



Democratic Efficacy and the Varieties of Populism in Europe

WORKING PAPER

Populist constitutionalism. Its impact on the constitution, the judiciary and the role of the EU

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Author(s)

Josep Maria Castellà Andreu, Marco Antonio Simonelli (University of Barcelona), Mátyás Bencze, Fruzsina Gárdos Orosz, Zoltán Szente (Centre for Social Sciences, Budapest), Helle Krunke, Sune Klinge (University of Copenhagen)

Contact Information

contact@demos.tk.mta.hu



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Abstract

This working paper aims at better comprehending the populist phenomenon. By choosing the anti-constitutionalist features of populism, the paper sheds light on the challenges posed by populism to constitutional democracy. This is the first step in formulating legal responses to the populist challenge. The DEMOS project is developing these responses. We divide the paper in four major sections. The first part analyses the key features of populist constitutionalism to assess whether it is possible to reconcile populist constitutionalism with contemporary constitutional democracy. We devote the second section to the European Union. In particular, we assess the instruments available to the EU to halt democratic backsliding in EU Member States, and how these instruments have been employed. In the third section, we investigate the concept of judicial populism by analysing the impact of populist policies on the case law of ordinary courts. The last section contains policy suggestions for constitutional democracy to react to the populist challenge.

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A. Executive summary

The present DEMOS working paper assesses the impact of populism on the institutions of constitutional democracy, including the European Union. It is structured along three distinct research areas.

The first one focuses on how the counter-majoritarian institutions of contemporary constitutional democracy are affected by populism. In a nutshell, populist parties affirm the need to profoundly change democratic institutions in order to ensure the primacy of the people's will, that they claim to represent. Yet, the populist attempts to reform the powers and system of appointment of judicial councils, constitutional courts, and independent authorities, evidence that these are ultimately aimed at placing these institutions under the control of the ruling majority. The claim supported in this paper is that the ultimate goal of populist parties is not to re-equilibrate the legitimacy of democratic institutions. Rather, it is to loosen any constraints on the ruling majority actions. This process also embraces parliaments, which have been one of the favourite targets of populist constitutionalism. In particular, populist parties often seek to reduce the number of MPs; — e.g. Czechia and Italy — or to significantly reduce the parliament's competences, as happened in Hungary. Finally, this contempt for the the rule of law principles and the prerogatives of other institutions ultimately affects also the relationship between the people and the populist ruling majority. As the Catalan secessionist process demonstrates, the pretence of populist parties to embody the popular will generate a clash with the checks and limits of constitutional democracy, which counter-majoritarian institutions, in particular the constitutional court, have the duty to enforce. In order to curb the effects of populist politics on constitutional democracy, the main solution appears to be the involvement of a plurality of actors in all the decision-making processes, from the appointment of members of the judiciary and independent authorities to the constitutional revision procedure, requiring a substantial political consensus for its approval.

The second strand of research analyses the role of the EU institutions. In particular, it investigates what are the instruments that should be deployed against anti-constitutionalist regimes in Member States.

The aims of political instruments such as the Rule of Law Framework and Article 7 TEU procedure have proven largely ineffective, given their dialogical nature and the inevitable political deadlocks inherent in the Council decision-making process. This is why the research focuses mainly on the judicial instruments. More specifically, it investigates the common efforts of the Commission and the EU Court of Justice to use the infringement proceeding under Article 258 TFEU as a tool to ensure compliance with EU values — above all, the principles of effective judicial protection and of judicial

independence — via an innovative interpretation of Article 19 TEU. The latter strategy allows the EU not to act in a sanctioning fashion, but rather to present its intervention as a support for the democratic institutions of a Member State, in particular the judiciary.

The third strand of the research, which corresponds to Section 3 of the present working paper, investigates the phenomenon of judicial populism. Judicial populism is indicated in the attitude of a judge who ‘deliberately breaches the standards of proper legal reasoning in order to satisfy the presumed expectations of ‘ordinary people’. Judicial populism may manifest itself in constitutional or ordinary courts (‘everyday judicial populism’) and can assume different shapes. In particular, when a judge truly believes that he has to take into consideration the interests and opinions of ordinary people, then we talk of ‘honest populism’. Conversely, ‘strategic populism’ does not seek to satisfy public needs and sentiments. Rather, it serves as a shield that can help judges to accommodate the objectives of the ruling populist majority. A clear example is offered by Hungary, where since 2010 the government has adopted a populist stance towards penal law and the judges have followed suit. A thorough investigation of everyday judicial populism in Central-Eastern European countries, which are the ones where judicial populism is more visible, allowed us to identify the main corrective answers to this phenomenon. Most notably, an effective lay participation in the administration of justice seems to be the best way to help judges take into account public sentiments without breaching the standards of legal reasoning, while providing an important factor of input legitimacy for the judiciary.

B. Introduction

The present working paper builds upon the results described in the report *Institutional Context of Populism*, which was submitted as a part of a previous DEMOS deliverable report (D2.2), which was published on the DEMOS website as a working paper.¹ In that report the research focused on the institutional contexts that favour the rise of populist politics. In this regard, the present working paper constitutes a step forward to better comprehend the populist phenomenon. By choosing the anti-constitutionalist features of populism, it sheds light on the challenges posed by populism to constitutional democracy. This would be the first step in formulating legal responses to the populist challenge,

¹ See Working paper *On the Institutional Context of Populism*: <https://openarchive.tk.mta.hu/423/>.

which will be developed within the project work package 7. In order to reach this aim, the present document is divided in four main sections.

The First Section analyses the main features of populist constitutionalism in order to assess whether it is possible to reconcile populist constitutionalism with contemporary constitutional democracy.

The Second Section is devoted to the European Union. In particular, the Section assesses the instruments available to the EU to halt democratic backsliding in EU member States, and how these instruments have been employed.

The Third Section is an investigation on the concept of judicial populism. More specifically, it analyses the impact of populist policies on the case law of ordinary courts.

The Fourth Section contains policy recommendations addressed to policy makers to better equip constitutional democracy vis-à-vis the populist challenge.

Before getting to the results of the research, a few preliminary remarks. First, the methodology best suited to answer the questions posed in the agreed DEMOS proposal is one based on a combination of analytical and empirical methods. In particular, the researchers used the relevant existing literature, legislative and constitutional acts, and case law to support their claims. Besides, the answers stemming from a questionnaire drafted in a previous DEMOS task, constituted a pool of data. On the one hand, the data helped researchers identify the most relevant issues to be investigated. On the other, they served as a litmus test for the hypothesis elaborated in the normative analysis. The combination of these two methodologies is of great importance, as it allowed us to produce original research outputs, which will contribute to advancing the knowledge of how populism affects constitutional systems.

Second, this working paper focuses on EU Member States that show a stronger presence of populist parties. Some of these — e.g. Hungary and Poland — already drawn the attention of EU institutions, while others, such as Czechia, Italy, Slovakia, and Spain, have been insofar ignored by the EU, yet are particularly worth investigating for having populist parties, as part of the national, regional or local governments, elaborated, proposed and in some cases enacted, reforms to the democratic system.

Finally, although the present working paper is the product of a common effort of the partners participating in a project task, supervised by the University of Barcelona (UB), each team has focused its investigation on a specific section. The UB team, composed of Prof. Josep Maria Castellà and Dr Marco Antonio Simonelli, has been responsible for the final draft of the present document and for the research work presented in sections 1 and 3.2. The team at the University of Copenhagen (UCPH), composed of Prof. Helle Krunke and Dr Sune Klinge, addressed the issues connected to the EU,

which is presented in section 2. The consortium coordinator team at the Centre for Social Sciences (CSS) in Budapest, composed of Prof. Zoltán Szente, Prof. Fruzsina Gárdos Orosz and Dr Mátyás Bencze, carried out the research on judicial populism, which is expounded in section 3.

1. The anti-constitutional features of populism

1.1 Introduction and methodological issues

Populist constitutionalism, unlike constitutional populism,² is not a fully-fledged constitutional doctrine.³ Rather, it consists of the different proposals concerning constitutional democracy, as excerpted from the populist narrative.⁴ Essentially, populists supposedly aim to enhance the representativeness of the constitutional system as a whole, and reaffirm the centrality of popular will, which they claim to embody. Reaffirming the needs for more democratic legitimacy of democratic institutions, may constitute a legitimate effort to re-equilibrate the democratic and constitutional dimensions of contemporary democracies. Constitutional democracy presupposes an ‘aspiration to a fair equilibrium’ between, on the one hand, the democratic principle, embedded in the respective roles assigned to the legislator and the government in the decision-making process, and on the other hand the rule of law, expressed by the subjection of the policymakers to the laws and the constitution, enforced mainly through the judicial review of legislation.⁵ To this regard, it has already been pointed out in a previous working paper (i.e., On the Institutional Context of Populism) that some legal scholars see in populist

² Constitutional populism is a doctrine originated in the 1990s in the United States and elaborated in the work Akhil Reed Amar, who once stated ‘I suppose if someone asked me, “What is your constitutional philosophy?” I might say that I am a constitutionalist, a textualist, and a populist’. The purpose of this doctrine was to correct the imbalance between the democratic and the aristocratic element of American democracy and advocated essentially for more instruments of democratic participation and less activism from the side of the US Supreme Court. To put it otherwise, constitutional populism does not seek to overstep the boundaries of constitutional democracy but rather to correct its current equilibrium, by offering a textual reading of the Constitution. See: A. Reed Amar, A Few Thoughts on Constitutionalism, Textualism, and Populism, 65 *Fordham Law Review* (1997), 1657 ss; from another author: R. Parker, *Here, the People Rule: A Constitutional Populist Manifesto*, (Harvard University Press, Cambridge), 1998;

³ A political manifesto of this doctrine is the book of Ryszard Legutko, head of the PiS delegation to the European Parliament, vice-president of ECR Group and one of the most prominent intellectuals of the party. See: *The Demon in Democracy: Totalitarian Temptations in Free Societies*, (Encounter Books, 2016).

⁴ Some authors instead outlined the main claims of a populist constitutional theory. These are namely: 1) the prevalence of the rule of men over the rule of law; 2) the unity and immediateness of the people will 3) a strong accent on constitutional identity. However, these more than proposals are a framework within which analysing the impact of populism on constitutional democracy. See: Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 *European Constitutional Law Review* 1 (2016): 6–26.

⁵ Maurizio Fioravanti, *Constitución*, (Trotta, 2011), 163-164.

constitutionalism a positive factor capable of redressing the lack of democratic legitimacy in contemporary democracies by stressing the importance of popular sovereignty.⁶ In particular, populist constitutionalism points to two features of contemporary democracy, which are allegedly threatening its democratic legitimacy. First, a supposedly uncontrolled growth of non-majoritarian institutions, which manifests itself through judicial activism, especially from constitutional jurisdictions and, second, a proliferation of independent authorities provoking a depoliticisation of the public sphere to the advantage of technocratic governance. The above-mentioned trends in constitutional democracies have been considered by some authors as a degeneration of democracy, labelling these trends as ‘juristocracy’ and ⁷‘technocracy’,⁸ respectively.

Before assessing the practical effects of populist constitutionalism propositions, it is worth mentioning how legal scholarship tried to categorise the impact which populist reforms have on constitutional democracy. The categories that are being proposed to describe the effects of populism on constitutional democracy are numerous, amongst them the most employed are: ‘constitutional coup’,⁹ ‘abusive constitutionalism’,¹⁰ ‘authoritarian constitutionalism’,¹¹ and ‘democratic regression’ or ‘erosion’.¹² The first concept, ‘constitutional coup’, refers to a situation in which the government, without formally breaking legality, through a series of perfectly legal moves, manages to achieve a ‘substantively anti-constitutional result’.¹³ The term ‘abusive constitutionalism’ is employed when governing majorities make a formally legal recourse to the mechanisms of constitutional revision to erode the democratic order. ‘Authoritarian constitutionalism’ has been conceived as an intermediate

⁶ See working paper *On the Institutional Context of Populism*: <https://openarchive.tk.mta.hu/423/> last accessed 20 October 2020.

⁷ Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, (Harvard University Press, 2004).

⁸ David Kosař, Jiří Baros and Pavel Dufek, The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism, 15 *European Constitutional Law Review* (2019): 427-461.

⁹ Kim L. Scheppele, Constitutional coups in EU Law, in M. Adams, A. Meuwese and E.H. Ballin (eds), *Constitutionalism and the Rule of Law*, Cambridge University Press, Cambridge, 2017, 448 ss.

¹⁰ David Landau, Abusive constitutionalism, 47 *University of California Davis Law Review* (2012): 189 ss.

¹¹ Mark Tushnet, Authoritarian Constitutionalism, 100 *Cornell Law Review* 2 (2015), 393 ss.; H. Alviar García and G. Frankenberg (eds), *Authoritarian Constitutionalism. Comparative Analysis and Critique*, Edward Elgar, Cheltenham, 2019.

¹² Tim Ginsburg and A.Z. Huq, *How to save a constitutional democracy*, (University of Chicago Press, 2018).

¹³ Kim L. Scheppele, Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary), 23 *Transnat'l L. & Contemp. Probs.* 51 (2014).

model between liberal constitutionalism and authoritarianism, where the government is still committed to respecting the constitution in force, but the standard of protection of rights guaranteed by the constitution is not comparable to that guaranteed in a liberal democracy.

According to Tushnet, the first scholar who employed the concept, authoritarian constitutionalism corresponds to a situation in which there is an intermediate level of protection of liberal freedoms, but elections are substantially free. Finally, the most comprehensive conceptual category is that of 'democratic erosion' or 'democratic regression', which can be defined as a situation in which there is a slow but substantial decay of all the three institutional prerequisites of liberal constitutional democracy, namely free and fair elections, guarantees of liberal rights, and the respect for the rule of law.¹⁴ Many of these categories are overlapping and, within the scope of this working paper, the most comprehensive one is adopted: democratic erosion. Independently of these labels, the ways to react to these phenomena from a constitutional point of view remain basically the same and they will be analysed in the concluding paragraph.

