



# EUROPEAN POLICY BRIEF

## Varieties of Populism and Democratic Efficacy: Populist Constitutionalism



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### INTRODUCTION

The EU and many EU democracies face a populist challenge. Apart from the multi-sector policy problems, populist aspirations have caused significant constitutional changes in some countries where populists have reached governmental positions and in others where state institutions reacted to or resisted populist challenges. These constitutional changes affected three different levels: constitution-making and amendments, law-making, and judicial work. Constitutional changes, however, took place in other EU member states as well.

Although the rise of populism in the past two decades has been regarded as evidence, specificities of populist constitutional changes in Europe have not been fully evaluated, neither in their scope and nature nor in their capacity to achieve future stability.

In DEMOS, we approached the phenomenon of “democracy backsliding” by focusing on understanding the construction of populism-related constitutional changes rather than elaborating on the deconstruction of classic liberal constitutional elements standardised in Europe and enforced by cautious common judicial and policy centred “constitutional” engineering.

The DEMOS project endeavoured to investigate these issues in 28 EU countries by using the contributions of national experts (questionnaire methodology), doing legal analysis desk research and pool knowledge with workshops and conferences. Furthermore, we examined case law of the constitutional courts, their judicial reaction to the populist challenge and the reaction of the ECtHR, the Venice Commission and the EUCJ. Populism is a multi-faceted, diverse, and dynamic scholarly concept in political science. For the legal analysis, we relied on typical law-related elements in mainstream literature.

### **Features of populism in constitutional change**

By surveying the literature, the project adopted a simple conceptualisation of populism with some common features that can have an impact on the constitutional system. These include: an appeal to the people; a focus on real or imagined, domestic or foreign enemies; a concomitant intolerance towards democratic checks and balances; goals against political pluralism and/or cultural diversity; identification of an empowered leader personifying most of the above features.

The DEMOS research examined whether these attributes are present in the constitutional systems, assessing how it manifests itself and with what intensity. We examined countries with populist governments such as Hungary and Poland and countries with non-populist governments with divergent political landscapes such as the Netherlands and the UK. In analysing EU Member States, we found that acknowledged features of constitutional populism do indeed appear in different constitutional regimes.

Ireland is famous for its direct democracy, something which could be packed into a populist toolbox. But the Irish constitutional environment is not populist, while Hungary, known for its populist stance, adopted a new Fundamental Law in 2013 which makes initiating and conducting a successful referendum almost impossible. Consider the case of migration. Attempts to anti-migrant legislation as part of the enemy-seeking populist constitutional narrative are significant in Lithuania, in which populists are not in power, while some populist countries, such as Italy, the anti-migrant constitutional change failed as well. DEMOS research proved that, in many cases, politics move away from the law, such as in Hungary and Poland. In these countries, populism manifests itself in strong leadership, but the limits in both parliamentary democracies do not change, nor do their leaders receive more legal competences in ordinary legal order.

As DEMOS research showed that the elements of populist constitutionalism are not always and exhaustively identified in otherwise populist countries and on the other hand some elements appear in non-populist regimes, policy related conclusion is that constitutional engineering and constitutional borrowing (to use one institution or procedure as a best practice to offer for other states' consideration) has its limits. This means that although Slovakia might be effective by the implementation of unconstitutional constitutional amendments, in Hungary this concept is used to protect the core concepts of the populist constitution. But to put it even more simply, the concept of the rule of law is understood completely differently in populist and non-populist EU countries. In Hungary for example it means the supremacy of the populist constitution that should prevail over any ordinary legislation that might have been adopted earlier than the populist turn. When identifying the best practices we could offer quite general lines of basic constitutional requirements but could not identify specific methods that are effective for the enforcement of rule of law democracy but as proved, non-effective to enforce a populist regime. Constitutional engineering and constitutional borrowing have their limits according to our research, because a certain set of legal constitutional vehicles are used for very different purposes. Our empirical research supported the theoretical stance of Nadia Urbinati, a most famous scholar of populism, saying that populism is a "parasite" concept hosted by classic liberal constitutionalism. The abuse and misuse of the constitutional institutions are not obvious by purely looking at the constitutional legislation. Constitutional legislation is quite similar in all EU countries and enforcing the operation of specific institutions and procedures in the EU does not help to fight against populism, because the practice of these can still be abusive such as the (mis)use of the Hungarian and Polish constitutional judicial bodies. On the other hand in some cases the apparently favourable constitutional change to populism such as the judicial refusal of EU competence in monetary or human rights matters like the Solange or PPSPP constitutional court cases in Germany do not in the end serve populist, anti-EU political goals.

