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Abstract	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 1

Josep Maria Castellà and Marco Antonio Simonelli 2

1 A CONTROVERSIAL RELATIONSHIP? 3

The relationship between populism and contemporary constitutional 4
democracy seems to escape any form of categorisation. The normative 5
proposals of populists concerning how democracy should be reformed, 6
which go under the name of populist constitutionalism,¹ do not compose 7

¹Populist 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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8 a coherent alternative vision to liberal democracy.² Rather, they are piece-
9 meal propositions constantly re-elaborated according to the changing
10 social reality,³ and characterised by an extreme simplification of the mes-
11 sage (Tudela, in this book).

12 Amongst the elements shared by all populist narratives, the least com-
13 mon denominator seems to be the reaffirmation of the centrality of the
14 sovereign will of the people that, in the populist discourse, is embodied
15 not in the representative institutions, but in the populist party or leader
16 itself. In force of this self-conferred democratic legitimisation, populists
17 engage in a dichotomic dialectic of ‘us and them’, which allows them to
18 affirm that any constraint on the will of the ‘true people’ imposed by the
19 ‘system’ is an attack to popular sovereignty and democracy.⁴

20 In this way, the ‘We, the People’ of the US Constitution Preamble,
21 enshrining the idea that the source of legitimacy of the whole legal order
22 is to be found in the popular will, which by establishing the separation of
23 powers and by delegating the government to representatives limits itself,
24 is transformed by populists into ‘We are the people’.⁵ Simply with this
25 small change of words, the message conveys a completely different mean-
26 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*.

²The political manifesto of this doctrine may be the famous speeches of Prime Minister Orbán delivered annually in Băile Tuşnad, in particular those of 2014 and 2019, where the Hungarian Prime Minister tried to frame ‘illiberal democracy’ as a legitimate alternative to liberal constitutional democracy. The text of the two speeches, translated into English, can be retrieved on the official website of the Hungarian government. Respectively at: <https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>; <https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-viktor-orban-s-speech-at-the-30th-balvanyos-summer-open-university-and-student-camp> last accessed 30 September 2021.

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

⁴Some 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.

⁵This 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. 27
 Populism, in fact, may constitute ‘an illiberal democratic response to 28
 undemocratic liberalism’ (Mudde and Rovira 2013), and rather than an 29
 attack on constitutional democracy, it would be a corrective to a deficit 30
 thereof. Constitutional democracy indeed presupposes an ‘aspiration to a 31
 fair equilibrium’ between, on the one hand, the democratic principle, 32
 reflected in the respective roles assigned to the parliament and the govern- 33
 ment in the decision-making process and, on the other hand, the rule of 34
 law, expressed by the subjection of the policymakers to the laws and the 35
 constitution, enforced mainly through the judicial review of legislation 36
 (Fioravanti 2011). In this light, this demand for more democratic legiti- 37
 macy may actually constitute a legitimate effort to reaffirm the democratic 38
 principle *vis-à-vis* a perceived disempowerment of elected bodies provoked 39
 by the rise of unelected ones. Be that as it may, if we accept that the core 40
 element of populism is the claim to embody the sovereign popular will, we 41
 can evaluate the apparently ambiguous relationship between populism and 42
 constitutional democracy by looking at the concrete effects this claim has 43
 on the various components of constitutional democracy. 44

The questions to be answered are essentially two. First, how the pre- 45
 sence to embody the popular will affects the functioning of the ordinary 46
 mechanisms of representative democracy? And, second, how the affirma- 47
 tion of the primacy of the sovereign will of the people affects the rule of 48
 law and the role of the institutions that are deputed to check the majority’s 49
 actions? 50

Without having the ambition of offering an all-embracing picture of 51
 these effects, in the following pages we will try to shed some light on the 52
 points of friction between populism and contemporary democracy, and 53
 show to what extent populism can be considered a healthy reaction to an 54
 existing imbalance in the democratic equilibrium. 55

