to a theory like Hart's.

The second argument is positive. I argue that, notwithstanding the incompatibility, an overlooked feature of Hart's theory indeed is relevant for clarifying the populist view of law. Using a distinction first proposed by Hans Kelsen, and recently elaborated in David Dyzenhaus' work, I show that the resemblance between the populist and the Hartian positivist arises because both propound *static* theories of law. Such theories presuppose a rather rigid structure of legal authority, where legal content is formulated predominantly outside the legal order and law's main role is to transmit judgments from political authorities to subjects. It is because and to the extent that both Hart and the populist minimize official discretion in creating and implementing legal norms that their respective theories

1. I shall use the terms 'legal system', 'legal order', and 'legal ordering' interchangeably, following Hans Kelsen's understanding of law as the unique social technique of regulating human behavior via norms. This loose articulation is meant to capture mainstream accounts of law as an efficacious system of norms governing a particular set of social relations, e.g., Hartian positivism, Dworkinian interpretivism, and so on. 'Legality' is accordingly used as the (set of) feature(s) such a system must possess, whereas 'legalism' denotes the legal regulation of political society (in this broad sense).

2. I shall use the terms 'aspiration' and 'tendency' interchangeably.

align. The positive argument therefore culminates in the realization that an important prophylactic against the populist abuse of theories like Hart's lies in insisting, with Kelsen, on the *dynamic* nature of legal ordering.

The article is structured in five parts. Section 1 sets the stage by substantiating the populist aspiration to immediate popular sovereignty and distinguishing populism from adjacent phenomena—most notably, authoritarianism and political opportunism. Section 2 presents and assesses Vasileios Adamidis' argument. Section 3 presents Kelsen's distinction between static and dynamic legal ordering, while Section 4 applies it to Hart's positivism. Section 5 traces the static logic back to the populist view, and concludes by instantiating the normative implications of the static nature of populist legal theory.

1. The Populist Aspiration

Populism is one of these concepts that philosophers are prone to feel they ought to rescue. The phenomenon it refers to is theoretically fragmented, historically rich, and—worse still—highly pertinent for political life. Unsurprisingly, legal and political philosophers have long attempted to define it, although a clear consensus has yet to emerge.³

This section has a narrower ambition. It seeks to highlight one core feature of populist governance that (to varying degrees) permeates its various manifestations. I do not argue that this feature is exhaustive, nor that it is necessarily the most important one for understanding populism. My claim is only that, as a mode of politics, populism displays an aspiration to what I call 'immediate popular sovereignty'. Once substantiated—and clearly distinguished from two adjacent phenomena—this general tendency can furnish a fulcrum for examining the interaction between populism and legal order. To this end, I first explain the aspiration; clarify how it sets populism apart from authoritarianism and opportunism; then refine it using a couple of real-world examples.

A. Sovereignty and Mediation

Populism is clearly a diversified phenomenon, and both legal and political theorists have been grappling with it for some time now. Early analyses have referred to populism as an 'ideology', a 'movement', and a 'syndrome',⁴—an ambiguity tackled more recently by Jan-Werner Müller. Müller famously took populism's internal logic to be anti-pluralistic,⁵ relying on a binary division between the "morally pure and fully unified" people and the "corrupt or in some

3. For a helpful recent survey of the literature, see Stefan Rummens, "Populism" in Mortimer Sellers & Stephan Kirste, eds, *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer Netherlands, 2023) 2743.

4. See Ghita Ionescu & Ernest Gellner, eds, *Populism: Its Meaning and National Characteristics* (Macmillan, 1969).

5. See Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press, 2016) at 3.

other way morally inferior [elite].”⁶ A similar, although not identical, view was defended most prominently by Cas Mudde and Cristóbal Rovira Kaltwasser, who defined ‘populism’ as:

[A] thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, “the pure people” versus “the corrupt elite,” and which argues that politics should be an expression of the *volonté générale* . . . of the people.⁷

This so-called ‘ideational’ approach to the concept—which contrasts with a second, ‘discourse-theoretical’ approach⁸—is widely cited, and some have argued that it represents the common theoretical view.⁹ But while illuminating and quite familiar, Mudde and Kaltwasser’s definition is not the only one around.¹⁰ Some theorists have seen populism—in line with the discourse-based view—as “the politics of the *Stammtisch* (the pub).”¹¹ Others, following the influential work of Margaret Canovan, understood it as connoting a kind of language and rhetoric: “[A] particular style of simplicity and directness, or the communication of a specific political mood,” populism relies on a core set of interrelated concepts—namely, democracy, popular sovereignty, the people, and majority rule.¹²

Canovan’s insights are noteworthy because they show that populism is not a limitless concept. Whether or not populism necessarily eschews pluralism, or is committed to the people/elite dichotomy, all populist manifestations rely on the core set Canovan identified. It follows that while it would be folly to deny the impressive variety of forms populism might take, there nonetheless are ideologies, social structures, or norms that necessarily stand in an uneasy relationship with any such form; no version of populism can dispense with the concept of popular will, for example. In this subsection, I argue that Canovan’s insights—specifically, her highlighting of populism as a mode of politics entwining popular will with directness—can be extended to illuminate the mentioned populist tendency, which I will instantiate as an insistence that any authoritative norm or institution *immediately* respond to the will of the people.

6. *Ibid* at 19–20 [footnote omitted].

7. Cas Mudde & Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press, 2017) at 6 [emphasis omitted]. See also Cas Mudde, “The Populist Zeitgeist” (2004) 39:4 *Government & Opposition* 541.

8. See Rummens, *supra* note 3 at 2745–47.

9. See Nicola Lacey, “Populism and the Rule of Law” (2019) 15:1 *Annual Rev L & Soc Science* 79.

10. See Rummens, *supra* note 3 at 2743, 2744ff. See also John B Judis & Ruy Teixeira, *The Emerging Democratic Majority* (Scribner, 2002).

11. Mudde, *supra* note 7 at 542, citing Harald Bergsdorf, “Rhetorik des Populismus am Beispiel rechtsextremer und rechtspopulistischer Parteien wie der ‘Republikaner’, der FPÖ und des ‘Front National’” (2000) 31:3 *Zeitschrift für Parlamentsfragen* 620 at 624.

12. Margaret Canovan, “Taking Politics to the People: Populism as the Ideology of Democracy” in Yves Mény & Yves Surel, eds, *Democracies and the Populist Challenge* (Palgrave, 2002) 25 at 32.

The fundamental insight animating populism has always been that political authority rightfully belongs to, yet constantly drifts away from, the people.¹³ A central populist commitment accordingly lies in the demand that the people reclaim what is theirs. On this analysis, what separates the populist from the liberal democrat or the simple majoritarian is the insistence that no locus of governance is exempted from this requirement. Every element of governance—whether official organ, professional body, or binding norm—must in principle be accountable to popular will, as no intermediary may legitimately second-guess or delay it. Put simply, populists require that *nothing* but what the people want should dictate how they govern their collective life.¹⁴

To appreciate the populist's resistance to intermediation, we need to unpack what 'immediate popular sovereignty' implies in our context. It refers not to emotional intensity or affective proximity (as theories of political psychology might), but to an aspiration for the undisturbed translation of popular will into authoritative norm or action. Let us substantiate this claim.

Consider 'popular' will first. As mentioned, for Canovan and others, populists presuppose the possibility of discerning and acting on what the people want. Yet although it is quite true that populists invariably rely on this possibility, it should also be noted that different forms of populism diverge on the legitimate mechanisms for ascertaining popular will. There is an important distinction between populists committed to straightforward mechanisms for aggregating the views of the people, such as referenda or elections, and those who see the leader as incarnating the (self-evident) will of the ('true') people, without any need for representative or aggregative institutions. Unfortunately, theorists did not always mind the difference—a fact that led many to either overlook the populist presupposition and its implications, or cast all populists as advocating for a charismatic, demagogue strongman.¹⁵

Yet however prominent this feature may seem these days, it is not universal. As Mark Tushnet and Bojan Bugarcic noted, populist movements include "late nineteenth century U.S. populism, the movements supporting Senators Bernie Sanders and Elizabeth Warren in the United States, and *Podemos* and

13. The original demands of the American Populist movement during the end of the 19th century are a case in point. "The People's Party sought to free the political system from the grip of 'the money power.'" Michael Kazin, "Trump and American Populism: Old Whine, New Bottles" (2016) 95:6 *Foreign Affairs* 17 at 18. See also Canovan, *supra* note 12.

