



Democratic Efficacy and the Varieties of Populism in Europe

WORKING PAPER

On the Institutional Context of Populism

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Abstract

The present working paper assesses the institutional factors which favoured, and those that hindered, the rise of populism, in order to identify the institutional arrangements which can be most effective to prevent populist politics to consolidate. Also, the paper seeks to evaluate which characteristics of the European project have facilitated the spread of populism in Europe. The main claim of this work is that to create a barrier to the spread of populism in Europe, it is necessary to enhance the democratic quality of European democracies. This should be done in two ways. On the one hand, the constitutional dimension of democracy shall be protected by introducing more counterweights between powers and a well-designed procedure for constitutional revision. On the other hand, correctives should be introduced to enhance the representativeness of the democratic institutions and the citizens participation in decision-making processes.

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Introduction

The goal of the research summarised in this working paper was to identify which institutional arrangements and procedures have favoured the spread of populism in Europe. Collaterally, the research also aimed at singling out the institutional barriers to populism. The present work has been drafted taking into account the comments and suggestions received by the partners in the DEMOS Project, in particular the Hungarian Academy of Legal Sciences and the University of Copenhagen and it is divided in four main sections.

The First Section presents the three strains of the research: populism v. constitutional democracy; populism v. representative democracy; populism and the European Union.

Section 2 contains the questionnaire that has been elaborated by the DEMOS partners to support the normative analysis with quantitative data.

Section 3 formulates some policy recommendations based both on the results of the normative analysis and the reports submitted by national experts.

Section 4 illustrates the further developments of the research in the DEMOS project.

Annex I to this deliverable contains the text of the questionnaire.

Finally, for the sake of transparency, some information concerning the people participating in the research and the working procedure are in order. The research within this subtask, and the drafting of the questionnaire, have been mainly carried out by three Partners: the University of Barcelona, leader of the subtask, the University of Copenhagen, and the Centre for Social Sciences of the Hungarian Academy of Sciences. The people actually involved in the research were: Prof. Jose Maria Castella and Dr. Marco Antonio Simonelli (UB); Prof. Helle Krunke and Dr. Sune Klinge (UCPH); Prof. Zoltán Szenté; Dr. Fruzsina Gárdos-Orosz and Dr. Emese Szilágyi. Besides, Prof. Dimitri Sotiropoulos of the University of Athens (ELIAMEP) provided inputs and suggestions concerning the general framework of the research. The research work started in April 2019, when the UB team drafted a first version of the report that was circulated amongst the partners. Then, in June 2019 a kick-off meeting, hosted by Chair of the Scientific Board of Demos, Prof. Tania Groppi, was held in Siena. During the meeting, the research for this report was discussed, and researchers proceeded with further dividing tasks. Other two meetings were held in Barcelona, in December 2019, to discuss the content of the report and further research within the DEMOS project.

1. Populism and contemporary democracy. A controversial relationship

The preliminary research work that has been carried out is a far-reaching review of the existing literature on the relationship between populism and contemporary democracy. In this regard, a caveat is in order. The definition of populism adopted in this working paper focuses only on one of its dimensions, i.e. on its relationship with the institutions of constitutional democracy.

This section is further subdivided in three subsections. Subsection 1 analyses the relationship between populism and representative democracy. Subsection 2 deals with the impact of populist politics on the institutions of constitutional democracy. Subsection 3 assesses the role EU institutions have played and may play in countering the spread of populist politics.

1.1 Populism and constitutional pluralistic democracy

In populist narrative, the concept of democratic legitimacy takes prevalence over the principle of legality, i.e. the popular will is conceived as *legibus soluta*. Evidently, such a claim undermines the very core of the rule of law state. The ‘We, the People’ which opens the Preamble to the US Constitution of 1787 enshrines the idea that the source of legitimacy of the whole legal order is to be found in the popular will, which by establishing the separation of powers and by delegating the government to representatives ultimately limits itself. However, as observed by Mounk, this expression has been transformed by the populist narrative in ‘We are the people’, a slogan used by the German far-right political movement Pegida (Patriotische Europäer gegen die Islamisierung des Abendlandes (Patriotic Europeans Against the Islamisation of the Occident)) in the street rallies against German immigration policy in 2014 and 2015 (Mounk 2018). Simply by inverting the words’ order, the message conveys a completely different meaning: the protesters pretend to speak in the name of every citizen, and they do not accept any limit to their will.

