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Populism and Liberal Constitutionalism

A Proposal to Define the Impact of Populism on the Constitutional Framework

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Abstract: Our paper focuses on the impact of populism on the functioning of constitutional democracy in Europe. To analyse such a complex issue, a survey has been elaborated, which tries to outline how the current populist tendencies influence the institutional framework of constitutional democracy and to what extent such parties aim and are able to undermine the long-term prevalence of rule of law. To achieve this goal, the survey monitors, amongst others, the use of referenda in European countries; the presence of instruments of participatory and direct democracy; which are the political programme of populist parties, and in particular what are their ambitions concerning institutional reforms; whether the status, the independence, the competence and the composition of the constitutional court and the judiciary are contested. The survey also examines whether the protection standard of the most important fundamental rights are relativized, or are intended to be relativized by the populist parties of the different countries. We approached young constitutional scholars from certain member states, at the initial stage of their academic career, and asked them to fill the survey.

Keywords: constitutional democracy, populism, populist parties, political participation, survey method

1. Introduction

This article aims to offer an overview of the overall impact of populism on the constitutional system. Relying on both analytical and empirical research, the article aims at identifying all the spheres of the national legal systems that are affected by populists' reform.

To further this ambition, it is first necessary to clarify the meaning of populism in the context of this article. In a broad sense,[1] populism is understood as an ideology that rejects the liberal interpretation of constitutionalism and rule of law (Skapska, 2018) and, instead of this, focuses on the effective promotion of the public interest, which is in principle unitary, and determined by the majority of the people.

As a constitutional project, populism can briefly be characterised as an attempt to (re)instate popular sovereignty at the centre of the political system.[2] Populist leaders are always expected to act as the executor of the majoritarian intent, and this legitimacy should prevail over any legal constraint (Blokker, 2019, pp. 541–544). As a consequence, populists generally treat law as an instrument to provide an enforceable form to the supposedly unitary will of the political community; the constitution is amended frequently, and judicial control mechanisms are weakened (Blokker, 2019, pp. 547–551).

This study does not dwell upon the exact definition of populism; rather, it simply considers populism as an alternative to liberal constitutionalism. The study's purpose is to identify the most crucial proposals attached to this concept, and to understand how and to what extent liberal constitutional theory should reflect on these challenges. In order to reach this stated aim, we decided to focus on what are those concrete constitutional measures that most frequently follow the rise of populist politics.

For this purpose, we have employed a set of 22 questions, concerning information about recent constitutional amendments, forms of popular participation, the electoral system, the form of government, instruments of militant democracy, oppositional rights, judicial independence, the status of the Constitutional Court, and the relationship between national and international law, as well as the law of the European Union. Building upon this set of questions, we built a picture of the main directions of populist discourse and policies, which may help to provide a deeper understanding of the populist impact on constitutional law.

2. The alleged centrality of popular sovereignty

2.1. The role of referendums, and other instruments of popular participation

As populists rely on popular sovereignty, they attribute, at least theoretically, greater weight to direct democracy than liberal constitutionalism (Brunkhorst, 2016). Consequently, populist parties frequently launch referenda, even on constitutional matters, and softer forms of popular participation are also seen as preferable.

The survey illustrates these trends well. If we see these attitudes towards referenda, it seems that the Hungarian and the Greek governments, which are usually considered populist, used them when their political aims were assumed to have the people's support.

[1] This study does not reflect on the discussion on the exact definition of populism; for some references from the recent literature on this issue see Rovira Kaltwasser et al., 2017; Akkerman, 2003, pp. 147–159; Albertazzi & McDonnell, 2015; Anselmi, 2018; Bang & Marsh, 2018, pp. 352–363; Brett, 2013, pp. 410–413; Inglehart & Norris, 2016; Mudde & Rovira Kaltwasser, 2017; Tormey, 2018.

[2] Paul Blokker attempted a detailed description of populism as a constitutional project (see Blokker, 2019, pp. 536–553).