14. Cf. Mark Dawson, "How Can EU Law Respond to Populism?" (2020) 40:1 *Oxford J Leg Stud* 183 at 187ff. Dawson helpfully notes that populist movements have a "strong preference" for "direct over-representative forms of democratic rule," as Spain's *Podemos*'s and Italy's *M5S*'s reliance on "direct and online forms of participatory democracy" illustrates (*ibid* at 187-88 [footnotes omitted]). He focuses on populist attacks at the stage of forming the popular will, i.e., on representative democracy and constitutionalism. As I argue, however, immediacy is a more pervasive notion, with different possible forms at the level of both formation and implementation of popular will. Since our task is to isolate the relation between populism and the law, I shall mostly be concerned here with immediacy at the level of implementation.

15. A prominent example of committing all populists to this latter ontology of popular will is Nadia Urbinati, "Political Theory of Populism" (2019) 22:1 *Ann Rev Political Science* 111 at 122-23. But I am unsure that this holds across the populist board; more benign manifestations, such as left-leaning European movements, are not easily captured by this purported transcendence.

Syriza.”¹⁶ Such examples hardly conform to the proverbial, proto-fascist image salient in both scholarly and public discussion. If we are after the general relation between populism and legalism, we should not brush these cases aside.

Populists, then, might diverge on exactly *how* popular will is to be ascertained, and the specifics of these possible mechanisms are a matter for political theory. Yet *that* the people have a discernable collective wish is a necessary condition for populist governance. It is especially notable in our discussion, because any reflection on populism’s relationship with the law must begin with the recognition of a collective will. Ascertaining the will of the people is, however, but a necessary first step; governance obviously requires carrying out this will as well. This helps focus our inquiry: In relation to law, the unique feature of populism is its insistence that the question, whether and how long the people should wait for the execution of their (presupposed) will, must itself be up to popular decision.

In short: The populist is committed to the possibility of a discernible popular will; populists may diverge on how this will is ascertained, and cannot all be put in the same proto-fascist box; and this fact opens up important space for more legitimate versions of populism, both historically and contemporarily.

Moving to the second element, the ‘immediacy’ of implementing the popular will involves two distinct but closely related intuitions. Suppose that upon turning fifteen, Sam surprisingly receives a gift from her grandparents: a sum of \$500. Concerned that she might recklessly spend the money, Sam’s parents come up with a creative suggestion. Instead of buying a new bicycle, as Sam intends, they would invest half of the money on her behalf, and she could use the rest as she likes. It would not surprise us if Sam responded to this proposal with some indignation. What she wants for her birthday is a new bike, she might retort, and she neither needs nor accepts further review of *her* decision to spend *her* money, not even by her well-meaning parents.

Realizing the delicacy of the situation, Sam’s parents decide to withhold funds: Within a week’s time, they explain, the buzz may well wear off, and Sam could more rationally appreciate the importance of saving. But this might turn out to upset Sam even more. Her decision, she might feel, is perfectly well-formed, and postponing it not only foils her plan to go out for a ride with her friends this coming weekend—it actually belittles her.

What Sam understands is that sometimes, delayed or partial autonomy means no autonomy at all.¹⁷ What she accordingly demands is the *immediate* implementation of her will, against institutional buffers (her parents’ alternative decision to invest the money) and temporal ones (their suggestion to wait a week). And just like Sam, populists suspect temporal or institutional interference in the execution of popular will because such intermediation, they believe, erodes the sense in

16. Mark Tushnet & Bojan Bugarcic, “Populism & Constitutionalism: An Essay on Definitions and Their Implications” (2021) 42:6 Cardozo L Rev 2345 at 2347, n 4.

17. For our purposes, we can set aside intricacies concerning the nature of autonomy. I only assume—following Joseph Raz, David Enoch, and many others—that autonomy is both possible and valuable (even beyond liberal theory). See e.g. David Enoch, “Autonomy as Non-Alienation, Autonomy as Sovereignty, and Politics” (2022) 30:2 J Political Philosophy 143.

which it is *the people* who govern their own collective fate.¹⁸ By insisting on the immediate implementation of popular will, the populist thus seeks to ensure that the people are sovereign; hence the aspiration to immediate popular sovereignty.

B. Authoritarianism and Opportunism

Even before qualification and refinement, our core thesis—that all populists are at least to some degree committed to immediate popular sovereignty—confronts two objections. The first holds that it is futile to construct a general populist view of legal order, given that our political reality makes clear that populists are basically authoritarians seeking to dismantle the law. The second, and in a sense opposite, objection is that the inherent elasticity of populism is incompatible with committing populists to anything resembling a rigid theory. We take each objection in turn.

i) Constitutionalism and the Rule of Law

The first objection should be familiar: it is the one underlying our two opening misgivings.¹⁹ As mentioned, several prominent accounts have sought to tackle the autocratic tendencies that they believe define modern populism. The idea is that the autocratic inclinations inherent in current populist movements are irreconcilable with key elements of legal ordering. This has led theorists either to examine populism's specific interaction with constitutionalism,²⁰ or to investigate the relation between populism and the rule of law.²¹ In both cases, the

18. In implementing what the people want, *temporal* immediacy favors that resolutions be applied as swiftly as possible, whereas *institutional* immediacy militates against any substantive intervention in the decision made by the people. James Madison's suggestion that a well-constructed republic would "refine and enlarge" public views, was thus doubly opposed to the 19th-century People's Party logic. James Madison (Publius), "Federalist Papers: No. 10" (23 November 1787) in *The Federalist Papers*, online: avalon.law.yale.edu/18th_century/fe10.asp In interposing an only partially responsive Federal Congress between the states and (some) authoritative decisions, it undercut temporal immediacy; in insisting on bicameralism, intricate mechanisms for proposing and voting on bills, and a Federal Judiciary and Executive—authorized to interpret and thereby amend Congressional outputs prior to application—it ran counter to the institutional immediacy required by then-prevailing populist sentiment. Notably, the point is not that the interpretation and application of popular will are irreconcilable with the populist tendency. It is that for the populist, such interventions cannot simply be granted unless the people themselves have authorized them and only for as long as they do.

19. See the discussion in the [Introduction](#).

20. For example, "constitutional change under populism carries out three core functions: deconstructing the existing political regime, serving as an ideological critique that promises to overcome flaws in the prior constitutional order, and consolidating power in the hands of the populist leadership. These tendencies appear inherent in nearly all populist projects." David Landau, "Populist Constitutions" (2018) 85:2 U Chicago L Rev 521 at 522. "An important thrust of populist constitutionalism is the claim to directly represent the people and to overcome the significant constraints to popular rule that they observe in liberal or legal constitutionalism." Paul Blokker, "Populism as a constitutional project" (2019) 17:2 Intl J Constitutional L 535 at 536.

21. See e.g. Lacey, *supra* note 9; Bojan Bugarcic & Alenka Kuhelj, "Varieties of Populism in Europe: Is the Rule of Law in Danger?" (2018) 10:1 Hague J Rule of Law 21.

corollary is that there is little prospect for—indeed, little need for—elaborating a populist legal theory. But I also mentioned in passing that, *qua* attempts at a general relation between populism and legal order, both strands falter.

The first thing to note is that the aspiration to immediate popular sovereignty does not in itself entail that populists must eschew any institutions whatsoever. More specifically, we can certainly conceive of a constitution that lives up to the populist aspiration, given one of two conditions. For one thing, it might be that the constitutional structuring of hierarchical government is continuously ratified by the people, at intervals they themselves accept. This would allow the adoption of institutions that operate based on a hierarchy of legal norms—most notably, judicial review. For another, the constitution might grant the people various outlets for resisting insulated institutional interventions in the implementation of their will—for example, a notwithstanding clause, recall mechanisms, or referenda—outlets that they find compatible with their understanding of self-governance.

Now this might imply that populism undermines safeguards on liberal values, although some have disputed this.²² But even so, this would not imply a *conceptual* tension between a constitution and populist governance. First, there is the possibility of legal orders that rely on political constitutionalism—for example, the UK. Second, even if we judge populism in its various forms to oppose any notion of liberal constitutionalism, it does not follow that other, non-liberal constitutions are excluded.