Nonetheless, the main idea that populist parties advance, namely to enhance the democratic legitimacy of the whole constitutional system is, from a theoretical point of view, a legitimate claim. Populism, in fact, may constitute ‘an illiberal democratic response to undemocratic liberalism’ (Mudde 2015, Mudde – Rovira 2013), and rather than an attack on constitutional democracy, it is a corrective to a deficit thereof. To this regard, Pinelli observed that the impressive growth, in contemporary constitutional democracies, of counter-majoritarian institutions has caused the space reserved to politics - and thus to the people - to shrink (Pinelli 2011), evidencing a problem about the democratic legitimacy of contemporary democracies, which populist leaders have exploited. Be that as it may, populist parties assert the necessity to re-legitimate the whole constitutional legal system, through a process of constitutional revision when they have the required majority to pass it. Otherwise, they tend to delegitimize the Constitution and the compromise at its origin, or to amend laws and change the composition of the Constitutional Court to loosen down the limits to its actions. Different from this is the enlarging of the space reserved to citizens’ participation (Castellà 2018), as it happened, amongst others, in Ireland and Italy.

In general terms, indeed, the tension between democracy and constitutionalism is frequently unavoidable. And, in the political agenda of populist parties, this tension is often exacerbated. Populist elected representatives seem more reluctant to accept to be subject to the laws and Constitution. They invoke their electoral legitimacy to oppose limits imposed by norms and enforced by the judiciary. This produces two main consequences. Firstly, once in power populist seek to destroy the independence of the judiciary, by approving substantive reforms especially as regards disciplinary regimes and appointments of judicial councils’ members and

judges¹. Secondly, if they obtain the necessary majority, they transform the national constitution into an instrument of everyday politics, thus nullifying its content, a phenomenon that has been referred to as abusive constitutionalism, i.e. a situation in which the governing majorities make a formally legal recourse to the mechanisms of constitutional revision to erode the democratic order (Landau 2012). Once constitutional limits are overcome, indeed, it is easier to block the mechanisms that allow for the alternance in power: changes to the electoral law; the removal of limits to presidential mandates and reduction of the space for public debate (s.c. shrinking spaces), are all examples of a process that has been called of democratic erosion (Ginsburg and Huq 2018). All in all, it can be held that the flaws in the contemporary constitutional democracy at which populists point out are not imaginary. Yet, the practical solutions they provide to redress the suboptimal level of democratic legitimacy in contemporary democracy results to severely undermine the very foundations of the rule of law state. The questionnaire tries to assess whether these processes are already happening in EU Member States (Q4, Q5, Q6), and whether this resulted in an alteration of the balance between the three branches of power (Q 7).

1.2 How populism affects the representative dimension of contemporary democracies

Populism rejects the very foundation of representative democracy: populist parties pretend to be linked directly with the people, without intermediaries and they privilege rapid governmental decision making over the centrality of the parliament, which is seen as an unnecessary intermediary institution protecting the interests of the elites. Also, in the ideas of populist parties, the only genuine form of democracy is direct democracy, hence they tend to advocate for referenda in the most important matters of the political agenda, e.g. EU membership. As Isaiah Berlin has observed, after a first phase in which the people are continuously interrogated with referenda about his will, there is a second phase in which the populist leader affirms to know the will of his people without the need of consulting him. (Berlin, 1968)

Despite a generalised tendency to consider representative democracy incompatible with populism, some scholars have argued that without representative democracy there cannot be populism. (Müller, 2017). First of all, populist parties do participate in elections with the goal of obtaining representatives. To this regard, one should distinguish populism with demagoguery. Whilst the latter is classically considered as a degeneration of democracy, where the people have an unlimited power that ultimately leads to tyranny, populism is born and operates within the boundaries of representative democracy. Indeed, populist parties do not want to overcome representative democracy, their ambition is rather to be the sole representative of the popular will. Of course, in order to fulfil such an ambition they propose to dismantle some of the features of representative democracy, like the prohibition of imperative mandate, e.g. the proposal of the Italian 5 Star Movement supported by the Northern League, and to introduce a more stringent control over representatives for example by introducing the institute of recall. In contemporary European democracies, we observe two tendencies, partially contradictory, of

¹See: Polish Report, 13-14; Hungarian Report, 21-23.

populist parties concerning the representative dimension. On the one hand, they advocate for the introduction of new instruments of participative and direct democracy as a counter-power to traditional representative institutions, and especially the parliament. On the other hand, however, populists do want to give more power to parliaments in relation to the oversight of independent authorities and in the appointment of members of the judiciary.

