The relationship between populism and contemporary constitutional democracy seems to escape any form of categorisation. The normative proposals of populists concerning how democracy should be reformed, which go under the name of populist constitutionalism, do not compose a coherent alternative vision to liberal democracy. Rather, they are piecemeal propositions constantly re-elaborated according to the changing social reality, and characterised by an extreme simplification of the message (Tudela, in this book).
Populism and Contemporary Democracy

Josep Maria Castellà and Marco Antonio Simonelli

1 A CONTROVERSIAL RELATIONSHIP?

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1 Populist constitutionalism must be kept distinguished from constitutional populism, a doctrine originated in the 1990s in the United States and elaborated in the work of Akhil Reed Amer, who once stated ‘I suppose if someone asked me, “What is your constitutional philosophy?” I might say that I am a constitutionalist, a textualist, and a populist’. The purpose of this doctrine was to correct the imbalance between the democratic and the aristocratic element of American democracy and advocated essentially for more instruments of democratic participation and less activism from the side of the US Supreme Court. To put it otherwise, constitutional populism does not seek to overstep the boundaries of constitutional democracy but to correct its current equilibrium, by offering a textual reading of the

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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_1
a coherent alternative vision to liberal democracy. Rather, they are piece-
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social reality, and characterised by an extreme simplification of the mes-

Amongst the elements shared by all populist narratives, the least com-
mon denominator seems to be the reaffirmation of the centrality of the
sovereign will of the people that, in the populist discourse, is embodied
not in the representative institutions, but in the populist party or leader
itself. In force of this self-conferred democratic legitimisation, populists
engage in a dichotomic dialectic of ‘us and them’, which allows them to
affirm that any constraint on the will of the ‘true people’ imposed by the
‘system’ is an attack to popular sovereignty and democracy.

In this way, the ‘We, the People’ of the US Constitution Preamble,
enshrining 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 limits itself,
is transformed by populists into ‘We are the people’. Simply with this
small change of words, the message conveys a completely different mean-
ing: populists pretend to speak in the name of every citizen.

Constitution. See Reed Amar, *A Few Thoughts on Constitutionalism*, Textualism; Parker, *Here, the People Rule*.


3 On the adaptability of the populist discourse, see Debras, in this book.

4 Some authors outlined the main claims of a populist constitutional theory. These are namely (1) the prevalence of the rule of men over the rule of law; (2) the unity and immediateness of the people will and (3) a strong accent on constitutional identity. See Corrias, *Populism in a Constitutional Key*, 6–26.

5 This slogan was actually used by the German far-right political movement Pegida (*Patriotische Europäer gegen die Islamisierung des Abendlandes*) in the street rallies against German immigration policy in 2014 and 2015. See Mounk, *El pueblo contra la democracia*, 25.
According to Mudde, however, such a message is not entirely negative. Populism, in fact, may constitute ‘an illiberal democratic response to undemocratic liberalism’ (Mudde and Rovira 2013), and rather than an attack on constitutional democracy, it would be a corrective to a deficit thereof. Constitutional democracy indeed presupposes an ‘aspiration to a fair equilibrium’ between, on the one hand, the democratic principle, reflected in the respective roles assigned to the parliament and the government in the decision-making process and, on the other hand, the rule of law, expressed by the subjection of the policymakers to the laws and the constitution, enforced mainly through the judicial review of legislation (Fioravanti 2011). In this light, this demand for more democratic legitimacy may actually constitute a legitimate effort to reaffirm the democratic principle vis-à-vis a perceived disempowerment of elected bodies provoked by the rise of unelected ones. Be that as it may, if we accept that the core element of populism is the claim to embody the sovereign popular will, we can evaluate the apparently ambiguous relationship between populism and constitutional democracy by looking at the concrete effects this claim has on the various components of constitutional democracy.

The questions to be answered are essentially two. First, how the pretence to embody the popular will affects the functioning of the ordinary mechanisms of representative democracy? And, second, how the affirmation of the primacy of the sovereign will of the people affects the rule of law and the role of the institutions that are deputed to check the majority’s actions?

Without having the ambition of offering an all-embracing picture of these effects, in the following pages we will try to shed some light on the points of friction between populism and contemporary democracy, and show to what extent populism can be considered a healthy reaction to an existing imbalance in the democratic equilibrium.