The crucial point is that ‘non-liberal’ does not entail ‘authoritarian’. As we saw, more benign movements, like the one supporting Sanders or Greece’s Syriza, are notable populist examples that must be taken into account. By casting all forms of populism as authoritarian, we not only unjustifiably sideline them—we also exclude any possibility for more radical forms of (constitutional) democracy, beyond the liberal one. Indeed, as several commentators noted, equating populism and authoritarianism means that “[t]he populist label is a form of ‘othering’ that eschews serious engagement with those who see more promise than peril in today’s disruptive politics.”²³ Populism thus sheds its explanatory function, to become “a pejorative cast on disruptive democratic politics of any sort that challenges elitist liberal democracy.”²⁴

Moving to the alleged incompatibility of populism and the rule of law, the argument is basically similar: We assume that legal order must be characterized by a commitment to the rule of law—how can it not be?—then identify a necessary tension between rule of law and populism, culminating in the conclusion that by threatening this ideal, populists must be opposed to any theory of law. The problem, however, is that it is not fully clear what the rule of law stands for

22. As Tushnet and Bugarcic have argued, the incompatibility between populism and legal constitutionalism is not as significant as frequently assumed. See Tushnet & Bugarcic, *supra* note 16.

23. Robert Howse, “Epilogue: In defense of disruptive democracy—A critique of anti-populism” (2019) 17:2 Intl J Constitutional L 641 at 642. See also Tushnet & Bugarcic, *supra* note 16 at 2351, n 25.

24. Howse, *supra* note 23 at 645.

in this context. Theorists are famously torn between various forms of ‘thin’ (i.e., formal or procedural) and ‘thick’ (i.e., substantive) accounts. Obviously, thicker conceptions, incorporating robust liberal protections or human rights, might contrast with the insistence on immediate implementation of popular will. Yet as Adamidis recently argued, thinner versions such as rule *by* law may be reconciled with populist politics.²⁵

Whether or not this is so, both the constitutional and rule-of-law strands remain inescapably partial. They either insist that all populist forms are cut from the same (authoritarian) cloth, or that the law is necessarily a liberal construct. Yet we know that neither premise holds unconditionally. As we saw, even the contemporary populist landscape is more complex than what the authoritarian reduction assumes, and we are well familiar with the possibility of legal systems that enshrine no liberal protections.²⁶ The two strands arise as responses to an essentially *liberal*, not legal, crisis. Consequently, they cannot do full justice to the relation between populism and legalism.

ii) *Populism as Opportunism*

If the authoritarian objection is undermined by the variety of populist movements, however, we must face a second objection. As we saw, theorists generally agree that populism is a “thin-centered ideology.”²⁷ Now, “ideology” here need not be taken in a Marxist sense. Rather, it can be thought of as ideological infrastructure, facilitating the populist’s enlisting of various kinds of social, ethical, and economic agendas. On this analysis, populism differs from other ‘isms’. Unlike liberalism, communism, capitalism, or feminism, for example, it exhibits a significantly thinner core of substantive commitments.

And there is the rub. If populism connotes a mere structural mode of acquiring and wielding power—if it recommends the immediate execution of popular will notwithstanding the particular substantive position—then it requires a complementing ideology to inform its terms and programs.²⁸ On the upside, this vindicates the diversity of modern populism against the parochiality of the authoritarian objection.²⁹ Yet by the same token, the fluidity casts doubt on attempts to distill any stable populist position, concerning the law or otherwise.

25. See Vasileios Adamidis, “Democracy, populism, and the rule of law: A reconsideration of their interconnectedness” (2024) 44:3 Politics 386.

26. For a powerful recent attempt to make a case to the contrary, see David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge University Press, 2022).

27. Mudde, *supra* note 7 at 544.

28. See Rummens, *supra* note 3 at 2746.

29. As noted, populists come in many shapes and colors. They might celebrate free-market economy or champion socialist reform (as parties like Syriza and Podemos serve to illustrate); they may seek to strengthen nationalist identity (such as Hungary’s Fidesz) or call for political egalitarianism (like the US People’s Party did: see Kazin, *supra* note 13); they can propagate racial animosity and isolationism or embrace cosmopolitanism: see e.g. Emmy Eklundh, Frank A Stengel & Thorsten Wojczewski, “Left populism and foreign policy: Bernie Sanders and Podemos” (2024) 100:5 Intl Affairs 1899.

Populists, this objection claims, are mere opportunists, who would say and do whatever gets them to power.

But we must not confuse a thin set of commitments with no commitments whatsoever; while populism certainly is a variegated phenomenon, it is not limitless. Indeed, that populism is indifferent between certain thicker political visions with which it can be loaded does not entail that ‘anything goes’ so far as the populist is concerned. Hence Canovan noted that all populist manifestations rely on an interrelated set of concepts, emphasizing democracy and popular sovereignty.³⁰ Likewise, if the argument from the previous section is sound, populism is marked by a pervasive aspiration to the immediate implementation of popular will.

Accordingly, the better we flesh out this aspiration, the more stable the resultant fulcrum will be for assessing the relation between populism and legalism. To this end, the following subsection examines two examples of populism in practice. These will also help qualify and refine the aspiration, establishing it as a regulative ideal of populism.

C. *Immediacy in Action*

Those familiar with Spanish politics may recall that Pablo Iglesias, then-leader of the far-left party Podemos, addressed his crowd at the closing rally of the 2016 Spanish election campaign by stressing “Patria [fatherland], order, law, institutions.”³¹ Yet the apparent embracing of legal order might have come as a surprise for anyone attuned to his party’s stance towards the Spanish legal system.

As Mr. Iglesias argued, in Spain, “the state and the law were one of the terrains of class struggle and working-class advance.”³² Highlighting the “Right’s cultural and ideological domination of the state,” he lamented the failure to recognize “that the legitimacy of the body that governs judges comes from Parliament.”³³ The admonition echoed efforts by Podemos and its center-left ally, Partido Socialista Obrero Español (PSOE), to revamp what they consider a judiciary captured by conservative interests and committed to thwarting progressive, anti-austerity policies advocated in the people’s name.³⁴

Podemos has thus called for stronger parliamentary control over judicial appointments,³⁵ accused the judiciary of subserving traditional forces—in

30. See Canovan, *supra* note 12.

31. Jacopo Custodi, “Nationalism and populism on the left: The case of Podemos” (2021) 27:3 *Nations & Nationalism* 705 at 706 [footnote omitted].

32. Pablo Iglesias, “The Left Needs to Break the Reactionary Stranglehold Over the Spanish State”, translated by David Broder, *Jacobin* (6 October 2021), online: jacobin.com/2021/10/pablo-iglesias-spain-far-right-franco-podemos-vox-state.

33. *Ibid.*

34. See C Cándido & M A Alfonso, “Podemos Registers in Congress a Reform of the General Council of the Judiciary (CGPJ) to Renew it without the PP”, *La Voz de Galicia* (30 April 2024), online: lavozdeg Galicia.es/noticia/espana/2024/04/30/podemos-registra-propuesta-renovacion-cgpj-quita-peso-senado/00031714475660151785208.htm [translated by author].

35. See “Podemos Celebrates the PSOE’s Agreement to Reform the General Council of the Judiciary”, *infoLibre* (2 October 2020), online: infolibre.es/politica/celebra-psoe-acceda-refo

particular, the conservative Partido Popular (PP);³⁶ proposed legislation for reducing judicial politicization;³⁷ supported change in the Constitutional Court and General Council of the Judiciary's (CGPJ) nomination processes;³⁸ and advocated for reform in how cases of corruption and gender violence are handled.³⁹

In other words, Iglesias and his allies did not merely accuse Spanish courts and officials of distorting the genuine wishes of Spaniards. They also called for the immediate implementation of popular will and, upon finding that courts impede it, sought to ensure their subjugation to the political echelon. Far from a vote of confidence, then, Iglesias' highlighting of 'order, law, and institutions' was a (Marxist) call for hemming in an unruly legal system; a battle cry for triumph in "the terrains of class struggle and working-class advance."

Two further points are noteworthy. First, Spanish populists did not resist *any* legal mediation. Their critique followed specifically from the assessment that Spanish courts do not align themselves with the (antecedent) will of the people. Second, at play here is not an autocratic instinct: Podemos' call for immediacy was animated by what many would consider salutary goals.