Beyond correcting the commonalities on the so-called populist constitutionalism, the DEMOS research collected the best practices states use to counter populism. The country level findings discussed by the national experts complement other theoretical research streams of the DEMOS project investigating how to enhance democracy. The evaluation was assessed through the tailored “best practices” methodology: “efficiency”, “effectiveness” and “transferability” criteria.

## FINDINGS IN MORE DETAILS

DEMOS tested the idea of populist constitutionalism by using data from surveys as well. This is the first large-scale cross-national study in which these different constitutional changes were measured at country levels.

### **1. The effect of populism on the constitutions and constitutional change (Is there a populist constitutionalism?)**

DEMOS explored to what extent features of populism have become institutionalised in EU Member States. The goal was to spot whether there have been general European trends – if we assume that populism is a political movement that is widespread in many countries of the continent – or whether it generates similar constitutional changes in different countries.

For this purpose, we conducted a survey on constitutional changes that happened in all EU member states and the UK between 2010 and 2020. This comparative research extended to both the changes in constitutional values and the institutional transformations of the last decade.

In doing so, we identified so-called primary criteria of populism as:

- the preference of popular sovereignty and the promotion of direct democracy;
- the claim for authentic representation by populists and in parallel, anti-pluralism;
- an extreme approach towards majoritarianism;
- the centralisation of power with a strong leader at the core.

We specified also secondary criteria, which represent characteristics often occurring in populist aspirations that are not as dominant or general as the primary indicators:

- promotion of constitutional identity;
- abusive legal borrowing;
- the use of means provided by crisis management;
- restriction of certain fundamental rights and discrimination against certain minorities;
- anti-globalism or nativism, and
- clientelism and state capture.

In fact, we empirically tested all these characteristics of populism, assessing whether these have prevailed in the various constitutional polities across member states. Certain attributes of political populism, such as the moral claim for authentic representation of the people, anti-elitism or the prominent role of a charismatic leader of the party are usually not institutionalised in constitutional law. Often, these attributes prevail in political communication, political style, or policy aspirations only, without making it into legal or constitutional change. Some characteristics associated with modern populism, such as certain rights restrictions, EU scepticism and an emphasis on constitutional identity, are also present in non-populist governments.

A key finding departs from current scientific knowledge: populist constitutionalism, understood as a set of specific formal-legal characteristics, has not had a significant influence on constitutional

development in EU Member States. These characteristics are virtually undetectable in about half of the countries surveyed, such as Germany, Croatia, France or Spain. Although certain features can be identified in several countries, they are hardly indicative of populism itself, such as the protection of national sovereignty and constitutional identity as seen in German, Spain or Denmark. Certain indicators may be of democratic character, their emergence might be a logical consequence of previous reforms, or they may be on the agenda of non-populist governments. Populism has had only a very modest impact on constitutional arrangements compared to its political significance: it is more likely to yield to for the purposes of policy changes within a more or less stable institutional-constitutional framework. The historical-institutional context of constitutional systems is arguably more likely to have a greater influence on constitutional reforms than any kind of conception or ideology, including populist constitutionalism.

## **2. Responses to populism and good practices in the domestic constitutional settings of EU Member States to counter populism**

In the EU context, totally different legal reactions were given to populist challenges. These reactions were grouped into four different categories based on the literature on populist constitutionalism:

1. the preference of popular sovereignty and the promotion of direct democracy.
2. the claim for authentic representation and, together with this, the anti-pluralism.
3. An extreme approach of majoritarianism.
4. restriction of certain fundamental rights together with intolerance of or discrimination against certain minorities.

Each category reads as a “populist threat”. Best practices belonging to each category constitute the legal reactions. Findings suggest that there are no national answers to “populist threats”, which may be effective everywhere at any given time. Key identified responses include:

*The Slovakian case of unconstitutional constitutional amendments (successful and repeatable):* it is possible to guard the liberal constitution by establishing an unamendable idea in it. The problem is that populist governments that have adopted a new constitution (i.e. Hungary) may also explore this unamendable core.

*The Cypriot case of the Attorney General (successful but not repeatable):* the case depended a lot on the special constitutional rulings that are not valid in other countries.

*The German case of militant democracy (Not successful but repeatable):* it is successful to say that the constitution shall be protected against non-constitutional efforts, but the idea of militant democracy can also protect populist constitutions, meaning that non-rule of law measures might be used to protect populist interventions.

*The Spanish case of decentralisation (Not successful and not repeatable):* the failure of the Catalan succession and the negative answer of the Constitutional Court to it.