2 Populism and Representative Democracy

Despite a generalised tendency to consider representative democracy incompatible with populism, Müller has argued that without representative democracy there could not be populism (Müller 2014, 43). Populist parties indeed do not want to overcome representative democracy, their ambition is to be the first representative of the popular will and they participate in elections to achieve this goal. But, as we said, the question to be
asked here is what consequence has the populist claim to embody the will of the people on the system of representation of constitutional democracy. In the propositions of populist parties concerning the role of legislative assemblies, this claim is declined into two distinct forms. First, populists depict the parliaments as expensive institutions protecting only the interests of the elite. Second, in the populist narrative, the only genuine form of democracy is direct democracy, hence they tend to advocate for an extensive use of referenda.

Concerning the former aspect, it may be worth remembering that populism tends to be strong in places with fragmented parliamentary systems: when the smooth functioning of parliaments has been hindered by an excessive fragmentation of political parties in the representative assembly, this constitutes the ideal breeding ground for populist phenomena to rise (Müller 2014). The populist solutions to the fragmentation and deadlocks of parliamentary systems are of two kinds. First, they propose the introduction of mechanism to ensure the MPs’ obedience to the party leader in order to foster internal party cohesion. In Italy, for instance, the 5 Star Movement supported by the Northern League proposed the introduction of the most stringent form of control over MPs’, the imperative mandate. However, as this would require amending Article 67 of the Italian Constitution, which explicitly prohibits imperative mandate, the 5 Star Movement adopted an internal rule against phenomena of ‘floor crossing’, providing the imposition of a pecuniary sanction of 100,000 Euros on the MP leaving the party.

On the other, they propose to reduce the size of parliaments, with the stated aim of reducing the cost of the institution. Always the 5 Star Movement managed to push through the parliament a constitutional reform which will reduce approximately one-third of the members of both chambers of the Italian Parliament (the Chamber of Deputies from 630 members to 400 and the Senate from 315 to 200 members). A similar proposal is the one contained in the political programme of Marine Le Pen Rassemblement National, which aims at reducing the number of members of both the lower and upper house of the French parliament.

6 It is worth noting that, insofar, this represents the sole institutional reform proposed by the 5 Star Movement, that ultimately saw the light, after it was approved in a referendum held on the 20–21 of September 2021.
7 Further, this proposal is accompanied by another which aims at introducing a majority bonus to the party who obtains at least the 30% of the popular vote in a newly designed proportional electoral system. Evidently, the combined effect of these proposals would be the...
When populist reach the power, their intentions concerning the role of parliaments become even clearer. The events in Czech Republic are a good case in point. In 2013, Czech Republic’s first directly elected president, Miloš Zeman, using the legitimacy deriving from its direct election proceeded to directly appoint his own government, completely bypassing the Czech parliament. This arrogation of the key power of government formation, that under the Czech constitution belongs to the parliament, made without any formal amendment to the Constitution, signals the idea of the parliament’s subordination to the executive. Subsequently, in 2017, the winner of the parliamentary elections and current Prime Minister, Andrej Babiš, pledged to abolish the upper chamber of the Parliament (Senate) and to reduce the number of MPs in the lower chamber from 200 to 101. Once again, the combined effect of these proposals results in a weakening of the parliament’s role, which is deprived of its most significant check on the executive and reduced in size. Yet, unlike Orbán, Babiš does not have the required majority to push through the Parliament these constitutional amendments.

In Hungary, in fact, the powers of the National Assembly have been significantly curtailed by Fidesz’s reforms. A case in point is the Budget Council’s veto right on approval of the annual budget law passed by the parliament. Although the Council, an organ supporting Parliament’s legislative activities, may refuse to give consent only in specified cases (e.g. if the budget bill would allow state debt to exceed half of the GDP), in case the Budget Council denies its consent to the budget, the President of the Republic may dissolve the parliament and this constitutes an exceptional restriction of the Parliament’s budgetary power. Evidently, in a parliamentary system, as Hungary formally still is, this constitutes a drastic curtailment of parliamentary prerogatives in a fundamental competence of the legislative assembly.

To be fair, the problem of parliaments’ marginalisation in constitutional democracy precedes the advent of populism in Europe. In order to give injection of a further majoritarian element in the French democracy, to the detriment of parliamentary component.

8 More in details on the reforms implemented by the Orbán’s government concerning the role of parliament, see Szente, How Populism Destroys Political Representation, 1609–1618.