Moving to the other pole of the political spectrum, consider now Poland's Law and Justice party (PiS). Party leader Jarosław Kaczyński has famously introduced comprehensive economic and political changes, even in the face of recalcitrant legal rules or officials who dared stand in the way of carrying out PiS's far-reaching reforms.⁴⁰ Notably, this was achieved by neutralizing Poland's longstanding bastion, the Constitutional Tribunal. After securing a parliamentary majority following the 2015 national elections, Reuters reported that Kaczyński maintained

rmar-cgjpj-golpismo-constitucional-pp-dias-contados_1_1188258.html?utm_source=chatgpt.com), calling for stricter political oversight and accusing the Council of being hijacked by the conservative Partido Popular.

36. "PSOE and Unidas Podemos even registered a reform of the Organic Law of the Judiciary to reduce the majorities required to elect the members of the CGPJ." Paula Huarte, "Podemos insta al PSOE a reformar el CGPJ y renovarlo sin el PP: «Abandonad la cobardía»," *The Objective* (31 August 2023), online: <https://theobjective.com/espana/tribunales/2023-08-31/podemos-psoe-reformar-cgjpj-pp/> [translated by author].

37. *Ibid.*

38. See Bernardo de Miguel & Carlos E Cué, "Spain defends its judicial reform plans despite warning from Brussels", translated by Susana Urra, *El País* (16 October 2020), online: https://english.elpais.com/spanish_news/2020-10-16/spain-defends-its-judicial-reform-plans-despite-warning-from-brussels.html. For a helpful survey of the recent standoff between the left- and right-wing blocs over the renewal of the Spanish Council of the Judiciary, see Mikel Diez Sarasola, "EU's Involvement in the Renewal of the Spanish Council of the Judiciary", *Verfassungsblog* (19 February 2024), online (blog): <https://verfassungsblog.de/renewal-of-the-judiciary/>.

39. See Begoña Sangrador-Vegas, "New Challenges and Opportunities: The Coalition Government PSOE-Unidas Podemos" in *The Nation in its Labyrinth: An Introduction to Contemporary Spain Since 1898* (Pressbooks, 2019), online: pressbooks.pub/spainthenationinitslabyrinth/chapter/new-challenges-and-opportunities-the-coalition-government-psoe-unidas-podemos/.

40. See Tushnet & Bugaric, *supra* note 16 at 2365ff.

“the reforms to the constitutional court . . . were needed to ensure there are no legal blocks on government policies aimed at creating a fairer economy.”⁴¹

His insistence on the immediate implementation of political reforms in the name of the Polish people was born of experience. The Tribunal had blocked several government plans in the first period of PiS rule, from 2005 to 2007.⁴² Most notably, in May 2007, it struck down key parts of Poland’s lustration law, which governed the participation of former communists in Polish government and civil service.⁴³ An enraged Kaczyński then threatened to discipline the judges for their ‘improper’ acts; eight years later, after resecuring office, the PiS-led government has delivered. Using court-packing and intimidation tactics, it managed “to render the constitutional court toothless,” and then went on to overtake the entire judiciary.⁴⁴

The Polish case exemplifies an even greater hostility to legal mediation, likely due to Kaczyński and his party’s despotic inclinations. This teaches that while an authoritarian tendency is analytically separate from the populist *modus operandi*, the former can certainly aggravate the latter, prompting movements and leaders to escalate their rhetoric and actions when encountering (what they perceive as) illegitimate legal mediation.

However, it should be noted that the Polish story is not simply one of sheer (autocratic) disregard for the law. As Wojciech Sadurski astutely observed, Kaczyński did not shy away from employing the very same legal system he was working so hard to control when it suited his agenda. “[J]ust like Orbán,” Sadurski explains, “[Kaczyński] knows and skillfully uses the legitimating value of formal legality—except when the political costs of legality are found by him and his advisors to be too high.”⁴⁵ It follows that even in cases of authoritarian, right-wing parties, the relation between populism and legal order is more complex than what mainstream accounts of authoritarian populism portray.⁴⁶

It is time to collect the strands of our discussion. I argued that in relation to the law, populism is marked by its aspiration to immediate popular sovereignty. This leads populists to distrust—and, sometimes, forcefully resist—attempts to refine, delay, or second-guess the faithful execution of the people’s will. As we have seen, the more autocratic the populist actor, and the more robust the legal resistance, the greater the chance that they will resort to extreme measures to subdue

41. Paweł Sobczak & Justyna Pawlak, “Poland’s Kaczynski calls EU democracy inquiry ‘an absolute comedy,’” *Reuters* (22 December 2016), online: www.reuters.com/article/us-poland-politics-kaczynski-democracy/polands-kaczynski-calls-eu-democracy-inquiry-an-absolute-comedy-idUSKBN14B1U5.

42. See Tushnet & Bugaric, *supra* note 16 at 2366; see also Wojciech Sadurski, “How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding” [2018] 2018:1 *Revista Forumul Judecatorilor* 104.

43. See Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press, 2019) at 58ff.

44. Tushnet & Bugaric, *supra* note 16 at 2366.

45. Sadurski, *supra* note 42 at 109–110. As we saw, the same is true for Spanish populists. Their attempts were aimed, not so much at abolishing legal order, but at guaranteeing its alignment with the antecedent, and morally superior, popular will.

46. Cf. Kim Lane Scheppele, “Autocratic Legalism” (2018) 85:2 *U Chicago L Rev* 545 at 562.

or overtake the recalcitrant organ, rule, or institution. Yet even considering more benign examples, it remains true that the aspiration plays an important role in populist governance, given the conjunction of two features of modern political societies: First, they are predominantly legally governed; second, their legal ordering has, at least to some extent, its own way of doing things.

At the same time, the aspiration need not be overstated. First, populists may well accept mediating institutions insofar as these can, and do, respond to popular will. From a specifically populist standpoint—setting aside opportunistic tendencies that some populists might certainly exhibit—the question is whether legal institutions illegitimately thwart popular will. Second, the legitimacy of any such intervention is gauged against the backdrop of an already formed popular will. Third, populism and authoritarianism diverge insofar as the actual mechanisms for ascertaining popular will guarantee the possibility of free and competitive elections.⁴⁷ Finally, populism is not exhausted by its tendency to immediate popular sovereignty, nor does it necessarily trump any other consideration.

Given these refinements, the populist aspiration is best viewed as a regulative ideal. This ideal cannot be reduced to a simplistic resistance to any legal or political institution whatsoever, nor should it be conflated with authoritarianism or opportunism. In its pure form, it is a call for more direct popular control over governance, manifesting itself in a pervasive demand to align institutional operation with a pre-existing popular will, as well as in a host of more or less violent responses to legal mediation which fails this requirement. And as we shall now see, this ideal provides a useful fulcrum for investigating the theoretical relation between populism and legalism.

2. Populism & Hartian Legal Positivism

Thus far, we established the first parts of the negative argument: that populist governance is marked by the regulative ideal of immediate popular sovereignty, and that this sets populism apart, analytically as well as in practice, from adjacent tendencies. This section finalizes the argument by examining the claim, recently put forward by Adamidis, that the populist's view of law is best explained as akin to H.L.A. Hart's theory of legal positivism.

In contrast to those who dismiss populists as sheer political opportunists, or identify populist governance with authoritarianism, Adamidis should be commended for attempting to provide a general explanation for populists' relation with the law. As he relies on Hart's view of the grounds of legal authority, we shall first briefly recall Hart's theory, then turn to reconstruct the argument in light of a recent development (A). We then critically assess it, to show that it

47. Recall the earlier distinction, between populists committed to mechanisms of representation and aggregation of popular will and those who take popular will as incarnated in the leader's say-so: see Section 1-A.

cannot account for the populist view of law (B). This will conclude the negative argument, and lead us to the second, positive one.

A. Adamidis and the Democratic Rule of Recognition

One of Hart's pivotal contributions was to distinguish (duty-imposing) 'primary' rules, which concern what must or must not be done, from (power-conferring) 'secondary' rules, which concern how such rules are made, interpreted, or changed.⁴⁸ Whereas the object of primary rules is the legal subject's behavior,⁴⁹ the target of secondary rules is the primary rules themselves. Secondary rules systematize the primary rules, by setting shared standards for three key legal processes. First, recognizing all and only the valid legal rules in a political society (using the rule of recognition);⁵⁰ second, regulating the amendment or termination of such rules (via rules of change);⁵¹ and third, orienting the interpretation and application of these rules in concrete cases (through rules of adjudication).⁵²

Hart went on to argue that law emerges following the union of primary and secondary rules.⁵³ He meant that at that point, the level of social interaction will have become sophisticated enough to give rise to a 'master' rule detailing criteria for recognizing all the rules backed by serious social pressure as partaking in a unified legal system. Grounding the system, this rule of recognition arises as a social fact from the "congruent practice" of the pertinent social group.⁵⁴ Famously, Hart thought that this group comprised the official class in the system.⁵⁵ Specifically, he emphasized the concerted behavior of judges in their practice of identifying and applying rules.⁵⁶ Thus, the rule of recognition reflects judges' convergence on the features, local to the system, by virtue of which a rule of the social group is recognized as legal.