## **3. The role of Constitutional Courts in Europe related to the populist challenge**

The investigation, based on ten country reports involving national experts' information allowed the evaluation of the role of the constitutional judiciary and the impact of courts' decisions-interpretations on the spread and on the counterreaction to populism. These pieces of empirical evidence allowed to identify 3 different types of methods and practices: (I) the “business-as-usual model”, in cases no changes in the jurisprudence occurred to react to populist threats (Austria, Italy, Romania, Czechia, United Kingdom); (II) the “changing interpretive practice to promote populist aspirations”, meaning those cases where populist issues triggered changes in interpretive practice resulting in a substantive concepts change and in some cases bringing real innovations into jurisprudence (Greece, Poland, Hungary); (III) the “changing interpretive practices to counteract populist initiatives” (Croatia). However, it should be noticed that in all cases populism did not generate any new theory of interpretation. Likewise, no close connection can be established

between populist constitutionalism and methods of constitutional interpretation. In short, populists do not have preferable interpretive patterns of theory or practice.

## POLICY IMPLICATIONS AND RECOMMENDATIONS

Populist parties and movements in Europe do not necessarily oppose representative democracy as such, nor do they oppose institutionalism if the institutions are controlled by them via preferential appointment rules, nor do they go against the elite by legal regulation if it is their economic, social elites. They also do not necessarily interfere with the independent work of the judiciary once it is controlled by them. DEMOS research found by mapping the most important constitutional change in the 28 countries in the last 10 years, by doing a complete literature review and by analysing selected case law that in most countries populists aim to get to state power or grab the state power primarily by non-legal, non-judicial ways: even when it appears to, it is the captured institution that serves with a bias and often doctrinally wrong legal decision and it is not the institution, the procedure or the legal doctrine which is dangerous to liberal constitutionalism.

Therefore, it is hard to measure the rule of law standards in general and create even better legal safeguards for the EU to defend the original agreement of the rule of law, separation of powers and a certain standard of inclusivity, the protection of human rights. We observed that populists might use the same procedures in rule of law, but for different purposes.

Because of that, it was a difficult task to identify best practices that might be transferable and long lasting – in any political regime – to protect constitutional values. Some practices adopted in some European political regimes worked successfully to mitigate the effects of populism. In Lithuania, the role of the constitutional court in standing against populist policies was important. In Slovakia, the text of the constitution protects liberal values by means of an eternity clause, which cannot be amended. In Czechia, constitutional interpretation had an important role in preserving liberal democracy, the same holds good in Croatia. Despite the good practices identified, our research shows that tackling populist constitutional ambitions is virtually impossible, as populism has ambitions to gain and keep power within the classic liberal state and law ideas.

No single policy aiming to enable the formulation of a better rule of law index would suffice, because research has already shown that this idea does not work in its abstraction. Alternatively, more in-depth legal analysis is necessary to scrutinise each case in which constitutional changes represent an abuse of legal institutions or procedures, or when affected changes are contrary to their purpose, or when they serve solely populists' goals.

Challenges get more complex because characteristics emerging from countries with populist governments are not so much populist in nature but rather authoritarian. If we take a look at the real constitutional changes of the two most well-known populist regimes within the EU – Poland and Hungary – we can observe that, as the most prominent features of populism have been to place countervailing institutions under more direct political control, as well as packing the constitutional courts, restricting judicial independence, backsliding the system of the rule of law, restricting the freedom of speech, among others, which are clear symbols of an authoritarian transition and has not much to do with promoting democratic efficacy.

Based on the analysis, policymakers should consider:

- ⇒ the current semi-authoritarian governance in Hungary or Poland was not the result of constitutional change but rather the result of a political process. The latter imitates how liberal institutions work with slight changes and without enforcing oversight.

- ⇒ examining the substance of the rule of law as opposed to performing checklists on formal indicators of rule of law (e.g. the existence of institutions and procedures); the real functioning of the state should be assessed thoroughly by legal practice and scholarship.
- ⇒ in the case of countries threatened by nationalist populism, it is necessary to intervene at the beginning of the process, because the development can reach a point of difficult return.
- ⇒ Implementing transferable legal tools is effective only in liberal democracies because they might have a contrary effect in populist states.
- ⇒ Non-legal instruments might be more effective to counter populism than legal responses, as populism usually preserves the role of institutions but captures them to serve their own political goals.

## RESEARCH PARAMETERS

DEMOS – Democratic Efficacy and the Varieties of Populism in Europe is a three-year collaborative research project with 15 consortium members across Europe. DEMOS is funded by the European Commission under the Horizon 2020 framework programme. The legal analysis relied on 23 expert surveys and case law analysis in 28 EU countries on constitutional changes in the past 10 years. The research was carried out in 2021.

## PROJECT IDENTITY

**PROJECT NAME** 'Democratic Efficacy and the Varieties of Populism in Europe' — 'DEMOS'

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**BUDGET**

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**WEBSITE**

<https://demos-h2020.eu/>

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