9 Similar criticisms were revised in the first EU report on the rule of situation in Hungary, the so-called Tavares Report. See European Parliament (2012/2130(INI)), Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012).
rapid answers to crises that have afflicted the European societies in the last two decades, executives became indeed primary norm-producer, reducing parliaments to mere validators of executive’s actions (Curtin 2014). This shift of decision-making powers from the legislative to the executive opened up a legitimacy creep in constitutional democracy, that during the COVID-19 pandemic emerged in all its evidence. Yet, populism rather than fixing it enlarges the creep by delegitimising the representative function of parliaments, portrayed as unnecessary and costly intermediary institutions, and introducing check on parliamentary law-making powers.

As regards the populist preference for direct democracy, we have to begin by noting that one of the most visible consequences of the advent of populist politics in Europe has been a more intensive use of the referendum. The referenda celebrated in the UK on Brexit, in the Netherlands on the EU-Ukraine agreement, in Greece on the conditions imposed by the ESM for receiving financial assistance, in Hungary on the application of the migrant-quota, the referenda on same-sex marriage in Romania and Slovenia, and the illegal referendum on the independence of Catalonia, only to mention the most relevant, can indeed be all considered symptoms of a populist rhetoric.

The Catalan illegal referendum that took place on 1 October 2017 well exemplifies the dangers inherent in the populist pretence to embody the popular will. The law declaring the referendum was approved by the Catalan parliament on 6 September 2017 along with the Law on legal transition and foundation of the Republic of Catalonia, containing a ‘provisional constitution’ of the Catalan Republic, which was approved the next day. Both bills were approved with disregard of the rules disciplining the legislative process, in particular regarding the opposition’s rights. More importantly, Article 3 of both laws self-attributed to the two statutes supremacy over all conflicting norms, thereby including the Spanish Constitution and the Catalan Statute of Autonomy. The referendum law also stated that if the votes in favour of independence would be the majority, the result of the referendum would be binding with a simple majority, without requiring any participation or approval quorum. The Spanish Constitutional Tribunal declared the referendum unconstitutional on 17 October, and the Law on legal transition null and void the following 8

10 On this problem, see Simonelli, in this book.
November.\textsuperscript{12} In the latter judgement, the Constitutional Tribunal stressed that the law was unconstitutional also according to the Statute of Autonomy of Catalonia which requires a two-third majority in the Catalan parliament for any change to Catalonia’s statute.

What the Catalan secessionist process demonstrates is that the pretence of populist parties to speak in the name of the people, which is depicted as a monolithic bloc, even at a subnational level, tends to refuse the checks inherent in constitutional democracy even and ultimately affect the rights of minorities which are not taken into account in the populist discourse.\textsuperscript{13} As a matter of fact, the Catalan referendum of 2017, the government-sponsored referendum held in Hungary on the mandatory relocation of refugees,\textsuperscript{14} and those, always sponsored by the government, on the ban of same-sex marriage in Romania and Slovakia,\textsuperscript{15} all saw the participation of a minority part of the electorate—in all of them turnout was lower than 50%—thus demonstrating that the populist agenda is not always in line with the people’s will.

The risk of marginalisation of minorities is particularly high in homogeneous societies, such as those of Central Eastern European states. Here, the exclusivist reference of populist parties to their people, in fact, results more often in a lowered protection of the rights of minorities and marginalised groups. The examples that can be offered in this regard are numerous: from the constitutionalisation of the prohibition of homelessness in Hungary to the challenges by Hungary and Slovakia of the Council Decision on the relocation of refugees among Member States, and the restrictive stance of all Central Eastern European states towards LGBTQ rights.

All in all, even though populist parties do not seek to overcome representation as such—even populist governments, despite often being illiberal, remain tied to electoral legitimacy (Finchelstein 2017)—populism appears to reject the very foundation of representative democracy. Populist parties indeed pretend to be linked directly with the people, bypassing parliamentary intermediation. Also, in the ideas of populist parties, the

\textsuperscript{12} STC 124/2017, of 8 November 2017.

\textsuperscript{13} More extensively on the Catalan secessionist process, see González Campañá, in this book.

\textsuperscript{14} Ibid., 8.

\textsuperscript{15} On these referenda, see Kużelewska, Same-Sex Marriage – A Happy End Story?
most genuine form of democracy is direct and participatory democracy, hence they tend to advocate for referenda in the most important matters of the political agenda, for example, EU membership. The use of referenda however betrays the populist conception of the representative democracy as the rule of the majority, where no space is reserved for the dialogue with minorities. In a nutshell, in the populist discourse, democracy and representation go hand in hand until the limits and gridlocks inherent in representative democracy collide with the idea of democracy populist parties have.