Populists, argues Adamidis, exploit the uncertainty inherent in this scheme, stressing that the monopoly over the criteria of legality cannot be confined to

48. See HLA Hart, *The Concept of Law*, 3rd ed (Oxford University Press, 2012).

49. Think, for example, about criminal laws requiring or prohibiting certain kinds of behavior, tort laws defining tortious claims, labor laws fixing employer and employee rights and obligations, and so on.

50. See Hart, *supra* note 48 at 91ff.

51. See *ibid* at 95. For a thorough recent review of the operation of rules of change, see Alma Diamond, "Lawfinding's Dilemma: Legal Formalism, or Judicial Neutrality" (2026) 104 *Or L Rev* 117 at 137ff.

52. See Hart, *supra* note 48. For a critical treatment of the circularity of rules of adjudication, see Matthew Kramer, "The Rule of Misrecognition in the Hart of Jurisprudence" 8:3 *Oxford J Leg Stud* 401 at 411-16.

53. See Hart, *supra* note 48 at 91.

54. *Ibid* at 118. As Hart puts it, "the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria." Hart, *supra* note 48 at 110. For a good critical discussion, see Kramer, *supra* note 52.

55. For a recent critique of Hart's exclusion of the legal subject from the ambit of his theory, see Dyzenhaus, *supra* note 26 at ch 4.

56. See Hart, *supra* note 48. See also Vasileios Adamidis, "Populism and the Rule of Recognition: Challenging the Foundations of Democratic Legal Systems" (2021) 4:1 *Populism* 1.

the judiciary.⁵⁷ Drawing on familiar characterizations, he explains that populism favors the absolute sovereignty of a “pure people.”⁵⁸ The populist accordingly insists that it is the consensus of the homogenous people, not the convergent behavior of judicial elites, which determines the criteria of validity. Thus, any official decision diverging from popular consensus—most readily reflected in the legislature’s or elected government’s decisions—cannot be legally valid. The corollary is that populism stands for positivism, democratized, although only for the “pure people.”

The argument has been developed further. Ofra Bloch and Natalie Davidson recently sought to employ it to spell out the legal theory undergirding authoritarian populism.⁵⁹ But while their target is more specific, examining their application of Adamidis’ view will serve our more general purpose. On their analysis, the (authoritarian) populist stance towards law includes two elements. First, a reduction of law to politics. Similarly to Critical Legal Scholars, populists seek to debunk law’s neutrality and perceived rationality.⁶⁰ They accordingly condemn legal officials who get in the way of popular will, particularly when courts intervene in legislative output. Legislation epitomizes what the people want; law, a mere “conduit” for executing this will, has no business ‘correcting’ or obstructing it.⁶¹

This instrumental approach leads to the second element, following Adamidis: Populism adopts an “extreme form of legal positivism.”⁶² Under this extreme version, legal validity is purely source-based. Whatever form or content the people desire—manifested in the democratic rule of recognition—can be legally valid. Legality is assigned to a norm based solely on its being an expression of popular will, and so (authoritarian) populist legal theory offers “an extreme, and quite simplistic, version of the denial of law’s autonomy.”⁶³

I think that Bloch and Davidson are quite correct to emphasize how such populists see the law. But while I will soon argue that this observation can be extrapolated, their reliance on Adamidis might undermine their analysis. The worry lies in the second element, which presupposes an untenable connection between the populist and the positivist. This reflects—and reinforces—the mistaken conclusion that populist legal theory is simply a form of Hart’s theory.

It is true that Adamidis recognizes that Hartian positivism and populism stand in a basic tension. But *pace* Adamidis, the roots of this tension do not stem from the identity of the group whose convergent behavior determines the criteria of validity. Rather, the tension goes much deeper, since it arises from the very notion of a rule of recognition as the ultimate determinant of authority in legally

57. See *ibid.*

58. *Ibid.* at 3. See also Section 1.A.

59. See Ofra Bloch & Natalie R Davidson, “Countering Authoritarian Populists’ Legal Theory” (2025) 26:2 *Theor Inq L* 103.

60. See *ibid.* at 105-06.

61. *Ibid.* at 109.

62. *Ibid.* at 105.

63. *Ibid.* at 110.

governed societies. This leads him to both mischaracterize and understate the incompatibility of the populist and Hart's legal theories. To see this, we need to delve a bit deeper into the nature of Hart's 'master' rule.

B. The Rule of Recognition as a Customary Social Fact

I mentioned that the rule of recognition is a customary social fact grounding a political society's legal system. As such, it evolves gradually in light of the cumulative interactions of the group whose practice it reflects.⁶⁴ Like any custom, the rule cannot be reduced to the action(s) of any specific individual, however prominent. It is an amalgamated, *post factum* rationalization of intricate patterns of behavior by various members over an at-least-somewhat prolonged period of time. These features of the rule of recognition—its being the ultimate grounds of the system, and a customary social fact—underlie the incompatibility of populism and Hartian positivism. They entail two notable corollaries.

The first is that it is *this* rule that grounds the authority of all other norms in the legally regulated society. Whereas the populist sees authority as emanating from the antecedently formed popular *will*,⁶⁵ one of Hart's key insights was that grounding legal authority is a more passive disposition of acceptance of a (customary) *practice*.⁶⁶ On this point, the populist logic is of a piece with John Austin's.⁶⁷ Despite notable differences, both consider an external, political element to precede—and condition—the possibility of legal ordering.⁶⁸ Hart's response to both was that at the foundation of legal systems one finds, not an (already) established governing entity, but the fundamental social rules that themselves structure and thereby give rise to this very (resultant) authority.⁶⁹ It does not matter here whether Hart was right. What matters is that his theory shifts the source of political authority from the purposeful political *decision* of an existing sovereign to the unwitting, gradual, and dispersed practice of acceptance and recognition. The logic of a rule-of-recognition-based legal system, in other words, is opposed to the populist view of the grounds of political authority.

The second corollary is that the rule of recognition is not amenable to *deliberate* popular control. As a customary fact, it arises gradually following the concerted practices of the relevant social group. Changes in the rule accordingly

64. For a recent discussion of the nature and implications of the customary character of the rule of recognition, see Sebastian Lewis, "Customary Law and the Limits of the Rule of Recognition" (2025) [unpublished, on file with author].

65. See Section 1-A.

66. See Hart, *supra* note 48 at chs IV-VI.

67. Cf Meir H Yarom, "Positivism & Unity" (2023) 36:1 Can JL & Jur 241 at 245-51.

68. See Hart, *supra* note 48 at ch IV for Hart's critique of this element, which Austin grounded in the "habit of obedience." John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, ed by Isaiah Berlin, Stuart Hampshire & Richard Wollheim (Lowe & Brydone, 1955) at 193.

69. See e.g. Scott J Shapiro, "What is the Rule of Recognition (and Does it Exist)?" in Matthew Adler & Kenneth Einar Himma, eds, *The Rule of Recognition and the U.S. Constitution* (Oxford University Press, 2009) 235.

track incremental dynamics latent in that group's patterns of behavior.⁷⁰ It follows that no willful change of the rule is possible, at least not in any way resembling that of ordinary legislation *qua* norm enactment.⁷¹ Adamidis argues that the populist exploits the ambiguity in Hart's theory to allow the 'pure' people complete dominance over the law by extending the group whose practice elicits the rule of recognition. But even if we were to refine Hart's theory to include the 'true' people as the relevant group determining the rule, such determination can never amount to a direct, on-demand enactment that can immediately respond to popular will. This would turn the rule from a factual social custom to a normative enactment, thereby defying Hart's basic commitment—namely, that the law is a social practice.⁷²

It follows that even under such extended rule of recognition, some secondary, power-conferring norms remain outside the people's direct reach. This contrasts with the regulative ideal's emphasis on the immediate responsiveness of *all* the rules governing the political community to popular will.⁷³ Adamidis' suggestion, then, either forces the populist to compromise his fundamental commitment by recognizing that some norms and institutions are in principle not responsive to the people, or undercuts Hart's logic, viz., that normative enactment must assume the existence of customary ways of creation and change of legal norms or—what for him amounted to the same—a rule of recognition, however rudimentary.