Finally, these notions have to be kept distinguished from that of illiberal democracy. Firstly popularised by Zakaria, the concept originally referred to a situation in which formal democracy is established in a country lacking a liberal tradition.¹⁵ The term rose to the general attention when he was employed by Prime Minister Orbán in his famous *Băile Tuşnad* speech of July 2014, where he straightforwardly affirmed that what he was trying to build in Hungary was 'a non-liberal state [which] does not deny foundational values of liberalism, as freedom, etc.. But it does not make this ideology a central element of state organization'.¹⁶ In any case, the term 'illiberal democracy' refers to the result of populist reforms rather than to the technique used to implement these reforms.

As a last preliminary remark, a definition of the material scope of the research and its methodology is in order. As to the first, in order to assess how the propositions of populist constitutionalism are put into practice, this Section, and the working paper as a whole, has its focus on the political systems where populist parties are, or have been, in power. Therefore, the focus of this Section will be mainly, but not exclusively, on the Central Eastern European States ('CEE States'), most notably the countries

¹⁴ Tom Ginsburg and Aziz Z. Huq, *How to save a constitutional democracy*, cit., 71.

¹⁵ Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 *Foreign Affairs*, 6 (1997): 22-43.

¹⁶ The English translation of the speech is available on the official website of the Hungarian government. See: <https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp> last accessed 20 September 2020.

of the Visegrad Group, i.e. Hungary, Poland, Czechia and Slovakia (in descending order of relevance). Concerning the methodology, the research builds upon the result of the investigation in WP 2.4. More specifically, the questionnaire distributed among EU Member States national experts — most notably Q1-5 and 13-15 — had allowed us at a first stage to identify the main streams of the research, and subsequently to validate the results of the normative analysis conducted by the DEMOS researchers.

1.2 Populist constitutionalism and non-majoritarian institutions

1.2.1 Populism, ordinary courts and judicial self-governance

In general, with the rise of populism, the role of ordinary judges in constitutional democracy has become one of the major issues of debate. Populist constitutionalism also challenges the ‘sophisticated version of the rule of law’ adopted in the European context,¹⁷ inasmuch it envisages strong constitutional courts checking the legality of the acts of the political branches.

Concerning the first aspect, the role of ordinary judges, populism, especially in Central Eastern European countries, has put into the question the European model of judicial independence. In a nutshell, this model provides for a high level of independence for judges, both structurally and individually, ensured through a judicial council whose main scope is to protect the independence of the judiciary thus ensuring a separation of the judiciary from the other two branches. Generally, a limited political interference is admitted in the judicial council, where members of the parliaments and/or government participate, on a minority basis, in the appointment, promotion, and disciplining of judges. Also, legislative assemblies participate to various degrees in the elections of the judicial council’s members.¹⁸

This model, albeit being virtually uncontested in Europe, even by populist parties, does not eliminate all friction between the judiciary and the political branches. The main contested issue is precisely the appointment of judicial council members. In this regard, there are two main alternatives. The first is to let parliament elect the majority, or the totality, of the members of the judicial council. Yet, this

¹⁷ The expression is taken from: Cesare Pinelli, ‘The Populist Challenge to Constitutional Democracy’, 7 *European Constitutional Law Review* (2011): 5–16.

¹⁸ For a complete overview of the European model of judicial council see : *German Law Journal*, vol. 19, no. 7, Special Issue - Judicial Self-Government in Europe.

often results in an excessive politicisation of the judicial council and, indirectly, of the whole judiciary, as illustrated by the cases of Spain and Latin American Countries.¹⁹ On the other side of the spectrum, the Italian model provides for the judicial council's members to be elected by judges themselves, with the parliament choosing a minority part of the body. This system has been authoritatively criticised already in 1985 by Cappelletti who held that albeit such a model 'might still be less fearful than one of dependency from the political power; it is not, however, necessarily less damaging'.²⁰ The increased politicisation of the judicial function indeed can hardly be said to be compatible with a judiciary that is essentially unaccountable towards the democratically elected branches of power. Also, as shown by the recent scandal involving members of the Italian High Council of the Judiciary and MPs, the Italian model only moves the problem of politicisation from one forum to another; i.e. the judiciary cannot be completely insulated from political pressure.²¹

If criticism of the European model of judicial council may in principle be justified, these are all the more valid for its practical implementation in Central European States. Two paradigmatic cases to that extent are Hungary and Poland. After the collapse of the Soviet Union, these two countries swiftly moved towards the Western model of democracy, with the purpose of joining the European Union.²² This included also the adoption of the European standards concerning judicial independence.²³ And, in countries that had experienced fifty years of communist rule, characterised by an extreme deference

¹⁹ Aida Torres Perez, *Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain*, 19 *German Law Journal* 7, 1769-1800. In 2013, the GRECO, the Council of Europe body entrusted with the fight against corruption, invited the Spanish government to reconsider the system of appointment of judges and members of the General Council of the Judiciary. See: GRECO Eval IV Rep (2013) 5E, Corruption prevention in respect of members of parliament, judges and prosecutors, adopted by on 6 December 2013. In October 2020 Prime Minister Sanchez proposed to change the Organic Law governing the system of appointment for the General Council of the Judiciary. The change envisages to lower the majority required for the election of 12 of 20 members of the Council from 3/5 of the members of the Parliament to an absolute majority as a response to the blockage of the renovation of the body by the opposition. Also the reform proposes that, after the expiration of the 5 years mandate, the Council is precluded to adopt relevant decisions until its renewal. Strong critics against such proposals were raised both by judges and opposition parties.

²⁰ Mauro Cappelletti, "Who Watches the Watchmen?" A Comparative Study on Judicial Responsibility, 31 *The American Journal of Comparative Law* 1 (1983): 61.

²¹ Interestingly, one of the proposals that were put forward to the reform the appointment process to the Consiglio Superiore della Magistratura, the Italian Minister of Justice, a member of the populist 5 Star Movement, proposed to select the judicial members of the Consiglio Superiore della Magistratura by drawing. On the impact of such a move for the legitimacy of the body, see: Marco Mandato, *Il sorteggio come metodo di decisione. Principi e fattispecie*, *Nomos. Le attualità nel diritto* 3 (2019), available at: <http://www.nomos-leattualitaneldiritto.it/nomos/marco-mandato-il-sorteggio-come-metodo-di-decisione-principi-e-fattispecie/> last accessed 20 October 2020.

²² A complete and detailed assessment of the adaptation of Central European States to the European standards concerning judicial independence is contained in: Open Society Institute, *Monitoring the EU Accession Process: Judicial Independence*, (Budapest, Central European University Press), 2001.

²³ Albeit the requirement to have an independent judiciary was not explicitly mentioned in the 'Copenhagen criteria', during the accession talks leading to the 2004 enlargement the Commission required all candidate States - thereby including Hungary and Poland - to provide sufficient guarantees for judicial independence. See: D. Kochenov, 'Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', 8 *European Integration Online Papers* (2004): 20.

of the judiciary towards the ruling majority, this process resulted, as characterised by AG Bobek, in an ‘extreme swing from zero judicial independence to 200%’.²⁴ This swing implied, amongst others, the institution of a judicial council. The European model of judicial council, in its version imposed on Central European States as a requirement under the Copenhagen criteria, used as a template the Italian Consiglio Superiore della Magistratura,²⁵ and thus provides for a constitutionalisation of the body; a majority of the members elected by the judges; and the transferral of all substantial decision-making powers concerning judges’ career to the body.²⁶

The Hungarian National Council of Justice, created in 1997, had responsibility for the appointment, promotion, dismissal, and disciplining of judges, and was elected exclusively by members of the judiciary, thus guaranteeing an almost complete self-administration of the judges. The granting of such extensive self-regulatory competences to a judiciary just came out from an authoritarian regime, without any serious vetting procedure may indeed represent one of the causes of the backlash against judicial independence in Hungary.²⁷

The Polish National Council of the Judiciary was composed of 15 judges elected by members of the judiciary, four by the parliament, one by the President of the Republic, with the Minister of justice and the President of the Supreme Court members *ex officio*. Similarly to Hungary, in Poland the establishment of judicial self-government was not preceded by any vetting procedure either.²⁸

Both these bodies were profoundly reformed by the populist governments of Hungary and Poland. As to the Hungarian National Council of Justice (‘NCJ’), in 2012 it was stripped of many of its powers by a constitutional reform that established the National Office for the Judiciary (‘NOJ’). The latter is a unipersonal body, composed of a President, elected with a nine year mandate by the Parliament, with a 2/3 majority, on a proposal from the Prime Minister. The President has the power to appoint, promote and discipline judges. Also, the President has been given an almost unfettered discretion to transfer cases from one court to another. All in all, the long duration of the mandate, combined with the extensive powers accorded to the President and its direct dependency from the ruling majority,

²⁴ Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14 *European Public Law* 1 (2008): 100-101.

²⁵ Simone Benvenuti and Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model*, 19 *German Law Journal* 7 (2018): 1641 ss.

²⁶ European Commission for Democracy Through Law (Venice Commission) CDL-AD (2007), *Judicial Appointments*, Report adopted by the Venice Commission at its 70th Plenary Session (March 16–17, 2007).

²⁷ David Kosař, Jiří Baros and Pavel Dufek, *The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism*, cit., 445.

²⁸ In total, only 30 disciplinary proceedings were initiated, of which four were heard by disciplinary courts. In the end, however, all judges were acquitted. See: Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 19 *German Law Journal* 7 (2018): 1842-1843.

makes it impossible to consider the President of the NOJ a self-governing body of the judges. The old National Council of Justice has been formally maintained, but it does not enjoy any meaningful power. Under the new legal framework, its main function would be to supervise the activity of the President of the NOJ. Yet, there is no accountability mechanism obliging the President to comply with the recommendations received by the Council. Interestingly, in 2019 a clash between the NCJ and the President resulted in the former body submitting a preliminary reference to the ECJ in which it is asked whether the rules of appointment of the President and its powers are compatible with EU standards concerning judicial independence and effective judicial protection.²⁹

The path followed by the Polish populist government was slightly different, as the PiS cannot count on a majority wide enough to proceed to a constitutional reform. Thus, instead of being reformed the national judicial council was packed. More specifically, on December 2017 by means of an ordinary law, the parliament prematurely terminated the terms of 15 judges sitting on the 25-member National Council for the Judiciary and changed the election rules so that 15 new members of the National Council for the Judiciary were elected by parliamentary majority rather than by judges.³⁰ After this move, the European Network of Councils for the Judiciary suspended the membership of the Polish concouncil for not being independent from the executive and the legislative power.³¹ Finally, the Minister of Justice was given the power, albeit temporarily limited to 6 months, to dismiss court presidents and appoint new ones without consultation.

One should also note that both executives approved laws lowering the mandatory retirement age for judges. In this case, Hungary succeeded whereas the Polish attempt was blocked by the European Court of Justice, which in *Commission v. Poland (C-619/18)* declared the lowering of the mandatory retirement age from 70 to 65 and the discretionary power of the President of the Republic to allow for a prorogation of the judges' mandate to be incompatible with judicial independence and thus with

²⁹ More extensively see: Dániel G. Szabó, A Hungarian Judge Seeks Protection from the CJEU – Part I, *Verfassungsblog*, 28 July 2019, <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/> last access 20 October 2020.

³⁰ Notably, the withdrawal of the law was the one of the recommendations contained in the Commission reasoned opinion for the activation of the Article 7 TEU procedure. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367 last accessed 20 October 2020.

³¹ See: <https://www.encj.eu/node/495> last accessed 20 October 2020.

the principle of effective judicial protection enshrined in Article 19 TEU and 47 of the Charter of Fundamental Rights.³²

The only country which resisted the pressure coming from the Commission and the Council of Europe to institute a judicial council was Czechia. Albeit the rule of law record of the Babiš government is far from being perfect, the judiciary appears to have better safeguarded its independence, especially if compared to Hungary and Poland. Thus, it is worth considering how judges are appointed in Czechia. All Czech judges are appointed by the President of the Republic, which is a counter-majoritarian institutional holding significant political powers, from a list prepared by the Minister of Justice and with the consent of the government.³³ The suitable candidates are indicated by courts presidents. Promotion and re-assignment are carried out within the judiciary only. This means that the most politically sensitive appointment, i.e. those to superior courts, including the Supreme Court, are outside the sphere of influence of politics. In the formulation of legal reactions to populism, in WP 7, the Czech model for guaranteeing judicial independence will thus deserve particular attention.

In conclusion, the combined effect of the changes implemented in Hungary and Poland, is a de facto breach to the founding principle of constitutional democracy: the separation of powers between the political branches and the judiciary. The origin of these changes is to be found probably in the blind acceptance of the European model of judicial independence during the transition to democracy, that did not take into account the peculiarities of the national legal systems and societal values. Yet, the

³² For an extensive commentary to the case see: Piotr Bogdanowicz and Maciej Taborowski, How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience, 16 *European Constitutional Law Review* (2020): 1-22.

³³ For more details on the judicial appointment process in Czechia and the role of the President of the Republic see: Michal Bobek, Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (Non)Transformation, *College of Europe Research Paper* 3 (2014), available at: <https://www.coleurope.eu/research-paper/judicial-selection-lay-participation-and-judicial-culture-czech-republic-study>, last accessed 20 October 2020.

solutions put forward by populist constitutionalism as implemented by populist governments undermine the very foundation of the rule of law state and represent an overreaction to an inherent tension in constitutional democracy between the majoritarian institutions and the counter-majoritarian ones.