2 POPULISM AND REPRESENTATIVE DEMOCRACY 56

Despite a generalised tendency to consider representative democracy 57
 incompatible with populism, Müller has argued that without representa- 58
 tive democracy there could not be populism (Müller 2014, 43). Populist 59
 parties indeed do not want to overcome representative democracy, their 60
 ambition is to be the first representative of the popular will and they par- 61
 ticipate in elections to achieve this goal. But, as we said, the question to be 62

63 asked here is what consequence has the populist claim to embody the will
64 of the people on the system of representation of constitutional democracy.

65 In the propositions of populist parties concerning the role of legislative
66 assemblies, this claim is declined into two distinct forms. First, populists
67 depict the parliaments as expensive institutions protecting only the interests
68 of the elite. Second, in the populist narrative, the only genuine form
69 of democracy is direct democracy, hence they tend to advocate for an
70 extensive use of referenda.

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

87 On the other, they propose to reduce the size of parliaments, with the
88 stated aim of reducing the cost of the institution. Always the 5 Star
89 Movement managed to push through the parliament a constitutional
90 reform which will reduce approximately one-third of the members of both
91 chambers of the Italian Parliament (the Chamber of Deputies from 630
92 members to 400 and the Senate from 315 to 200 members).⁶ A similar
93 proposal is the one contained in the political programme of Marine Le Pen
94 *Rassemblement National*, which aims at reducing the number of members
95 of both the lower and upper house of the French parliament.⁷

⁶It 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.

⁷Further, 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.⁸ 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.⁹

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 s.c. 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*.

127 rapid answers to crises that have afflicted the European societies in the last
128 two decades, executives became indeed primary norm-producer, reducing
129 parliaments to mere validators of executive's actions (Curtin 2014). This
130 shift of decision-making powers from the legislative to the executive
131 opened up a legitimacy creep in constitutional democracy, that during the
132 COVID-19 pandemic emerged in all its evidence.¹⁰ Yet, populism rather
133 than fixing it enlarges the creep by delegitimising the representative func-
134 tion of parliaments, portrayed as unnecessary and costly intermediary
135 institutions, and introducing check on parliamentary law-making powers.

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

146 The Catalan illegal referendum that took place on 1 October 2017 well
147 exemplifies the dangers inherent in the populist pretence to embody the
148 popular will. The law declaring the referendum was approved by the
149 Catalan parliament on 6 September 2017 along with the Law on legal
150 transition and foundation of the Republic of Catalonia, containing a 'pro-
151 visional constitution' of the Catalan Republic, which was approved the
152 next day. Both bills were approved with disregard of the rules disciplining
153 the legislative process, in particular regarding the opposition's rights.
154 More importantly, Article 3 of both laws self-attributed to the two statutes
155 supremacy over all conflicting norms, thereby including the Spanish
156 Constitution and the Catalan Statute of Autonomy. The referendum law
157 also stated that if the votes in favour of independence would be the major-
158 ity, the result of the referendum would be binding with a simple majority,
159 without requiring any participation or approval quorum. The Spanish
160 Constitutional Tribunal declared the referendum unconstitutional on 17
161 October,¹¹ and the Law on legal transition null and void the following 8

¹⁰On this problem, see *Simonelli*, in this book.

¹¹STC 114/2017, of 17 October 2017.

November.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.¹³ As a matter of fact, the Catalan referendum of 2017, the government-sponsored referendum held in Hungary on the mandatory relocation of refugees,¹⁴ and those, always sponsored by the government, on the ban of same-sex marriage in Romania and Slovakia,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

¹²STC 124/2017, of 8 November 2017.

¹³More extensively on the Catalan secessionist process, see *González Campaña*, in this book.

¹⁴Ibid., 8.