In conclusion, the main critical aspects that were identified in the relationship between populism and representative democracy are essentially two. The first one is the introduction of more stringent forms of control of representatives by the people, via the abolition of the prohibition of imperative mandate or the institute of recall. The second one is a more intense use of instruments of direct democracy, above all the referenda, at the expense of the normal decision-making procedure, i.e. the parliamentary one. Both these aspects, therefore, there have been investigated through specific questions contained in the questionnaire (see in particular Q1 and Q8).

1.3. The European Union and the spread of populism in Europe

Article 2 TEU affirms that ‘[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. Therefore, it is evident that the processes described above, happening in EU Member States, concern also the European Union. This is why in this subtask, the research has been conducted also on the role of EU institutional context in the spread of populism in Europe.

Since the beginning of the XXI century, the EU is suffering from a substantial legitimacy crisis.² Its structural lack of democratic legitimacy, combined with the difficulties in the management of the sovereign debt crisis, has generated anti-European sentiments, making the EU the favourite target of the populist narrative (Pinelli, 2011). These anti-European sentiments, which populist parties have channelled into Euroscepticism, call for the creation of a European public sphere. As evidenced by Habermas in its seminal essay ‘Why Europe needs a Constitution’ (2001), the lack of opportunities to participate in the European decision making progress is in fact a primary cause of distrust towards the EU institutions.

The main path, to enhance the EU’ democratic legitimacy, thus reconnecting the EU institutions to the citizens and giving substance to Article 10 TEU, would be to reshape the role of the European Parliament (‘the EP’). To this regard, it is worth noting that in the two major crises of the last ten years, the sovereign debt crisis and the rule of law one, the EP stimuli have been substantially ignored by the Member States sitting in the Council. During the former, the EP had virtually no role (Fasone, 2014), as all the most significant decisions were taken outside the EU legal framework, above all the establishment of the European Stability Mechanism. In

²In general on the issue of the EU democratic deficit and how to reduce it see: B. Pérez de las Heras (ed.), *Democratic Legitimacy in the European Union and Global Governance: Building a European Demos*, Palgrave Macmillan, London, 2016.

the rule of law crisis, the main contribution the EP gave, has been to trigger the Article 7 TEU procedure against Hungary. Yet, the rules of procedure for the hearings referred to in Article 7(1) TEU, approved by the Council in July 2019, do not allow the EP to take part in these hearings, even in the case where is the EP formulated the reasoned proposal, thus depriving the whole procedure of a significant input of democratic legitimacy. Another case is in point to show the marginalisation of the EP's position is the election of the new Commission President. The informal procedure followed for the election of Juncker in 2014, known as *spitzenkandidat*, according to which the European Council appoints as Commission President the candidate indicated by the party that gathered most votes in the EP election, was indeed abandoned. Instead, the appointment of President Van der Leyen has been the result of lengthy negotiations conducted between Member States only, which the EP had to ratify.

All in all, the European Parliament, being the institution through which European citizens are directly represented at the Union level, should play a more central role in European politics. The fact that for the first time in history the overall turnout for the EP elections rose, most notably in Hungary and Poland, attests that the EU is still perceived, even in populist-ruled Member States, as part of a democratic endeavour. But, if Member States continue to relegate the EP to a subordinate position, it will be just too easy for populist parties to depict the EU as an elite-driven project.

Finally, another way to give substance to Article 10(3) TEU, which reads '[e]very citizen shall have the right to participate in the democratic life of the Union', is to promote the use of the European Citizens Initiative. This instrument, representing a way for direct engagement of citizens in the decision-making process, may constitute a way to reduce the EU's democratic deficit and to push back anti-Europeans sentiments.

On another note, one should also consider which policy sector in which the EU has a competence to act, constitute a battlefield on which populist parties are challenging the legitimacy of the European Union. One is without doubt migration. To this regard, is possible to cite many examples, but the most symptomatic is probably that of Hungary. Faced with a Council decision imposing the relocation of refugees amongst EU Member States,³ the Hungarian government outrightly refused to accept even one single refugee. If the Decision was adopted invoking the principle of solidarity and of fair sharing of responsibility amongst Member States, Prime Minister Orbán claimed that the quota system envisaged by the Council Decision 'redraw[s] Hungary's and Europe's ethnic, cultural and religious identity, which no EU organ has the right to do'⁴ and therefore called a referendum in which the Hungarian population had to decide whether or not to accept the relocation plan. Unsurprisingly, the referendum turned out to be a major success for Orbán: albeit with a turnout of only 44%, 98% of the voters declared to be contrary to the mandatory relocation plan. This example shows that the EU's attempts to impose a liberal view about immigration, are inevitably doomed to fail.

³ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁴ See: <https://www.telegraph.co.uk/news/worldnews/europe/hungary/12171895/Hungary-to-hold-referendum-on-whether-to-accept-EU-migrant-quotas.html> last accessed 20 October 2019.

The closure of borders is clearly perceived as beneficial by the Hungarian population and the government can exploit such a feeling by calling an election or a referendum asking voters to choose between European values and Hungarian ones. In a nutshell, the possibilities for intervention in the domestic political arena by the EU institutions should be limited. More specifically, any interference need to be based on sound legal arguments rather than on value-laden ones (von Bogdandy, 2019). This consideration is reflected in the composition of the questionnaire that, in the part dedicated to the European Union (Qs 9, 10 and 11), is exclusively focused on the Member States perspective and seek to identify the major causes of conflicts.

2. The questionnaire. Structure and goals

The purpose to conduct a survey was twofold. On the one hand, it helped the researchers to identify the main lines of actions followed by populist politics, at the same time identifying the institutional setups that promote or hinder populism, on the other hand, it constitutes a validation of the results of the normative analysis. Also, the answers to the questionnaire will constitute the basis for further research work to be carried in later stages of the Demos project.

The decision to distribute the questionnaire amongst the 28 EU Member States was taken in light of several considerations. The first is that the 28 EU Member States constitute a sufficiently homogenous pool of countries, susceptible to being analysed with a single framework. Any other selection would have been arbitrary, or would have presented problems of consistency. Secondly, one of the project's main goals is exactly to evaluate the role and impact of EU institutions on populism; in this light, the pool's composition is just consequential.

The temporal scope of the questionnaire is limited to relevant changes happened in the last ten years. This delimitation allowed national experts to focus on the most relevant transformations happened in the last decade, which was characterised by the emergence of populist parties throughout Europe. A common root of this sudden growth of populism in Europe is can be identified in the sovereign debt crisis that shook Europe in 2008 (C. Procentese 2018), a growth that was subsequently fuelled by the 2015 refugees' crisis. Indeed, albeit the existence of a link between populism and crisis is still a debated issue (M. D. Poli 2016, Knight 1998), empirical data confirms that the electoral breakthroughs of Europe's major populist parties, with the possible exception of the French 'Front National', all happened in the last decade.⁶

The questionnaire is divided into four parts, each with a different objective.

⁵ The main alternative proposal was to enlarge the focus to the Council of Europe Member States. However, amongst this pool, there are fully-fledged authoritarian States such as Azerbaijan and Russia for which render any analysis pointless.

⁶As a matter of fact, only in the last decade populist parties entered national governments, first in Hungary and subsequently in Czechia, Slovakia, Poland and most recently Italy.

The first two parts of the questionnaire are the ones on which this working paper is mainly based. The first part seeks to trace back the institutional transformations that happened in the last ten years in the EU Member States. More specifically, this part aims at evaluating the impact of populism on constitutional democracy. These questions are based on two presumptions. One is that populist parties tend to weaken the institutional guarantees of constitutional democracy such as, above all, the rigidity of the constitution and the separation of powers. The other is that once entered the government, populists also tend to consolidate their grasp on power by changing the ‘rules of the game’, e.g. the electoral law and the overall system of checks and balances.

The second part contains questions focusing on the effects of populist politics on representative, direct and participative democracy. The questions ask the respondent to investigate the use of referenda, the relationship with NGOs’ and the status and positions of political parties in the legal order.

The third part seeks information about the stance of national populist parties towards the European Union and how this affects the posture of national governments and constitutional courts. The answers to this part will be used also in the framework of WP 5.4 (Populism and the European Union: major fields of policy conflicts). This part of the questionnaire wants to examine what populist parties proposed, both at national level and in the European Parliament, in relation to the EU’s migration policy and the Eurozone reform, and what responses were given to these challenges by the governments.

The last part of the questionnaire moves from the assumption that even in countries where populist parties have not come to power, populist politics have an impact in proceedings before administrative and judicial authorities, and to evaluate whether in EU Member States there have been cases of ‘judicial populism’, especially in the case-law of constitutional courts. Also, another question focuses on pointing out the constitutional guarantees which have been most effective in resisting or repealing populist challenges or, alternatively, which constitutional institutions/policies/procedures have been successfully used in the EU Member States to strengthen liberal constitutionalism.