3 Populism and Counter-Majoritarian Institutions: Constitutional Courts, Judicial Councils and Independent Authorities

3.1 Populism and Judges

In its quest for reinstating the legitimacy of the political system, populism identifies various enemies. First and foremost, the organs are deputed to safeguard and enforce the respect for the rule of law, that is, constitutional and ordinary judges.

What is particularly heinous for populists is the sophisticated version of the rule of law adopted in the European context, inasmuch as it envisages strong constitutional courts checking the legality of the acts of the political branches. The role of constitutional courts is substantially undisputed by populist parties in Western Europe—with the possible exception of Catalan independentists—in Central Eastern European States, conversely, constitutional judges have been frequently the target of attacks by populist governments. During the transition to democracy of post-communist countries, a body entitled to perform judicial review of legislation was made a requirement under the ‘Copenhagen criteria’ and, generally speaking, all the constitutional jurisdictions of those States showed a somehow surprising readiness to overturn important statutes, often frustrating...
genuine attempts of reforms by incumbent governments (Schwartz 2000). Among these courts, the most active was the Hungarian Constitutional Court, that during the 1990s, acted as the guardian of the democratic transition. The Hungarian Constitutional Court was an example of judicial activism especially with respect to the transposition of European standards concerning the rule of law, fundamental right and democracy in the country. Yet, in the end, the most powerful constitutional jurisdiction in Central Eastern Europe was the target of the most ferocious attack on its prerogatives and independence. By packing the constitutional courts with government-friendly judges and by shrinking its jurisdiction and the rules of standing (Halmai 2019), the populist governments conveyed the message that the will of the ruling majority, being legitimated by the popular vote, cannot be subjected to the scrutiny of unelected bodies.

Nevertheless, it would be erroneous to identify a causal link between judicial activism in constitutional adjudication and a populist backlash against constitutional judges. The constitutional courts of Slovakia and Czechia, in fact, were able to reassert their position in the political system without abandoning an activist stance vis-à-vis populist politics. Significantly, both courts embraced the doctrine of unconstitutional constitutional amendments:19 the Czech court in 2009, and the Slovak one in 2016.20 This doctrine, which represents the ultimate consequence of judicial activism, essentially empowers constitutional courts to strike down constitutional amendments and legislation for incompatibility with the higher principles of the constitution, sometimes identified by the judges themselves.21 Even this ‘extreme’ form of judicial activism did not cost the two courts their independence. In the Slovak case, on the contrary, this judicial doctrine was adopted in the aftermath of a constitutional crisis, during which the President of the Republic refused to appoint three new judges to the Constitutional court, notwithstanding a ruling from the Constitutional Court that this constituted a violation of the Slovak Constitution.22 After the ‘surrender’ of the President of the Republic, who finally appointed the three judges, and the election of a new liberal

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19 For a detailed illustration of this theory, see Roznai, Unconstitutional Constitutional Amendments.
20 Judgement of Slovak Constitutional Court of 30 January 2019.
21 In legal systems where the constitution contains an eternity clause, as is case for Germany, the application of this doctrine is obviously less controversial.
22 A complete illustration of this constitutional crisis can be found in the I-Connect Symposium on the case. The first episode of the saga is available at http://www.iconnect-
pro-European president, Zuzana Čaputová, it can be safely affirmed that, notwithstanding its judicial activism, the Czech Constitutional Court resisted the populist tide.

Also, the independence of ordinary judges has been put into question, especially in Central Eastern European countries, by populist parties challenging the validity of the European model of judicial independence.

After the collapse of the Soviet Union, these countries, looking forward to joining the European Union, swiftly moved towards the European model of judicial independence, in which the key institution guaranteeing the independence of the judiciary is the judicial council. In its version imposed on the Central European States as a requirement under the Copenhagen criteria, this model provides for a constitutionalisation of the judicial council, a majority of its members to be elected by the judges; and the transferral of all substantial decision-making powers concerning Judges’ career to the body. A certain degree of politicisation is admitted through the provision that parliament shall elect a minority of members, normally with a qualified majority.