¹⁵On these referenda, see Kuźelewska, *Same-Sex Marriage – A Happy End Story?*

194 most genuine form of democracy is direct and participatory democracy,¹⁶
195 hence they tend to advocate for referenda in the most important matters
196 of the political agenda, for example, EU membership. The use of referenda
197 however betrays the populist conception of the representative democracy
198 as the rule of the majority, where no space is reserved for the dialogue with
199 minorities. In a nutshell, in the populist discourse, democracy and repre-
200 sentation go hand in hand until the limits and gridlocks inherent in repre-
201 sentative democracy collide with the idea of democracy populist
202 parties have.

203 3 POPULISM AND COUNTER-MAJORITARIAN
204 INSTITUTIONS: CONSTITUTIONAL COURTS, JUDICIAL
205 COUNCILS AND INDEPENDENT AUTHORITIES

206 3.1 *Populism and Judges*

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

211 What is particularly heinous for populists is the sophisticated version of
212 the rule of law adopted in the European context, inasmuch as it envisages
213 strong constitutional courts checking the legality of the acts of the politi-
214 cal branches.¹⁷ The role of constitutional courts is substantially undisputed
215 by populist parties in Western Europe—with the possible exception of
216 Catalan independentists—in Central Eastern European States, conversely,
217 constitutional judges have been frequently the target of attacks by populist
218 governments.¹⁸ During the transition to democracy of post-communist
219 countries, a body entitled to perform judicial review of legislation was
220 made a requirement under the ‘Copenhagen criteria’ and, generally speak-
221 ing, all the constitutional jurisdictions of those States showed a somehow
222 surprising readiness to overturn important statutes, often frustrating

¹⁶The use of instruments of participatory democracy is a typical feature of left-wing Latin American populism. In Europe populist parties.

¹⁷Venice Commission, CDL-STD(1993)002-e, *Models of constitutional jurisdiction—Science and technique of democracy*, no. 2 (1993), 3.

¹⁸A comprehensive comparative account of these reforms is contained in *Granata-Menghini*, in this book.

genuine attempts of reforms by incumbent governments (Schwartz 2000). 223
 Among these courts, the most active was the Hungarian Constitutional 224
 Court, that during the 1990s, acted as the guardian of the democratic 225
 transition. The Hungarian Constitutional Court was an example of judi- 226
 cial activism especially with respect to the transposition of European 227
 standards concerning the rule of law, fundamental right and democracy in 228
 the country. Yet, in the end, the most powerful constitutional jurisdiction 229
 in Central Eastern Europe was the target of the most ferocious attack on 230
 its prerogatives and independence. By packing the constitutional courts 231
 with government-friendly judges and by shrinking its jurisdiction and the 232
 rules of standing (Halmai 2019), the populist governments conveyed the 233
 message that the will of the ruling majority, being legitimated by the pop- 234
 ular vote, cannot be subjected to the scrutiny of unelected bodies. 235

Nevertheless, it would be erroneous to identify a causal link between 236
 judicial activism in constitutional adjudication and a populist backlash 237
 against constitutional judges. The constitutional courts of Slovakia and 238
 Czechia, in fact, were able to reassert their position in the political system 239
 without abandoning an activist stance *vis-à-vis* populist politics. 240
 Significantly, both courts embraced the doctrine of unconstitutional con- 241
 stitutional amendments:¹⁹ the Czech court in 2009, and the Slovak one in 242
 2016.²⁰ This doctrine, which represents the ultimate consequence of judi- 243
 cial activism, essentially empowers constitutional courts to strike down 244
 constitutional amendments and legislation for incompatibility with the 245
 higher principles of the constitution, sometimes identified by the judges 246
 themselves.²¹ Even this 'extreme' form of judicial activism did not cost the 247
 two courts their independence. In the Slovak case, on the contrary, this 248
 judicial doctrine was adopted in the aftermath of a constitutional crisis, 249
 during which the President of the Republic refused to appoint three new 250
 judges to the Constitutional court, notwithstanding a ruling from the 251
 Constitutional Court that this constituted a violation of the Slovak 252
 Constitution.²² After the 'surrender' of the President of the Republic, who 253
 finally appointed the three judges, and the election of a new liberal 254

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->

255 pro-European president, Zuzana Čaputová, it can be safely affirmed that,
256 notwithstanding its judicial activism, the Czech Constitutional Court
257 resisted the populist tide.

