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Abstract

This chapter examines how populist constitutionalism has permeated the constitutional polities of the EU Member States (and the UK) and the extent to which its features have spread within these countries. Since populist constitutionalism is a contested concept, the authors base their analysis on its most frequently identified first- and second-order conceptual criteria taken from the relevant literature, and explore whether they can be found in the constitutional development of the reviewed countries in the last decade. In essence, the authors confront the presuppositions of normative theories of populist constitutionalism with actual, formal and informal, constitutional changes. This chapter aims to contribute to the ever-growing academic literature debate on the constitutional implications of populism and to the clarification of the relationship between constitutional democracy and populism, by testing the relevant theories, comparing them with practices and providing a broad empirical basis. The study is based on a comparative survey of the constitutional systems of the EU Member States proceeded in the framework of the H2020 international research project *Democratic Efficacy and the Varieties of Populism in Europe* (DEMOS).

Constitutional Effects of Populism in EU Member States, 2010–2020

Zoltán Szente and Fruzsina Gárdos-Orosz

I INTRODUCTION

According to conventional wisdom, populism is one of the most characteristic political trends in contemporary Europe, posing a significant challenge to the traditional values and institutions of constitutional democracies. It is generally thought that one of the distinguishing features

This research has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No. 822590, DEMOS. The research was also supported by 29245 programme on Populism in the policy and law making funded by the National Research Development and Innovation Office. We owe special thanks to Emese Szilágyi and Domonkos Polonyi for their contribution to the research project.

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J. M. Castellà Andreu, M. A. Simonelli (eds.), *Populism and Contemporary Democracy in Europe*,
https://doi.org/10.1007/978-3-030-92884-1_6

9 of modern populism is its “constitutional project”, that is, the ambitions
10 of populists to pursue constitutional changes to achieve their goals when
11 they come to power (Blokker 2019a). Although the contemporary decline
12 or backsliding of liberal democracies is defined in various ways, such as
13 “constitutional breakdown” (Sadurski 2019), “stealth authoritarianism”
14 (Varol 2015), or “democratic recession” (Diamond 2015, 142), and the
15 political systems that have emerged as a result of these tendencies are often
16 referred to as “hybrid regimes” (Bogaards 2009), “illiberal” or “non-
17 liberal democracies” (Drinóczi and Bień-Kacała 2019; Walker 2019),
18 competitive (Levitsky and Way 2010) or electoral (Schedler 2013) author-
19 itarianism, “autocratic legalism” (Scheppelle 2018), “counter-
20 constitutionalism” (Blokker 2019b), or “abusive constitutionalism”
21 (Landau 2013, 213), perhaps the most sophisticated and elaborated
22 explanation for these changes is the theory of populist constitutionalism.

23 In this study, we explore how the characteristics of populism have been
24 transformed into constitutional law in the EU Member States or, in other
25 words, which attributes have been institutionalised in these countries, and
26 to what extent. In doing so, we wanted to know whether there are more
27 general European trends, that is, if we assume that populism is a political
28 movement that is widespread in many countries of the continent, whether
29 it generates similar constitutional changes in different countries. Ultimately,
30 we were looking for an answer to the theoretical question of whether, on
31 the basis of the actual constitutional development of the past period, it is
32 possible to identify populist constitutionalism as a specific form of modern
33 European constitutionalism.

34 While much of the literature on populist constitutionalism has focused
35 on the concept of this phenomenon, there has been little empirically based
36 analysis of the characteristics of populist constitutionalism from a com-
37 parative perspective. Rather, the decline of constitutional democracy and
38 the rule of law have been examined in only a few countries, most notably
39 Poland and Hungary, and these developments have been described as
40 manifestations of populist constitutionalism. In our study, we attempt to
41 fill this gap to some degree by empirically examining the extent to which
42 the criteria of populist constitutionalism has characterised constitutional
43 changes in EU Member States over the past decade.

44 For this purpose, we designed a questionnaire focusing on the charac-
45 teristics of populist constitutionalism identified in the literature. The ques-
46 tionnaire has been edited and discussed among the members of the law
47 team of the DEMOS project, notably the experts of the University of

Barcelona, the Centre for Social Science of the Hungarian Academy of Sciences, the University of Copenhagen and the University of Siena. This questionnaire was a tool for collecting data and information about the legal repercussions of populist politics or ambitions in the EU Member States. We are aware that it contains quite general and abstract questions, some of which cannot be interpreted in some countries at all, while in other countries, a whole study or book would be needed to reply to them. It is also to be noted that our goal here was not to describe in depth the constitutional development of the EU Member States; however, the respondents were requested to answer all the questions (apart from the fact-finding ones) in relation to populism or populist trends in their own countries. We asked the national experts¹ to give us as much precise data as they could, indicating, for instance, the legislative acts and judicial decisions to which they refer.

The questionnaire concentrated on both the changes in constitutional values and the institutional transformations of the last decade in the EU Member States. The questions were based on the presumption that populist governments make efforts to consolidate their own power and to weaken the institutional guarantees of constitutional democracy. We asked respondents to list the constitutional changes that have taken place in the last ten years in each country, specifying the date and content of constitutional amendments, as well as the failed attempts at constitutional changes.