1.2.2 Populism and constitutional courts

Moving to the second aspect, i.e. judicial activism in constitutional adjudication, the cause-effect relationship follows the same pattern. Alike an independent judiciary, a constitutional court empowered to carry out judicial review of legislation is considered to be part of the European version of constitutional democracy.³⁴ The possibility of declaring a piece of legislation null and void for being in violation of the constitution, embeds the very idea that the will of the ruling majority is subject to constraints: constitutional courts indeed can be rightfully considered the counter-majoritarian institutions par excellence. After WWII constitutional courts took a proactive stance, abandoning the role of mere negative legislators assigned to them under the Kelsenian model, and beginning an extensive production of judge-made law. The 20th century, in fact, has also been dubbed by constitutional law scholars as the century of constitutional justice.³⁵

Whilst the role of constitutional courts is essentially undisputed by populist parties in Western Europe - with the possible exception of Catalan independentists - in CEE States constitutional judges have been frequently the target of attacks by populist governments. During the transition to democracy of post-communist countries, a body entitled to perform judicial review of legislation was made a requirement under the 'Copenhagen criteria'. In general, all the constitutional jurisdictions of CEE States showed a somehow surprising readiness to overturn important statutes, often frustrating genuine attempts of reforms by incumbent governments.³⁶ Among these courts the most active was the Hungarian Constitutional Court. During the 1990s, it presented itself as the guardian of the democratic transition. The Hungarian Constitutional Court, in fact, was an example of judicial activism especially with respect to the economic and social policies of government by limiting what the government could do at its own discretion. Also, the Hungarian Constitutional Court availed itself of its

³⁴ See: Venice Commission, CDL-STD(1993)002-e, Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993), 3.

³⁵ See: David Rousseau, *La justice constitutionnelle en Europe*, (Montchrestien 1992).

³⁶ See: Hermann Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (The University of Chicago Press 2000).

powers to introduce into the country European standards concerning the rule of law state and fundamental rights. In the end, the most powerful constitutional jurisdiction in CEE was the target of the most ferocious attack on its prerogatives and independence.

In comparison to the Hungarian Constitutional Court, the Polish Constitutional Tribunal had, at least in its first years, a more deferent attitude towards the government. Nonetheless, in the context of a multi-party system where political deadlocks were common, the Polish Constitutional tribunal gradually affirmed itself as the supreme interpreter of the Constitution. Notwithstanding a high rate of judgment of unconstitutionality, the Constitutional Court and the Parliament in Poland managed to build strong mutual relations with only occasional conflicts.³⁷ On the contrary, the period after the election of the first PiS government, in 2005, was marked by frequent and much more serious conflicts between the government and the Polish Constitutional Tribunal. These clashes were only the prelude to what happened in 2015 when the PiS came to power again.

By packing the constitutional courts with government-friendly judges and hollowing them out of their powers - e.g. the New Fundamental of Hungary substantially reduces the scope of judicial review of legislation especially as regards abstract control - the populist governments conveyed the message that the will of the ruling majority, being legitimated by the popular vote, cannot be made subject to unelected bodies.

A justification for such a claim is ready made. Many states, including within the EU, e.g. the Netherlands, indeed do not allow any judge to scrutiny the constitutionality of legislative acts. However, one should note that any comparison between consolidated democracies and new one should be given careful consideration, in particular one should look at the national legal system as a whole and its history. Also, if a constitutional jurisdiction is provided for in the constitution, as it is still case in both Hungary and Poland, it should be put in the conditions to carry out its mandate. And, this is not case in these two countries, where the constitutional courts have been captured by the ruling majority and they have been transformed into sham constitutional courts.

Concerning Hungary specifically, the main instrument to shield laws enacted by the majority from judicial review, has been to enact these laws at a constitutional level, thus radically foreclosing the jurisdiction of the court. And this often resulted in a violation of the rights of minorities and marginalised groups, as illustrated by the constitutionalisation, after two rulings from the Constitutional

³⁷ David Kosař, Jiří Baros and Pavel Dufek, *The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism*, cit., 445.

Court of opposite sign, of the possibility for local governments to prohibit homelessness and a classic definition of marriage, as including only heterosexual couples.

What happened in Poland, during the ‘battle for the Constitutional Tribunal’,³⁸ also clearly demonstrates that these attacks on constitutional courts are not based on a dissatisfaction with the overall performance of the Court, but rather strikes at the very existence of limits to the popular will. The illegal appointment of three constitutional judges, albeit preceded by a dubious attempt of the previous ruling party, the Civic Platform, to appoint five candidate judges in the last days of the legislature, the removal of the Court’s president and the subsequent packing of the Constitutional Tribunal demonstrate that behind the PiS attack there is only the intention to loosen the constraints on the government’s actions, rather than an intention to coherently reshape the functions and competences of the constitutional adjudicator.³⁹

The constitutional courts of Slovakia and Czechia, instead, appear to have better resisted the populist tide. Significantly, both courts embraced the doctrine of unconstitutional constitutional amendments:⁴⁰ the Czech court in 2009, and the Slovak one in 2016.⁴¹

This doctrine represents the ultimate consequence of judicial activism, as it essentially empowers constitutional courts to strike down constitutional amendments and legislation for incompatibility with the higher principles of the constitution, sometimes identified by the judges themselves.⁴² However, this ‘extreme’ form of judicial activism, did not cost the two courts their independence. In the Slovak case, on the contrary, this judicial doctrine was endorsed in the aftermath of a constitutional crisis, during which the President of the Republic refused to appoint three new judges to the Constitutional court, notwithstanding a ruling from the Constitutional Court that this constituted a violation

³⁸ Tomasz Tadeusz Koncewicz, Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense, *Int’l J. Const. L. Blog*, Dec. 6, 2015, at: <http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense>, last accessed 20 October 2020.

³⁹ A more detailed account of these event may be found in the Venice Commission opinion on the law on the Constitutional Tribunal. See: CDL-AD(2016)001, *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

⁴⁰ For a detailed illustration of this theory see: Yaniv Roznai, *Unconstitutional Constitutional Amendments*, (Oxford University Press, 2018).

⁴¹ Judgment of Slovak Constitutional Court of 30 January 2019. For a commentary on the judgment see: Simon Drugda, Slovak Constitutional Court Strikes Down a Constitutional Amendment—But the Amendment Remains Valid, *Blog of the International Journal of Constitutional Law*, 25 April 2019, available at: <http://www.iconnectblog.com/2019/04/slovak-constitutional-court-strikes-down-a-constitutional-amendment-but-the-amendment-remains-valid/> last accessed 20 October 2020.

⁴² In legal systems where the constitution contains an eternity clause, as is case for Germany, the application of this doctrine is obviously less controversial.

of the Slovak Constitution.⁴³ After the ‘surrender’ of the President of the Republic, who finally appointed the three judges, and the election of the a new liberal pro-European president, Zuzana Čaputová, the Constitutional court may ride this anti-populist tide to reaffirm its role as the supreme interpreter of the Constitution and guarantor of fundamental liberties.

At the opposite side of the spectrum there is Hungary, where the populist majority has tried to limit as much as possible the judicial activism of the Constitutional Court. The Hungarian Fundamental Law of 2011 indeed prescribed the methods of interpretation of its own text. According to this unusual but not unprecedented approach, the Constitution requires the Constitutional Court to apply specific methods when it interpreting the provisions of the Fundamental Law. While some of these ways are well-known and appear in most constitutional courts’ practices, like the purposive interpretation or the plain meaning rule, others relate to certain content requirements in order to enforce specific constitutional values, such as respect for the historical constitution or the principle of balanced, transparent and sustainable budget management. Besides,, the Fourth Amendment to the Fundamental Law of March 2013 repealed all Constitutional Court rulings prior to the entry into force of the new Fundamental Law in 2012. Thus further pushing the Constitutional Court to a change of its case law, more in line with the values bring forward by the new populist majority. The combined effect of the imposed methods of constitutional interpretation and court-packing resulted unsurprisingly in constitutional jurisprudence more favourable to the populist majority, and makes it harder to consider the current constitutional court as an effective counter-majoritarian institution.⁴⁴

1.2.3 Populism and technocratic governance

Like the judiciary and constitutional courts, all the bodies which embody technocratic governance, can be classified as non-majoritarian ones. Yet, if the former respond to the necessity of ensuring that the political branches act in respect of laws and constitution, the creation of independent authorities

⁴³ A complete illustration of this constitutional crisis can be found in the I-Connect Symposium on the case. The first episode of the saga is available at: <http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-introduction/>, last accessed 20 October 2020.

⁴⁴ More extensively see: Fruzina Gárdos-Orosz and Zoltán Szente. Framing constitutional interpretation in the populist age, paper presented at the XIVth CEENJ conference, *Jurisprudence in Central and Eastern Europe*, which took place in Bratislava, Slovakia, on September 12-13 2020.

is adopted on another rationale. Namely, the idea that, giving the growing complexities of contemporary societies, the government's functions are better exercised by the people with expertise in the field to be regulated.⁴⁵

Critics of technocratic governance point out that this delegation actually is due to the unwillingness of political parties to take decisions with long term effects, as these may affect negatively their electoral performance, on which their permanence in power relies. Many authors have also emphasised how, in the last decades, the growth — both in number and competences — of independent authorities and regulatory agencies, has been uncontrolled, causing an excessive depoliticisation of the public sphere and a marginalisation of the parliament's role.⁴⁶ Hence, they observe that, in this regard, populism and technocratic governance are related phenomena as they both produce an imbalance in the separation of powers.⁴⁷ In this light, a clash between technocratic institutions and populism appears unavoidable.

Within the European Union Member States, the diffusion of independent authorities amongst Member States varies considerably. For instance, France, following the 'EU model', created a vast array of technocratic authorities with a considerable degree of independence. At the opposite, in Germany, confidence in the capacity of the legislature and the executive to pursue rational policy remains strong, as a consequence there are only a few independent administrative agencies.⁴⁸ Nonetheless, the EU has always pushed for a significant depoliticisation of the public sphere, to be realised by conferring significant powers to bodies composed of experts.⁴⁹ Evidently, during the accession phase of CEE States the EU leverage power was bigger. All CEE States did indeed adopt a vast array of regulatory agencies and independent oversight authorities.

The dismantlement of technocratic governance can be considered as 'step two' of democratic erosion, which is why such a process has been systemic only in Hungary, where Fidesz's spell on power started in 2010. In a nutshell, Orbán packed all the independent entities within the executive branch,

⁴⁵ Davide Majone, Europe's "Democratic Deficit": the Question of Standards, 4 *European Law Journal* 1 (1998): 5-28.

⁴⁶ See: Cesare Pinelli, 'The Populist Challenge to Constitutional Democracy', 7 *European Constitutional Law Review* (2011): 15.

⁴⁷ Christopher Bickerton and Carlo Invernizzi Accetti, 'Populism and Technocracy', in C. Rovira et al. (eds.), *The Oxford Handbook of Populism*, Oxford University Press 2017. The challenge to the separation of powers posed by technocratic governance has been also signalled by Bruce Ackerman. See: 'The New Separation of Powers' 113 *Harvard Law Review* (2000): 633.

⁴⁸ Susan Rose-Ackerman, The Regulatory State, in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press, 2012), 676.

⁴⁹ Stéphanie De Somer, *Autonomous Public Bodies and the Law: A European Perspective*, (Edward Elgar 2017), in particular, 23-100.

including the Electoral Commission, the Budget Commission, the Media Board, and the Ombudsman office, in most of the cases simply by removing incumbent members.⁵⁰ The negative effects of such a move are particularly visible in the case of the Electoral Commission, whose function is to ensure the fairness of all electoral consultations. The Orbán government proceeded to modify the composition and powers of the body only in 2013, contextually all the incumbent members were also removed.⁵¹ The most worrying element is the distinction between members elected by the parliament with a 2/3 majority, whose mandate has a duration of nine years, and members delegated by the opposition parties, who took office just after the inauguration of the Parliament and whose mandate ends with the legislature, i.e. they are not sitting in the Electoral Commission during the parliamentary elections.

Poland can also provide a useful example in this regard. In 2015, the PiS enacted a new media law that required all broadcasters to have a board controlled by the government. The new law dismissed the boards of all public-service broadcasters and gave each broadcaster a new board, whose members can be appointed and dismissed at any time by the Ministry of the Treasury. Such a dependency, in a context in which the National Media Council — the oversight authorities for media in Poland — is already controlled by the government, cannot but threaten the freedom of information in the country, especially for political opponents.⁵²

All in all, the Polish and Hungarian cases illustrate that the attacks on technocratic governance are not motivated by a desire to redress an existing imbalance in constitutional democracies. Rather, they aim at dismantling the checks on the ruling majority's actions with the objective of tightening its grip on power.

1.3 Populist constitutionalism and the role of parliaments

In legal scholarship, there is a general consensus about the fact that populism is strong in places with weak party systems.⁵³ In other words, when the smooth functioning of parliaments has been hindered by an extreme fragmentation of political parties in the representative assembly, this constitutes the ideal breeding ground for populist phenomena to rise. The reaction of populist constitutionalism to

⁵⁰ For more details on the attack on the Hungarian independent authorities see: Valentina Carlino, *Ungheria: le autorità indipendenti e la 'democratic erosion', Nomos. Le attualità nel diritto*, 3 (2019).

⁵¹ Act XXXVI of 2013 on Electoral Procedure.

⁵² More in details on the attack on freedom of expression by the Polish Government see: Joanna Fomina and Jacek Kucharczyk *The Specter Haunting Europe: Populism and Protest in Poland*, 27 *Journal of Democracy* 4 (2016): 58-68.

⁵³ Jan Werner Müller, *What is Populism?*, (Penguins Book, 2016).

this fragmentation, which often leads to political deadlocks in parliamentary systems, is to strip Parliament of any effective powers in favour of the executive, more specifically in the figure of the Prime Minister.