258 Also, the independence of ordinary judges has been put into question,
259 especially in Central Eastern European countries, by populist parties chal-
260 lenging the validity of the European model of judicial independence.

261 After the collapse of the Soviet Union, these countries, looking forward
262 to joining the European Union, swiftly moved towards the European
263 model of judicial independence, in which the key institution guaranteeing
264 the independence of the judiciary is the judicial council.²³ In its version
265 imposed on the Central European States as a requirement under the
266 Copenhagen criteria, this model provides for a constitutionalisation of the
267 judicial council, a majority of its members to be elected by the judges; and
268 the transferral of all substantial decision-making powers concerning
269 Judges' career to the body. A certain degree of politicisation is admitted
270 through the provision that parliament shall elect a minority of members,
271 normally with a qualified majority.

272 In countries that had experienced 50 years of communist rule, charac-
273 terised by a full dependency of the judiciary to political power, the adop-
274 tion of these European standards resulted, as characterised by AG Bobek,
275 in an 'extreme swing from zero judicial independence to 200%' (Bobek
276 2008). Both Hungary and Poland followed this model, and it has been
277 argued that it was the granting of too extensive self-regulatory compe-
278 tences to a judiciary that just came out from an authoritarian regime, with-
279 out any serious vetting procedure, may have indeed represented a major
280 cause of the backlash against judicial independence in the two countries
281 (Kosař, Baros and Dufek 2019, 445). Conversely, in Czechia, the only
282 country which resisted the pressure coming from the Commission and the
283 Council of Europe to institute a judicial council, the judiciary appears to
284 have better safeguarded its independence, notwithstanding the rule of law
285 record of the Babiš government is far from being perfect.

blog.com/2018/01/symposium-slovak-appointments-case-introduction/, last accessed 30 September 2021.

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.²⁴ Notwithstanding the recommendations coming from the Council of Europe to give the judges a say in the composition of the judicial council,²⁵ 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 members²⁶ from three-fifth of the members of both chambers to absolute majority.²⁷ 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

²⁴ Extensively on the Spanish judicial council, see Torres Perez, *Judicial Self-Government and Judicial Independence*.

²⁵ See GRECO Eval IV Rep (2013) 5E, Corruption prevention in respect of members of parliament, judges and prosecutors, adopted by on 6 December 2013. Recently the Greco repeated the necessity of a reform of the appointment system. See Greco RC4(2021)3, *Fourth Evaluation Round. Second Compliance Report*.

²⁶ Precisely, the proposal provides the lowering of the majority of 12 of the 20 members of the Spanish judicial council, as for the other 8 Article 122(3) requires a three-fifth majority of the members of both the Congress of Deputies and the Senate.

²⁷ Strong critics against these proposals were raised both by judges and by opposition parties. Appointments to the Spanish Judicial Council are blocked since December 2018.