At the date 30 April 2020, 21 of out 28 national reports have been submitted for analysis to the Demos partners. The national reporters have been selected upon indication of the Demos partners. Preference has been given to constitutional law scholars or political scientist with a strong research focus on populist phenomena. Each national reporter has been chosen having regard to his deep knowledge of the national legal system concerned. Hereafter, the names and affiliation of the reporters that have insofar submitted the report:

- 1) Austria, Prof. Konrad Lachmayer, Sigmund Freud University Vienna
- 2) Belgium: Prof. Marc Verdussen, UCL Louvain
- 3) Croatia: Prof. Djordje Gardasevic, University of Zagreb
- 4) Czechia: Dr. Vlastimil Havlík, Masaryk University Brno

- 5)Denmark: Prof. Helle Krunke and Dr. Sune Klinge, University of Copenhagen
- 6)France: Prof. Bertrand Mathieu, University of Paris I (Panthéon - Sorbonne)
- 7)Estonia: Mr. Vadim Poleshchuk, Legal Information Centre for Human Rights
- 8)Germany: Prof. Lando Kirchmair, University of Munich
- 9)Greece: Prof. Dimitri Sotiropoulos, University of Athens
- 10)Hungary: Hungarian Academy of Legal Sciences
- 11)Ireland: Eoin Carolan, University College Dublin
- 12)Italy: Dr. Marco Antonio Simonelli, University of Barcelona
- 13)Latvia: Inese Freimane, Riga Graduate School of Law
- 14)Lithuania: Prof. Jurgita Pauzaitė-Kulvinskienė, Law Institute of Lithuania
- 15)Poland: Prof. Mirosław Granat, Cardinal Stefan Wyszyński University, Warsaw. Former Judge at the Polish Constitutional Court (2007-2016)
- 16)Portugal: Dr. Teresa Violante, Max Planck Institute Heidelberg
- 17)Romania: Prof. Simina Tanasescu, Bucharest University
- 18)Slovakia: Mr. Simon Drugda, PhD Candidate, University of Copenhagen
- 19)Spain: Prof. Jose Maria Castellà Andreu, University of Barcelona
- 20)Sweden: Prof. Henrik Wanander, Ms. Lovisa Häckner Posse, Ms. Lisa Kerker, Dr. Vilhelm Persson, Lund University
- 21)United Kingdom: Prof. Merris Amos, Queen Mary University London

3. Preliminary findings and policy recommendations

Taking into account the results of the analytical research and the reports received from national experts, we have identified some of the institutes and procedures which may be more effective in preventing a rise of populist policies, and it is thus possible to formulate some policy recommendations:

- 1) Introduce more counterweights between powers. To this contributes, first, the introduction of limits to the number of presidential mandates in presidential or semi-presidential systems has proved to be an effective way of limiting power: by temporarily limiting power, powers are rebalanced. Also, in parliamentary systems, this could be an effective solution despite the many objections⁷. The Constitution is the right place to provide for this element that modifies the form of government at the national level. Recently the Venice Commission has addressed the question of the legitimacy of imposing limits on the presidential mandates and other public authorities (subnational and local level, MPs) and whether they violate the right of participation of the elected and electors. In the opinion of the Venice Commission, unlimited mandates end up affecting constitutional democracy itself: ‘Term limits aim to protect a democracy from becoming a de facto dictatorship. Furthermore, term limits may strengthen a democratic society, as they impose the logic of political transition as a predictable event in public affairs. They can be important mechanisms to safeguard against “winner-take-all politics.” They also keep alive the opposition parties’ hope of gaining power in the near future through institutionalized procedures, with little incentive to seize power in a coup. Term limits, therefore, aim to protect human rights, democracy and the rule of law, which are legitimate aims within the meaning of international standards.’⁸

- 2) another tool that can effectively protect constitutional democracy against populist politics is a well-designed procedure for constitutional revision. In particular, the existence of eternity clauses and scrutiny by constitutional courts on the observance of the reform procedure is a valuable option chosen by some countries, e.g. Article 79(3) of the German *Grundgesetz*, to protect the core values of the Constitution. Also is particularly preferred, the provision of a super-majority requirement in parliament to pass a constitutional amendment: in this way, indeed, obtaining a majority of government, would not be sufficient to amend the constitution (as happened in Poland with the government led by the Law and Justice party). The determining factor is to reach a broad parliamentary consensus, a requirement that cannot be replaced by a referendum of ratification of the reform, as the Venice Commission has warned⁹, as it could become an instrument in the hands of the president to move it forward. The referendum is an additional element of guarantee, but, being an expression of majoritarian democracy, it cannot be enough for the approval of constitutional reform. The alteration of these procedures, basically through the addition of new requirements as an advisory referendum at the beginning of the reform process introduces a distortion that can be used by populism.