The events in Czech Republic are paradigmatic to that regard. First, in 2013, Czech Republic's first directly elected president, Miloš Zeman, sought to transform the country's parliamentary system into a semi-presidential one. Zeman, used the legitimacy deriving from its direct election and proceeded to directly appoint his own government, completely bypassing the Czech parliament. This arrogation of the key power of government formation, that under the Czech Constitution belongs to the parliament, was made without any formal amendment to the Constitution, yet the separation of powers was significantly altered as the Parliament was deprived of its most significant check on the executive. Subsequently, in 2017, the winner of the parliamentary elections and current Prime Minister, Andrej Babiš, pledged to abolish the upper chamber of the Parliament (Senate) and to reduce the number of MPs in the lower chamber from 200 to 101. In other words, Babiš aims for a centralisation of power by strengthening the majoritarian elements of Czech parliamentarism. Yet, unlike Orbán, Babiš does not have the required majority to push these constitutional amendments through the Parliament.

Also in Hungary, the powers of the National Assembly have been significantly curtailed by Fidesz's reforms.⁵⁴ The newly created Budget Council, 'an organ supporting Parliament's legislative activities and examining feasibility of the State Budget', does indeed have a veto right on approval of the annual budget law passed by the parliament. Although the Council may refuse to give consent only in specified cases (e.g. if the budget bill would allow state debt to exceed half of the GDP), its decision may not be reviewed or annulled, and this constitutes an exceptional restriction of the Parliament's budgetary power. Further, in case the Budget Council denies its consent to the budget, the President of the Republic may dissolve the parliament. Evidently, in a parliamentary system, as Hungary formally still is, this constitutes a complete reversal of the normal functioning of the relationship between the executive and the legislative powers.

A similar attitude towards the parliament's role has been manifested by the Italian 5-Star Movement, in power since 2018. First, the 5 Star Movement supported by the Northern League, proposed to introduce a more stringent control over representatives by abolishing the prohibition of imperative

⁵⁴ More in details on the reforms implemented by the Orbán's government concerning the role of parliament see: Zoltán Szente, How Populism Destroys Political Representation (Anti-)Parliamentary Reforms in Hungary after 2010, *DPCE Online* 2 (2019): 1609-1618.

mandate. However, while a proposal for amending Article 67 of the Italian Constitution, which contains the prohibition of imperative mandate, has not been presented yet, the 5 Star Movement adopted an internal rule against the phenomenon of 'floor crossing', which provides for the imposition of a pecuniary sanction of 100 000.00 euros on any MP leaving the party. Leaving aside the question of the constitutionality of such a rule, which is at least doubtful,⁵⁵ one should ponder carefully the effect of the introduction of an imperative mandate in parliamentary systems. Indeed, this can only result in an increase in the role of political parties, in the person of their leaders, which would have the power to expel members, causing the automatic termination of the MP's mandate. The prohibition of imperative mandate in fact constitutes the main guarantee for individual MPs against political parties' abuse, and its abolition would only lead to a stronger 'partitocracy'.

Also, the 5 Star Movement pushed through the parliament a constitutional reform which reduces the members of both chambers by approximately one third (the Chamber of Deputies from 630 members to 400 and the Senate from 315 to 200 members).⁵⁶ After its approval in a referendum celebrated on the 20-21 September 2020, the reform entered into force, albeit it only will produce its effects from the next legislature. So far, this represents the sole institutional reform enacted by the 5 Star Movement which has been approved by the parliament, thanks to the votes of the Democratic Party.

A similar proposal is the one contained in the political programme of Marine Le Pen *Rassemblement National*, which aims at reducing the number of members of both the lower and upper houses of the French parliament. This proposal is accompanied by another which aims at introducing a majority bonus to the party that obtains at least the 30% of the popular vote in a newly designed proportional electoral system. Once again, the combined effect of these proposals would be the injection of a further majoritarian element in the French constitutional democracy, to the detriment of parliamentary component.

Finally, these direct attacks on the parliaments have to be considered also in light of that illustrated in working paper *On the Institutional Context of Populism* regarding the use made by populist parties of the direct and participative democracy instruments.⁵⁷ Indeed, the attitude of populist parties as regards the role of parliament in constitutional democracy is only apparently contradictory. The real goal of the populist constitutionalism is not to enhance the democratic legitimacy of the constitutional

⁵⁵ See: Cesare Pinelli, *Il M5S e il rifiuto della rappresentanza politica*, *Rivista Il Mulino*, 02 February 2018, available at: https://www.rivistailmulino.it/news/newsitem/index/Item/News:NEWS_ITEM:4239 last accessed 20 October 2020.

⁵⁶ The reform also limits to 5 the number of the senators appointed by the President of the Republic that can be sitting in the parliament, whilst under the previous system each President had the right to appoint 5.

⁵⁷ See working paper *On the Institutional Context of Populism*: <https://openarchive.tk.mta.hu/423/> last accessed 20 October 2020.

system but rather to empower the ruling majority to act without constraints. To do so, populists push for a centralisation of powers in the hands of the executive, frequently controlled by a charismatic leader. This produces as a consequence a marginalisation of parliaments, which manifests itself in various forms, spacing the abolition of the upper house, the reduction of the number of MPs, to the most extreme one, the introduction of checks above its core competences, like the approval of budgetary bills.

1.4 Populist constitutionalism and the people

To fully evaluate the impact of populist constitutionalism on constitutional democracy, it is also necessary to assess the consequence of the claim made by populist parties to embody the popular will.

Significative in this regard, is the case of the Catalan secessionist process, at least since 2015 until 2017. The separatist parties, who held a thin majority in the regional parliament elected in 2014, approved Resolution 1/XI which proclaimed the start of a constituent process and expressly declared the will to ignore the decisions of the Spanish State institutions, and in particular the Constitutional Tribunal, which is declared deprived 'of competence and legitimacy'.⁵⁸ This resolution represents a turning point in the secessionist process, inasmuch as from this moment on, the Catalan government acted in open defiance of the laws and Constitution of Spain with the sole goal of achieving independence. An illegal referendum took place on 1 October 2017. The law declaring the referendum was approved by the Catalan parliament on 6 September 2017 along with the Law on legal transition and foundation of the Republic of Catalonia, containing a 'provisional constitution' of the Catalan Republic, which was approved the next day. Both bills were approved with disregard of the rules disciplining the legislative process, in particular regarding the opposition's rights. More importantly, Article 3 of both laws self-attributed to the two statutes supremacy over all conflicting norms, thereby including the Spanish Constitution and the Catalan Statute of Autonomy. Further, the referendum law stated that if the votes in favour of independence would be the majority, the result of the referendum would be binding with a simple majority, without requiring any participation or approval quorum. The Spanish Constitutional Tribunal declared the referendum unconstitutional on 17 October,⁵⁹ and the Law on legal transition null and void the following 8 November.⁶⁰ In the latter judgment, the

⁵⁸ The Spanish Constitutional Tribunal declared the unconstitutionality of this resolution in its judgment 259/2015 firmly defending constitutional democracy *vis-à-vis* the attempt to initiate a secessionist process outside a consensual framework. More extensively see: Josep Maria Castellà, Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional, 37 *Teoría y Realidad Constitucional* (2016): 561-592.

⁵⁹ Judgment 114/2017, of 17 October 2017.

⁶⁰ Judgment 124/2017, of 8 November 2017.

Constitutional Tribunal stressed that the law was unconstitutional also according to the Statute of Autonomy of Catalonia which requires a two third majority in the Catalan parliament for any change to Catalonia's Statute.

What the Catalan secessionist process illustrates is that the pretence of populist parties to embody the popular will generates a clash with the limits inherent in constitutional democracy, in particular the rights of political minorities. Besides, this overemphasis on popular legitimacy, leads populist parties, even at subnational level, to disregard the checks and limits imposed by counter-majoritarian institutions, in particular by the constitutional court.

Besides, what the Catalan crisis confirms is how referenda, especially if not provided for by the constitutional framework and thus illegal, are a dangerous instrument that can led to a polarisation in the civil society.⁶¹

In homogeneous societies, such as those of CEE states, the exclusivist reference of populist parties to their people, instead results more often in a lower protection of the rights of minorities and marginalised groups. The examples that can be offered in this regard are numerous: from the constitutionalisation of the prohibition of homelessness in Hungary, to the challenge by Hungary and Slovakia of the Council Decision on the relocation of refugees among Member States, and the restrictive stance of all CEE states towards same-sex marriage.

All in all, populist constitutionalism seems to be radically incompatible with the pluralistic nature of contemporary constitutional democracy. Moreover, the claim 'we are the people' often overlooks the real composition of the civil society. In Catalonia, for instance, the separatist parties only have a thin majority, if any, in the Parliament, not in the electorate. Similarly, the government sponsored referendum held in Hungary on the mandatory relocation of refugees,⁶² and the referendum on the ban of

⁶¹ Working paper *On the Institutional Context of Populism*, 15-16 available at: <https://openarchive.tk.mta.hu/423/> last accessed 20 October 2020.

⁶² *Ibidem*, 8.

same-sex marriage in Romania and Slovakia,⁶³ saw the participation of a minority part of the electorate — in the latter cases the turnout was around 20% — thus demonstrating that the populist agenda is not always in line with the people's will.

1.5 Conclusions

In conclusion, at least to a certain degree, the actions of populist governments in CEE Member States can be considered an 'overreaction to an overreaction'.⁶⁴

The imposition from above of predetermined standards concerning judicial independence, the role of constitutional courts, and technocratic governance may indeed not have been the most effective strategy for a successful transition to democracy in the long run. Yet, as the Slovak constitutional crisis demonstrates, the institutional context only has a relative importance in the contrast of populism, other factors such as the civic engagement and personal qualities of public officials play a decisive role. As Karl Popper once wrote '[i]nstitutions are like [a] fortress. They must be well designed and manned', and 'the functioning of even the best institutions will always depend to a considerable degree, on the persons involved'.⁶⁵

In this light, the reforms enacted by populist governments, especially in Hungary and Poland, rather than an 'overreaction' should be qualified as an attempt to affirm that the popular will, embodied by the ruling majority, is the sole legitimate authority to be obeyed. Such a claim cannot but result in a State which is not governed by the rule of law: ultimately populist constitutionalism ends up eroding constitutional democracy as a whole rather than re-equilibrating it.⁶⁶ With regard to the preliminary findings of the research carried out within this subtask, two main points need to be emphasised.

1) Any justification for the claims of populist constitutionalism seems to be untenable. Whilst it can be said that populist constitutionalism seeks to redress existing imbalances and flaws inherent in constitutional democracy, populist parties provide the wrong solutions to these problems. More worryingly, populist parties, once in power, appear to act in bad faith, disregarding the limits imposed by the Constitution, with the only aim to ensure their permanence in power. And, this constitutes a direct

⁶³ On these referenda see: Elżbieta Kuźelewska, Same-Sex Marriage -A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe, 24 *Białostockie Studia Prawnicze* 1 (2019), available at: <https://www.researchgate.net/publication/333984515>, last accessed 20 October 2020.

⁶⁴ David Kosař, Jiří Baroš and Pavel Dufek, The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism, cit..., 430.

⁶⁵ Karl Popper, *The Open Society and Its Enemies*, (Routledge, 2011 (1st version 1945)), 120.

⁶⁶ Tom Ginsburg and Aziz Z. Huq, *How to save a constitutional democracy*, (Chicago University Press, 2018), 68 ss.

threat to the pluralistic dimension of contemporary constitutional democracy both in the institutions and in society.

2) As a consequence of the point above, we are forced to agree with David Landau that the agenda to immunise constitutional democracy vis-à-vis the populist challenge, is an almost impossible one.⁶⁷ Yet, this should not lead to the conclusion that checks and balances of constitutional democracy are irrelevant. Drawing from the research conducted in WP 2 and 6 it is possible to affirm that the involvement of a plurality of institutional actors in the procedure of constitutional revision, in conjunction with qualified majorities ensuring a substantial consensus to its approval, as well as in the appointment process of constitutional and ordinary judges appears to be a successful strategy to limit the most detrimental effects of a prolonged populist rule. In other words, the answer to the populist oversimplifications may well be more complexity in the design of democratic institutions.

⁶⁷ David Landau, *Abusive constitutionalism*, cit., 259-260.

2. Populism and the EU

2.1 The Rule of Law and EU's values

The Rule of Law is one of the fundamental values of the Union, enshrined in Article 2 (TEU). It is a prerequisite for the protection of all the other fundamental values of the EU, especially fundamental rights and democracy.⁶⁸ Most notably the respect of these values is a precondition for the effective application of EU law, the proper functioning of the internal market and for mutual trust among member states.⁶⁹ The core of the rule of law is effective judicial protection, which requires the independence, quality and efficiency of national justice systems, as reflected in Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU.⁷⁰ Article 2 aims at protecting the constitutional fundamentals of the European legal foundations. The values enshrined in Article 2 TEU apply to any Member State action through mutual amplification with a specific provision of EU law but does 'not aim at the existence of uniform principles and rules, but solely at the observing of European minimum standards'.⁷¹ This approach is based on the idea, embedded in Article 4(2) TEU, that the EU shall respect the constitutional diversities existing between its Member States.⁷² Evidently, this affects the extent of the Article 7 procedure, as the EU cannot demand uniform standards from Member States, as such an interpretation cannot be squared with either Articles 4(2) and 5(1) TEU or Article 51(1) CFR. Therefore, the question is not if there are limits to constitutional pluralism, but how the limits should be defined when certain Member States are weakening the Rule of Law values.⁷³

The tools available to EU institutions to ensure compliance with the Rule of Law values vary significantly in their scope and reach. There are three 'soft law' mechanisms that can be seen as a preparatory step towards legal action, which include the transitional 'special cooperation and verification mechanism' (included in the Act of Accession for Bulgaria and Romania), the Commission's rule of

⁶⁸ See more The Treaty on European Union (TEU), St. Mangiameli (eds.), 2013 on Article 2.