313 Justice Scoreboard concerning the perceived level of judicial
314 independence,²⁸ seem to have proved him right.

315 Probably then, the origin of the backlash against judicial independence
316 is to be found in the blind acceptance of a model of judicial independence
317 which was too unresponsive to political branches and societal needs. But,
318 the solutions put forward by populists, court-packing, removal powers
319 conferred on the ministry of justice and also the judicial council fully
320 elected by the parliament cannot be considered a legitimate attempt to
321 strike a fair balance between judicial independence and the democratic
322 accountability of the judiciary. In this regard, the institutional set-up of
323 other judicial councils across Europe may represent useful examples of
324 how to reconcile these two apparently contradictory concepts. In the
325 French *Conseil Supérieure de la Magistrature*, for instance, 14 of the 22
326 judicial council's members are elected by judges amongst themselves, and
327 the other 8 need to be persons from the outside the judiciary, that is, lay
328 members. Yet, in the panels deciding on appointments, judges are in a
329 minority and in the compositions deciding on disciplining sit an equal
330 number of lay and judicial members. Leaving aside, for the moment, the
331 question of the concrete arrangements put in place to achieve this fair bal-
332 ance, it can be concluded that even though a certain degree of politicisa-
333 tion of the judiciary is unavoidable and even desirable, the populist reforms
334 aiming at placing the judiciary under the majority control blur the separa-
335 tion of powers, thus undermining the very foundation of the rule of law.

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

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.

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 delegitimize 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

³⁰This is the case of Poland. See *Granat*, in this book.

³¹For more details on the attack on the Hungarian independent authorities, see Carlino, *Ungheria: le autorità indipendenti e la 'democratic erosion'*.

378 body in 2013; contextually, he also removed all the incumbent members.³²
379 The most worrying feature of the reform is the distinction between elected
380 and delegated members. Whilst the latter are elected by the parliament
381 with a two-third majority for a mandate of nine years, the delegated mem-
382 bers, chosen by the opposition parties, took office just after the inauguration
383 of the Parliament and their mandate ends the government calls for a new
384 election, that is, they are not sitting in the Electoral Commission during
385 the legislative elections, when their presence is most needed.

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

403 Such a dependency, in a context in which the National Media Council
404 is already controlled by the parliamentary majority, threatens pluralism in
405 the media sector, which according to the Venice Commission, is an essen-
406 tial element of a democratic society.³⁵

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

³² Act XXXVI of 2013 on Electoral Procedure.

³³ Rule of Law Report 2020.

³⁴ More in details on the attack on freedom of expression by the Polish Government, see Fomina and Kucharczyk, *The Specter Haunting Europe*.

³⁵ CDL-AD(2005)017, *Opinion on the compatibility of the laws 'Gasparri' and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media*, paras. 36 and 260, cited in CDL-PI(2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media*, 7.

democracies, it is possible to distinguish between independent authorities 409
of a counter-majoritarian nature and authorities with regulatory powers 410
on highly technical and complex matters, like competition authorities or 411
authorities for the regulation of financial markets. These latter lack a 412
counter-majoritarian character—as a matter of fact, they are normally 413
instituted within the executive—and they are better defined as non- 414
majoritarian institutions, in as much as they are excluded from the circuit 415
of political representation. Originally a characteristic feature of the US 416
system, those kind of authorities became increasingly common also in 417
Europe, where the EU pushed for a significant depoliticisation of the pub- 418
lic sphere, to be realised by conferring regulatory powers to experts com- 419
posed bodies (De Somer 2017). 420

The ensemble of these authorities is normally referred to as technoc- 421
ratic governance, defined as a system in which the legitimacy of decision- 422
making is based on the rationale that, given the growing complexity of 423
contemporary society, we should let the experts rule. In the last decades, 424
the growth—both in number and competences—of regulatory agencies, 425
has been uncontrolled, causing a marginalisation of the parliament’s role.³⁶ 426
Hence, in this regard, populism and technocratic governance are related 427
phenomena as they both produce an imbalance in the separation of pow- 428
ers (Bickerton and Invernizzi Accetti 2017; Ackerman 2000). Yet, if tech- 429
nocratic governance relies on the assumption that complex decisions 430
should be based on technical expertise, to the detriment of the democratic 431
legitimacy of decision-making, populism essentially argues the opposite, 432
the people always know what is best for them. A clash between technoc- 433
ratic institutions and populism is thus unavoidable. This clash happened, 434
first and foremost, with the European Union, the epitome of technocratic 435
governance. 436

4 POPULISM AND THE EUROPEAN UNION 437

The exclusionary reference of the populists to their people cannot but 438
affect the populist posture towards globalisation and transnational pro- 439
cesses. In all populist narratives, international actors are indeed considered 440

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.

