

18 Populist challenges to constitutional interpretation

An assessment

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18.1 Introduction

The problem-setting of our book was based on the recognition that one of the most characteristic political tendencies in contemporary Europe is modern populism, which seeks to realize its power ambitions as well as its values and aspirations through constitutional changes. Consequently, according to all indications, the populist agenda influences constitutional development not only when populists are in government, but also when they are in opposition and when the government, often under pressure from public opinion, takes on and pursues similar policy objectives.

Nevertheless, real constitutional moments occur only rarely, and formal constitutional changes often lack the appropriate majority support. In such circumstances, the importance of the use of informal tools and procedures to change the constitutional design increases. Among them, constitutional interpretation can have a crucial role, because if new methods are used to reveal the meaning of the constitutional text, or certain substantive constitutional concepts are reinterpreted, significant reforms can be performed even without amending the constitution. In addition, as Fruzsina Gárdos-Orosz's study reports, even when specific political expectations are reflected in a constitutional amendment, they do not necessarily prevail in reality. In sum, our presumption was that if populist constitutionalism is a real phenomenon with certain common features, it will certainly have an effect on previous, well-developed ways of constitutional interpretation.

Although our research focused on the interpretive practice of constitutional and other high courts, it should not be forgotten that constitutional interpretation is not the exclusive domain of these courts, as other public bodies also carry out such activities and often seek to influence the constitutional jurisprudence accordingly. As Wojciech Brzozowski points out in relation to Poland, for example, 'the populist revolution relied greatly on constitutional arguments and interpretations put forward by the political branches of government and by their committed supporters'.

Moreover, we must distinguish between political demands, proposals, and judicial practice, because our study focuses not on political rhetoric but on the actual effects of populism on constitutional interpretation. In other

words, populism as a political movement, style or rhetoric cannot be identified with populist constitutionalism, as the latter covers only the constitutional dimensions of populist political aspirations.

Below, when analysing the chapters of this volume, we first discuss the various forms of populism in the countries examined, before exploring how courts performing constitutional review have responded to the populist challenge by constitutional interpretation. Next, we attempt to give explanations for why certain courts have changed their interpretive practice, while others have not, and in this way, whether they support or resist populist aspirations. In the last section, we briefly summarize our most important findings and conclusions.

18.2 National varieties of populism

Populism is present in different forms in different political systems. Among the countries where populism has emerged as an organized political movement, populists have gained a constitution-making majority only in Hungary, while in some other countries they have a parliamentary majority and a dominant position in government but they alone cannot achieve formal constitutional changes. In other states, although populists have joined the governing coalition, they do not have a parliamentary majority, while in most countries they are in opposition. But even in the last group of countries, there recently have been constitutional or legislative changes, or simply attempts at reform, that have followed or realized typically populist purposes. Another similarity is that in spite of the different national contexts and the varying policy objectives and goals, these changes have often been inspired by wide-ranging dissatisfaction with the political establishment and their vested interests; such anxiety has been expressed in Britain by the Brexit campaign and referendum, while in Spain the Catalan secession movement has indicated the emergence of a revolt against the existing political order in Catalonia. Whatever has caused social discontent, populism has offered new and distinctive political platforms challenging the pre-existing frameworks of political decision-making.

Nevertheless, self-evidently, the stronger the populists' position in government, and the greater their political support, the greater their chances of accomplishing the populist agenda through constitutional changes.

18.2.1 Populists in government

In this respect, Hungary is in a special situation, because it is the only state among the countries examined in this book where the populist government has had a constitution-making majority in parliament for a long time. Thus, for our subject, the impacts made by populist constitutional policy on the methods of constitutional interpretation can be best examined by analysing the recent constitutional developments in Hungary. There is a broad consensus that the major governing party, Fidesz, and its charismatic leader, Viktor Orbán, embody the archetypes of populism and populist politics. The consecutive Orbán governments, with the exception of the period between

2015 and 2018, have had a qualified majority in the legislature since 2010, so they have had a continuous opportunity to pursue their constitutional ambitions almost without any limitation. The government coalition has made wide use of this situation: the government majority, despite the protests and boycott of the opposition parties, adopted a new constitution (Fundamental Law) in 2011, which has been amended no less than nine times since then, and in parallel, by extensive legislation, they have reshaped the entire legal system. In addition, since the regulation of many elements of the public law system can be adopted only by a two-thirds majority, the government has probably managed to cement for a long time to come a constitutional system that is mostly characterized in the literature as right-wing nationalist populism. Indeed, the government pursues a confrontational domestic policy, it is EU-sceptical emphasizing national sovereignty, it sharply opposes immigration and it centralizes public power. The almost continuous constitution-making activities and the considerable transformation of the legal system has provided ample opportunity for the Constitutional Court to respond to all these changes through its interpretive practice.