⁶⁹ Koen Lenaerts, 'La Vie Après l'Avis: Exploring the Principle of Mutual (yet not Blind) Trust' (2017) 54 CMLR, 811.

⁷⁰ See: Case C-619/18. Commission v. Poland, para. 47.

⁷¹ See Armin Von Bogdandy and Luke D. Spieker, Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges, 15 *European Constitutional Law Review*, 3 (2019), 422.

⁷² Gerhard Van der Schyff, 'Exploring Member State and European Union Constitutional Identity'. 22 *European Public Law* 2 (2016): 227–242, Mary Dobbs, Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?" 33 *Yearbook of European Law* 1 (2014): 298–334.

⁷³ This becomes quite apparent when considering fundamental rights: relying only on the essentials avoids a breach of Article 51(1) CFR. The Charter, with its full fundamental right *acquis*, remains solely applicable to member states 'when they are implementing Union law' See Armin Von Bogdandy, Luke D. Spieker, Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges, cit., 422.

law framework, and the Council's annual dialogues on the rule of law. Adding to the 'soft law' mechanisms, the following legal procedures are also available to ensure the protection of the rule of law in the EU:

- The breach of values procedure following TEU Article 7 TEU can be triggered, possibly leading to the suspension of a Member State's membership rights.⁷⁴
- Infringement proceedings under Article 258 TFEU can be brought by the Commission if the alleged breach could amount to the violation of a specific rule of EU law.
- National courts from a Member State in which the rule of law is breached may refer preliminary questions pursuant Article 267 TFEU, seeking guidance on the interpretation of EU law and the values in Article 2 TEU with a view to assess the compatibility of national legislation.

2.2 The New EU Framework to Strengthen the Rule of Law (2014)

The Commission presented its New EU Framework to Strengthen the Rule of Law in 2014 as a tool to ensure 'an effective and coherent protection of the rule of law in all Member States.'⁷⁵ The 2014 Rule of Law Framework comprises a structured dialogue between the Commission and Member States disrespecting the rule of law, and the Council's Annual Dialogues on the Rule of Law (2014),⁷⁶ allowing national governments to discuss rule of law related issues within the Council have been amended in 2019.

The 2014 framework has been heavily criticised for being not legally binding and not providing any sanctions' mechanism. Furthermore, non-compliance does not automatically lead to activation of Article 7 TEU. Thus, this discursive approach is unlikely to have any substantial effect on defiant Member States.⁷⁷ In Poland, for instance, the long dialogues allowed for even more dismantling of the rule of law before Article 7 (1) TEU was ultimately activated. The Venice Commission published several opinions on Poland in the same period.⁷⁸ The Commission's 2014 Rule of Law Framework has only

⁷⁴ [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2019\)642280](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2019)642280) last accessed 20 October 2020.

⁷⁵ COM (2014) 158, A New EU Framework to Strengthen the rule of law, 3.

⁷⁶ Council Document 16862/14, 12 December 2014.

⁷⁷ Dimitry Kochenov and Laurent Pech, "Better Late than Never? On the European Commission's Rule of Law Framework and its Activation, 54 *Journal of Common Market Studies* 5 (2016), 1066-1067.

⁷⁸ <https://www.venice.coe.int/webforms/documents/?country=23&year=all> last accessed 20 October 2020.

been applied to Poland, whereas Article 7(1) TEU has been triggered both in relation to Poland and Hungary.⁷⁹

The latest development in the Rule of Law framework is the Communication of 17 July 2019 in which the Commission sets out concrete actions to strengthen the Union's capacity to promote and uphold the rule of law, through promotion of a common rule of law culture, prevention of rule of law problems and an effective response. In particular, the Commission has established a Rule of Law Review Cycle and called on the EU institutions for a coordinated approach.⁸⁰

Many authors rate these mechanisms as largely ineffective.⁸¹ In particular, they suggest that there is no point dialoguing with would-be autocrats all too happy to establish autocratic regimes while pocketing EU funds. This is why the Commission should not bother with activating the pre-Article 7 procedure and rather prioritise the prompt initiation of an infringement action based on Article 258 TFEU — coupled with Article 19(1) TFEU regarding aspects relating to judicial independence as well as an application for interim measures to provisionally prevent the application of relevant national provisions.

2.3 Article 7 TEU mechanism: 'serious and persistent breach' of EU values

The specific purpose of Article 7(1) TEU is to prevent Member State's breaches of the Rule of Law. It allows for action before a Member State has breached the values. The mechanism is triggered by a reasoned proposal from either 1/3 of Member States, the European Parliament (EP) or the Commission, following which the Council by a majority of 4/5, and after having obtained the EP's consent, may determine the existence of a clear risk of a serious breach of EU values by a Member State. The preventive mechanism is independent from the sanctions mechanism provided in the subsequent paragraphs of Article 7 TEU. In the first step the European Council determines by unanimity the existence of a serious and persistent breach of EU values by a Member State — and in a second step the Council can decide by qualified majority to suspend 'certain of the rights deriving from the application of the Treaties to the Member State in question.' The Council may subsequently decide to vary

⁷⁹ <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights> last accessed 20 October 2020.

⁸⁰ COM(2019) 343 final. Strengthening the rule of law within the Union - A blueprint for action.

⁸¹ Laurent Pech, Vlad Perju and Sébastien Platon, How to address rule of law backsliding in Romania, *Verfassungsblog* 29 May 2019, <https://verfassungsblog.de/how-to-address-rule-of-law-backsliding-in-romania/>, last accessed 20 October 2020.

or revoke such measures if the situation in the Member State changes, again acting by qualified majority.

This is a mechanism dominated by political actors, assigning a major role to the Council.⁸² Article 7 TEU 'is not confined to areas covered by EU law but empowers the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously.'⁸³ The requirement for unanimity in Article 7(2) makes it very difficult to activate the sanctions mechanism, and so far only Art. 7(1) has been triggered: against Poland in 2017⁸⁴ and Hungary in 2018.⁸⁵ Due to the unanimity requirements in the second stage of the procedure, expectations are low as to its efficiency.

2.4 The judicial response. The infringement proceeding against Hungary and Poland

The Commission in its 2014 Rule of Law Framework envisaged Article 7 as taking over when the infringement mechanism is inadequate to tackle systematic breaches, and the Council and the ECJ seem to endorse a view of the two mechanisms as coexisting in the field of the Rule of Law.⁸⁶ In this light, the infringement procedure under Article 258 TFEU can be seen to complement Article 7 TEU.

2.4.1. Infringement procedures. The human rights approach

The first infringement procedure following Article 258 TFEU about rule of law was launched in 2012 against Hungary. The CJEU found that Hungary had failed to fulfil its obligations by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 — which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued.⁸⁷

The legal basis used by the CJEU was Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. By relying on the provisions of Directive 2000/78 and the principle of non-discrimination on the grounds of age,⁸⁸ the Commission did not eliminate the threat to the independence of the judiciary as

⁸² Leonard F. M. Besselink, *The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives*, in A. Jakáb and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford University Press 2017, 132

⁸³ Carlos Closa, *Reinforcing EU monitoring of the rule of law*, in C. Closa and Dimitri Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press 2016, 28

⁸⁴ European Commission: Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final.

⁸⁵ <https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act> last accessed 20 October 2020.

⁸⁶ Conclusions, General Affairs Council, 16 Dec. 2014, doc. 16936/14, p. 21

⁸⁷ C-286/12, *Commission v Hungary*.

⁸⁸ Franziska-Marie L. Hilpert, *An Old Procedure with new Solutions for the Rule of Law Crisis*, *Nordic Journal of European Law* 2 (2019): 12

the judges could be compensated instead of reinstated to their former positions.⁸⁹ This approach by the EU Commission in securing compliance with EU values can therefore be labelled as the ‘human rights approach’.

In the second case against Hungary the Commission used another strategy by invoking the EU Charter as grounds of infringement.⁹⁰ The ECJ found that by adopting the national provision and thereby *ex lege* cancelling the rights of usufruct over agricultural land located in Hungary that are held, directly or indirectly, by nationals of other Member States, Hungary had failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter.

This case exemplifies how the Commission is and was determined to use the Charter as a legal instrument in the Commission’s infringement policy and the rule of law crisis.⁹¹ However, the ECJ did not address the concerns about the arbitrary exercise of power and the rule of law directly. The human rights approach was therefore not sufficient to combat the fundamental weakening of the rule of Law.

2.4.2. The second phase. A strategy focused on judicial independence

In the next phase of case law from the CJEU the EU Commission decided to directly tackle the problem of independence of the national judiciaries. This was made possible by the somewhat unexpected turn in the ECJ’s case law with the judgment in *Associação Sindical dos Juízes Portugueses* (‘ASJP’).⁹² The case did not directly concern the Rule of Law crisis, instead the ECJ was called upon to clarify whether the austerity measures adopted during the financial crisis by Portuguese govern had a negative effect on judicial independence.⁹³

The judgment affirms that the principle of the effective judicial protection, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, and the existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. The ECJ thereby held that it was

⁸⁹ Bojan Bugarič: “Protecting Democracy inside the EU On Article 7 TEU and the Hungarian Turn to Authoritarianism, in C. Closa and Dimitri Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, cit., 82-102.

⁹⁰ C-235/17 *Commission v Hungary*.

⁹¹ Franziska-Marie Laura Hilpert, “An Old Procedure with new Solutions for the Rule of Law Crisis”, in *Nordic Journal of European Law*, 2 (2019), 1-19.

⁹² C-64/16, *Associação Sindical dos Juízes Portugueses*.

⁹³ Nevertheless, it was the first case after the 23 April 1986 *Les Verts* case, in which it was affirmed that the Union is “a Community based on the Rule of Law” see C-294/83, *Les Verts* para. 23

possible to find a national provision incompatible with EU law on the ground that it violated Article 19 TEU. Thereby combining the human rights approach with a value-based approach.

The next important case in order to appreciate the development of the jurisprudence of the CJEU is the judgment of 25 July 2018 in *Minister for Justice and Equality C-216/18 PPU*, also known as the *LM* case⁹⁴. In this case the High Court of Ireland asked the ECJ about the conditions to refuse to execute European Arrest Warrants. The referring court did indeed consider that the ‘wide and unchecked powers’ of the Minister of justice in Poland were inconsistent with those granted in a democratic State subject to the rule of law, and that there was a real risk of the person concerned being subjected to arbitrariness in the course of his trial in the issuing Member State.⁹⁵

The ECJ emphasised that the reasoned proposal of the Commission to activate Article 7(1) TEU could be used as an indicator that there is a real risk of breach of the fundamental right to a fair trial guaranteed by Article 47(2) of the Charter. Consequently, the ECJ allowed the Irish court to determine, specifically and precisely, whether there were substantial grounds for believing that that person will run such a risk if he is surrendered to that State. The relevance of this judgment for the rule of law protection is debatable, inasmuch as the ECJ reaffirmed that application of the principle of mutual trust can be suspended only in extremely exceptional cases.

The ASJP case also constituted the legal basis for the two infringement proceedings against Poland. In the first case, the Commission impugned the Polish law which lowered the retirement age for Supreme Court judges and that applied to judges in post who were appointed to that court before 3 April 2018. The same law also granted the President of the Republic the discretion to extend the period of judicial activity of retiring judges beyond the newly fixed retirement age.⁹⁶ The judgment, rejecting the argument brought forward by the Polish government, specifies that the Commission can bring infringement proceedings under Article 258 TFEU even where Article 7(1) TEU has been initiated⁹⁷. Further, the ECJ made clear that the Commission could rely on Article 19 TEU separately in infringement proceedings while further substantiating the interpretation of Article 19 TEU through Article 47 of the Charter.⁹⁸ Consequently, the ECJ concluded that the Polish government had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, given that the impugned

⁹⁴ C-216/18 PPU, *Minister for Justice and Equality v. LM*.

⁹⁵ *Ibidem*, para. 22.

⁹⁶ C-619/18, *Commission v. Poland*, 24 June 2019, para 126

⁹⁷ EU Law Analysis “Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juizes Portugueses*”

⁹⁸ Franziska-Marie L. Hilpert, *An Old Procedure with new Solutions for the Rule of Law Crisis*, cit., 8-9

law was inconsistent with the principles of the irremovability and independence of judges which are protected under EU law.

The same approach was used in the second infringement proceeding against Poland about the alleged discrimination on grounds of sex due to the different retirement age of ordinary court judges, Supreme Court judges and prosecutors for women and men and granting the Minister for Justice the power to extend the active mandate of ordinary court judges.⁹⁹ The legal basis was Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, but also Article 19(1) TEU. Yet another infringement action has been brought on 25 October 2019, in which the Commission alleges the violation of Article 19(1) TEU caused by the Minister of Justice's possibility of disciplining judges for the content of their decisions.

In parallel to the Commission's actions, Polish judges are submitting preliminary questions to the ECJ about the threats to the independence of the Polish judiciary.¹⁰⁰ Romanian national courts have recently followed the example of the Polish courts with a series of requests for preliminary reference rulings concerning threats to the rule of law and the independence of the judiciary in Romania.¹⁰¹ In contrast, Hungarian judges have always been more deferential towards their government, and thus making it harder for the ECJ to protect the rule of law in that country.

2.5 Conclusions

In light of the aforesaid, there are two main provisional conclusions that can be drawn:

- 1) Given the quasi-federal nature of the EU, Member States retain a significant margin of autonomy in framing their legal systems. Consequently, the application of valued-laden provisions - like Article 2 TEU - in political forums open the flank to criticism from populist governments as to the right interpretation of these values. Besides, the high threshold required in the context of Article 7 TEU procedure and the lack of sanctioning instruments in the Commission Rule of Law framework, deprive the two instruments of meaningful effects.
- 2) The most effective strategy EU institutions can deploy to limit the rise of populist parties in Member States is one focused on reinforcing the national democratic institutions, and in particular the

⁹⁹ Case C-192/18, *Commission v. Poland*.