441 enemies of the people. From the left, the mistrust towards international-
442 ism is motivated by a globalisation process that has left behind poorly
443 qualified workers and fragile groups. From the right, instead, the cosmo-
444 politan and globalised society is presented as a menace for the cultural and
445 ethnic identity of the national community. In this sense, a form of defen-
446 sive nationalism can be considered a corollary of all forms of populism (De
447 Marco 2020).

448 Needless to say, in Europe, the populist anger has been directed mainly
449 towards the EU.³⁷ Given its structural lack of direct democratic legitimacy
450 and its strong reliance on technocratic governance, the EU makes an ideal
451 enemy for populists, which depict it as an elite-driven project protecting
452 the interests of the international financial establishment.³⁸ More so after
453 the 2010 sovereign debt crisis, when the EU unresponsiveness to its citi-
454 zens contributed to the growth of anti-European sentiment, helped popu-
455 list parties to generate scepticism towards the EU integration process itself
456 and increase their electoral consensus.

457 This scepticism has been translated by populists into various forms.
458 When at the opposition, populist parties challenge the very substance of
459 the integration process. As a matter of fact, virtually every populist party
460 in the EU, albeit for different reasons, has at some point called for a refer-
461 endum on the EU membership, the last in order of time being the German
462 right-wing populist party *Alternative für Deutschland*.³⁹ Alternatively,
463 they propose Treaty revisions to take back the competences transferred to
464 Bruxelles, above all on economic and monetary policy, but also concern-
465 ing the European free movement space, that is, the pillars of the EU proj-
466 ect. In any case, the elites are accused of having been incapable of opposing
467 to, or for being complicit in, establishing EU's supranational technocracy
468 (Martinelli 2018, 63).

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

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.

³⁹ <https://www.politico.eu/article/germanys-far-right-afd-alternative-for-germany-to-campaign-on-possible-eu-exit-alexander-gauland/> last accessed 30 September 2021.

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. 474
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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. 478
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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. 489
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⁴⁰ European Commission, *EU Budget 2018 Financial Report*, 75. Available at: https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget_financial_report_web.pdf last accessed 30 September 2021. In 2018, the last year for which figures are available, the Hungarian government received from the EU five billions euros more than what it contributed to the EU budget, and the Polish twelve billions, making Poland the biggest net beneficiaries of the EU budget. Just to give a term of comparison, such funding accounted respectively for 43% and 56% of all public investment in the two countries in 2018. These data have been excerpted from the European Semester Reports for the two countries. See SWD(2018) 215 final, *Country Report Hungary 2018*, 10; SWD(2018) 219 final, *Country Report Poland 2018*, 14. Respectively available at: <https://ec.europa.eu/info/sites/default/files/2018-european-semester-country-report-hungary-en.pdf>; https://ec.europa.eu/info/sites/default/files/2018-european-semester-country-report-poland-en_1.pdf last accessed 30 September 2021.

⁴¹ European Commission, *Standard Eurobarometer 95 Spring 2021. Public opinion in the European Union*, 10. Available at <https://europa.eu/eurobarometer/surveys/detail/2532> last accessed 30 September 2021.

⁴² On this aspect, see *Krunke, Tornøe, Wegener*, in this book.

494

5 PRELIMINARY ANSWERS

495 At this point, it is time to try to answer the questions posed at the
496 beginning.

497 Concerning the impact of populism on representative democracy, it can
498 be affirmed that the real goal of populism is not to reinstate the demo-
499 cratic legitimacy of the constitutional system, but rather to realise a cen-
500 tralisation of powers in the hands of the executive, frequently controlled
501 by a charismatic leader. This produces, as a consequence, a marginalisation
502 of parliaments as for debating public policies with the involvement of the
503 opposition, and which manifests itself in various forms, spacing from the
504 abolition of the upper house, the reduction of the number of MPs, to the
505 introduction of control on individual MPs. Also, the claim 'we are the
506 people', with its strong exclusionary character, is hardly compatible with
507 the pluralistic nature of contemporary constitutional democracy as it often
508 overlooks the real composition of the society and the respect for minorities.