⁷In Spain and Italy limits to re-election are present at subnational level (Autonomous Communities of Castilla La Mancha, Extremadura and Castilla y León in Spain, and all regions and municipalities in Italy).

⁸See: CDL-AD(2018)010-e Report on Term of Limits - Part I - Presidents, adopted by the Venice Commission at its 114th Plenary Session, Venice, 16-17 March 2018, 93. See also: J.M. Castellà Andreu, “Estudio preliminar” a Comisión de Venecia, Informe sobre los límites a la reelección. Parte I. Presidentes, Centro de Estudios Constitucionales y Tribunal Constitucional, Perú, 2018.

⁹See: CDL-AD(2010)001-e Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session, Venice, 11-12 December 2009.

- 3) with regards to the regulation of political parties, legislation should provide stronger guarantees for their effective democratic functioning. A paradigmatic example of how the lack of regulation of political parties or a very general or open regulation may become harmful for democratic quality are the cases of Italy, and Spain. Albeit the both the Italian and Spanish Constitutions, at Article 49 and 6 respectively, provides that political parties should follow a ‘democratic method’, the regulation of political parties in Italy is virtually non-existent (Bonfiglio 2016), whilst in Spain is contained in an organic law (6/2002) which only gives a general discipline (Virgala, 2015). To aggravate the lack of internal democracy in the functioning of political parties, the Italian and Spanish electoral laws both provide for ‘blocked lists’ that are formed by party leaders and within which the voter had no choice whatsoever.¹⁰

- 4) Concerning electoral systems, there is no clear indication on whether proportional or majoritarian systems may be most effective in containing the effects of populist politics. At first glance, it may appear that majoritarian systems may be more effective in holding back the advancement of populist parties. Two examples can be provided to that extent. First, in the United Kingdom, the electoral law, which provides for a majoritarian first-past-the-post electoral system (i.e. candidates run in single-seat districts), has effectively prevented the far-right populist UK Independence Party (UKIP) from transforming its electoral success into seats in the House of Commons. A similar situation happened in France, which also has a majoritarian system based on a two-round runoff voting for both the election of the President of Republic and the National Assembly. In 2017, Marine Le Pen, leader of the *Rassemblement National* (RN), a far-right populist party, notwithstanding having obtained as much as 10 million votes in the runoff for the presidential post, only won eight seats in the following general election. Conversely, given that proportional systems favour small parties, as populist ones tend to be, it may be held that a proportional electoral system may ultimately favour them. Yet, evidence coming from countries with proportional systems offer a different picture. In the Netherlands, for example, the far-right populist party Party for Freedom (Partij voor de Vrijheid, PVV) was the second most voted for party in the 2017 general election. Yet all the mainstream political parties, already before the elections, were committed to leaving the PVV outside of any governing coalition, as in fact happened. Also, in Germany the far-right party Alternative for Germany (Alternative Fur Deutschland, AFD), obtained some 13.6% of the popular vote but was left out of the governing coalition. However, a non-proportional system, especially if based on a majority bonus, may help populist parties to ascend to government. For instance, the electoral system of Greece, which ‘consistently leads to highly disproportionate conversions of votes to seats’¹¹, and that gives a 50 seat bonus to the first most voted for

¹⁰ This substantial power in the hands of party leaders was harshly criticised by the Italian ‘5 Star Movement.’ Both for the 2013 and 2018 general elections, in order to mark the difference between other mainstream parties and itself, the ‘5 Star Movement’ held consultations with its members to choose the names of candidates to be put on the electoral list (s.c. parlamentarie).