¹⁰⁰ C-522/18, C-537/18, C-585/18, C-624/18, C-625/18, C-668/18, C-487/19 and C-508/19.

¹⁰¹ Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19.

judiciary. In order to safeguard the national judiciary amidst the rule of law crisis all tools available to the Commission and the ECJ must be used in order to make sure that no irreversible damage to the judiciary occurs. In this framework, the infringement procedure, combined with the operativisation of Article 19 TEU, remains the most effective enforcement mechanism which provides a solution to existing problems. This could entail a combined use of the expedited or accelerated procedure,¹⁰² interim measures¹⁰³ (the value-based approach). This approach combined with accelerated procedure and interim measures could enhance the effectiveness of the infringement procedure and make it the most viable solution in the ongoing ‘rule of law crisis’.

¹⁰² Article 23a of the Statute of the Court of Justice of the European Union.

¹⁰³ Order of the Vice-President of the Court in Case C-619/18 R, 19 October 2018. See Daniel Sarmiento, Interim Revolutions: the CJEU gives its first interim measures ruling on the rule of law in Poland, in *EU law Analysis*, <http://eulawanalysis.blogspot.com/2018/10/interim-revolutions-cjeu-gives-its.html> last accessed 20 October 2020.

3. Judicial Populism

3.1 Conceptual clarification and scope of the examination

Populist actors, considered either as representatives of a specific ideology or specialists of a communication style, often refer to the popular will or popular feeling as the ultimate orientating point of decisions which affect the community. That is why the populist expectation as regards tribunals is that judges show empathy in their decisions towards the people's will they claim to embed;¹⁰⁴ even if these decisions are in conflict with the textual meaning of laws, the established judicial practice or the constitutional principles of the legal system.

The role of extra-legal factors in judicial decisions is an evergreen topic in the theory of adjudication. A judicial approach that takes the consequences of the decision (such as the reaction of the public or the expectations of politicians) into consideration in adjudication is commonly identified as pragmatism. However, we have to make a clear distinction between judicial populism and pragmatism.

One similarity between the two approaches is that both focus on the social impact of the decision and neither care much about its legal correctness or its compatibility with fundamental legal values. A pragmatist judge considers it more important to adequately reflect the social needs behind the law. Several representatives of the pragmatist approach have a clear concept of the social function of law that adjudication should serve.¹⁰⁵ These versions of judicial decision-making can be called 'reflective pragmatism', since one may discover a more or less coherent ideology, which drives them in a series of judgments.

While reflective pragmatists see judicial power as a means to achieve a certain social aim and are sensitive to the long-term consequences of the judgment, a populist judge does not reflect on the deeper social consequences of his or her decision. As for judicial populism, one of its essential features is that judges deciding certain cases feel bound by the views and sentiments of the 'ordinary man or woman'. What matters for a populist judge is the popular reaction to the judicial decision.

To sum up, when a judge deliberately breaches the standards of proper legal reasoning in order to satisfy the presumed expectations of 'ordinary people', this can be considered a manifestation of

¹⁰⁴ <https://demos-h2020.eu/en/judicial-populism> last accessed 20 October 2020.

¹⁰⁵ Richard A. Posner, Pragmatic Adjudication, 18 *Cardozo Law Review* 1 (1996): 1-20.

judicial populism. This definition excludes from the concept of judicial populism cases where the populist ruling majority makes laws fit its agenda and judges simply apply these laws without challenging them. This legalistic form of adjudication can be defined as bureaucratic or technocratic rather than populist. It is safe to say that bureaucratic judges also apply the laws made by a non-populist legislature smoothly .

Another distinction is that the decisions of judges appointed by or courts packed by a populist government whose aim is to change the established judicial practice are also not included in the concept of judicial populism. The reason for that is that in these cases judges are not autonomous public actors, their activities are controlled by politicians.¹⁰⁶ These judges can be the supporters of a populist political regime, but they serve the political leader(s) and not the ‘people’.¹⁰⁷ That is why the examination of judicial populism is a meaningful enterprise only in political systems where judges have some autonomy.

Finally, empirical evidence suggests that judicial formalism manifests itself in two forms. On the one hand, it can take the form of ‘honest populism’, where a judge truly believes that he or she has to take into consideration the interests and opinion of ordinary people.¹⁰⁸ On the other hand, populism serves as a kind of judicial strategy, where judges follow a purpose by applying this strategy, which can be clearly distinguished from the purpose of satisfying public needs and sentiments. ‘Strategic populism’, for example, may serve as a ‘shield’ that can help judges, in uncertain political circumstances, to secure their institutional position through the external support of the public sphere.¹⁰⁹

The question whether courts can be effective defenders of liberal democracy against a populist tide is also a subject of scholarly examination. The DEMOS project will scrutinise the conditions and opportunities of courts’ resistance to the populist pressure in WP 7.5, whilst WP 6.1 focuses on the

¹⁰⁷ The taming of ordinary courts via populist-controlled judicial council is analysed above. See *supra*: Section 1.2.1

¹⁰⁸ This is the case in Russia, see Daniel Smilov, *Populism, Courts and the Rule of Law: Eastern European Perspectives*, FLJS, https://www.fljs.org/sites/www.fljs.org/files/publications/Smilov_Policy_Brief%25231%2523.pdf, last accessed 20 October 2020. It can happen, as in Romania, that judges who are not elected or appointed by populists for some reason defer to a populist government. However, even in this case they show loyalty to the government and not to the people. See Elena Simina Tanasescu, Can Constitutional Courts become populist?, in Martin Belov (ed.) *The Role of Courts in Contemporary Legal Orders*, The Hague, Eleven International Publishing, 2019.

¹⁰⁹ Lon Fuller depicted this judicial attitude through the figure of Justice Handy. See Lon. L. Fuller, The Case of the Speluncean Explorers, 62 *Harvard Law Review* 4 (1949): 616-645.

¹¹⁰ This might be the case, for example, in Pakistan, see <http://tribune.com.pk/story/649601/beyond-judicial-populism/> last accessed 20 September 2020.

above-outlined phenomenon of judicial populism. In the investigation of judicial populism two research methods have been applied. Besides studying and analysing the relevant literature, the research relied also on opinions from national experts of EU member states collected with the questionnaire, in particular Q 13 and 15.

3.2 Judicial Populism in constitutional courts

As elucidated above,¹¹⁰ given their nature as a constraint on the ruling majority, constitutional courts are among the institutions most frequently put under stress by populist governments. In legal scholarship, a number of works illustrate the attacks on constitutional courts by populist and illiberal governments,¹¹¹ as well as the EU reaction to those attacks.¹¹² The focus of the present Section is instead on how and if the case law of constitutional courts is influenced by the rise of populism. In fact, while there are a number of studies in political science on the role of judicial actors in authoritarian regimes,¹¹³ a comprehensive analysis of populism in constitutional courts from a legal point of view, seems to be lacking. In order to assess the changes in constitutional jurisprudence, the researchers relied on the questionnaire distributed in the context of WP 2, and in particular on question n. 13.¹¹⁴

Before embarking in this analysis some preliminary considerations about the role of judicial review of legislation in constitutional democracies are in order. In the previous pages, we mentioned how an activist constitutional court, not showing deference towards the ruling majority, has become a common feature of the European model of constitutional democracy. Yet, some constitutional scholars, especially from the North American tradition,¹¹⁵ have raised objections against a supposedly excessive judicial activism by constitutional jurisdictions. According to this tradition, which is commonly

¹¹¹ See: Section 1.2.

¹¹² Bojan Bugarič and Tom Ginsburg, The Assault on Post-Communist Courts, 27 *The Journal of Democracy* (2016): 69

¹¹³ Laurent Pech and Kim Lane Scheppele, Illiberalism Within: Rule of Law Backsliding in the EU, 19 *Cambridge Yearbook of European Legal Studies* (2017): 10.

¹¹⁴ See, for instance: Tamir Moustafa, Law and Courts in Authoritarian Regimes, 20 *Annual Review of Law and Social Science* (2014): 281.

¹¹⁵ Which reads: 'In your assessment, has the jurisprudence of the constitutional court (or any other high court having constitutional review power) changed?'. See working paper *On the Institutional Context of Populism*: <https://openarchive.tk.mta.hu/423/>.

¹¹⁶ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, 1962 (1st Edition).

referred to as ‘political constitutionalism’, judicial actors in a functioning constitutional democracy defer to the political powers when it comes to the fundamental decisions that regulate society.¹¹⁶

In this light, the far reaching reforms of the design and powers of constitutional courts in Hungary and Poland,¹¹⁷ have been considered an attempt ‘to take the constitution seriously and return it to the citizens’.¹¹⁸ Lamenting the juridification of politics operated by constitutional courts, populist governments do indeed identify constitutional courts as obstacles to the new prevailing views and ideas in society and advocate constitutional courts more open to changes, and thus more flexible Constitutions. Emblematic is the case of Spain, where pro Catalan secession politicians take a similar point of view and criticise the intervention of the Constitutional Tribunal in politics,¹¹⁹ particularly since the latter’s declaration of unconstitutionality of the Statute of Autonomy of Catalonia in judgment 31/2010.¹²⁰

On the contrary, many scholars, belonging to the tradition of ‘legal constitutionalism’,¹²¹ consider the functions performed by populist-reformed constitutional courts radically incompatible with constitutional democracy.¹²² Their main argument is that constitutional courts are reduced to devices in the hands of populist governments which serve the purpose of formally allowing the ruling majority to circumvent the constitutional text. This results in the complete loss of the constitution’s normativity thus undermines the very foundations of the rule of law in these countries.¹²³

Although the present Section deals mainly with constitutional courts in populist regimes, the impact of populism on constitutional jurisdictions is visible, to a lesser extent, also in legal systems that cannot be classified as populist ruled. In this regard we can observe two tendencies.

On the one hand, it is a commonplace in constitutional scholarship that in the last decade, as a consequence of the financial crisis that hit Europe in 2010, constitutional courts have practised self-

¹¹⁷John Auerin Grey Griffith, *The Political Constitution*, 42 *Modern Law Review* (1979): 15.

¹¹⁸See: Section 1.2.2.

¹¹⁹Adam Czarnota, *The Constitutional Tribunal*, in *Verfassungsblog*, 03 June 2017 <https://verfassungsblog.de/the-constitutional-tribunal/> last accessed 20 October 2020.

¹²⁰See also above: Section 1.4.

¹²¹Francisco Javier Pérez Royo, *La STC 31/2010 y la contribución de la jurisprudencia constitucional a la configuración de un estado compuesto en España: elementos de continuidad y ruptura, e incidencia en las perspectivas de evolución del estado autonómico*, 43 *Revista Catalana de Dret Públic* (2011): 121-149.

¹²²This tradition ultimately goes back to the seminal text of Hans Kelsen: *La Garantie juridictionnelle de la Constitution (La justice constitutionnelle)*, *Revue de droit publique et science politique* (1928), 197-256.

¹²³Pablo Castillo Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 *European Constitutional Law Review* (2019): 48–72.

¹²⁴Wojech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, 18 *Sydney Law School Legal Studies Research Paper 1* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 last accessed 30 October 2020.

restraint on the legislation adopted to face the financial emergency.¹²⁴ Besides, countries like Italy and Spain,¹²⁵ have a long-standing problem with governmental abuse of Law Decrees, a problem exacerbated during an emergency situation, and that contributes to a further narrowing down of the extent of the scrutiny by constitutional courts on the actions of the ruling majority.

On the other hand, it appears that constitutional courts in Western democracies are more aware of the necessity to enhance their democratic legitimacy in the public eye. An example is provided by the Italian Constitutional Court, which in January 2020 modified its rule of procedure to relax the criteria for standing in incidental proceedings and allow the submission of *amicus curiae*.¹²⁶ This being said, it is possible to move on to assess the role of constitutional courts in populist regimes through the prism of their case law.

In order to do that, the researchers relied on the answers to the questionnaire drafted in WP 2.4, in particular Q. 13. The answers to this question illustrate the tendencies in the last 10 years, but it is almost impossible to make predictions for the future. The reason for that is that small changes in the composition of a constitutional court can result in sharp turns in its jurisprudence. Political and other crises can also lead to departures from the established case law of a court.

The first observation, based on the answers, is that two kinds of populism exist in the context of the jurisprudence of constitutional courts. One of them is that a court follows a populist agenda in deciding certain issues. In this case the source of the motivation of judges can stem from their own worldview or from external pressure directly from the populace (often strengthened or generated by the media). This can be called ‘direct judicial populism’ where the court tries to gain more legitimacy by taking popular convictions and/or ‘the interest of ordinary people’ into consideration in their decision-making.

Certain judgments of French and Irish courts in immigration policy cases can be interpreted in this manner. Courts, in accordance with the public mood, approved the more restrictive measures of governments towards foreigners. The Portuguese and the Latvian courts impinged on governments that

¹²⁵For a comprehensive assessment of the financial crisis effects on the European constitutions see: Xenophon Contiades (ed.). *Constitutions in the Global Financial Crisis: A Comparative Analysis*, Routledge, 2013, in particular 10-242.

¹²⁶For Italy see amongst many: Valeria Piergigli, *Le Regole della produzione normativa*, Giappichelli, 2009; specifically on governmental lawmaking during the financial crisis: Roberta Calvano, *La crisi e la produzione normativa del Governo nel periodo 2011-2013. Riflessioni critiche*, *Osservatorio sulle Fonti* 3 (2013): 1-24.; for Spain: Ana María Carmona Contreras, *Artículo 86*, in Carmen Montesinos Padilla, Pablo Perez Tremps and Alejandro Saíz Arnaiz (eds.), *Comentario a la Constitución Española: 40 aniversario 1978-2018*, Vol. 1, 2018, 1277-1287.