We thus conclude the first, negative argument: We cannot explain the populist view of law as a version of Hart's theory. However, I also mentioned that once we set aside Adamidis' claim, there remains Bloch and Davidson's important insight of the possible resonance of populism and positivism, captured in the idea that law serves as a mere conduit for popular will. This insight provides a crucial clue to the explanation we are after. To see it, we now move to the positive argument.

3. Static and Dynamic Theories of Law

While Hart's theory cannot ground the populist's view of law, it nevertheless includes resources to explain why Adamidis and others have seen significant similarities between them—or so I will now argue. This positive argument also accounts for the fact that populists readily draw on positivistic themes to motivate their potentially violent reactions to legal mediation. To establish it, I will use a

70. *Ibid* at 238.

71. Given the admittedly unlikely but conceptually possible (willful) official cartel, perhaps more accurate would be to say that no *immediately deliberate action* can change the rule. The important point is that this still preserves the distinction between (cumulative) *social fact* and (deliberate) *normative enactment* as the grounds of legal systems.

72. The contrast is, of course, Kelsen. For him it is a norm, not a factual social rule, which grounds legal authority. "That a norm belongs to a certain system follows simply from the fact that the validity of the norm can be traced back to the basic norm constituting the system." Hans Kelsen, *Introduction to the Problems of Legal Theory*, translated by Bonnie Litschewski Paulson & Stanley L. Paulson (Clarendon Press, 1992) at 56.

73. See Section 1.A.

distinction between two models of normative validity, first proposed by Hans Kelsen. His *Pure Theory of Law* remains a groundbreaking, if contested, intervention in legal philosophy.⁷⁴ My aim is not to defend a full reconstruction of this intricate theory. Rather, I wish to draw specifically on his distinction between static and dynamic validity. To this end, this section briefly explains his view on the matter, while the next one applies it to our discussion.

A scientific theory, Pure Theory seeks to accurately cognize its object—namely, the law as a systematic ordering of positive norms or, as Kelsen often referred to it, the ‘legal order’.⁷⁵ Presupposing the possibility of this project, Kelsen held that the task of jurisprudence is to portray the law as what it really—conceptually—is.⁷⁶ A central problem pertains to clarifying the validity of legal norms. Ordinarily, such explanation should comprise two aspects: *what* legal validity is, and *how* legal norms acquire it. For reasons of brevity and focus, I shall leave the first aspect for another occasion.⁷⁷ Zeroing in on the second one, our question is: By virtue of what do legal norms become valid?

In answering this question, Kelsen’s premise was that some kinds of norms—we can call them systemic norms—acquire their validity only as parts of a valid order, namely, based on their interrelationship.⁷⁸ Establishing the validity of a norm which partakes in a normative order means providing an explanation for its existence in terms of another norm of that order.⁷⁹ There are two ways for providing such an explanation, and they correspond to two models of normative relations, ‘static’ and ‘dynamic’.

Static validity turns on the derivation of a ‘lower’ norm from the content of an ‘upper’ norm. This norm is taken to subsume the lower one like a general to the particular, not unlike how particular descriptive propositions are deduced from more abstract ones. As an example, think about a norm prescribing veracity in all dealings between individuals. From this norm, a more concrete norm, proscribing fraud in business transactions, can be derived. The general, higher norm thus becomes a (static) source for the validity of the particular, lower norm subsumable under it. Normative science represents this relation as follows:

74. See Hans Kelsen, *Pure Theory of Law*, 2nd ed, translated by Max Knight (University of California Press, 1967).

75. See *ibid* at ch 1.

76. See *ibid* at 19–20. For an excellent discussion of Kelsen’s view of idealizations, see especially Alexander Somek, “Kelsen Lives” (2007) 18:3 Eur J of Intl L 409, noting that “[t]he idealization most prevalent among legal scholars has it that law, in and of itself or *in toto*, is a good thing” (*ibid* at 411).

77. I note only that for Kelsen, “validity” is “the specific existence of a norm.” Kelsen, *supra* note 74 at 10. Hence, any existing norm is valid, and all valid norms are in existence.

78. See Andrei Marmor, “The Pure Theory of Law” in Edward Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2021), online: plato.stanford.edu/archives/fall2021/entries/lawphil-theory/.

79. See also Joseph Raz, “Legal Validity” (1977) 63:3 Archiv für Rechts- und Sozialphilosophie 339 at 343. Cf Stephen Munzer, *Legal Validity* (Springer Netherlands, 1972) at ch II, 15ff. For a more sustained discussion of Raz and Kelsen’s views on validity, see Meir Hai Yarom, “Raz’s Contributions to the Theory of Legal Systems” (2004) 8:2 Rivista di Filosofia del Diritto 283 at § 2.

N_{SH}: One must never lie

N_{SL}: Fraud in business transactions is forbidden

The key is that the validating relation turns on logical deduction: It is because N_{SL}'s content can be subsumed under that of N_{SH} that validity 'flows' from the latter to the former, thereby forming a (static) chain of validity.

Three notable upshots follow. First, applying a higher norm means intellectually inferring a lower norm. Second, the application is to that extent constrained, for the lower norm's content must already be contained in the higher one. This is a crucial point, often underappreciated in discussions of Kelsen: The static model minimizes the role of officials *qua* decisionmakers. It emphasizes, not so much *how* the lower norm came about, but *what* its content is and whether it can be deduced from that of the higher norm. This leads to the final upshot: The basic norm, hypothesized at the end of the (static) validity chain to avoid infinite regress, is a static norm, i.e., it contains the content of the norms derivable from it.

Kelsen believed that the static model fails to capture the complexity of the validating processes typifying real-world legal systems. He found it "a most significant peculiarity of law that it regulates its own creation and application."⁸⁰ This is a conceptual claim about the uniqueness of law as a normative order: Kelsen noted that whereas many normative systems exist, the law is the only system which takes itself to be its own ultimate regulator. Unlike etiquette, games, normative systems of social clubs, etc., the law considers itself the final arbiter of all practical normativity—itsself included.⁸¹

This uniqueness manifests itself in two related phenomena. First, the universal existence of laws that are taken to be unjust but remain in force.⁸² Even if a legal norm is universally condemned as imprudent, asinine, unholy, or immoral, it remains in force, which affirms that the legal regulation of human behavior is not subjected to other normative orders. Accordingly, the content of a legal norm is irrelevant for explaining its (in)validity—a fact that contravenes any explanation that stresses logical derivation.⁸³

The second phenomenon concerns the ubiquity of official errors—including apparently 'legal' ones—in the creation and application of the law, which nonetheless give rise to existing, valid norms.⁸⁴ Suppose that parliament enacted a

80. Kelsen, *supra* note 74 at 71.

81. Cf Raz's analysis of law as the supreme guardian of society: see Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) at ch 5.

82. See Kelsen, *supra* note 74 at ch V.

83. There is a small caveat to this claim, because Kelsen held that content-based conditions *might* give rise to explanations of validity under specific circumstances. But he also believed that such material conditions may well be flouted with impunity by the deciding official, as the subsequent discussion makes clear. For a fuller elaboration of the point, see Meir Hai Yarom, "The Limits of Dynamic Constitutionalism: Kelsen, Dyzenhaus, and the Official Monopoly over Legal Validity" (2026) [unpublished, on file with author].