¹The following experts contributed to the research by preparing the country reports: Prof. Konrad Lachmayer, Sigmund Freud University, Vienna (Austria), Prof. Marc Verdussen, UC Louvain (Belgium), Prof. Djordje Gardasevic, University of Zagreb (Croatia), Dr Vlastimil Havlík, Masaryk University, Brno (Czech Republic), Prof. Helle Krunke and Dr Sune Klinge, University of Copenhagen (Denmark), Prof. Bertrand Mathieu, University of Panthéon-Sorbonne Paris I (France), Mr Vadim Poleshchuk, Legal Information Centre for Human Rights (Estonia), Prof. Lando Kirchmair, University of Munich (Germany), Prof. Dimitri Sotiropoulos, University of Athens (Greece), Prof. Zoltán Szente and Dr Fruzsina Gárdos-Orosz, Institute for Legal Studies, Budapest (Hungary), Eoin Carolan, University College, Dublin (Ireland), Dr Marco Antonio Simonelli, University of Barcelona (Italy), Inese Freimane, Riga Graduate School of Law (Latvia), Prof. Jurgita Pauzaitė-Kulvinskienė, Law Institute of Lithuania, Vilnius, (Lithuania), Prof. Mirosław Granat, Cardinal Stefan Wyszyński University, Warsaw (Poland), Dr Teresa Violante, Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Portugal), Prof. Simina Tanasescu, Bucharest University (Romania), Mr Simon Drugda, PhD Candidate, University of Copenhagen (Slovakia), Prof. Jose Maria Castellà Andreu, University of Barcelona (Spain), Prof. Henrik Wanander, Ms. Lovisa Häckner Posse, Ms. Lisa Kerker, Dr Vilhelm Persson, Lund University (Sweden), Prof. Merris Amos, Queen Mary University London (United Kingdom), Samo Barduczky, University of Ljubljana (Slovenia), Mr George Coucounis, advocate (Cyprus).

70 The data collection extended to the form and content of constitutional
71 identity and “unconstitutional constitutional amendment” in the domes-
72 tic constitutional discourse and law. Other questions covered the major
73 institutional and procedural changes in the legislature, the changes in elec-
74 toral laws and the development in governmental decision-making. The
75 changes in the rules governing the legal status, procedural rules and the
76 scope of responsibility of the politically neutral or control institutions such
77 as the constitutional court, the judiciary, the audit commission, the
78 ombudsman and similar public authorities were also explored. A further
79 group of questions focused on the relationship or balance between the
80 branches of public power with special attention to how the role of the vari-
81 ous power institutions has changed in the recent years. The questionnaire
82 included some questions on the legal forms of direct democracy and citi-
83 zens’ participation, the constitutional-legal changes in recent years affect-
84 ing the autonomy of non-governmental organizations (churches, higher
85 education, civil organisations), and whether the legal status of political
86 parties has changed in the last ten years. We have further assessed the rela-
87 tionship between European/international law and domestic law, if there
88 have been any conflicts between the two legal systems.

89 We also posed questions about populism’s impact on law, legal con-
90 cepts and the juridical process. We presumed that even in countries where
91 populist parties have not come to power, populist challenges have had an
92 impact on various legal proceedings, including administrative and judicial
93 procedures. The other major issue here was, therefore, to investigate
94 which constitutional guarantees have been effective in resisting or repeal-
95 ing populist challenges or, alternatively, which constitutional institutions/
96 policies/procedures have been successfully used in the EU Member States
97 to strengthen liberal constitutionalism. Thus, in this section of the ques-
98 tionnaire, we focused on the practice of constitutional bodies not in gener-
99 al terms, but in relation to populist politics or tendencies. We asked if
100 the jurisprudence of the constitutional court (or any other high court
101 having constitutional review power) has changed, and if any changes have
102 occurred in administrative procedures. We asked respondents which pro-
103 cedures have proved to be most successful in hindering or, conversely,
104 promoting the development of populism.

105 Constitutional changes were originally examined between 2010 and
106 2018, but due to the delay caused by the COVID-19 pandemic and some
107 important recent changes, we sought to extend the period of analysis to
108 2020, where this was possible. It is important to bear in mind, however,

that constitutional frameworks are constantly changing in contemporary Europe, partly due to the pandemic and the spread of populism, so it is almost impossible to get a completely accurate snapshot of changes in constitutional regimes. Nevertheless, we believe that an overview of the most important constitutional changes over the last ten years or so provides an opportunity to identify broader trends and developments, and to assess the impact of populism on the constitutional polities. Given that the United Kingdom was still a member of the European Union when our research began, the data collection and analysis was extended to this country, which may be all the more justified as modern European populism is often associated with Brexit, the referendum initiative that resulted in Britain leaving the EU.

The whole of the research was carried out under the Democratic Efficacy and the Varieties of Populism in Europe (DEMOS) project. This research programme aims at obtaining a better understanding of populism, addressing the contemporary populist challenge through the lens of democratic efficacy.² Basically, our analysis was grounded on this data collection: 23 national experts have completed the questionnaires themselves, and in 5 cases (Malta, Luxembourg, the Netherlands, Finland and Bulgaria), the scholars of the DEMOS group completed the questionnaire based on desk research and asked national experts to verify, complete or comment on the data that they found.³

Below, we will first review the conceptual attempts at defining populist constitutionalism and its criteria, and then we will consider the limitations of the applied research methodology and the scope of our findings. In the next section, we examine whether there are trends in actual constitutional change that can be linked to the supposed phenomenon of populist constitutionalism. Then we explore how and in what context the individual characteristics emerge in the constitutional development of various countries. Finally, our conclusions will be presented, trying to provide an answer to the original research question, namely whether the theory and analytical tools of populist constitutionalism can be empirically supported, that is, whether populist constitutionalism provides an adequate

²“DEMOS H2020—The Project”.