¹¹See: Greek Report, 5.

party, in 2015 allowed the leftist populist party Syriza to obtain 149 seats out of 300, notwithstanding the fact that Syriza had obtained only the 36.3% of votes. A similar situation would have happened in Italy, where the idea of having a ‘clear winner’ on the same day of elections, inspired an electoral law which attributed 54% of seats to the party or coalition obtaining at least the 40% of popular vote¹². Yet on the eve of the elections, given that polls predicted a success of the populist ‘5 Star Movement,’ the mainstream parties reached an agreement for a more proportional electoral law, thus abolishing the majority bonus. All in all, non-proportional electoral systems are at the two extremes of populist success—they usually prevent populist parties from obtaining substantive political representation; but when populists manage to gain strong popular support, majoritarian systems can boost their presence in national parliaments. Independently of the electoral system adopted, it appears that any reform of the electoral system should pursue at least one of these two aims. One objective is to enhance the proportionality of the electoral system, so as to increase the representativeness of the parliament as a whole. The second objective, that can be pursued either in combination with the first one or alone, is to allow a more direct identification between the elector and the representative. Such a goal can be achieved by reducing the size of electoral districts; but more easily by abolishing, where present, block lists of candidates chosen by the political parties. In light of the preceding observations, it cannot be surprising that Italy and Spain, the two western European states with the most significant presence of populist parties, have electoral systems that fall short of meeting these two goals, as they provide for a system of block lists and have very wide constituencies, 52 in Spain and only 28 in Italy (for the Chamber of Deputies). Just to give a term of comparison, Germany, the most populous EU Member State, has 299 constituencies for the national parliament.

- 5) Concerning the possibility of introducing imperative mandates for MPs or the institute of recall, the results of the research suggest to avoid recourse to these instruments. As a preliminary point, it is necessary to distinguish between the imperative mandate and the institute of recall. Recall is a mechanism through which citizens can ensure that the elected representative will abide by the political programme on the basis of which he/she has been elected. If the elected representative does not fulfil his/her promises, electors have the possibility to remove him/her before the end of the mandate. The imperative mandate, on the other hand, is an institute that, when in place, allows voters to impart compulsory instructions to the elected representatives. If the latter is nowhere present in EU Member States — with many European Constitutions explicitly prohibiting it¹³— recall is present, albeit at a national level only in Latvia (for the Parliament as a whole), the UK and Romania, and at sub-national level in a few more European countries, namely Croatia, Germany and Poland¹⁴. Although recall, especially if used at subnational level, may be considered to be beneficial in order to enhance the accountability of elected representatives, both instruments constitute a threat to the

¹²For further details on the point see: Italian Report, 7-9.

¹³See: Croatia, Article 74; France, Article 27; Germany, Article 38.1; Italy, Article 67; Lithuania, Article 59; Romania, Article 69; Spain, Article 67.2.

¹⁴See: Croatia, Article 74; France, Article 27; Germany, Article 38.1; Italy, Article 67; Lithuania, Article 59; Romania, Article 69; Spain, Article 67.2.

correct functioning of representative democracy, as they create a sentiment of distrust towards national parliaments. Finally, we leave open the question as to whether a specific form of government is best equipped to curb populism or to prevent its most harmful manifestations. First, because this question cannot be considered in isolation from the question of the best electoral system for that purpose. For instance, it is often considered that the presidential system creates a more pronounced polarisation both in politics and in the society, thus generating greater instability, whereas in parliamentary systems political parties have incentives to reach agreement to isolate the populists. However, one should not lose sight of the fact that in the former the separation of powers introduces effective barriers to the powers of the President and that in the second a governmental majority in Parliament has hardly any limit.

- 6) with regard to the celebration of referenda it is necessary to clarify that the improvement of democratic quality in a State does not necessarily or primarily involve the provision of direct participation mechanisms. Referenda are, of course, important instruments of direct democracy, which enhance the democratic legitimacy of the constitutional system and give substance to the principle that sovereignty belongs to the people. However, there are strong arguments in the literature that point to the problems of referenda: their conflicts with the principles of representative democracy, responsible policy making, and the potential of manipulations by the political elite.¹⁵ Indeed, in recent years we have often assisted to a distorted use of referenda. As evidenced by the cases of the United Kingdom (Brexit), Hungary (Migrants quota) and Greece (Greek Bailout), Netherland (EU-Ukraine Association Agreement) referenda were not used to hear the people's voice but rather to obtain a political capital to be spent against the EU. And in such cases, as illustrated in particular by the Greek referendum of 5 July 2015 and the referendum on Brexit of 23 June 2016, the result is a polarization of the society with the consequential emersion of extremist positions. However, these situations may have been avoided by abiding to a few simple rules. Most importantly, referenda are to be celebrated only in the cases provided for by the Constitution and according to the rules of each legal system in order to avoid an abuse of the instrument. Also, the referendum should not be used as ordinary mechanisms of decision-making. Finally, it is worth considering that highly technical matters, e.g. the referendum on the Greek bailout,¹⁶ the one held in the Netherlands on the ratification of the Association agreement between the EU and Ukraine,¹⁷ and the referendum on Brexit, are not suitable to be decided on a yes/no basis, as this precludes any meaningful debate about the issue at stake. What these examples clearly show is that referenda often imply an oversimplification of

¹⁵ See, e.g. Hug, S. (2009). Some thoughts about referendums, representative democracy, and separation of powers. *Constitutional Political Economy*, 20(3-4), 251; Walker, M.: The strategic use of referendums: Power, legitimacy, and democracy. Springer, 2003.