Many claim that Poland has been following the path trodden by Hungary in many respects since the right-wing nationalist Law and Justice Party (PiS) came to power in 2015. Since then the PiS has been the major party of the government coalition, but the government has never had a large enough majority to modify the Polish Constitution. Even so, the development that Brzozowski calls 'statutory anti-constitutionalism' has brought about important constitutional changes, from packing the Constitutional Tribunal to judicial reforms that undermine judicial independence. As extensive and significant reforms have taken place without any formal change to the Constitution, constitutional interpretation has played an important role in this process.

Modern Italian populism emerged as a result of the decline of the traditional party system in the mid-1990s, when the coalition of *Forza Italia*, formed by Silvio Berlusconi, the Northern League (*Lega Nord*), and the National Front came to power in 1994. Although these parties have not disappeared, contemporary Italian populism has a new leading party, the Five Star Movement (*Movimento5Stelle*), which formed a government coalition with the so-called Centre-Right Coalition (including the right-wing populist *Lega Nord*) after the 2018 general elections, and although this government was toppled in August 2019, populism is still very strong (the analysis in our volume refers to the period of this populist government). This is proved by the constitutional reforms initiated in recent years, which were, as Demuro and Montaldo argue, populist in nature, given that the first, the initiative to reduce the number of members of the two chambers of parliament, as well as to expand direct participation in legislation, would have weakened the representative nature of the political system, while the other proposal would have linked immigration to internal security, which is a hallmark of contemporary populism. Both cases had constitutional implications and reached the courts.

In the Czech Republic, the presidency of Václav Klaus is usually associated with a shift in the Czech political system towards populism, while its latest

wave is linked to the government led by Andrej Babiš, which shares the Hungarian and Polish governments' scepticism towards the EU's immigration policy. It is important, however, that the populist stance of the government has not led to serious attacks on the system of the rule of law in this country.

Populism is not a new phenomenon in Austria either, where Jörg Haider's far-right populist party, the Austrian Freedom Party, which became more and more popular in the 1990s, formed a coalition government with the Conservative People's Party in 2000 at the federal level, an alliance which lasted until 2006. Between 2017 and 2019, these two parties governed together again. However, as Konrad Lachmayer claims, the presence of populism in Austria does not end with the Freedom Party's involvement in the federal government, as is proved by certain policy elements of the Sebastian Kurz-led government, such as the restriction of NGOs, the strong, determined leader, and most importantly, the anti-immigration policy.

18.2.2 Populist aspirations under non-populist governments

Experience shows that demands, decisions or policies of a populist nature can be born and become the subject of constitutional controversies not only through the policies of a populist government, but also by other channels, for example, under external political influence or the pressure of public opinion. This is particularly likely if the constitutional framework provides favourable circumstances for anti-elitist or anti-institutional initiatives. As Djordje Gardasevic points out, in Croatia, for example, the constitution offers several opportunities for direct popular participation. One of them is a constitutional amendment by constitutional referendum, a process which has been initiated several times in recent years. Some of these were particularly populist in nature, such as those that had an anti-elitist purpose or wanted to influence identity politics. Interestingly, whereas populist pretensions can find the appropriate tools, political circumstances have had adverse effects on these claims in recent times, as, on the one hand, in the fragmented party structure, populists have not been able to gain a majority capable of achieving constitutional changes, and, on the other hand, the EU accession process has not favoured populist policies.

As Alexandra Mercescu explains, it is arguable whether the ethno-nationalist features of the Romanian political system can be considered populist, but, as she adds, at least a 'mild' form of populism is a recurring feature of Romanian politics, and certain populist-like legislation may challenge the normal method of constitutional interpretation.