³Martin Belov for Bulgaria, Katalin Cseres for the Netherlands, Janne Salminen from Finland, Málta arranged by Helle Krunke and Luxembourg arranged by Jose Maria Castellà Andreu.

142 theoretical framework for explaining and understanding real constitu-
143 tional changes across Europe.

144 2 CONCEPTS AND METHODS. CONCEPT
145 AND CONCEPTUAL CRITERIA
146 OF POPULIST CONSTITUTIONALISM

147 However, in order to assess or test the explanatory power of the theory of
148 populist constitutionalism, it is necessary to define what this concept
149 means, all the more so because, like populism itself, it is a contested notion.

150 Like populism, which is an essentially contested concept, populist con-
151 stitutionalism does not have a widely shared definition. Instead, a variety
152 of conceptualisations is known (Szente 2021). Thus, constitutional popu-
153 lism can be characterised by populist governments, which have imple-
154 mented populist-oriented constitutional reforms (Anselmi 2018).

155 Populist constitutionalism is defined by some scholars through its rela-
156 tionship to democracy, emphasising that “it is a theory of constitutions
157 and constitutional practices that emphasizes their populist character and
158 recommends that they develop along a populist trajectory” (Doyle 2019,
159 164). According to its characteristics, populist constitutionalism can also
160 be understood as a coherent political theory (Doyle 2019, 165). In this
161 view, populist regimes are not fighting for an improved liberal constitu-
162 tionalism, but for an alternative one based on direct legitimacy through
163 the people (Landau 2018, 541). Just as liberal constitutionalism is in fact
164 an aspirational idea, so illiberal constitutionalism can also be a normative
165 concept, albeit in the opposite direction (Tushnet 2017). Populism has a
166 sui generis constitutionalism, a counterpart of liberal constitutionalism,
167 and “constitutional populism” is characteristic of government-run, insti-
168 tutionalized populism that pursues populist constitutional reforms, such
169 as in Venezuela, Bolivia or Hungary (Anselmi 2018, 87).

170 However, the concept of populist constitutionalism is most often
171 defined by its most important characteristics, or, more exactly a specific
172 combination of them. The identification of conceptual elements is essen-
173 tial for an in-depth analysis, so that they can be compared with actual
174 constitutional changes, and the prevalence and validity of populist consti-
175 tutionalism can be verified, at least to some extent, empirically, rather than
176 as a matter of subjective judgement. This purpose was served by the
177 method we have chosen to distinguish between the primary and secondary

criteria of populist constitutionalism. This distinction of conceptual elements was based on their acceptance in the academic literature; we considered those criteria as “primary” aspects that are included in most definitions, that is, those around which there is a significant professional consensus, while others are “secondary” features that are attributed to populist constitutionalism by some academics but do not have a general recognition in scholarship. Many of these criteria are also closely related to and overlap each other, but it is worth separating them for analysis and clarity.

In our research methodology, the primary criteria include:

- the preference of popular sovereignty and the promotion of direct democracy;
- the claim to authentic representation and, together with this, anti-pluralism;
- an extreme approach of majoritarianism;
- the strong leader and the personification of power.

As in the classical definition of populism, it is “a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps”, “the pure people” versus the “corrupt elite”, and which argues that politics should be an expression of the *volonté générale* (general will) of the people” (Mudde and Kaltwasser 2017, 5). Populists postulate that the public interest, or the popular will, is unified and ascertainable (Müller 2016, 26; Corrias 2016, 11), and both the political and constitutional systems must represent it as accurately as possible (Scholtes 2019, 354). According to the populist concept of popular sovereignty, the majority formed in elections is the sole source of democratic legitimacy (Mueller 2019, 1033), and direct democracy should be preferred to representative democracy: “Populism, for its part, refuses the model of representation, by proposing a return to a direct approach to democracy which would give the people the opportunity to influence and change the constitution without passing through parliamentary representatives” (Fabbrizi 2020, 438). The emphasis of popular sovereignty may be closely linked to the anti-institutionalism that characterises populism in general, questioning the legitimacy of representative institutions. If it is true, then this attitude could generate constitutional changes when populists are in government.

214 The emphasis on the supremacy of the popular will in the populist con-
 215 ception is associated with a kind of anti-pluralism and the need for authen-
 216 tic representation. There is also a broad consensus among scholars that
 217 populists are against pluralism, considering themselves the only exclusive
 218 representatives of the real interests of the people (Mudde 2004, 543;
 219 Müller 2016, 3, 2017, 593; Bugaric and Kuhelj 2018, 26). Although the
 220 authentic representation of the popular will by populist parties and politi-
 221 cians is a moral claim (Müller 2016, 39), its accomplishment requires
 222 institutional changes, which is why it can be included among the primary
 223 criteria of populist constitutionalism. This ambition is often associated
 224 with a strong anti-elitism, stemming from the opposition between the rul-
 225 ing elites and ordinary people, and aims to ensure that political decision-
 226 making puts the public interest first, rather than the special interests of
 227 the elites.

228 Populist constitutionalism can be characterized by an extreme concep-
 229 tion of majoritarianism which is based on a specific approach to democ-
 230 racy, which regards electoral empowerment as an expression of the will of
 231 the people and, on that basis, rejects the constitutional restriction of power
 232 (Landau 2018, 533; Mudde 2004, 561; Mueller 2019, 1035; Scheppele
 233 2019, 562; Urbinati 2018, 113). This idea may justify weakening non-
 234 elected controlling institutions, rejecting any veto of majority decisions
 235 based on legal or constitutional considerations, and ultimately contrasting
 236 the majority principle with the rule of law (Fournier 2019, 366.).