In Greece, in July 2015, a referendum was held on the proposal of the left-wing populist government party, Syriza. The question was whether Greece should accept the conditions imposed by the European Commission, the European Central Bank and the European Monetary Fund on Greece's financial bail-out. The referendum was valid, as around 62 percent of the voters participated, and more than 60 percent of the valid votes rejected the proposed conditions, in alignment with the intent of the government (Aslanidis & Rovira Kaltwasser, 2016). Similarly, one year later, a referendum took place in Hungary on the migration quotas contained in an EU Council Decision,[3] which would have obliged each member state to give asylum status to a particular number of immigrants. The right-wing populist Hungarian government called for the rejection of these quotas, and the vast majority of participants agreed with this approach. However, the threshold of validity was not met, since less than half of the adult population submitted its vote. Nevertheless, in the light of the clear support expressed by most of the valid votes, the government claimed this outcome as a political success and retained its policy against migration quotas (Chronowski et al., 2019, p. 1473). These examples demonstrate that populist governments tend to invite the people to the ballot only when a confirmation of the actual governmental policies is expected from referenda.

Similarly, in Germany, there is a right-wing populist party, Alternative für Deutschland, which put forward proposals to extend the scope of direct democracy in Germany by holding national referenda and for the President of the Republic to be elected directly by the people. However, the *Grundgesetz* provides a form of decision-making in a very narrow circle[4] due to the terrible experience of direct democracy during the Nazi period. Referenda are nevertheless frequently organised in the *Länder* and in the municipalities;[5] the last example being the referendum held in Berlin on the expropriation of housing units from real estate corporations (Berry, 2021).

The direct participation of people is also furthered by other populist means. For instance, people are often involved in the constitution-making or amendment process to strengthen the legitimacy of such steps (Blokker, 2016a). In Latvia, certain constitutional amendments are subject to parliamentary approval,[6] and some of them might be subject to referendum,[7] while in Greece, if the parliament passes an amendment of the constitution then, after the next parliamentary election, the newly-formed legislative body shall also confirm the proposed amendments.[8] In this way, the people could select their representatives in the light of their attitude towards the amendment concerned. The introduction of referenda on adopted constitutional amendments and international treaties before their entry into force has been also rumoured in Greece, but these endeavours have so far remained unsuccessful (Mavrozacharakis et al., 2015).

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

[4] Grundgesetz, Art. 20 and 29 (2019) (http://bit.ly/3kF6OpU).

[5] Art. 62 and 63 of the Constitution of Berlin (2016) (http://bit.ly/3ZY1uOv).

[6] Art. 77 of the Constitution of Latvia (2019) (http://bit.ly/3kvRCeu).

[7] Art. 78 and 79 of the Constitution of Latvia (2019) (http://bit.ly/3kvRCeu).

[8] Art. 110 (3) of the Constitution of Greece (2020) (www.servat.unibe.ch/icl/gr00000_.html).

The Fundamental Law of Hungary, enacted in 2011 has not extended the scope of referenda in comparison with the previous Constitution of Hungary; the rules on initiating and holding a referendum, as well as thresholds of validity and effectiveness are essentially the same.[9] Any referendum on constitutional amendments is excluded;[10] the adoption of these bills is exclusively subject to the approval of a two-thirds parliamentary majority.[11]

Softer forms of popular participation in the decision-making processes are also attractive for populists; national consultations have been in fact used in Hungary and Greece during recent years. In Greece, this appeared as an element of the constitution-making process, while in Hungary national consultations are commonly used to ask the opinion of the citizens on certain issues. These consultations are often criticised, as the questions are themselves manipulative, and they are phrased in such way as to induce the participants to agree with the view of the government (Pogány, 2013). It also generates several difficulties, in that usually only a small number of people are involved in these processes, so the outcome does not demonstrate the real approach of the whole society. Despite these concerns, national consultations are widely used to collect arguments for populist policies by their showing broad social support.