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

521 Any justification for the claims of populist constitutionalism focused
522 mainly on institutional arrangements seems thus untenable. Whilst it can
523 be agreed that theoretically populist constitutionalism aims to redress
524 existing imbalances and flaws inherent in constitutional democracy, popu-
525 list parties in power provide the wrong solutions to these problems
526 (Ginsburg and Huq 2020, 68). More worryingly, they appear to act in bad
527 faith, overstepping constitutional boundaries with the only aim to ensure
528 their permanence in power. And, it is when they obtain the majority neces-
529 sary to modify the constitution that populists become particularly danger-
530 ous, as they may cause constitutional democracy drifting towards
531 authoritarianism.

Concerning the remedies, it may be true what David Landau affirms 532
that the agenda to immunise constitutional democracy vis-à-vis the popu- 533
list challenge is an almost impossible one (Landau 2012, 259). Yet, this 534
should not lead to the conclusion that checks and balances of constitu- 535
tional democracy are irrelevant, the opposite. The involvement of a plural- 536
ity of institutional and political actors, in conjunction with qualified 537
majorities, in the appointment process of constitutional tribunals and judi- 538
cial councils appears to be a successful strategy to limit the most detrimen- 539
tal effects of a prolonged populist rule. Multilevel governance is also a 540
solution. As illustrated by the Catalan secessionist process, the existence of 541
various levels of governance is an effective barrier to the spread of the 542
populist contagion. In this sense, notwithstanding all the criticisms 543
directed to Bruxelles, the role of the EU in countering populism may have 544
been much more decisive than what the many apparent failures of the EU 545
actions suggest. All in all, the answer to the populist oversimplifications 546
may well be more complex in the design of democratic institutions. 547

However, without civic engagement, a voiceful public opinion and 548
well-trained civil servants, even the best designed constitutional system is 549
doomed to succumb to democratic erosion. After all, as wrote by Popper 550
‘[i]nstitutions are like a fortress. They must be well designed and manned’, 551
and ‘the functioning of even the best institutions will always depend to a 552
considerable degree, on the persons involved’ (Popper 2011, 120), in 553
other words, on each of us. 554

In conclusion, populism is not a corrective to constitutional democracy, 555
because once the flaw is identified it does not do anything to amend it; on 556
the contrary, it rubs salt on the democratic wound, exacerbating and 557
exploiting the weaknesses of the constitutional system. As long as democ- 558
racy is in good health, it is capable to absorb the populist impact for a 559
while. But at some point, it needs to answer back. In this regard, the pan- 560
demic may have been a useful shock. 561

Independently of the legal aspects of the crisis management,⁴³ national 562
governments demonstrated substantial responsiveness to their citizens’ 563
concerns and needs, which seem to have put populism to sleep, as certified 564
by the good electoral results of all traditional parties in national consulta- 565
tions across Europe. The suspension of the applicability of European bud- 566
getary rules and the launch of Next Generation EU, defined by Olaf 567
Scholz as a ‘hamiltonian moment’ for the EU, have allowed European 568

⁴³ For an overview of the issues, see *Castellà*, in this book.

569 governments to support their economies with an unprecedented amount
 570 of public investments and hopefully marked a turning point in the EU
 571 integration process.

572 However, visible creeps remain in the institutional set-up of constitu-
 573 tional democracy, from executive dominance, and the consequent margin-
 574 alisation of parliaments, to the blurred separation of powers between
 575 political branches and the judiciary. Those need to be fixed to prepare
 576 constitutional democracy for future challenges lying ahead.

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