237 Charismatic and strong leadership and the personification of power are
 238 also very common among the basic characteristics of populism in academic
 239 literature (Bugaric and Kuhelj 2018, 27; Drinóczi and Bień-Kacała 2019,
 240 1159; Landau 2018, 33; Pappas 2019, 71–72; Kaltwasser 2018, 68).
 241 Constitutional law self-evidently can be an effective tool for centralising
 242 power, either by strengthening the executive or by neutralizing counter-
 243 balancing institutions or removing re-election barriers.

244 In addition to this, we have identified as secondary criteria:

245 promotion of constitutional identity;
 246 abusive legal borrowing;
 247 the use of means provided by crisis management;
 248 restriction of certain fundamental rights together with the intolerance of
 249 or discrimination against certain minorities;
 250 anti-globalism and nativism and
 251 clientelism and state capture.

In addition to the principle of popular sovereignty, populists also like to refer to constitutional identity (Corrias 2016, 9) as an expression of the self-identity of a united people and its separation from other nations. In fact, they can associate with this concept any values they like, which can be contrasted with the universal principles and requirements favoured by international organisations. The background motivation can be to symbolically strengthen the political unity of the people (or their supporters) and, through this, to legitimize populist governance (Thornhill 2020, 2; Walker 2019, 522).

The legitimacy of populist governance is also served by the practice of concealing the arbitrary exercise of power by institutions and procedures borrowed from consolidated democracies. Indeed, the so-called abusive legal borrowing is the arbitrary adoption and application of certain otherwise well-admitted techniques or legal solutions out of context, as long as they serve populist purposes.

Some scholars also specify *crisis management* as a source of legitimacy for populism because an external threat gives populists the opportunity to legally break free from the limits of power (Levitsky and Ziblatt 2018, 93), and as experience shows, people are more permissive towards restrictions when their security is threatened, and are more inclined to expect protection from political hardliners.

The government of populists is often referred to as illiberal rule, both because the authoritarian exercise of power is often accompanied by restrictions on certain fundamental rights, especially political liberties, and because it often discriminates against certain minorities (migrants, LGBTQ groups, religious sects) claiming that they do not belong to the people or endanger national culture and identity.

Populists are often characterised by nativism and anti-globalism, as these movements and politicians often claim that international organisations represent “foreign” interests and thus threaten the culture and identity of the national community. They are therefore usually distrustful of international organisations that represent supranational interests and values, like the European Union, international human rights organisations or the European courts.

Similarly, we evaluated clientelism and state capture as secondary criteria, because these phenomena are also often associated with populism. According to some authors, systematic clientelism (Müller 2016, 597; Pappas 2019) and the “colonisation” of the state, that is, the “capture” of

290 key institutions (filling them with politically loyal people), are characteris-
291 tics of populism (Pappas 2019, 73; Landau 2013, 200).

292 In our opinion, even if some of its elements are controversial, this set of
293 criteria taken from the academic literature on populist constitutionalism is
294 capable of making theoretical assumptions and findings about populist
295 constitutionalism assessable and controllable. Even if it is not possible to
296 determine exactly which combination of these criteria is needed to achieve
297 a weak version of constitutional populism, it is only possible to rationally
298 establish the existence of a new kind of constitutionalism if at least the
299 majority of the primary criteria are present together in a constitu-
300 tional system.

301 Before examining the nature and directions of constitutional change in
302 terms of the characteristics attributed to populist constitutionalism, we
303 must be aware of the circumstances that limit the scope of validity of our
304 analysis.

305 Perhaps the most important of these is to emphasise that individual
306 indicators cannot in themselves be interpreted as populist characteristics.
307 The use of direct democratic procedures, for example, can improve
308 democracy through the effective involvement of the citizens and can only
309 be seen as a tool for populist political ends in a specific context. Similarly,
310 strong leadership is not a characteristic of populist politicians alone; in
311 constitutional democracies, there are also leaders who exert a decisive
312 influence on political decisions. Then, democracies are often grouped
313 according to their majoritarian or consensual character, and extreme inter-
314 pretations of the majoritarian principle or the weakening of neutral, con-
315 trolling institutions are typical of authoritarian regimes in general, not
316 (only) of populism. Or, constitutional identity is recognised in EU law and
317 in the constitutional systems of several EU Member States, while crisis
318 management can also be imposed in constitutional democracies in emer-
319 gencies, and so on. We have, therefore, at each stage tried to take into
320 account the context in which some of the criteria of populist constitution-
321 alism have emerged in different countries. It was not possible to assess as
322 a populist trait, for example, if certain solutions, which are also character-
323 istic of populist politics, were applied by mainstream political parties as
324 part of a reform process that had been started earlier, without other ele-
325 ments of the populist toolbox being applied. However, even if the primary
326 criteria may only together constitute populist constitutionalist regimes,
327 then it would be an exaggeration to require that all criteria must be met in
328 order to recognize the existence of populist constitutionalism.

It is also important to note that, since the theory of populist constitutionalism claims that populism can develop a particular variety of constitutionalism which has distinguishable characteristics from other developments, our analysis covered only the formal constitutional changes occurring in the last decade. This is important because, when we scrutinised the data, we often found that certain characteristics only appeared as elements of political communication, without any practical consequences, and our research was focused specifically on the phenomenon of constitutional, rather than political populism.