2.2. Imperative mandate

Another way to emphasise the pre-eminence of popular sovereignty is by introducing the institution of imperative mandate. This means that representatives are held directly responsible by the people for fulfilling their tasks, not only in the next election but also during their mandate. People may initiate the dismissal of their representatives, and they must be replaced with new parliamentarians. The idea behind this practice is that it would promote accountability and transparency. Even so,[12] people are often manipulated by political parties, by the media and especially by false information and radical views, spread by the social media, and therefore, people might also use this institution when it is not objectively justifiable. Due to these concerns, most democracies do not allow imperative mandates, with some constitutions explicitly prohibiting their introduction.

The idea of introducing an imperative mandate was put forward by the Syriza Government in Greece in 2013 and 2014, but it remained an isolated idea (Pappas, 2014, pp. 27–32). In Hungary, by contrast, the institution has never been considered. Conversely, Latvia provides us with an excellent example of how to balance these two countervailing interests. According to a constitutional amendment that entered into force in 2010, ten percent of the whole population may initiate a process to remove the whole legislative

[9] Art. 28/B and 28/C of the previous Constitution of Hungary (1949) (www.wipo.int/edocs/lexdocs/laws/en/hu/hu047en.pdf); Art. 8 of the Fundamental Law of Hungary (2019) (http://bit.ly/3R2XYOF).

[10] Art. 8 (3) 1 of the Fundamental Law of Hungary (2019).

[11] Art. S) of the Fundamental Law of Hungary (2019).

[12] Venice Commission study no. 288/2008 on imperative mandate (2009) (https://bit.ly/3JeypbO).

assembly.[13] Next, a consultation must be held and, if the majority expresses no confidence in the Parliament, and their number is at least equal to two-thirds of the number of votes submitted at the last parliamentary election, a new legislative election shall take place at least one, and at most two months after the revocation referendum. Individual deputies, however, cannot be removed separately.

All in all, imperative mandate is a doubtful constitutional instrument, which could easily destabilise the political system if it does not function properly. Nevertheless, it is at least clear that imperative mandate provides a potentially effective means of handing active control over public life to the people. As such, it may be useful to reflect on alternatives to ensure that MPs meet the expectations of their electors. A valuable solution is offered by the Spanish system, where all the major parties sitting in the parliament have signed an agreement against floor-crossing (Política Territorial 2020), thus enhancing the accountability of individual MPs towards their electors, without hindering their freedom and autonomy.

2.3. The restructuration of the legislation, and a reduced number of parliamentarians

The third direction of populist discourse on the expression of popular sovereignty is linked to the structure of the legislative body. Usually, the internal organisation of the parliament and the number of deputies are the issues that have paramount importance in this regard.

First, in Hungary and Greece, there has been extensive, but mostly academic, discussion of establishing a second chamber, which may strengthen historical ties, and might also strengthen those actors who would be keen on populist ideas (Pappas, 2014, pp. 27–32; Dezső, 2011). Since these proposals have not been transposed into the constitution, this issue has only a secondary significance from a populist perspective.

Regarding the number of deputies, it is an attractive measure in the eye of populist leaders to reduce the number of politicians, be they municipal representatives or parliamentarians. This step is always very popular, as it is depicted as anti-elitist, capable of guaranteeing a reduction in public expenses and of promoting a more effective political arena (Szentgáli-Tóth, 2014; Bakos et al., 2019). However, in reality, such a decision only affects the effectiveness and economic operation of the public administration to a limited extent, as the salaries of politicians constitute only a minor item in the budget. Even so, a reduction would bring remarkable political benefit for those parties that initiated it, and it also serves majoritarianism, which is also a key element of populism and which will be assessed more thoroughly in the next section. If there are fewer seats in the parliament, the role of smaller political groups with parliamentary representation would be significantly curtailed, as political life will be organised around two or three main centres of power (Norris, 1997).

[13] Amendment of the Constitution of Latvia enacted on 14 June 2009, entered into force on 2 November 2010.