In Spain, in recent years, there have been significant changes in the political system at both national and regional levels. In national politics, bipartisanship, i.e. the dominant position of traditional parties, seems to have finally disappeared, and the party system has become significantly fragmented. In addition, Catalan separatism has become stronger, which is important for our subject because it has led to a constitutional crisis and posed serious challenges to constitutional interpretation. Francisco Balaguer Callejón discovers

populist traits in both trends. At the national level, he argues, the latest wave of populism is linked to the Covid-19 pandemic as the protest against social distancing measures has been led by VOX, a populist party, organizing demonstrations against the government's measures to handle the health crisis. He claims that populism permeates Catalan secessionism even more, because the pro-independence Catalan parties 'appeal to a superior will, that of the "people" whom they alone represent', but in fact, this is only an imagined popular will, rather than one that the people would have expressed in an institutional way. Probably this view will be disputed by many, but it is worth noting that Balaguer Callejón's argumentation continues, stating that the adherents of separatism fail to comply with the relevant rulings of the Constitutional Court, 'because they do not accept any legal limit to their will, which is defined as the authentic will of the Catalan people' expressed by a regional referendum and the parliamentary majority in the Catalan legislature. His final assessment is that these political forces adhere to legal norms only as long as they coincide with their own interests.

John McEldowney's study sees populist trends in the national debate on an extremely divisive political issue, Brexit. In Britain, as he points out, the typical signs of populism were combined in the Brexit campaign from buzzwords such as 'taking back control' to anti-immigrant feelings. The British example is particularly interesting because populism, mostly represented by the UK Independence Party, is not present in the UK Parliament, so it is only a marginal force in this country, but at the same time its main political objective, exit from the EU, has dominated British domestic politics for years.

Apostolos Vlachogiannis's chapter shows that the Greek situation is also very special, as the Greek Council of State, which has the exclusive competence to judge the constitutionality of legal rules, flirts with populism and communitarian constitutional ideals and values. As he explains, during the years of economic crisis (between 2010 and 2018), strong populist tendencies prevailed in this country, but the role of the Council of State was even more significant in this respect, as the practice of this court in the past few years has been permeated by populist ideas. After the turbulent years of tackling the negative effects of the crisis, the Court changed its attitude and tried to stand up for the people's interests against international actors, such as the EU institutions or foreigners in general.

The perspectives of the chapters by Pablo Riberi and Mark A. Graber well illustrate that populism has different effects on constitutionalism in Latin America and the United States than it does in Europe. In many Latin American countries adopting patterns of American constitutionalism, strong populism significantly distorts the original principles and practices of these borrowed constitutional principles and institutions, the main reason for which is the shortcomings of the constitutional culture. Regarding the present-day right-wing populism in the United States, Mark A. Graber draws attention to the fact that, due to the basically different institutional settings, the constitutional vision of President Donald Trump and his allies differs significantly from that of their European and Latin American counterparts. While the European

nationalist, right-wing populists have had to restructure the national constitutions in order to consolidate and expand their power, the Trump administration has not had to abuse the constitutional frameworks or to refashion the dominant mode of constitutional interpretation, because both the inherited constitution, as well as originalism, favour the traditional values preferred by populists. Briefly, to borrow Graber's expression, the U.S. constitutional polity and the judiciary is largely 'born populist instead of becoming so'.

In summary, we can state that in those countries which are discussed in our book, right-wing, authoritarian populism has raised issues that have affected the well-accepted way of constitutional interpretation, and in one way or another, the courts adjudicating constitutional cases have directly encountered populist aspirations everywhere.

18.3 New interpretive doctrines or methods?

18.3.1 *How to assess interpretive responses to populist-inspired constitutional issues?*

The country studies in this volume show that no matter how populism is present in a national political system, populist-inspired changes have reached constitutional review to varying degrees, so the previously elaborated methods of constitutional interpretation might have been affected in one way or another by populist reforms.

Exploring how the constitutional and the equivalent courts have responded to these challenges, and whether they have developed and applied new interpretive methods or judicial constructions, we primarily examined, as a first step, whether the practice of constitutional interpretation has changed in the cases that our authors consider to be part of the populist agenda in their country, that is, in the cases involving constitutional reviews of legislation inspired by populism.

We assumed that one theoretical possibility was that the interpretive practice of the courts has remained unchanged, that is, they have used the same principles and methods of interpretation in these cases as in others. Therefore, as a first step we examined whether there has been any change in the methods of interpretation.