In countries that had experienced 50 years of communist rule, characterised by a full dependency of the judiciary to political power, the adoption of these European standards resulted, as characterised by AG Bobek, in an ‘extreme swing from zero judicial independence to 200%’ (Bobek 2008). Both Hungary and Poland followed this model, and it has been argued that it was the granting of too extensive self-regulatory competences to a judiciary that just came out from an authoritarian regime, without any serious vetting procedure, may have indeed represented a major cause of the backlash against judicial independence in the two countries (Kosař, Baros and Dufek 2019, 445). Conversely, in Czechia, the only country which resisted the pressure coming from the Commission and the Council of Europe to institute a judicial council, the judiciary appears to have better safeguarded its independence, notwithstanding the rule of law record of the Babiš government is far from being perfect.


23 Albeit the requirement to have an independent judiciary was not explicitly mentioned in the ‘Copenhagen criteria, during the accession talks leading to the 2004 enlargement the Commission required all candidate States to provide sufficient guarantees for judicial independence. See Kochenov, Behind the Copenhagen Facade, 20.
Despite being the most common form of judicial self-government in Europe, also in Western Europe, the validity of this model has been challenged both by practice and by theory.

In practice, the major challenge came from Spain where, since 1985, it is the parliament who appoints the totality of the members of the judicial council. Notwithstanding the recommendations coming from the Council of Europe to give the judges a say in the composition of the judicial council, the proposal advanced in October 2020 by Prime Minister Sánchez to modify the appointment system to the judicial council fully maintains a system in which the parliament appoints the totality of the members. Further, as a response to the blockage of the renovation of the body by the opposition, it envisages a lowering of the majority required for the election of judicial council members from three-fifth of the members of both chambers to absolute majority. Thus, showing that intolerance to the gridlocks of representative democracy, and to judicial independence, is not exclusive to Central Eastern European populist parties.

Concerning the theory, already in 1983, Cappelletti criticised the European model, for the ‘risk of corporative insulation of the judiciary’ (Cappelletti 1983, 61). Cappelletti addressed his criticism especially to the Italian High Judicial Council, where he observed a situation of ‘individual anarchy’, consequence of a lax attitude of the body to exercise its control power over judges, and which led him to affirm that the Italian system ‘might still be less fearful than one of dependency from the political power; it is not, however, necessarily less damaging’ (Cappelletti 1983, 62). The problems that are currently afflicting the judiciary in Italy and Spain, attested by the worryingly bad performance of both countries in the EU 2020 cycle of the Rule of Law, have led to a renewed interest in the risk of corporative insulation of the judiciary. This risk is particularly acute in Spain, where the parliament’s control over the composition of the judicial council has been questioned by judges and opposition parties. The recent proposals by Prime Minister Sánchez to modify the appointment system to the judicial council, by lowering the majority required for the election of judicial council members, have raised strong criticism from judges and opposition parties.
Justice Scoreboard concerning the perceived level of judicial independence,\textsuperscript{28} seem to have proved him right. Probably then, the origin of the backlash against judicial independence is to be found in the blind acceptance of a model of judicial independence which was too unresponsive to political branches and societal needs. But, the solutions put forward by populists, court-packing, removal powers conferred on the ministry of justice and also the judicial council fully elected by the parliament cannot be considered a legitimate attempt to strike a fair balance between judicial independence and the democratic accountability of the judiciary. In this regard, the institutional set-up of other judicial councils across Europe may represent useful examples of how to reconcile these two apparently contradictory concepts. In the French \textit{Conseil Supérieur de la Magistrature}, for instance, 14 of the 22 judicial council’s members are elected by judges amongst themselves, and the other 8 need to be persons from the outside the judiciary, that is, lay members. Yet, in the panels deciding on appointments, judges are in a minority and in the compositions deciding on disciplining sit an equal number of lay and judicial members. Leaving aside, for the moment, the question of the concrete arrangements put in place to achieve this fair balance, it can be concluded that even though a certain degree of politicisation of the judiciary is unavoidable and even desirable, the populist reforms aiming at placing the judiciary under the majority control blur the separation of powers, thus undermining the very foundation of the rule of law.

Similar conclusions apply to populist reforms concerning constitutional courts. These reforms cannot be considered a proportionate reaction to an excessive judicial activism; they should be rather treated as symptoms of the populist malaise to accept any limit to the sovereign will of the people. The possibility of declaring a piece of legislation null and void for being in violation of the constitution is the ultimate consequence of the basic tenet of the rule of law: governors, including ruling majorities, are not above the law. The populist refusal of this fundamental principle renders hard to reconcile populism with the rule of law and its guardians.\textsuperscript{29}

\textsuperscript{28} According to the 2021 EU Justice Scoreboard, the perceived independence of the judiciary in the two countries is amongst the lowest in the EU, with more than 60% of the interviewed declaring to consider the level of judicial independence fairly or very bad. See 2021 EU Justice Scoreboard, 41. Available at: https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf.