The best example of this tendency is Hungary, where the number of parliamentarians has been reduced from 386 to 199 and, in parallel with this, the electoral system has been also reconsidered, from a mostly proportional system to a primarily majoritarian framework (Mécs, 2017). Simultaneously with the enactment of the Fundamental Law and the new act on Parliamentary elections,[14] the system of municipal elections was also renewed in Hungary.[15] The number of local councillors have been reduced by more than 50 percent, and the majoritarian character of the electoral system principle has been strengthened. A similar reform has been approved in Italy, where the two chambers of the Parliament will lose roughly a third of their members in the next legislature, as a result of constitutional reform pushed by the populist 5 Stars Movement, and subsequently confirmed in a referendum. In Germany, the idea to limit the number of deputies in the Bundestag has been already discussed, and similar proposals have also been published in Greece, but they have not received wide support from participants in the political sphere.

2.4. Majoritarianism

Majoritarianism is a core element of the populist concept, which is clearly linked to the argumentation based on popular sovereignty. In a nutshell, majoritarianism means that the view shared by the majority of the population shall be given pre-eminence; as a consequence, the protection of political minorities has only a limited space in this logic (Urbinati, 2017).

The amendment of the electoral system is used for strengthening the majoritarian decision-making mechanisms in the legislation. There are two ways in which this goal is promoted: the electoral system shall mainly be based on the majoritarian principle and, with fewer available seats, smaller political parties' room to manoeuvre is further limited.

As regards the first instrument, the Hungarian electoral system was shifted from a mostly proportional framework to an inherently majoritarian one. Before 2014, around 46 percent of the deputies were selected on a majoritarian basis from individual districts, after which, their proportion increased to around 55 percent (Mécs, 2017). Second, simultaneously with this, the number of the distributed mandates has been reduced; therefore, weaker political groupings have remarkably less chance of obtaining parliamentary mandates. There are also several smaller details during the electoral process (stricter requirements for presenting lists of candidates, additional mandates for the winner [which is also used in Greece]) which also serves the purpose of centralising the political arena in the hands of the strongest.[16] In Cyprus, a more majoritarian system has been considered several times instead of the current proportional one, but this has been rejected in each case.[17]

[14] Act CCIII of 2011 in Hungary on the elections of Members of Parliament (2012) (https://bit.ly/3kK9136).
[15] Act L of 2010 in Hungary on municipal elections (2010) (http://njt.hu/cgi_bin/njt_doc.cgi?docid=131705.283319).
[16] Greek conservatives (2019) (http://bit.ly/3WBxWDB).
[17] Republic of Cyprus Parliamentary elections (2016) (www.osce.org/files/f/documents/2/b/230496.pdf).

In Greece, almost every government has amended the electoral system: the Syriza Government moved it in a proportional direction, while the New Democracy Government changed the framework back to a mostly majoritarian system by providing additional mandates for the election's winner. Amendments to electoral laws are also ordinary business in Italy, where in the last decade the electoral law was first amended in a majoritarian sense and then in a proportional fashion. This continuous change brings permanent uncertainty to the system, which threatens to exacerbate voters' conscious decision-making.