Then, in the second phase of our analysis, assuming that interpretive practice has changed, we examined what kind of change(s) have taken place, and

- whether new 'technical' interpretive modes have come to the fore, or the emphasis has been placed on methods already used by the courts, or
- whether certain substantive constitutional concepts have been reinterpreted or new substantive categories have been used (possibly created or borrowed) by the courts.

Certainly, the courts may reply to the populist challenges by combining these mechanisms, using, for instance, a mixture of interpretive methods as well

as evoking dormant constitutional provisions or inventing new substantive concepts. The attitudes towards activism and deference represent another dimension of possible judicial strategies, as the same methods can be applied extensively, or moderately.

Finally, as the third step, we summarized the authors' assessments on how the continuity or the changes in constitutional interpretation have had repercussions on populist claims; that is, whether the courts, by way of constitutional interpretation, have resisted or supported populist aspirations, or, possibly, had a neutral effect on them.

18.3.2 No interpretive changes: the business-as-usual model

Analysing the national case studies in this volume, it can be stated that the interpretive practice of some constitutional courts or other equivalent supreme courts has not changed even when they have encountered populist-inspired cases. Paradoxically, this does not represent an unchanged judicial strategy, but only the continuity of the techniques or substance of constitutional interpretation. However, behind the application of the same interpretive tools may lie different judicial strategies or behaviours.

As Konrad Lachmayer reports, for example, even though there are no perceptible changes in the interpretive methods used by the Austrian Constitutional Court, the Court has become more self-restrained in the past decade than it was before, in particular in the protection of fundamental rights. Prior to 2008, the Court pursued an activist stance for promoting basic rights, boldly using teleological reasoning and interpreting substantive concepts such as equality. As a result of this kind of judicial activism, the body was able to be an effective barrier to the first wave of populism in Austria. Now, however, due to the more deferential approach of the Court, it has lost its earlier role in this respect. This illustrates that even when there is no change in the interpretive methods applied, there can be different outcomes depending on whether the courts pursue an activist or self-restraining practice.

Gianmario Demuro and Riccardo Montaldo evaluate the Italian Constitutional Court's responses to populist initiatives in a similar way, claiming that the Court has not taken the opportunity to curb populist aspirations – although in some cases this would have been possible – but has evaded responsibility for the decision on procedural bases. Interestingly, however, some ordinary courts have acted against populist attempts and annulled individual decisions using a constitutionally conforming interpretation that used to be applied otherwise by the Constitutional Court.

Alexandra Mercescu draws a similar conclusion, saying that the interpretive practice of the Romanian Constitutional Court has remained unchanged in cases that can be considered populist 'mostly because of their outcome'. However, this jurisprudential continuity, as she argues, means the perpetuation of weaknesses in standard reasoning such as the argumentative fallacies of '*non sequiturs*, tautologies, contradictions and selective treatment of case law'. The results of the low-level judicial reasoning ultimately weaken

constitutional guarantees and control mechanisms, even if the Court's rulings do not comply with the objectives of the populist political agenda.

In the Czech Republic, as Zdeněk Kühn supposes, although the populist trends have had little effect on the jurisprudence of the Constitutional Court, the body observed the coming new wave of populism and embarked on a more moderate practice, at least in the sense that it ceased to extend its powers, and some of its decisions have not been 'in line with the earlier case law'. The self-restraining practice culminated in refusing the justiciability of the declaration of the state of emergency in 2020, but the interpretive toolkit and the self-understanding of the Court have remained unchanged.

As opposed to the cases discussed so far, the continuity of constitutional jurisprudence has obstructed populist ambitions in Spain. In this country, as Balaguer Callejón states, neither Catalan separatism, nor the national populist parties have 'managed to generate a jurisprudential line of interpretation of the constitution that can be defined as populist', because the Spanish Constitutional Court has resolutely resisted such aspirations. This means that the existing interpretive practice has provided appropriate tools for the Court to combat populist constitutionalism. Essentially, the Court has taken the position that unilateral legislative actions that do not respect the constitutional framework, even on the basis of the popular will, are unconstitutional.

In Britain, according to McEldowney's analysis, during the protracted Brexit controversies, the Supreme Court's decisions were consistent with the well-established judicial practice reviewing the prerogative powers of the Executive, giving priority to the principle of parliamentary sovereignty, and rejecting the special legal status and judicial enforceability of constitutional conventions.