Moreover, we found that the characteristics of populist constitutionalism should not be examined in a quantitative way, because there can be huge differences in the significance of individual attributes: while the Brexit referendum, for example, has caused constitutional conflicts over several years in Britain, and will probably have long-term effects on the British public law system, the nine so-called national consultations held informally in Hungary have had no constitutional or political impact, although in both countries these events have taken place under the buzzword of “direct democracy”. Therefore, even if we have been able to identify some characteristics of constitutional populism in a country, we have tried to assess its legal impact.

Likewise, it is difficult to assess cases where primary or secondary populist characteristics have been attempted but failed (e.g. in the case of referendums or constitutional amendments in support of populist ambitions). On the one hand, it may be possible to detect certain populist aspirations in this way, but the institutional and legal changes necessary for constitutional populism to prevail have not been made, and, on the other hand, the rejection of such initiations may be an indication of the failure of populist constitutionalism.

3 ASSESSING POPULIST CONSTITUTIONALISM IN THE CONSTITUTIONAL DEVELOPMENT OF THE EU MEMBER STATES

When looking for the major trends of populist constitutionalism in Europe, we wanted to know the extent or frequency of the possible constitutional effects of populism reflected in the constitutional development of EU countries. Are there similar constitutional changes at least in those countries where populist parties have been part of the government in

365 recent years, or which are usually considered to be the states most affected
366 by populism? As a matter of fact, if one of the main features of modern
367 populism is indeed its constitutional ambitions, it is reasonable to expect
368 that it will at least seek to impose the primary features of its preferred
369 constitutionalism.

370 The analysis of constitutional changes over the last ten years shows that
371 some form of rights restrictions has been the most common of the above-
372 identified criteria. However, these have been of different types and degrees,
373 and the reasons for the restrictions have varied widely. Certain limitations
374 were introduced because of the migrant crisis or the threat of terrorism
375 under governments dominated by traditional social democratic or conser-
376 vative parties.

377 Interestingly, many rights restrictions have been related to the regula-
378 tory environment of NGOs, although one might think that the aim of the
379 discussion on populism in the positive sense is to enhance civil participa-
380 tion in public matters. The legal conditions of the activity of non-
381 governmental organisations have been tightened in several EU Member
382 States. Although in some countries, such as in Luxembourg, support for
383 human rights organisations has been increased in recent years, in the
384 Netherlands significant debates erupted when certain civil organisations
385 that had acted against the “public good” were banned. Austria introduced
386 a ban on foreign financial support for Islamic organisations, while Bulgaria,
387 similarly to Hungary, introduced special transparency rules that made the
388 life of NGOs more expensive and difficult. In Latvia, the requirement to
389 list the traditional religious associations (churches), which has not hap-
390 pened before, was surprising, since its purpose was not clear to the public.
391 The Ministry of Justice mentioned purposes such as the recognition of the
392 special relationship between the traditional churches and the state, but the
393 concrete goals remained unclear, according to the national rapporteur.
394 Although in Latvia we also experienced wide constitutional debates about
395 the autonomy of higher education, because the Rector of one of the uni-
396 versities was appointed arbitrarily, in the overall assessment we would say
397 that in Latvia, for example, counteractions were much more significant
398 than the attempts to restrict rights (BNN 2019). In many cases restrictive
399 rules proceeded very slowly in the legislative process because of the strong
400 deliberation mechanisms and opposition. Apart from this significant worry
401 about the conditions of civil society, some other populism-related con-
402 cerns have been raised in human rights matters in relation to terrorism and
403 migration. In Austria, the Kurz government in the fight against terrorism

introduced an act on extensive surveillance, and the Constitutional Court 404
annulled it as unconstitutional and against international law and ECHR 405
provisions (EDRi 2019). On the other hand, in Lithuania, although there 406
are no specific state-related problems mentioned regarding the operation 407
of civil society, the national rapporteur interestingly noted that there is no 408
strong independent mass media, which is so crucial in democratic society. 409
Radio and the television are largely commercialised, and the daily and 410
private papers have been replaced mostly by commercial on-line sites and 411
weekly periodicals. What can be classified as public national broadcasting 412
is often accused of being politically biased. 413

Nevertheless, it is noteworthy that in Hungary and Poland since the 414
beginning of populist government (2010 and 2015), there have been the 415
kind of restrictions on rights that have not occurred in other countries. 416
These have included both fundamental political rights, such as freedom of 417
expression and right to association, and personal liberties. In both coun- 418
tries, for example, the government has captured the public media and 419
turned them into a tool of political propaganda, and has also used market 420
instruments to bring about significant changes in the media market. In 421
Hungary in particular, the activities of NGOs have been restricted, stigmat- 422
ising human rights organisations that receive financial support from 423
abroad. In this country new legislation in 2021 imposed discrimination 424
against LMBTQ groups, while in Poland the right to abortion has been 425
severely restricted.⁴ 426

Restrictions on certain political rights were also increased in Spain in 427
connection with the imposition of criminal sanctions for expressing politi- 428
cal disapproval by burning a picture of the Spanish royals,⁵ and the criminal 429
procedures and convictions of the leaders of the Catalan separatist 430
movement.⁶ However, while the first case started in 2007, before the new 431
wave of populism, the second case was more about condemnations of 432
Catalan separatism, which is considered populist in many respects 433
(Callejón 2018). 434

Both during the world financial crisis and the COVID-19 pandemic, 435
many restrictions of fundamental rights have taken place. The cuts in state 436
salaries and pensions, in Greece, Italy, Spain and Portugal, were debated 437
before the constitutional courts, but have not yet been significantly linked 438

⁴K 1/20 Judgment of the Constitutional Tribunal.