\textsuperscript{29} Extensively on the point, see de Ghantuz Cubbe, in this book.
More generally, it is the same idea of a constitution capable of fixing the boundaries of the majority will that appears incompatible with populism in power. In fact, when populists obtain the necessary majority, like in Hungary, they transform the national constitution into an instrument of everyday politics, shielding their reforms from judicial review (Landau 2012, 189). Otherwise, they try to delegitimate the constitution and the compromise at its origin, by proposing reforms aiming at a total refashioning of the political system, emblematic in this sense is the 2018 proposal of constitutional reform by Greek Prime Minister Tsipras, or to capture the constitutional court to loosen down the constraint to its actions.30

3.2 Populism and Independent Authorities

In contemporary constitutional democracy, the judiciary and the constitutional courts are not the only counter-majoritarian powers. Especially in new democracies, independent public bodies with the function of monitoring or directly carrying out the exercise of sensitive executive functions, like the organisation of elections, the regulation of media and the oversight over the compliance with fundamental rights by public administrations, are becoming a common feature (Rose-Ackerman 2012, 676).

These bodies, electoral commissions, media regulatory authorities and ombudsmen shall be counted amongst counter-majoritarian powers, as long as they are not depending on the executive. Given their nature, populist governments end up colliding with them at some point, and indeed, the capture of oversight authorities is just another page of the populist playbook, the one about tightening the grip on power by rigging electoral competition.

As usual, Hungary and Poland are paradigmatic in this regard. In a nutshell, Orbán packed all the independent entities within the executive branch, including the Electoral Commission, the Budget Commission, the Media Board and the Ombudsman office, in most of the cases simply by removing incumbent members.31 The negative effects of such a move are particularly visible in the case of the Electoral Commission, whose function is to ensure the fairness of all electoral consultations. The Orbán government proceeded to modify the composition and powers of the

30 This is the case of Poland. See Granat, in this book.
31 For more details on the attack on the Hungarian independent authorities, see Carlino, Ungheria: le autorità indipendenti e la ‘democratic erosion’.
body in 2013; contextually, he also removed all the incumbent members.\textsuperscript{32} The most worrying feature of the reform is the distinction between elected and delegated members. Whilst the latter are elected by the parliament with a two-third majority for a mandate of nine years, the delegated members, chosen by the opposition parties, took office just after the inauguration of the Parliament and their mandate ends the government calls for a new election, that is, they are not sitting in the Electoral Commission during the legislative elections, when their presence is most needed.

The Polish PiS instead pursued the strategy of capturing the media system to prevent political pluralism. In December 2015, the PiS began its attack on the media independence and pluralism with a law that disposed the premature termination of the mandate of all the members of the National Broadcasting Council, a body provided by the Polish Constitution for the safeguard of the right to information and the public interest regarding radio broadcasting and television, and the temporary shift of its responsibilities to the treasury minister. In June 2016, the parliament passed legislation creating a parallel National Media Council, which was attributed the power to appoint and dismiss the members of the governing bodies of the public media.\textsuperscript{33} The body consists of five members, three appointed by the parliamentary majority and two by President of the republic on the advice of opposition parties. Finally, in December 2017, the parliament passed a law terminating the mandates of the boards of all public-service broadcasters and gave each broadcaster a new board, whose members can be appointed and dismissed at any time by the Ministry of the Treasury.\textsuperscript{34}

Such a dependency, in a context in which the National Media Council is already controlled by the parliamentary majority, threatens pluralism in the media sector, which according to the Venice Commission, is an essential element of a democratic society.\textsuperscript{35}

Albeit it is hard to elaborate clear-cut categorisation amongst the vast array of independent authorities that can be found in European

\textsuperscript{32} Act XXXVI of 2013 on Electoral Procedure.

\textsuperscript{33} Rule of Law Report 2020.

\textsuperscript{34} More in details on the attack on freedom of expression by the Polish Government, see Fomina and Kucharczyk, \textit{The Specter Haunting Europe}.

democracies, it is possible to distinguish between independent authorities of a counter-majoritarian nature and authorities with regulatory powers on highly technical and complex matters, like competition authorities or authorities for the regulation of financial markets. These latter lack a counter-majoritarian character—as a matter of fact, they are normally instituted within the executive—and they are better defined as non-majoritarian institutions, in as much as they are excluded from the circuit of political representation. Originally a characteristic feature of the US system, those kind of authorities became increasingly common also in Europe, where the EU pushed for a significant depoliticisation of the public sphere, to be realised by conferring regulatory powers to experts composed bodies (De Somer 2017).