18.3.3 Changing interpretive practice to promote populist aspirations

In those cases in which populist issues have triggered changes in interpretive practice, these effects have taken a variety of forms. The outcomes of our research show that most often some substantive concepts have come into the mainstream of constitutional interpretation, in some cases bringing real innovations into jurisprudence. In Greece, for example, when the Council of State (endowed with the power of constitutional review of laws) sought to act as the protector of the people's interests, it fulfilled this mission primarily through the interpretation of the concept of constitutional identity. According to Vlachogiannis, the development of this substantive concept needed a holistic approach, but only after the turn in its practice. Previously, when dealing with the debt crisis, the Court had raised sovereignty issues rather than the concept of constitutional identity. In 2018, however, the Court reactivated the 'prevailing religion' clause of the Constitution, yielding normative power to this provision that had previously been considered a purely declarative clause, claiming that the Greek Orthodox religion is a centrepiece of Greek constitutional identity. It is also worth noting that, in contrast to the jurisprudence of the German Federal Constitutional Court, the Council of State did not invoke the eternity clause of the Constitution when it

evolved the new concept of constitutional identity. This new approach postulates national selfhood as a pre-constitutional phenomenon which can be contrasted with external threats to the nation's existence. In addition, the Court, similar to its Hungarian counterpart, considers the Preamble of the Constitution to be an aid to interpretation. It is worth noting that the Court, in the relevant part of its jurisprudence, preferred the contextual interpretation of the constitutional text. However, neither constitutional identity as a newly discovered substantive concept nor the contextual method have become general or pervasive modes of constitutional interpretation. Yet these interpretive tools are now available and can be revived at any time in the future, not just in cases in which they have been used so far (i.e. judgments on nationality, Sunday laws and religious education).

The Greek Council of State is not the only court examined in this volume that has used some new interpretive tools to pursue a populist stance. The invention of new substantive concepts and the reinterpretation of older ones have been characteristic of the jurisprudence of the Hungarian Constitutional Court in recent years as well. As Fruzsina Gárdos-Orosz explains, here, the 'historical constitution' (in effect the one existing before the end of World War II) and 'constitutional identity' are the most preferred new magic words, while the concept of 'human dignity' has been significantly reinterpreted. In this country, the Constitutional Court, fully packed by the government parties, has assiduously favoured the legislative policy of the government, which is widely believed to be the archetype of populist rule. Notably, in this country, the right-wing populist government has always exploited its constitution-making majority unscrupulously whenever it has needed to, so even an independent Constitutional Court would have lacked the weapons to deal with the government-dominated legislature. In addition, Hungary is the only country where the constituent power also sought to influence constitutional interpretation by including the preferred interpretive methods in the constitutional text. In such circumstances, it might be surprising that these modes do not play a prominent role in the recent jurisprudence of the Court. The current judicial deference uses a mixture of interpretive modalities in the same way as it did in its activist era in the past, but this time to support the governmental power rather than to counter-balance it. Overall, the overwhelmingly populist political course, which has overcome all institutional barriers and resistance, has ultimately led to significant changes in the content of the constitutional interpretation without radically reshaping its methods.

Populism has also had a very significant effect on constitutional interpretation in Poland because, as Wojciech Brzozowski puts it, 'the populist revolution relied greatly on constitutional arguments and interpretations put forward by the political branches of government ... interpretations which were proposed and enforced precisely against the judges and the courts'. In this country, the Constitutional Tribunal was quickly packed by the populist government, and it has used old techniques for new purposes. Thus, the Court has not abandoned the practice of giving guidelines to courts

on the proper interpretation of constitutional provisions. However, the Constitutional Tribunal has used this tool only in a narrowly tailored way, namely to defend the controversial measures of the populist majority. While the interpretive techniques applied have not changed, if the previous practice obstructs the governmental will, it is rapidly changed by the Court. Brzozowski argues that there is no consistency in the interpretive practice, which he characterizes as a ‘cherry-picking model’.