¹²⁷ See Articles 4-bis and 4-ter, Rules of Procedure of the Italian Constitutional Courts.

adopted laws to attain fiscal sustainability by reducing welfare costs. At the same time, the latter court supports nationalist legislation against an ethnic (Russian) minority.

The other manifestation of populism is where a court defers to a populist government and decides cases in favour of the government even if these decisions are definitely anti-populist in their outcome ('indirect judicial populism'). A good example here is the Romanian Constitutional Court, which has become subordinate to the populist government and made rulings in which it relaxed the criminal repression of corruption, which is certainly an anti-populist step, but it served the interests of the government perfectly. It seems that Hungarian and Polish courts also defer more to their populist governments than to citizens.

Of course, in the examination of the practice of courts sometimes it is hard to unfold the real motives behind a decision (e.g. it is difficult to determine whether these motives are stemming from the populist sentiments of judges, the enormous pressure from the public or from deference to the government).

The second observation is that there is a sharp difference in the character of judicial populism between constitutional courts of 'stable' and (relatively) 'new' democracies. In courts of the former countries the signs of populism are rather sporadic and limited only to certain issues, such as immigration policy. This is the case in Ireland and France where courts are generally consistent defenders of human rights, but in cases relating to foreigners they show some deference to a restrictive governmental policy. It must be noted that other courts in Western-Europe go openly against anti-migrants and other populist laws adopted by the ruling majority (Austria, Belgium, UK, Sweden) even if they could easily become victims of a fierce attack coming from the public and/or the media (a telling example is the media reaction to the Brexit-decision of the Supreme Courts of England and Wales).

On the contrary, in Central and Eastern European countries, where judicial populism exists, it takes a systemic shape. Romanian, Hungarian and Polish courts systematically rule in favour of populist governments in almost every politically sensitive case. The difference between the three countries is

that while in Poland and Hungary the populist turn was achieved by court packing, in Romania the populist shift ‘came without any packing, reshuffling or visible political pressure’.¹²⁷

This is not to say that judicial populism is the ‘historical fate’ of these countries. The Lithuanian, Czech and Slovakian courts strongly resist populist governments and there are countries (Croatia and Bulgaria), where courts have not yet decided in cases where they would have been exposed to populist pressure.

Finally, some of the experts call attention to the paradox of judicial fight against populism: promoting a consistent human rights-centred approach, anti-populist agenda in sensitive cases by courts (LGBTQ rights, prisoner voting etc.), can actually decrease the level of trust towards courts and fuel populist sentiments.

3.3. Everyday judicial populism

Legal scholarship tends to concentrate on the landmark judgments of constitutional and apex courts in terms of judicial populism. The phenomenon of ‘everyday judicial populism’ where ordinary courts decide cases in a way that they think will please the populace is essentially overlooked. Some authors, e.g. Smilov, mention the extremely high conviction rate in Bulgaria as a sign of judicial populism (penal populism), but without supporting this hypothesis with relevant facts.¹²⁸ That is not to deny the importance of decisions of apex courts (rather to put emphasis on lower court judges who can also be susceptible to the populist *Zeitgeist*. The examination of the activities of ordinary courts

¹²⁸ The citation is from the answer of the Romanian expert.

¹²⁸ Daniel Smilov, *supra* fn 108,

(whether or not ‘everyday judicial populism’ exists) is of great importance as they shape the lives of citizens and can strengthen or curb populist politics.

The second observation was that judicial populism is typically researched intensively in common law legal systems such as the US, India and Pakistan,¹²⁹ and in Latin American countries.¹³⁰ The sensitivity of common law legal cultures to the phenomenon of judicial populism can be explained by the fact that common law judges are considered organic parts of political life (in the US, for example, some states even provide for judges to be elected by the people).¹³¹ In Latin America, where democracies are weak and political populism has a long tradition,¹³² it is no surprise that courts are affected by populism. It is remarkable that in the European context there is no significant literature on the phenomenon of judicial populism, with the exception of Hungary, Romania and Bulgaria.¹³³ Also taking into account the answers received to the questionnaire drafted in WP 2.4, it can be argued that judiciaries of new and weak democracies in Central and Eastern Europe (CEE) are more prone to populism than their Western counterparts. This can be connected to the strength of Rule of Law institutions in different regions of Europe, but a complete explanation would require further in-depth

¹²⁹ See <https://www.crossword.in/regional-studies/falling-over-backwards-essay-reservations-judicial-populism-arun/p-1341200-30293217618-cat.html> (India); <https://www.dawn.com/news/1461194> (Pakistan); <https://www.fljs.org/sites/www.fljs.org/files/publications/The%20Impact%20of%20Populism%20on%20Courts.pdf> (USA); all last accessed 20 October 2020.

¹³⁰ See <https://verfassungsblog.de/judges-speaking-for-the-people-judicial-populism-beyond-judicial-decisions/> (Brasil) last accessed 20 October 2020.

¹³¹ Rene David and John E. C. Brierly, *Major Legal Systems in the World Today*, Stevens & Sons 1985), 373-374; John Bell, *Judiciaries within Europe*, Cambridge University Press, 2006, 329-349.

¹³² See Collier, R. B. & Collier, D. (2002). *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Analysis in Latin America*. Notre Dame: University of Notre Dame Press.

¹³³ See supra fn 3.

legal-sociological investigation. Be that as it may, the next part of this chapter focuses on the existing form of ‘everyday judicial populism’ in some CEE countries.

3.4 Characteristics of judicial populism in CEE countries¹³⁴

Being aware of the fact that some populist judicial decisions can be delivered at almost any time and in every legal system,¹³⁵ Central and Eastern European legal systems, as was discussed above, we show a greater intensity of populist judgments than in Western ones.¹³⁶ Hungary has seen a series of court decisions that clearly show the signs of the populist mentality of judges, while in Bulgaria the newly elected Prosecutor General seems to follow a classic populist agenda (‘sheriff of the people’).¹³⁷ The question is, therefore, what the specificities of the CEE form of judicial populism are.

1) The first characteristic of judicial populism in CEE countries is that the judges, although they use legal arguments, do not provide their judgments with sufficient reasoning, in other words, they do not present a transparent, coherent and convincing explanation for why they emphasised one of the reasons and not some others in the decision-making process (strategic use of the formalist model of adjudication).¹³⁸ Judges in decisions affected by populism significantly limit the number of adequate legal reasons, that is, they did not take their professional obligations seriously.¹³⁹

Thus, insufficient judicial reasoning can be an indicator that the judge follows a hidden agenda, such as populism (the judge uses ‘token’ legal arguments in order to hide his or her real motives behind

¹³⁴ The examples referred below mostly are from Hungary. Nonetheless the Bulgarian and Romanian experts confirmed that similar tendencies are also detectable in their countries.

¹³⁵ For example, see IRA-related miscarriages of justice in the United Kingdom, <http://www.theguardian.com/politics/2009/may/05/miscarriage-justice-innocent-people-jailed>, last accessed 20 October 2020.

¹³⁶ Smilov, after having examined the tendency of adjudication in Bulgaria and other orthodox Eastern European countries, comes to a similar conclusion. See Daniel Smilov: The Rule of Law and the Rise of Populism: A Case Study of Post-Accession Bulgaria, in Kyriaki Topidi, Alexander H. E. Morawa (eds.), *Constitutional Evolution in Central and Eastern Europe: Expansion and Integration in the EU*, Ashgate, Aldershot, 2010, 270-272.

¹³⁷ <https://www.euractiv.com/section/justice-home-affairs/news/bulgaria-appoints-new-chief-prosecutor-amid-protests/>, last accessed 20 October 2020.

¹³⁸ See Marcin Matczak, Mátyás Bencze & Zdenek Kühn, EU Law and Central European Judges: Administrative Judiciaries in the Czech Republic, Hungary and Poland Ten Years after the Accession, in Michal Bobek (ed.), *Central European Judges under the European Influence. The Transformative Power of the EU Revisited*, Oxford, Hart Publishing, 2015, 43-71.

¹³⁹ Alexandra Mercescu, Non Sequitur in Constitutional Adjudication: A Populist Tool? (Manuscript).

the decision). That is why a group of legal scholars launched a research project in order to determine the quality criteria of judicial reasoning. They have elaborated some quality indicators, which can show whether a judicial decision deviates from the rules of proper justification.¹⁴⁰ Testing judicial decisions against these indicators can help to identify the suspicious judgment which then can be subjected to an in-depth analysis.

2)Based on the experiences of CEE countries, populist judges tend to adopt a clear majority-protective legal position. In hate crimes cases¹⁴¹, for example, Hungarian justice has more frequently found Romany people guilty than non-Romany ones.¹⁴² Paradoxically, the objective of the legislation which introduced hate crime into the Penal Code was to protect vulnerable minorities.¹⁴³ In the field of sentencing a significant bias can also be detected, especially in murder cases. It seems that many judges tend to impose severe sentences on perpetrators coming from ethnic minorities. On the other hand, judges are usually more lenient when it comes to crimes committed against ethnic minorities.¹⁴⁴ Once again, this phenomenon is particularly visible in Hungary. On the one hand, hate crimes committed against non-Romany people almost always receive nation-wide publicity; on the other hand, a survey conducted by the Hungarian Helsinki Committee did not find any difference in sentencing between Romany and non-Romany perpetrators in robbery cases which did not trigger a ‘threshold

¹⁴⁰ See Mátyás Bencze: Obstacles and Opportunities – Measuring the Quality of Judicial Reasoning, in: Mátyás Bencze, Gar Yein Ng (eds), *How to Measure the Quality of Judicial Reasoning*, Springer, 2018, 87-101.

¹⁴¹ See Eszter Jovánovics and András László Pap: Kollektív bűnösség a 21. század Magyarországon: magyarellenesség vádja cigányokkal szemben két emblematikus perben, *Fundamentum*, (4) 17:153-157.

¹⁴² In the five officially published cases up to 2014 where the accusation was violence against a member of the Romany community courts only once found the defendant(s) guilty in that type of crime (author’s own research). See also Eszter Jovánovics: A tárgyalótermek fantomja: a rasszista cigány, http://ataszjelenti.blog.hu/2013/02/20/a_targyalotermekek_fantomja_a_rasszista_cigany, last accessed 20 October 2020.

¹⁴³ <http://www.parlament.hu/iromany/fulltext/00548txt.htm> last accessed 20 October 2020.

¹⁴⁴ Borbála Ivány: Minősíthetetlen szigorúság, <http://www.szuveren.hu/jog/minosithetetlen-szigorusag>, last accessed 20 October 2020.

stimulus' for the national media.¹⁴⁵ This fact seems to support the hypothesis that the populist approach and not racism is responsible for numerous judicial miscarriages in Hungary.

According to the latest report of World Justice Project¹⁴⁶ the practice of criminal justice is more discriminatory towards minorities in CEE Member States (in Hungary, Bulgaria, Estonia, Croatia, Hungary and Slovenia) which have significantly larger ethnic minorities than the EU average

Beside criminal cases, in Hungary, traces of judicial populism are visible in other branches of adjudication as well. Scrutinising the published civil or administrative court verdicts from the past 15 years we cannot find — with one exception — any cases where any fundamental rights would have overridden the right to religious freedom or religious sentiments in cases where one of the parties was the Catholic Church. It is an important feature of all these cases that the legal correctness of the judgments was highly controversial.¹⁴⁷ According to the results of the last two censuses, it is clear that the majority of Hungarian society identifies itself as Roman Catholic. A plausible explanation of the legally arguable decisions therefore is the pro-majoritarian populism of the courts.

3) In the beginning of the working paper a distinction was made between 'honest' and 'strategic' populism. In CEE countries the latter is predominant. In order to prove this hypothesis, we need to turn to public choice theory, and consider courts as players in the arena of politics, who tend to enforce their institutional interests by applying various strategies. For example, in the case of Hungary it is possible that courts use a populist strategy in some cases as a means of fulfilling their institutional purposes, because political populism in Hungary has become stronger over the past few years. There are many unambiguous examples of the application of this political strategy. Criminal legislation in

¹⁴⁵ https://helsinki.hu/wp-content/uploads/HHC_Last_Among_Equals_2014.pdf last accessed 20 October 2020.

¹⁴⁶ https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf last accessed 20 October 2020.

¹⁴⁸ Mátyás Bencze and Richárd Drótos: A társadalmi tekintély szerepe az ítélkezésben – tradicionális keresztény egyházak jogai és érdekei a magyar bíróságok előtt. *56 Állam- és Jogtudomány* 3 (2015):3-28.

the past ten years has followed a ‘classic’ populist agenda.¹⁴⁸ One of the first moves the new government took in 2010 was to enact the notorious ‘three strikes’ provision in the Penal Code.¹⁴⁹ A parliamentary majority then implemented an American style ‘lawful defence’, which made the murder of a trespasser legal under certain circumstances.¹⁵⁰ Following this, the Hungarian government declared it would uphold the literal ‘life’ imprisonment against a consolidated jurisprudence of the European Court of Human Rights, which qualifies life sentencing as an inhuman and degrading punishment.¹⁵¹ Recently, Hungarian legislation has criminalised some forms of help for asylum seekers and homelessness.¹⁵²

This may generate a similar attitude on the part of the judiciary (those who have an inclination to be populist), implying that a good judge serves the people rather than being a black-letter lawyer. As the ruling majority is doing the same thing in the field of politics and legislation (e.g. ‘getting tough on crime’) many judges may feel their populism justified. They may think that they can only win if they follow governmental strategy.