84. See *ibid*. See also Stanley L Paulson, "Material and Formal Authorisation in Kelsen's Pure Theory" (1980) 39:1 Cambridge LJ 172: "errata are a fact of legal life" (*ibid* at 192).

discriminatory statute despite a constitutional provision guaranteeing equality.⁸⁵ Even in such a case, where the derivation went clearly wrong, and the lower norm's content cannot be traced to that of the upper norm, the lower norm retains its validity unless and until it is terminated in a legally regulated process.⁸⁶ Since both phenomena put the lie to a neat static model, a dynamic model is necessary, vindicating legal validity as different in kind from other normative orderings.⁸⁷

Dynamic validity captures this legal peculiarity. Dynamic relations between norms accordingly turn, not on an idealized derivation of the content of the lower norm from its upper-level counterpart, but on the process through which lower norms come to be. The higher norm is taken to contain, not the specific content to be teased out by an act of intellect, but the manner in which the lower norm may be brought about by the official. This reflects Kelsen's persistent belief that any application of a legal norm necessarily involves official creativity, i.e., there is an irreducible element of choice in creating legal norms. For unlike the case of (static) moral norms,⁸⁸ attention to the two mentioned phenomena teaches that legal norms cannot be derived from the content of the higher norms regulating their creation.⁸⁹

If static relations connect norms through logical *inference*, dynamic relations highlight that interpretive discretion is inherent to the *creation* of lower norms,⁹⁰

85. The example is Kelsen's: see Hans Kelsen, "The Concept of the Legal Order", translated by Stanley L Paulson (1982) 27:1 Am J Juris 64 at 69ff.

86. See Kelsen, *supra* note 74 at 198ff. Kelsen repeatedly argued that even if a higher norm sets a 'frame' of possibilities for the content of the created lower norm, and the official creates a norm whose content deviates from the frame entirely, the norm could still be valid; see his explanation of the impossibility of conflict between a higher and lower norm, even if the latter defies the (content-based) dictates set by the former (*ibid* at 268ff). For the same reason, in cases where parliament created a statute in blatant violation of a material constitutional provision, not only would the statute retain its validity, but the constitutional provision apparently in tension with it must be either reconstructed to allow the deviation or, if no mechanism is available for such reconstruction (e.g., the order includes no constitutional court with final authority), the constitutional provision would be debunked, since "[t]he [applicable] constitutional [provision] ... must be regarded as *legally irrelevant*. The designation of statutes that do not conform to [such] constitutional provisions as 'unconstitutional' has no legal significance; like the designation of a statute as unjust, it is only morally or politically significant." Kelsen, *supra* note 85 at 71 [emphasis added].

87. On Kelsen's view of the *sui generis* nature of legal validity, see Yarom, *supra* note 67 at 247ff. See also Damiano Canale, "Legal Reasoning" in Luka Burazin, Kenneth Einar Himma & Giorgio Pino, eds, *Jurisprudence in the Mirror: The Common Law World Meets the Civil Law World* (Oxford University Press, 2024) 417 at 420 ff (stressing that for Kelsen, the deductive legal syllogism is constitutive in character).

88. See Kelsen, *supra* note 74 at 195-96. Kelsen is sometimes taken to have held somewhat simplistic views on morality. But his point here is not outrageous: At least under some moral systems, the content of the lower norm is perfectly governed by that of its higher-order counterpart (think about classic utilitarianism, for example). In this sense, he believed, morality is a static normative order.

89. Kelsen remained committed to this idea throughout his career, and despite changes of heart over several other important points: see *ibid* at ch V. See also Hans Kelsen, *General Theory of Norms*, translated by Michael Hartney (Oxford University Press, 1991). For a good survey of the changes in Kelsen's view, see Stanley L Paulson, "Metamorphosis in Hans Kelsen's Legal Philosophy" (2017) 80:5 Mod L Rev 860.

90. For Kelsen, any application of a general, higher norm implies the creation of a more concrete, lower one. Setting aside minor differences, this is true for the application of the constitution by

given that the organ or official always enjoys at least some leeway in applying a higher norm.⁹¹ Slightly differently, legal norms are validated because they are ‘posited’ by an organ or created in a legally authorized way—as prescribed by their validating norms and, ultimately, in the manner set by the basic norm. Hence, the reason for dynamic validity lies *exclusively* in the process through which norms come to be, mediated by official acts.⁹²

4. Hart’s (Partly) Static Positivism

It is difficult to overstate the jurisprudential significance of this distinction. Let me just say that one of the foremost contemporary legal theorists, David Dyzenhaus, recently argued that the distinction underlies the true divide in legal philosophy, and that a contrast between static and dynamic theories of law should accordingly supplant the worn-out battles between positivists and natural lawyers.⁹³ I think that Dyzenhaus is right, and the following discussion provides one illustration for the distinction’s importance. For the crux of our positive argument is that Hart’s and the populist’s legal theory are similar because, despite notable nuances, both are static theories.

The burden of the previous section was that a theory of law is static to the extent that its explanation of validity is a function of deriving a lower norm’s content from that of an upper one.⁹⁴ The more the explanation relies on derivation, the less the theory accords officials leeway in creating or applying norms—and the more static it would be.

We saw that for Hart, law is a social practice at the foundation of which one finds a complex interaction between primary, duty-imposing and secondary, power-conferring rules. I also mentioned that one of the central functions of secondary rules is to orient the application of primary rules of obligation.⁹⁵ Notably, Hart assumed that the application of legal rules is generally speaking a straightforward manner.⁹⁶ Based on the predominant strand of philosophy of language at 1950s Oxford, his idea was that each legal rule exhibits a “core of

means of creating general statutes as it is for the application of a statute by means of creating a judicial or administrative decision. See Kelsen, *supra* note 74 at 234–36.

91. Kelsen reiterates his commitment to official discretion in a long discussion on the value of ‘legal security’, which he contrasts with the value of flexibility in the law. The central point for our purposes is that Kelsen clearly thinks that while certainty in the creation of lower norms is a possible virtue of law, it is not a necessary, i.e., conceptual, feature of legal order. See *ibid* at 235, arguing that in Plato’s ideal state, where judges decide cases based on pure discretion, there still exists law application. See also *ibid* at 250–56, discussing a possible decentralized model of legal order based on Plato’s ideal state.

92. See *ibid* at 198.

93. See Dyzenhaus, *supra* note 26 at 22–23.

94. Kelsen used the term ‘norm’ for denoting laws, whereas Hart usually spoke about legal ‘rules’. To facilitate their interaction, I shall use the terms interchangeably.

95. See Section 2.B.

96. See HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71:4 Harv L Rev 593 at § III.

settled meaning.”⁹⁷ Whenever a legal question displays facts that fall under the meanings of the terms in the rule, application proceeds simply by “classify[ing] [the factual] particulars” under the rule all the way to its logical conclusion.⁹⁸ Hence, if a (primary) legal rule stipulates that theft shall be punishable by up to one-year imprisonment; and if Brian stole from Amy; the normative syllogism would conclude in Brian’s being punished by up to one year in prison.

Had this structure exhausted Hart’s theory of law implementation, his theory would have been a fully static one. It would recognize the validity of the court’s judgment if, and only if, the court had correctly applied the terms in the rule to the factual circumstances of the case. Extrapolating, any decision by a legal organ or official would be valid only if it concretized the content of the relevant rule to the case before them. This would mean that officials are bound by (the content of) duty-imposing rules, and so Hart’s theory of legal validity would effectively boil down to static derivation.

Hart’s theory is more complex than that, however, because he recognized that not all legal disputes lend themselves to such straightforward resolution. Given the ambiguity of language, as well as other normative goals legal systems might cherish, Hart knew that rules are never fully lucid and self-applicable.⁹⁹ It followed for him that, rarely, a case might fall in the “penumbra” of the legal rule.¹⁰⁰ Suppose that Amy gave Brian a gift which, years later, she regrets having given; she now claims that by keeping it, Brian stole it from her. Suppose further that, besides the mentioned rule against theft, no other duty-imposing rule in the system pertains to such circumstances. The primary rule is indecisive with respect to the penumbral case, and the deciding judge would have to resort to their own discretion—namely, judgment unstructured by primary rules—to resolve the dispute. The judge would typically interpret the rule and, if needed, the body of law to which it doctrinally belongs, to come up with an *ad hoc* solution to the fringe case. It follows that, at least in penumbral cases, power-conferring rules may allow officials to resort to their own judgment, including moral and political judgment, to refine, complement, or otherwise smooth the application of the rule to the case.

But while this indeed shows that Hart does incorporate dynamic elements, it also partly vindicates Kelsen’s accusations. For Hart’s theory retains static elements in proportion to two variables: first, the extent to which cogent normative derivation conditions the official resolution of core cases; second, the relative frequency of penumbral cases in the system.

97. Yarom, *supra* note 67 at 251. Compare Jeremy Waldron’s excellent analysis of the positivist logic: see Jeremy Waldron, “‘Transcendental Nonsense’ and System in the Law” (2000) 100:1 *Colum L Rev* 16.