The ensemble of these authorities is normally referred to as technocratic governance, defined as a system in which the legitimacy of decision-making is based on the rationale that, given the growing complexity of contemporary society, we should let the experts rule. In the last decades, the growth—both in number and competences—of regulatory agencies, has been uncontrolled, causing a marginalisation of the parliament’s role. Hence, in this regard, populism and technocratic governance are related phenomena as they both produce an imbalance in the separation of powers (Bickerton and Invernizzi Accetti 2017; Ackerman 2000). Yet, if technocratic governance relies on the assumption that complex decisions should be based on technical expertise, to the detriment of the democratic legitimacy of decision-making, populism essentially argues the opposite, the people always know what is best for them. A clash between technocratic institutions and populism is thus unavoidable. This clash happened, first and foremost, with the European Union, the epitome of technocratic governance.

4. Populism and the European Union

The exclusionary reference of the populists to their people cannot but affect the populist posture towards globalisation and transnational processes. In all populist narratives, international actors are indeed considered...

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36 Critics of technocratic governance point out that the delegation to regulatory authorities is actually a consequence of the political parties’ failure to take decisions with long-term effects, as these may affect negatively their electoral performance, on which their permanence in power relies. See Pinelli, The Populist challenge 12-13.
enemies of the people. From the left, the mistrust towards internationalism is motivated by a globalisation process that has left behind poorly qualified workers and fragile groups. From the right, instead, the cosmopolitan and globalised society is presented as a menace for the cultural and ethnic identity of the national community. In this sense, a form of defensive nationalism can be considered a corollary of all forms of populism (De Marco 2020).

Needless to say, in Europe, the populist anger has been directed mainly towards the EU. Given its structural lack of direct democratic legitimacy and its strong reliance on technocratic governance, the EU makes an ideal enemy for populists, which depict it as an elite-driven project protecting the interests of the international financial establishment. More so after the 2010 sovereign debt crisis, when the EU unresponsiveness to its citizens contributed to the growth of anti-European sentiment, helped populist parties to generate scepticism towards the EU integration process itself and increase their electoral consensus.

This scepticism has been translated by populists into various forms. When at the opposition, populist parties challenge the very substance of the integration process. As a matter of fact, virtually every populist party in the EU, albeit for different reasons, has at some point called for a referendum on the EU membership, the last in order of time being the German right-wing populist party Alternative für Deutschland. Alternatively, they propose Treaty revisions to take back the competences transferred to Bruxelles, above all on economic and monetary policy, but also concerning the European free movement space, that is, the pillars of the EU project. In any case, the elites are accused of having been incapable of opposing to, or for being complicit in, establishing EU’s supranational technocracy (Martinelli 2018, 63).

When they are on power, or with concrete perspectives of reaching it, populists’ attitude towards the EU becomes more ambiguous. They abandon the idea of completely dismantling the EU, whilst keeping the demand for their national sovereignty to be ‘restored’, obviously opposing any further attempts towards an ‘ever closer union’ (Bugaric 2019). Yet, they

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37 In this book, Guerra explains why it is rightly so.
38 Arguably, national governments favoured this process, hiding behind the EU to justify failures and unpopular decisions. See, Pinelli, in this book.
continue to blame the EU for threatening the national identity by imposing from the above values that are extraneous to the country’s constitutional traditions and for the supposedly uncontrolled flux of immigrants entering the EU territory.

At the same time, however, populist governments have strong incentives to maintain a good relationship with the EU. According to the data made available by the European Commission, all Central Eastern European Member States are net beneficiaries of EU funds, with Hungary and Poland being the two biggest net beneficiaries of the EU.\(^{40}\) Also, the popular support for the European Union in populist-ruled countries remains quite high: according to the 2021 Eurobarometer, 56% of Hungarian and 55% of Polish trust the EU, with an even greater percentage of citizens having an optimistic view about the future of the Union.\(^{41}\) Once again showing how the populist portrait of the society rarely corresponds to reality.

Leaving aside the question of what remedies the EU should deploy to counter democratic erosion in its Member States,\(^{42}\) as long as exiting the EU remains an unattractive option for both local societies and executives, the EU contributes to prevent and limit democratic erosion in its Member States.