18.3.4 Changing interpretive practice to counteract populist initiatives

While constitutional interpretation using new substantive terms has not been used by constitutional courts in Greece and Hungary to prevent or counteract populist aspirations, the Croatian Constitutional Court has sought to resist some populist initiatives by applying similar interpretive tools. For this country, Gardasevic examined the methods and changes in constitutional interpretation in connection with the constitutional review of popular constitutional initiatives, based on the assumption that some of them pursued populist goals such as anti-elitism, the restriction of minority rights and backing of identity politics. According to his analysis, the Croatian Constitutional Court has also used contextual interpretation to develop certain substantive concepts, bestowing upon them high constitutional values, such as constitutional identity or unconstitutional constitutional amendments. Likewise, it has reserved some unenumerated powers for itself, such as the constitutional review of popular constitutional initiatives, although this can be seen as a manifestation of the constituent power (since successful referendums result in an immediate amendment of the constitutional text). It is noteworthy that these substantive categories are not included in the text of the constitution, so in this case the populist challenge has provided an opportunity for the Constitutional Court to strengthen its position and, in many cases, to break with its previous practice, to establish a kind of hierarchy among constitutional values. As to the modalities of constitutional interpretation, the Constitutional Court has used several different methods inconsistently; the interpretive tools applied have ‘varied significantly from case to case’ in relevant review procedures, but as Gardasevic argues, the Court has used the various methods always against populist demands; it rejected the popular constitutional initiatives aimed at restricting minority rights by the proportionality test, refused the initiative to change the electoral system on the basis of a grammatical interpretation, and then, referring to the systematic interpretation, also declared the referendum to prevent the outsourcing of certain public services unconstitutional.

18.4 Explaining different judicial strategies

As we have seen, constitutional courts and other high courts exercising constitutional review have reacted to populist legal aspirations in different ways. The diverse judicial strategies may be manifested not only in the outcome of

the constitutional interpretation but also in its method. If we accept that the aims and means of populist constitutionalism challenge the constitutional system of liberal democracies, undermine the functioning of traditional institutions and seek to establish an alternative constitutional design, it is reasonable to assume that they also affect the well-accepted forms and methods of constitutional interpretation. Presumably, the power of interpretation is therefore greatly appreciated in the eyes of populists. And if this is the case, it is plausible to presume that they seek to develop a specific interpretive method that will most effectively help them to achieve their goals.

However, Anna Gamper, based on a wide-ranging comparative analysis, has found no evidence that populists would favour any particular method of constitutional interpretation. As she demonstrates, although the new constitutions prescribe mandatory interpretive methods more often than the old ones, wherever this occurs, populism is not the main explanatory variable. Presumably, their approach is a target-oriented one, that is, it does not matter how the desired result is achieved. Interestingly, she has concluded that when constitutions contain binding guidelines for interpretation, they are mostly intended to establish and promote liberal democracy (at least on paper). What can make a difference is that 'established liberal democracies rarely entrench such rules in their constitutions, because they rather consider constitutional interpretation to be the domain of independent courts', while populist or illiberal constitutionalism calls into question whether the courts should really be the ultimate interpreters of the constitution. Among the countries examined in this book, only in Hungary have the populists become so strong that they were able to adopt their own constitution, which included preferred methods of constitutional interpretation. However, this has not had a decisive effect, even in this country.

Beyond the fact that comparative analysis has not proved that different political systems would have their own specific rules of constitutional interpretation, Mark Tushnet is sceptical about whether the nations of the world would have autochthonous interpretive methods. All the signs show that national constitutional and supreme courts use the same modalities. Nevertheless, there may be some room for national peculiarities in that the same interpretive methods are used in different combinations in various countries, establishing a specific hierarchy between them. In this sense, different meanings can be attributed to the same substantive concepts depending on the national legal culture in which they operate.

Martin Loughlin's study, exploring the American debates on constitutional interpretation, highlights the difference between the 'strict constructivist' and the 'aspirational' interpretations, resting on diverse approaches to the constitution. This kind of conceptualization can be an appropriate way of characterizing populist constitutionalism, supposing that the prevailing authoritarian populism, with its eagerness for power and zeal for comprehensive political and social reforms, prefers to take the aspirational approach to constitutionalism and constitutional interpretation.