⁵ECtHR *Stern Taulats and Roura Capellera v. Spain*, 13 March 2018.

⁶Sentencia 177/2015 of the Constitutional Court.

439 to the populist debate. In Italy, the financial crisis and the support
440 requested and finally received from the EU has held back populist aspira-
441 tions in some fundamental rights matters. The COVID-19 related cases
442 with regard to rights restrictions were not closely connected with the dis-
443 cussion on populism. Rights restrictions were quite similar in all states,
444 and the measures taken, although not independent in nature, were inde-
445 pendent in effect from populist aspirations. In the first period of
446 COVID-19 in Spring 2020, for example, Sweden decided not to apply
447 such severe restrictions on rights as other EU states and in the third term,
448 in spring 2021, Hungary was quite restrained in its lockdown measures.

449 A comparative analysis of constitutional changes shows that in the last
450 decade there have been reforms in several countries that have affected the
451 status of independent and countervailing institutions. It seems that
452 extreme majoritarianism and its corollaries, the strengthening of executive
453 power and weakening of institutional checks and balances are very charac-
454 teristic of those countries that are usually considered to be model states of
455 populist governance, notably Poland, Hungary and Romania. Constitutional
456 courts, and the central administration systems of courts, in
457 particular, have been major targets of political restructuring. Yet, even if
458 not to the same extent, there are examples of similar institutional reforms
459 in non-populist countries. In Sweden, for example, the constitutional
460 reform of 2011 introduced a clearer separation of the judiciary and the
461 administrative authorities, and a new method of appointing judges in
462 order to promote transparency and strengthen judicial independence
463 (Zamboni 2019). Similarly, a significant development of judicial indepen-
464 dence took place in the United Kingdom when the Supreme Court was
465 established in 2009, taking over the role of supreme judicial authority
466 from the House of Lords.

467 However, such institutional changes have not taken place in several
468 countries where populists have also been in government (e.g. Austria, Italy
469 and the Czech Republic).

470 There are also some examples of conflicts between national and
471 European law, questioning the supremacy of EU law over national consti-
472 tutions in general, or simply opposing certain EU policies on specific
473 issues. The first can be illustrated by the Lisbon judgement of the German
474 Federal Constitutional Court. It should be noted that, in this respect, the
475 two features of populist constitutionalism are in many cases closely inter-
476 twined, in so far as constitutional identity is set against the principle of the
477 supremacy of EU law. However, this is not only the case for populist

governments' claims, as in Hungary or Poland, but also for Germany, where there is a strong history of this sort of legal conflict, which can hardly be linked to any populist politics. Similarly to the German case, the decision of the French Constitutional Council related to the EU-Canada agreement is a good example illustrating the protection of constitutional identity against the EU. In this case, the *Conseil Constitutionnel* declared that the decisions that belong to the exclusive competence of the EU can be examined by the Council if such decisions interfere with the constitutional identity of France.⁷ In Italy, the Constitutional Court openly defied a judgement of the European Court of Justice very recently. The concept of constitutional identity has been also employed by the *Corte Costituzionale* in its last preliminary reference to the ECJ, albeit with a more conciliatory tone (Catalano 2019). In conclusion, constitutional identity is a concept that is being used by the Italian Constitutional Court to resist the primacy of EU law, in a form of constitutional patriotism, oriented towards a higher degree of the protection of individual rights.

These decisions—also discussed as part of the wave which emphasizes constitutional identity—are present all over Europe, but their strength and anti-EU nature differ depending on their context.

There are several examples of Euroscepticism limited to a single issue, as well. In Austria, although in overall terms the Constitutional Court pushes the European and international agenda, the “Gold-plating” argument appeared when the Kurz government used this concept to argue that EU law should be implemented in a minimum way, without giving the national parliament the possibility to add further content. The introduction of border control in relation to Slovenia and the withdrawal of certain family benefits from non-Austrian EU citizens were both qualified as anti-EU legal actions. In Greece, however, while the populist parties have a rather pro-EU political stance, non-populist, outsider political parties (Golden Dawn and the Communist Party of Greece) advocated an even more aggressive stance towards the country's creditors, effectively renouncing all debt obligations and cutting ties with the EU. In addition to this, in recent years in Italy, there have been several conflicts between Italian domestic law and both the ECHR and EU systems, especially at a judicial level. The national expert calls attention to the fact that the two populist parties, the Five-Star Movement and the Northern League, had very different stances before and after getting to power. A good example

⁷Décis. 2017-749 DC, Conseil Constitutionnel.

515 is their attitude towards the Euro. Before 2018, both parties were pushing
516 for a referendum on an Italian exit from the Euro area. Confronted with
517 the legal obstacles, both parties dropped the proposal when in govern-
518 ment. Both the Northern League and the Five-Star Movement are also
519 clamouring for reform of the TSCG (Coordination and Governance in the
520 Economic and Monetary Union) in order to abrogate the provision oblig-
521 ing Member States to have a balanced budget, notwithstanding this obli-
522 gation is now contained in the Italian Constitution in Article 81.

523 We can therefore conclude that, although conflicts between national
524 law and EU law involving the Member States' need to respect their con-
525 stitutional identity have been relatively frequent in recent times, these
526 phenomena are not only found in countries with populist governments,
527 and are often not linked to other criteria of populist constitutionalism.