\(^{42}\) On this aspect, see *Krunke, Tornøe, Wegener*, in this book.
Concerning the impact of populism on representative democracy, it can be affirmed that the real goal of populism is not to reinstate the democratic legitimacy of the constitutional system, but rather to realise a centralisation of powers in the hands of the executive, frequently controlled by a charismatic leader. This produces, as a consequence, a marginalisation of parliaments as for debating public policies with the involvement of the opposition, and which manifests itself in various forms, spacing from the abolition of the upper house, the reduction of the number of MPs, to the introduction of control on individual MPs. Also, the claim ‘we are the people’, with its strong exclusionary character, is hardly compatible with the pluralistic nature of contemporary constitutional democracy as it often overlooks the real composition of the society and the respect for minorities.

The populist attitude towards counter-majoritarian institutions is even more straightforward. Populism rejects any constraint on the popular will imposed by unelected institutions and seeks to replace the delicate system of checks and balances of constitutional democracy, with a system where the will of the elected must prevail in any case. This overbearing emphasis on the majority rule, as the almost unique method of decision-making, leads to the creation of monistic systems in which all power is detained by electorally legitimate bodies, free from any possible controls (Tarchi 2018, 913): an attitude that embraces also the opposition and minority groups in Parliament, which are deprived of meaningful oversight powers and excluded from the participation in the appointment of counter-majoritarian institutions.

Any justification for the claims of populist constitutionalism focused mainly on institutional arrangements seems thus untenable. Whilst it can be agreed that theoretically populist constitutionalism aims to redress existing imbalances and flaws inherent in constitutional democracy, populist parties in power provide the wrong solutions to these problems (Ginsburg and Huq 2020, 68). More worryingly, they appear to act in bad faith, overstepping constitutional boundaries with the only aim to ensure their permanence in power. And, it is when they obtain the majority necessary to modify the constitution that populists become particularly dangerous, as they may cause constitutional democracy drifting towards authoritarianism.
Concerning the remedies, it may be true what David Landau affirms that the agenda to immunise constitutional democracy vis-à-vis the populist challenge is an almost impossible one (Landau 2012, 259). Yet, this should not lead to the conclusion that checks and balances of constitutional democracy are irrelevant, the opposite. The involvement of a plurality of institutional and political actors, in conjunction with qualified majorities, in the appointment process of constitutional tribunals and judicial councils appears to be a successful strategy to limit the most detrimental effects of a prolonged populist rule. Multilevel governance is also a solution. As illustrated by the Catalan secessionist process, the existence of various levels of governance is an effective barrier to the spread of the populist contagion. In this sense, notwithstanding all the criticisms directed to Bruxelles, the role of the EU in countering populism may have been much more decisive than what the many apparent failures of the EU actions suggest. All in all, the answer to the populist oversimplifications may well be more complex in the design of democratic institutions.

However, without civic engagement, a voiceful public opinion and well-trained civil servants, even the best designed constitutional system is doomed to succumb to democratic erosion. After all, as wrote by Popper ‘[i]nstitutions are like a fortress. They must be well designed and manned’, and ‘the functioning of even the best institutions will always depend to a considerable degree, on the persons involved’ (Popper 2011, 120), in other words, on each of us.

In conclusion, populism is not a corrective to constitutional democracy, because once the flaw is identified it does not do anything to amend it; on the contrary, it rubs salt on the democratic wound, exacerbating and exploiting the weaknesses of the constitutional system. As long as democracy is in good health, it is capable to absorb the populist impact for a while. But at some point, it needs to answer back. In this regard, the pandemic may have been a useful shock.

Independently of the legal aspects of the crisis management, national governments demonstrated substantial responsiveness to their citizens’ concerns and needs, which seem to have put populism to sleep, as certified by the good electoral results of all traditional parties in national consultations across Europe. The suspension of the applicability of European budgetary rules and the launch of Next Generation EU, defined by Olaf Scholz as a ‘hamiltonian moment’ for the EU, have allowed European

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43 For an overview of the issues, see Castellà, in this book.
governments to support their economies with an unprecedented amount of public investments and hopefully marked a turning point in the EU integration process.

However, visible creeps remain in the institutional set-up of constitutional democracy, from executive dominance, and the consequent marginalisation of parliaments, to the blurred separation of powers between political branches and the judiciary. Those need to be fixed to prepare constitutional democracy for future challenges lying ahead.

**BIBLIOGRAPHY**