Analysing the country studies in this book, the most plausible explanatory variable of judicial behaviour is the political context that surrounds the

courts. Where populists have been strong enough to pack the constitutional courts, such as in Hungary and Poland, they have taken this opportunity to replace judges with their own nominees. However, the new judges have not developed new interpretive methods to legitimize the majority will; at most, they have placed some new legal concepts or constitutional provisions at the centre of their jurisprudence, or creatively resorted to the methods available, choosing the one best suited to justify the preferred decision. It is also interesting that the political subordination of a constitutional court does not necessary involve judicial deference, but also depends on the given political circumstances. In Hungary, where the government majority may write anything in the constitution that they want, the Constitutional Court has pursued a self-restraining stance in recent years, while in Poland, where the governing parties do not have a sufficient majority to amend the constitution, populists have urged judicial ‘passivism’ only in opposition, but in government, they have needed a fairly activist Constitutional Tribunal to reinterpret the unchanged constitution.

In a number of countries, the mainstream parties have succeeded in preserving the support of their voters, or the fragmentation of the party structure has prevented populist movements from coming to power or reaching a position in which they could influence the composition of the high courts. Yet, as the Austrian, Czech and Italian examples illustrate, some constitutional courts have started a more self-restraining practice, showing deference to the decisions of political branches, even if they have otherwise remained intact. We assume that if such a court relinquishes its earlier activism in the hard cases generated by a populist agenda, this can be better explained by its own institutional interest or the pressure of public opinion, rather than by the national legal culture. Nevertheless, constitutional traditions can play a decisive role, as can be seen in the United States, where the ancient constitution and the well-accepted methods of constitutional interpretation favour populist aspirations.

Furthermore, some authors in this book have argued that although the existing interpretive toolbox has provided appropriate instruments for the courts to resist populist aspirations which seek to reshape the constitutional framework, only some high courts have used these instruments for this purpose. As a matter of fact, only a few of the constitutional and supreme courts we have examined have undertaken decisive action against populist initiatives, even if the latter have challenged the traditional constitutional framework; perhaps the high stakes involved (such as the unity of the state against Catalan separatism in Spain, or EU membership in Croatia) have encouraged these courts to do so.

Overall, where populists are in opposition, and where the constitutional or supreme court is in a strong position, the business-as-usual model is most likely; and vice versa, where populists rule and have been able to change the competence or composition of the court(s) reviewing the constitutionality of legislation, there has been a change in constitutional jurisprudence in favour of populist objectives.

18.5 Our major findings and conclusions

All country studies show that where populism has influenced the interpretive practice of the courts, no new theory of interpretation has evolved, and no close connection can be established between populist constitutionalism and any specific method of constitutional interpretation. In short, populists do not have any favourite interpretive method or theory. Even the rubber-stamp courts do not need to use specific interpretive methods or judicial philosophy; this does not mean, however, that such courts would be reluctant to find the most appropriate ways to be deferential to the political will of the government. However, in these cases, the choice of the modalities of interpretation applied is made on a pragmatic basis, from case to case, depending on the desired end result, and there is no consistent interpretive theory or practice behind it. In other words, even if populists are able to achieve informal constitutional changes by influencing the high courts' jurisprudence, the methods of constitutional interpretation play a merely instrumental role. In these countries, even the most sophisticated and elaborate interpretive theories and methods can be used to justify blatantly unconstitutional laws and initiatives.

Putting our research results in a broader context, we can also draw an important conclusion. As has been said earlier in this chapter, our presumption was that if populists are not strong enough to achieve formal constitutional changes, they are likely to want to influence the way the constitution is interpreted in order to reach their goals. We also assumed that if 'populist constitutionalism' is an analytically useful tool, the methods of constitutional interpretation must be its crucial domain. However, we have not been able to confirm this presumption; we have concluded that no substantive theory or specific mode of constitutional interpretation can be ascribed to populist aspirations, and populist constitutionalism does not, in effect, have a special constitutional toolbox. In other words, populism, as a political phenomenon, although it can achieve real constitutional changes, does not achieve them in any particular way, by elaborating a new constitutional theory.

The growing literature on populist constitutionalism is based on the assumption that, firstly, populism is a worldwide trend, and that secondly, it has made significant constitutional changes whenever populists have been able to. The term 'populist constitutionalism' may at most refer to this relationship, but we have not found any evidence that these achievements have elaborated any specific constitutional ideas or methods which would be characteristic only of populism. All indications are that populism considers constitutional interpretation only in a purely instrumental way, handling every legal concept and procedure, including constitutional adjudication and – as an element of this – constitutional interpretation, as a tool to achieve political objectives and goals.