98. Hart, *supra* note 96 at 610.

99. Specifically, Hart spoke about the “indeterminacy of aim,” in addition to the mentioned indeterminacy of language. Hart, *supra* note 48 at 128. Sometimes it would be wise to articulate open-ended rules, especially in areas where a correct decision by an organ proximate to the case is more important than a secure, uniform decision. There are additional reasons, which need not detain us here.

100. Hart, *supra* note 96 at 615.

First, the more rigid the normative syllogism is, and the more central to the explanation of official applications of the law, the less leeway the deciding official reserves, and the more static the explanation is. Recall Kelsen's example of a legislature enacting a law in blatant defiance of a constitutional provision. As we saw, Kelsen thought that the purported 'unconstitutionality' of the law is neither here nor there when its legal validity is on the line.¹⁰¹ Simply, it does not matter that (we think that) the legislature acted against a primary rule of the system (to use Hart's terminology). So long as the minimal formal conditions designating the legislature as such have obtained, the law enacted would retain its validity notwithstanding the so-called 'error' in its creation. The same holds for any decision of a legal organ: Even when there is no way to trace the content of a lower norm back to that of the upper norm regulating its creation—even when, in Hart's vernacular, the application of the primary rule was *ultra vires*—the defective norm would retain its validity, unless and until it has been abrogated by another legally-regulated process.¹⁰² Not so for Hart: He allowed for such promiscuity only in penumbral cases.¹⁰³

Which leads to the second variable. The more cases in Hart's theory where the above description holds—the more core cases there are—the more static his overall theory would be, because the more frequently it would resort to derivation to explain the (in)validity of lower norms. Put slightly differently, the greater the part that core cases occupy, the more the relevant rules authorize an organ to apply a norm by conditioning the application based on substantive, i.e., content-based, stipulations. In such cases, Hart's theory leaves the official little room for straying from the politically dictated content in core cases, i.e., when a valid rule has been detected; in other words, in such cases, it all but collapses *application to execution*.

Hence its (partly) static nature. No matter how inefficient, morally depraved, or otherwise demeritorious a *valid* rule is, the judge may not alter its content or fail to apply it exactly as enacted. It follows that any change in the content of valid law is reserved to the political echelon, a paradigmatically static feature. As Dyzenhaus puts it, in a way readers might recognize, in such instances law's role reduces to that of a "transmission belt," conveying dictates from political authority to legal subjects, unhampered by the mediation of official interpreters.¹⁰⁴ And it is here that the true affinity between Hart and the populist emerges.

101. See *supra* note 86.

102. See Kelsen, *supra* note 74 at 230ff.

103. We can conceive of core cases, i.e., circumstances falling under rules whose content is clear and readily applicable, where secondary rules nevertheless allow the official to completely diverge from the rule's content. These would indeed amount to dynamic core cases. But such cases are extremely rare—it makes little sense to command an official to consider normative content in applying a legal rule *and* give them leeway in straying from this requirement—so I shall set them aside.

104. Dyzenhaus, *supra* note 26 at 180. Cf Waldron on the positivist emphasis on legislation as a more important source of law than legislation: "We must remember that legal positivism represents not merely a descriptive but also a normative impulse. The classic positivists . . . were not entirely neutral when they identified a parliamentary sovereign as a primary source of law. They valued the opportunity that legislation represented as a way by which the community, or

5. Populist Legal Theory Revisited

Albeit for different reasons and to a different extent, both Hart and the populist see the law as a conduit for mediating the judgments of political authorities, particularly the legislature, to subjects. Hart is committed to this static logic to the extent that the structure of his explanation underlines content-based conditions as necessary for norm application—namely, so long as officials may not deviate from such conditions or their pronouncements would be *ultra vires*. The populist is committed to it even more forcefully because, in their view, the validity (and authority) of any legal norm stems from its immediate responsiveness to popular will. They thus completely exclude the discretion of officials to stray from political dictates, insofar as these reflect the popular will.

This static logic, we now see, makes good sense of the seemingly schizophrenic attitude populists display towards legal order.¹⁰⁵ On the one hand, populists welcome any official decision aligned with (what they consider) popular will, and they would hardly resist legal mediation in such cases. On the other hand, whenever judges (or other officials) intervene in legislation or acts by an elected government, we saw that the populist adamantly criticizes the mediation as an *illegal* gambit by a corrupt, captured, or self-serving institution—notwithstanding the consequences of the suspect political act either to the integrity of legal order itself or to the rights and interests of relevant parties. In both cases, populist legality precludes applying officials from relying on their discretion, for the only thing that matters is that the law accurately channels pre-existing political will. It is, then, a static theory and, for *this* reason, it resembles Hart's.

It is of particular importance to recognize that this similarity serves populists well. As we saw, populists readily harness the apparently 'natural' supremacy of political authorities over the legal order and its judges, to legitimate their attempts to stifle legal resistance to their ambitious programs.¹⁰⁶ But this subjugation is hardly a necessary feature of legal ordering; rather, it is a radicalization of the static logic inherent in Hart's theory. Put simply, the centrality of Hart's jurisprudence allows populists to stretch and weaponize the static logic while selectively drawing on his theory. This allows them to present the reduction of the courts' role to mere execution—and, more generally, the subjugation of legal officials to political authorities—as the default, so-called 'common sense' view.

This overlooked gambit places significant justificatory hurdles on legal theorists and practitioners who seek to resist the populist overtaking. From a normative standpoint, then, the difficulty with arguments such as Adamidis' is that by highlighting the wrong kind of similarity between populists and Hartian theory, they inadvertently serve to legitimize Hart's static logic and

the most enlightened part of it, could take control of its law as something explicitly man-made." Waldron, *supra* note 97 at 37 [footnotes omitted].

105. See Section 1.C.

106. See *ibid.*

the populist reliance upon it in subjecting the legal to the political, the judge to the omnipotent legislature or executive.

In contrast, I argued that Hart's theory is not easily reconcilable with the populist's view of law. True, both instantiate a static logic. But it should be clear enough that, on our analysis, populists *hijack* Hart's theory to thwart judicial attempts at resisting political power grabs. Indeed, modern populists are hardly committed to legal positivism, especially if by this label one has in mind Hart's version. First, populists have difficulty accommodating the central doctrine of a rule of recognition. They likewise care little for the existence of a legal system as the union of primary and secondary rules, the conceptual bedrock of Hart's theory. As far as they are concerned, both primary and secondary rules should immediately respond to popular will. That this is in principle impossible matters little to the populist, who nevertheless seeks to contest legal norms and institutions that stand in their way while simultaneously relying on them when this suits their interests.

Second, populists can only partly assent to another Hartian tenet, mentioned only briefly above: that penumbral cases are decided by (so-called 'extra-legal') discretion—namely, by recourse to the judge's personal judgment. While such judgments might sometimes be oriented by existing law, it was clear to Hart that cases exist where the judge would simply reason morally and politically. Yet inasmuch as judges are insulated from majoritarian pressures, the populist must explain how their unregulated judicial decisions derive from or reflect the people's will.

True, there will be cases where the populist can probably justify penumbral judicial decisions, in particular where the people's will is silent or indeterminate.¹⁰⁷ But it seems just as clear that there will be cases where judges make decisions that cannot plausibly be so explained. One is reminded of Austin's contrivances—specifically, the infamous doctrine of 'tacit adoption'—in explaining how courts apply legal custom, notwithstanding the fact that the Sovereign has never commanded it into being.¹⁰⁸ Similarly, in cases where judges find it necessary to diverge from black letter law or further develop doctrines even against popular pressures, the populist would be hard-pressed to justify the 'free rein' given to a juridical caste—in fact, a quite familiar populist accusation.¹⁰⁹

The populist selective reliance on Hart should not lead us to condemn his theory (or, for that matter, Adamidis'). Far from blaming theories like Hart's for the emergence of insidious populist legalism, we should note how the limits of static positivism, highlighted by Kelsen and Dyzenhaus, invite us to elaborate a dynamic theory of law that does not shy away from granting legal officials true discretion. By recasting legal officials as part and parcel of the formation of legal

107. I thank an anonymous reviewer for pressing me on this point.

108. For an incisive discussion and critique, see Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, 2d ed (Clarendon Press, 1980) at 38ff.

109. Recall that for Hart, linguistic and normative indeterminacy were integral elements in legal systems, not mere esoteric aberrations: see *supra* note 99.

content, we steer clear of the difficulties in Hart, and devise an important prophylactic against the populist's rallying cry against 'usurping' courts.

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