528 As another example of a special kind of Euroscepticism, or even nativ-
529 ism, the more and more restrictive immigration policies observed in many
530 countries can be highlighted. Nevertheless, although this has emerged in
531 its toughest form in the Central European countries where populism is
532 strong, there have also been many restrictions in traditionally hosting
533 countries with strong multicultural traditions, such as Germany or Sweden.
534 However, the opposition to migration is not unanimous, even among
535 populist parties, and legal restrictions on immigration are not unique to
536 populist governments. Although, for example, the so-called Visegrad
537 countries (the Czech Republic, Hungary, Poland and Slovakia) are more
538 or less on the same platform in this respect, in Lithuania the populist par-
539 ties have not even proposed or supported any policy measures which
540 would be inconsistent with European measures relating to refugees and
541 migrants status. Or, while the Northern League and the Five-Star
542 Movement in Italy were asking for a reform of the Dublin Regulation of
543 the EU, tightening immigration policy, the Greek Syriza/Anel coalition
544 government did not react negatively to EU migration policy and did not
545 adopt anti-immigration legislation.

546 We also examined the patterns, that is, combinations, of the alleged
547 characteristics of populist constitutionalism in each country, as it is assumed
548 that if populism is characterised by a particular constitutional conception,
549 then similar types of constitutional change will occur where populism is a
550 significant political force. Our analysis of country studies, however, shows
551 the opposite

552 Overall, it is difficult to discover any trend towards an emergence of the
553 criteria of populist constitutionalism in European constitutional change

over the past decade. A comparative analysis of the recent constitutional developments in the EU Member States shows that there are no defining patterns in the criteria of populist constitutionalism; if one or more of its indicators can be identified in each country, they occur in varying combinations.

It is also worth noting that even though there are many similarities between the constitutional ambitions of populist government and parties, if they have proved unsuccessful and have not led to real constitutional change, then at best we can speak of similar aspirations, not constitutional populism. If the attempts to attack the liberal concept of constitutional democracy have finally failed, this shows the limits of populism, or the capability of the existing constitutional system to resist populist challenges. The examples confirm our thesis that formal constitutional changes are very rare in Europe. An incomplete attempt to amend the constitution took place in 2018 in Greece under the populist coalition government of the radical left party Syriza and the nationalist right-wing Anel (Independent Greeks) party on the expansion of instances in which referenda are called. Other failed proposals for amendments include the decoupling of the election (by parliament) of the President of the Republic from the dissolution of parliament and early elections, the introduction of proportional representation in parliamentary and local elections, the introduction of mechanisms of popular legislative initiatives, among others. But we could mention Italy as well, where a significant populist reform also failed to change the constitution substantively by first of all changing the representation of the people in the parliament to a more centralized and less regionalised system. In Italy, conversely to the typical attribute of populist constitutionalism favouring direct democracy, one element on which both the Five-Star Movement and the Northern League have based their electoral campaigns is the very functioning of the existing form of representation, that is, parliamentary democracy. Between 2013 and 2018, the Five-Star Movement was claiming that the government was lacking legitimacy because it was “unelected”. Similarly, Matteo Salvini claimed that, after the formation of the second Conte government, voters were deprived of their right to vote and the government was not legitimate.

No clear conclusions can be drawn even when examining the reflection in constitutional law of the individual features of populist constitutionalism in the various countries. In fact, constitutional changes typical of populist constitutionalism have occurred with very different frequency in Europe in the past decade. In addition, each characteristic can be found in

593 very different contexts, while certain hallmarks of populism do not appear
594 at all in formal constitutional law.

595 For example, although the decisive influence of a strong, charismatic
596 leader is considered by most authors to be one of the main characteristics
597 of populism, this is hardly reflected in constitutional law, even in countries
598 where a populist politician has a truly prominent influence, like Viktor
599 Orbán in Hungary, or Kaczynsky in Poland. It seems to be a feature of
600 political, rather than any kind of constitutional, populism. Here it is worth
601 noting that in our experience there is a significant difference between the
602 constitutional and the political approach: many political initiatives classi-
603 fied as populist are not institutionalised or do not even aim at legal changes
604 in the first place. Likewise, although to provide better, and mostly direct,
605 representation for the people in order to enhance democracy is one of the
606 most prominent claims of populists, it is hardly reflected in actual legal
607 changes. Although it could be said that it is easy to organise better means
608 of direct participation, as we can see in Finland, which introduced a new
609 form of direct participation, in reality there has not been much change to
610 facilitate direct democracy. In Hungary, for example, which might be a
611 model country of nationalist populism, the procedural rules of the national
612 referendum have been tightened, as the constitutional requirement of its
613 validity was raised by the 2011 Constitution from 25% to 50% of voters.
614 In addition, the National Election Commission, packed by the populist
615 government, has rejected all referendum initiatives since 2010, with the
616 only exception being when the government itself initiated a national
617 referendum.

618 What is more, the characteristics identified as features of populist con-
619 stitutionalism are almost as prevalent in countries with non-populist gov-
620 ernments as in populist ones. For instance, the aforementioned
621 constitutional identity as such cannot be attributed to populist politics; at
622 most, it can be argued that populists use it for their own purposes. It is
623 common in several countries to invoke it against the extension of EU
624 competences, but this in itself is independent of populist aspirations (it can
625 be limited to a single issue, or it can express non-populist
626 Euroscepticism, too).