The fact that the level of the perceived judicial independence is lower in CEE countries than in other EU countries (with the exception of Italy and Spain) can strengthen the tendency of strategic use of judicial populism in the CEE countries.¹⁵³ The reason for that is that lower level of perceived judicial independence leads to lower level of public trust towards courts, which is why judges may try increasing their legitimacy by rendering ‘popular’ judgments.

4) Judicial populism in its strategic form represents a danger to judicial independence, as a strong political party or a government can manipulate the public mood in many ways according to its own

¹⁴⁹ The Hungarian Society of Criminology dedicated its annual meeting to discuss the phenomenon of penal populism in Hungary (<http://www.kriminologia.hu/esemenyek/tarsasag-eves-kozgyulese-es-tudomanyos-ules-bunteto-populizmus>). See also Katalin Gönczöl: A ’büntető populizmus’, *Élet és Irodalom*, 2013/36, <http://angelusz.elte.hu/sites/default/files/B%C3%BCntet%C5%91pop.pdf> both last accessed 20 October 2020.

¹⁵⁰ Article 4, Act LVII of 2010.

¹⁵¹ Article 22, Act C of 2012.

¹⁵¹ ECtHR, 73593/10, László Magyar v. Hungary, 20/05/2014. For governmental reaction, see <http://nol.hu/belfold/trocsanyi-marad-a-tenyleges-eletfogytiglan-1466965> last accessed 20 October 2020.

¹⁵³ <https://www.theguardian.com/world/2018/jun/20/hungary-passes-anti-immigrant-stop-soros-laws> and <https://www.euronews.com/2018/10/22/homeless-people-face-prison-in-hungary-after-tough-new-law-is-passed> last accessed 20 October 2020.

¹⁵⁴ https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf. last accessed 20 October 2020.

political agenda.¹⁵⁴ Thus, a clever populist government can exercise undue influence on courts in an indirect form. A good illustration of this manipulation is a Hungarian judgment where one of the reasons for the harsh sentence was that the accident caused huge public outcry.¹⁵⁵ In fact, this huge public outcry was largely generated by the government through the media and the decision supported the ‘tough on crime’ and anti-elitist rhetoric of the government. Most recently in Hungary the government has launched a fierce media campaign against judges who (on the basis of the law adopted by the Fidesz-led parliament) ordered the state to pay compensation for Romany people and prisoners whose human rights were violated by the state.¹⁵⁶ In Bulgaria a parole decision caused a huge public outcry and steps were taken against presiding judges.¹⁵⁷ Such campaigns can further incentivise judges to render judgments that are in accordance with the attitude of the ordinary people towards unpopular social groups (convicted persons, ethnic minorities).

5) Two factors have contributed to the emergence of judicial populism in CEE, which are well-known in the other parts of the world as well. These are the ‘politicisation’ and ‘mediatisation’ of adjudication. As to the former, with increasing frequency over the past three decades sensitive political cases have been brought before courts.¹⁵⁸ Moreover, in some — mostly criminal — cases, court judgments have themselves acquired political significance. In these cases, judges can suffer from indirect pressure from the strongest political group.

Since the early nineties the media have also paid increasing attention to court trials, and court trials have been more and more frequently broadcast. Some interesting cases are watched by tens of millions of viewers on a daily basis in the form of a TV show. The presence of journalists and TV cameras may have an impact on the behaviour of judges.¹⁵⁹ It has already been detected that in some

¹⁵⁵ Boda Zsolt, Gabriella Szabó; Attila Bartha ; Gergő Medve-Bálint; Zsuzsa Vidra, Politically driven. Mapping political and media discourses of penal populism – the Hungarian case, 29 *East European Politics and Societies* 4(2015): 871-891.

¹⁵⁶ https://index.hu/belfold/2014/09/11/rezesova_masodfok_itelet/; <https://dailynewshungary.com/appellate-court-raises-rezesova-prison-sentence-to-9-years/> last accessed 20 October 2020.

¹⁵⁷ <https://www.kormany.hu/en/ministry-of-justice/news/government-suspends-payment-of-prison-awards-with-immediate-effect>; <https://hungarytoday.hu/govt-finds-court-ruling-on-school-segregation-of-romas-unfortunate-refuses-to-pay-compensation/> last accessed 20 October 2020.

¹⁵⁸ https://ec.europa.eu/info/sites/info/files/progress-report-bulgaria-2019-com-2019-498_en.pdf last accessed 20 October 2020.

¹⁵⁹ See John A. Ferejohn, Judicializing politics, politicizing law, 65 *Law and Contemporary Problems* 3(2002): 41-68.

¹⁶⁰ See Péter Hack’s contribution to the conference *Az igazsáügyi adatkezelésről és tájékoztatásról szóló törvény koncepciója* held in Szeged, Hungary, 17 January 2014, http://www.birosag.hu/sites/default/files/jegyzet_0207_oszesített_javitott_ta_0.pdf. last accessed 20 October 2020.

countries court decisions are sometimes influenced by popular sentiment.¹⁶⁰ In CEE countries these tendencies have also occurred over the past fifteen years, creating the preconditions for the emergence of judicial populism. However, it must be emphasised, that judicial populism does not affect the entirety of the judicial system, as it ultimately concerns each individual judge. There are court rulings, even in Hungary, that go against the governmental will or pressure from the public.¹⁶¹

3.5 The evaluation of judicial populism

One cannot say that populism is an inherently negative phenomenon that we should expel from all spheres of public life. We have gathered some arguments pro and contra judicial populism.

First, it is commonplace that established judicial practices need external challenges from time to time in order to be able to renew themselves. Adjudication has to reflect social needs and the requirements of the zeitgeist also have to be followed (the most prominent example being the US Supreme Court landmark judgment *Brown v. Board of Education*).¹⁶² On the other hand, the populist approach oversimplifies legal-doctrinal questions and makes the law primitive and incapable of responding to the needs of a complex society.

Secondly, populism builds the image of the ‘good court’, and in this way it generates public trust in the justice system. However, at the same time, it violates the principles of the rule of law and equality. Thus, it may have a detrimental effect on the justice system in the long run.

Thirdly, lay justice is an organic part of justice systems almost everywhere in the world. The populist approach may substitute the merely formal lay participation by embedding lay attitudes in the mentalities of professional judges. Nonetheless, it is the first order duty of professional judges to enforce the internal values of the law, rather than ignore them. That is why we cannot find ‘pure’ lay justice systems anywhere in the modern world. It would be important to learn from the experience of countries with well-functioning mixed justice systems where lay judges can work together with professional judges. In such systems the effective participation of lay people can increase the level of public

¹⁶¹ For example, in India: ‘Far too many in the Indian judicial system are reacting and responding to public sentiment and pressure with an eye on television cameras rather than with their eyes blindfolded like Lady Justice. Judicial populism has become a disease, an affliction that runs the risk of creating institutional paralysis. http://www.business-standard.com/article/opinion/judicial-populism-110122900016_1.html last accessed 20 October 2020.

¹⁶² See Mátyás Bencze, *Judicial populism and the ‘Weberian judge’ – the strength of judicial resistance against governmental influence in Hungary*, (forthcoming). Also, ordinary judiciary in Poland and Romania have proved to be surprisingly resistant to governmental pressure. See Elena Simina Tanasescu, *Romania: From Constitutional Democracy to Constitutional Decay?*, in Violeta Besirevic (ed.): *New Politics of Decisionism*, The Hague, Eleven International Publishing, 2019, 177-191.

¹⁶² *Brown v. Board of Education*, 347 U.S. 483 (1954)

trust through the representation of ordinary people in the judicial process, while professional judges could concentrate on the legal aspects of the cases brought before the court.

Besides these reasons, there are two general objections against the populist judicial approach. First, popular wishes sometimes simply do not deserve to be fulfilled; the question of what qualifies as right or wrong in a moral sense cannot be answered by referring to the majority's opinion (the moral-philosophical argument). Second, the 'will of the people', or the 'sentiment of the public' etc. are confusing concepts. It is very difficult to obtain well-grounded empirical data on them (the sociological argument).

In conclusion, these arguments show that ordinary people may have their say in justice administration but not in a crude manner. The legislator and professional judges should filter the 'will of the people'. Actually, these institutions are designed to tackle this task.

3.6 Conclusions

1) Early recognition of judicial populism is of great importance. Although it seems that Western European countries are not (yet) infected with populism, a questionnaire should be made which can detect populist tendencies. The questionnaire should be sent to legal/court experts. Questions would be as follows:

- 1) Are there legally controversial judicial decisions in favour of powerful organisations, social groups or popular political parties?*
- 2) Is judicial bias toward public opinion detectable in cases that draw media interest?*
- 3) If these kinds of decisions (populist decisions) exist, do they form a trend or are they detectable only in isolated cases?*
- 4) Do courts in politically sensitive cases take into consideration the reception of their judgement when making their decision?*
- 5) Does an effective lay justice system exist in your country?*

Other questions related to judicial populism that may be included are: 'Are there judgments which are discriminative because, for example, they impose harsher punishment on members of unpopular minorities than on the members of the majority?' or 'What is the level of public trust towards courts

in a certain country?’) which can be answered by studying reports and surveys of international organisations.¹⁶³

2) The institutionalised quality control of the justification of judgments could make it hard for judges to follow a hidden agenda such as populism in their decisions. This is because populist decisions are often wrapped in camouflage legal argumentation. Because of the importance of judicial independence, the quality control of judicial argumentation is a very sensitive topic. To avoid problems related to populist-controlled judicial councils, this should be introduced only in a decentralised way and quality indicators should be as objective as possible and clearly formulated.

3) Although the pure form of lay justice is neither possible, nor desirable in a modern justice system, the effective participation of lay people in the administration of justice can decrease the efficiency of populist demagoguery against courts and improve democratic efficacy, thus rendering it much harder for populists to depict courts as institutions of the elite. Besides this, there is a danger that in lieu of effective lay participation, professional judges may feel a temptation to serve the demands of the populace directly at the expense of their professional duties, including the unbiased application of law and defending civil liberties.

4) It would be the task of legal education to present legal institutions together with their social contexts. Deeper knowledge of the social backgrounds of legal problems can defend judges from cheap demagoguery, which identifies the deference to the momentary mood of the public (generated by the media or the government) with sensitivity to serious social issues.

5) Courts themselves should communicate their judgements in a way that is comprehensible to the public, especially in cases that receive nation-wide publicity.

¹⁶⁴ See, for example, the above referred EU Justice Scoreboard and World Justice Project.

4. Policy Recommendations

In light of the analytical research conducted and taking into account the answers to the questionnaire received from EU Member States, it is possible to formulate some preliminary policy recommendations. It is important to note, however, that the legal and political reactions to be given to the rise of populist parties will be specifically developed in the project work package 7.

Concerning non-majoritarian institutions, we can affirm that:

- i) in order to reduce the impact of a prolonged populist rule on the independence of judges and administrative authorities, it is recommended to involve a plurality of institutional actors in their appointment. As shown by the Czech case, where the judiciary — thanks to its systems of appointment which provides for the involvement of the judges, the Parliament and the President of the Republic in the Judicial Council — appears to have better resisted the populist tide than only Parliamentary election of the Council — the participation of different actors in the appointment of judges makes it harder for populist parties to pack courts, especially higher ones.
- ii) concerning constitutional courts, it is recommended to preserve their role as supreme interpreters of the constitution. More specifically, the constitutional court's competences should be clearly defined by the constitution and the law, and any attempt to narrow it down should be avoided. Another tool to empower constitutional courts vis-à-vis a populist ruling majority may be conferring on them an explicit power of reviewing the constitutionality of constitutional amendments, at least with regard to the procedures followed for constitutional revision. In any case, any provision enhancing the rigidity of the constitution, such as an eternity clause on the model of Article 79(3) of the German *Grundgesetz* — shall be particularly welcomed, as it eliminates the risk of the constitution being reduced to an instrument of everyday politics. Besides, Constitutional Courts should seek to establish more firmly their social legitimacy, for example, by loosening the rules for standing — as was recently done by the Italian Constitutional court — especially in countries where access to constitutional justice is narrow and adopting transparency rules for the proceedings and judgments.
- iii) with respect to the role of parliaments, it appears that a weak representative assembly provides the ideal terrain for the growth of populist parties. Also, populist parties, once in power, tend to reduce the effective decision-making power of the parliament. Thus, all reforms seeking to reduce the number of MPs; to abolish the upper House; or to strip away competences from legislative assemblies, shall indicate populist influence. Conversely, as evidenced in the project deliverable report D2.2 (see working paper On the Institutional Context of Populism on the DEMOS website, it is advisable to

enact reforms that enhance the parliament's representativeness, for instance by reducing the size of constituencies and/or allowing the voters to express their preferences for the candidates, and, especially in parliamentary systems, its supervisory power over the government.

iv) As for the EU, the most effective strategy available for EU institutions to halt democratic erosion in Member States is to reinforce national democratic institutions, and in particular the judiciary, rather than trying to impose EU values through dialogues, as envisaged by the Rule of Law Framework. Among the tools available to the Commission and the ECJ, the most effective to enforce compliance with rule-of-law values, seems to be the infringement procedure pursuant to Article 258 TFEU.

v) Concerning judicial populism in ordinary courts, the effective participation of lay people in the administration of justice may be a useful way to decrease the efficacy of populist rhetoric depicting courts as elitist institutions. In this regard, the French *Cour d'assises* and the Italian *Corte d'assise*, where lay people compose the bench integrated by professional judges when adjudicating most serious crimes, can be taken as a blueprint for a reform of the judiciary aiming at enhancing the trust of citizens towards judges without lowering the standards of legal reasoning.

vi) Also, the possibility of introducing institutionalised quality control for judicial argumentation may be considered, as this may prevent judges from following populist agendas. In order to minimise the populist impact on the independence of each individual judge, any form of control should be introduced only in a decentralised way and the quality indicators should be as objective as possible and clearly formulated.