¹⁶ Greek voters were called upon to accept or reject the economic austerity package which had been proposed to Greece as a requirement to receive further financial assistance by the EU and the IMF. Every aspect of the referendum was contested, both at domestic and international level, but ultimately a large majority of the Greek population (61.3%) voted for the refusal of the austerity package, as indicated by the PM Tsipras. However, the latter could not keep his promises and only one week later he was forced to accept the same, if not harsher, austerity package, imposed by international lenders.

¹⁷ Notwithstanding 61% of voters voted against the ratification, albeit with a turnout of only 32%, the Association Agreement was ultimately ratified by the Dutch parliament.

complex matters which may also render it impossible to respect the popular will as emerged from the consultation. This is why the recent proposals of the 5 Star Movement in Italy aimed at amending the Constitution to introduce a new form of referendum (Marrone 2018), and the initial proposal of Podemos in Spain to ask for a referendum, pursuant to Article 167 of the Spanish Constitution, on every constitutional reform, have to be regarded with suspicion. In conclusion, the decision as to the incorporation of new instruments of direct democracy must consider adequately the characteristics of each constitutional system in which they are going to be inserted and not as isolated or predominant pieces. To this regard, it is worth to trace a distinction between instruments of direct democracy and participative ones. The latter allow for the people's opinion to be known and taken into account in governmental and parliamentary decision-making through proposals received by citizens and consultations. These type of instruments, virtually absent in the European constitutions, being present only in the Italian and Portuguese ones, are becoming increasingly common at subnational and state level (Pettinari, 2019). The use of institutes of participative democracy, embedding the pluralistic principle in the decision making processes, should be promoted by governments as a way to restore democratic legitimacy and to reconnect citizens to democratic institutions.

- 7) Finally, as regards the EU institutions, they should avoid to interfere in the domestic political discourse, as this may produce a backlash against the EU itself, depicted as an elite-driven project. To this regard, it is paradigmatic the referendum on the mandatory relocation of refugees held in Hungary in 2016. Conversely, the EU Institutions, should try to fill the democratic gap with its citizens in particular by restoring the centrality of the EP in European politics and by promoting the use of participatory instruments such as the European Citizens Initiative.

4. Conclusions

In conclusion, the research work insofar carried out in the Demos project produced clarity that populism constitutes a threat to both the representative and constitutional dimensions of contemporary democracies.

With regard to the relationship between populism and representative democracy, it can be observed that populism seems to enhance, at least at a first stage, democratic quality via a frequent recourse to institutions of direct democracy, especially referenda. Populist parties indeed do not seek to overcome representation as such: as a matter of fact, even populist governments, despite often being illiberal, remain tied to some form of electoral or plebiscitary legitimacy (Finchelstein 2017). However, they conceive representative democracy as the rule of the majority, disregarding other basic features of representative democracy, above all pluralism and respect for the right of the minorities. The way to respond to these phenomena is an enhancement of democratic quality, to be obtained, inter alia, by electoral laws that guarantee

a high degree of representativeness of the votes and more guarantees provided by law for the democratic functioning of political parties.

As to the constitutional dimension of contemporary democracy, populism represents a threat that should not be underestimated. Once they reach power, populist parties tend to destroy the basic feature of constitutional democracy and blur the separation of powers by undermining the independence of the judiciary, transferring substantial law-making powers to the government and abolishing limits to presidential mandates. The instruments available to prevent these phenomena of democratic erosion from arising are to be found mainly in well-designed constitutional revision procedures, with more rights given to the minority, and with stronger constitutional guarantees for judicial independence.

Finally, as regards the EU, populist parties have exploited eurosceptic sentiments in order to present the European project as running against the people's interests. To counter these attacks, the EU should essentially focus on reducing the distance between its institutions and the citizens. Another question is what legal instruments are available to the EU to react to the democratic erosion provoked by populist governments in EU Member States. The possible answers to this question, however, will be investigated in a later stage of the project.

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