627 The situation is similar for non-political control institutions. While
628 populist state capture often begins by removing the independence of con-
629 stitutional courts, like in Hungary and Poland, where these bodies were
630 packed soon after the populists came to power, controversial institutional
631 reforms have taken place in a number of other countries, as well. In

particular, thorough reforms of the central administration of judiciary took place in some Member States. However, whereas in Hungary and Poland the forced retirement of some judges, and the removal or replacement of certain judicial leaders were clearly aimed at undermining judicial independence, the constitutional reform of 2011 in Sweden, by introducing a clearer separation of the judiciary and the administrative authorities or a new procedure for appointing judges, served to increase the integrity and transparency of courts. Moreover, in Greece, the non-populist government appointed many judges and prosecutors, which became a subject of a public debate regarding the undue packing of institutions. Interestingly, during the populist government, an anti-corruption office was established (Law 4022/2011), and some measures strengthened the organisation system of public administration and justice.

In sum, the restriction of the independence of the countervailing institutions is the most typical feature that can be detected in some countries with populist governments (Hungary, Poland, Romania), but it is not specific for certain countries where populists take part in the government coalition (such as in Austria, Italy and the Czech Republic). In addition, controversial changes have also occurred in countries with non-populist governments.

Notably, in many countries no clearly populist characteristics can be detected in the recent formal constitutional changes at all, as is the case in Germany, Ireland, Luxembourg, Portugal and Sweden. Indeed, the very recent constitutional development under review tends to show that some countries have been very effective in resisting not only populism but also anti-democratic tendencies in general: Spain, Cyprus, Estonia, Latvia and Croatia can be classified in this group of countries. However, even this efficiency of constitutional systems can be explained in different ways: in certain cases, there is convincing evidence of the effective operation of a militant democracy, as in Germany, where the Constitutional Court has remained unaffected by recent global challenges and has maintained its stable jurisprudence. The situation was different in Croatia, where the national ambition and efforts to join the EU has overridden the populist tendencies that were undoubtedly present. There is no doubt that accusations or suspicions of populism are also regularly raised in these countries with regard to certain political aspirations or even constitutional ambitions, but these have not yet had any constitutional consequences.

669 Several of the features of populist constitutionalism which have been
670 studied can be found in the UK, Bulgaria and Poland, but also, for exam-
671 ple, in Denmark.

672 From a formal point of view, the Hungarian constitutional system
673 shows the most characteristics of populist constitutionalism, but even
674 there it is lacking several of its fundamental features (e.g. the preference
675 for popular sovereignty and direct democracy, or the legal recognition of
676 a strong leader).

677 4 CONCLUSIONS

678 If we examine the presumptions of the theory of populist constitutional-
679 ism in the light of recent constitutional changes in Europe, empirical evi-
680 dence suggests that the postulates of this theory have only modestly
681 influenced the real constitutional development of EU Member States over
682 the last decade. As a matter of fact, no strong correlation was found
683 between the prevalence of the criteria of populist constitutionalism and
684 the constitutional development of countries with populist governments or
685 strong populist parties.

686 Contrary to the mainstream academic literature, populist constitution-
687 alism, understood as a set of specific formal-legal characteristics, has not
688 had a significant influence on the constitutional development of EU
689 Member States. These characteristics are virtually undetectable in about
690 half of the countries surveyed. Although certain features, the combination
691 or co-existence of which is often considered to be a characteristic of popu-
692 list constitutionalism, can be identified in several countries, they are hardly
693 indicative of populism in themselves. Certain indicators may be democ-
694 ratic in character, a logical consequence of previous reforms, or may be
695 on the agenda of non-populist governments too. But even in the countries
696 considered to be the most populist, there is no definite pattern of these
697 characteristics, and many of the features held to be fundamental do not
698 prevail. Political populism, if it exists, has only a very modest impact on
699 constitutional arrangements: it is more likely to result in policy changes
700 within a more or less unchanged institutional-constitutional framework.
701 The historical-institutional context of the constitutional systems is argu-
702 ably more likely to have a greater influence on constitutional reforms than
703 any kind of conception or ideology of populist constitutionalism.

704 In some senses, empirical evidence from our research does not support
705 the theory of populist constitutionalism: the characteristics that some of

the literature identifies as defining this concept have not systematically emerged in the course of constitutional changes in Europe in the past years. Nonetheless, there are warning signs: in several countries, there have been attempts to strengthen the central government's influence on the judiciary, to restrict certain fundamental rights, and a new wave of Euroscepticism has emerged, with the invocation of national constitutional identity and the renewed question of supremacy between national constitutions and EU law. In addition, and most worryingly, nationalist populism in some EU Member States, most notably in Hungary and Poland, has partially dismantled the system of the rule of law, which could set an example for other governments. The decline of constitutional democracy is unfortunately a real danger—even if it is not threatened by a specific, populist form of constitutionalism, but simply by authoritarian politicians and governments.

AU5

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Author Queries

Chapter No.: 6 0005296822

Queries	Details Required	Author's Response
AU1	Kindly note *** note has been changed to article note. Please check and confirm.	
AU2	In the sentence "As in the classical definition of populism..." please check the quotes and provide the missing opening quotes.	
AU3	Ref. "Scheppelle 2019" is cited in text but not provided in the reference list. Please provide details in the list or delete the citation from the text.	
AU4	Please check if edit in the sentence "The introduction of border..." is okay.	
AU5	Reference "Walker (1997)" was not cited anywhere in the text. Please provide in text citation or delete the reference from the reference list.	