3. An instrumentalist approach to the law

3.1. Constitutional amendments

In compliance with their emphasis on the respect of the majoritarian will, populists do not consider the law, nor legality itself, as a supreme value: in their view, the interest of the community may overcome legal constraints if the situation so requires (Elkins et al., 2009). As a consequence, although the constitution is still formally recognised as the supreme legal source, its content is subject to continuous revisions, and transformed into an instrument of everyday politics, in order to pursue the alleged collective interest of the community (Müller, 2017). It is indeed a widespread tendency in several national constitutional systems that constitutional amendments are more frequent than earlier (Elkins et al., 2009). The primary value is not the constitution itself, but the actual content of the constitution, which shall be flexible, and shall at any time be in harmony with the feelings of the majority (Scheppele, 2018). Consequently, it is a widely accepted practice under populist regimes that when the Constitutional Court outlaws a particular statute, the constitution is amended, and then the same law is enacted with constitutional rank. Populist governments also tend to amend the constitution relatively frequently when it serves political rather than legislative necessities (Walker, 2019). The best example is the Hungarian development after 2010, when the previous Constitution was amended several times by a two-thirds governmental parliamentary majority. Moreover, simultaneously with this, a new Fundamental Law was being prepared, which functioned as a constitution (cf. The German *Grundgesetz*) but also highlighted the historical traditions of Hungary, and strengthened the protection of the national values and the Christian culture (Kovács & Tóth, 2016). The Fundamental Law has been amended eight times since its enactment in 2011, which undermined its social reception as a coherent and permanent framework (Sonnevend et al., 2015). Moreover, transitional measures concerning the entry into effect of the Fundamental Law were adopted, but some of these were subsequently repealed by the Constitutional Court since, despite their *interim* character, they substantively and permanently overruled the main text of the Fundamental Law itself.[18] What is more, the Fundamental Law expresses as a duty

[18] 45/2012 (XII.29.) ruling of the Constitutional Court of Hungary, ABH 2012, 346.

for everyone, and in particular the Constitutional Court, to interpret its provisions in the light of their purposes, of the National Avowal, and of the achievements of the historical constitution.[19] The enumeration of these points of reference as secondary legal sources would increase the uncertainty about the borders and the real content of the constitution even further (Kovács & Tóth, 2016).

One may argue that the presence of populist ideas may enhance the possibility of frequent constitutional amendments, but the real extent depends mostly on the procedural flexibility of the constitutional framework. A good case in point is Germany, which, notwithstanding the presence of populist parties in parliament, is minoritarian: eleven constitutional amendments were approved over the last decade.[20] A similar situation is observable in both Hungary and Cyprus where, as in Germany, a two-third legislative majority is sufficient for amending the constitution. By contrast where, the constitutional revision process became being stricter, like in Greece, the presence of populist parties in government has a smaller impact on the frequency of constitutional amendments.

4. Reforming the Constitutional Court and constitutional adjudication

According to populist ideology, the expression of the democratic will of the majority is the primary orientation for decision-makers; legal considerations could restrict this logic only exceptionally, in the event of serious violations of procedural requirements, fundamental principles or substantial limits (Lacey, 2019). Consequently, the role of judicial review should be marginal.

Hence, the autonomy and powers of constitutional courts become targets of populist endeavours. Hungary and Poland have provided the best examples of intense discussion about the role of the Constitutional Court: in this study, however, we will focus only on the Hungarian Constitutional Court.

The populist attitude towards the Constitutional Court mostly respects the formal framework of the body, and its status, including the safeguards of its autonomy; however, the composition and the competences of the Constitutional Court are often under

[19] Art. R (3) of the Fundamental Law of Hungary (2011) (https://mkogy.jogtar.hu/jogszabaly?docid=a1100425.ATV).

[20] 19 March 2009: Art. 106, 106b (new), 107, 108 GG, road traffic taxation; 17 July 2009: Art. 45d GG, implementing parliamentary control committee concerning the Federal Intelligence Service; 29 July 2009: Art. 87d GG, aviation administration system changed; no monopoly for national providers anymore; air traffic control also by – within the EU – authorized providers; 29 July 2009: Article 91c, 91d, 104b, 109a, 143d (new), 104b, 109, 115 GG, deeper integration between states and federation; 21 July 2010: Art. 91e GG, deeper integration between states and federation concerning better support for the unemployed; 11 July 2012: Art. 93 para. 1 nr. 4c GG, implementing a constitutional legal proceeding for parties, which were denied to take part in the national election; 23 December 2014: Art. 91b GG, deeper integration between states and federation concerning funding of science and research; 13 July 2017: Art. 21 GG, political parties that are fighting against the main values of the Grungiest are excluded from federal party financing; 13 July 2017: 104c, 143e, 143f, 143g (new); Art. 90, 91c, 104b, 107, 108, 109a, 114, 125c, 143d GG, federal financial support for the states; 28 March 2019: 104d (new), Art. 104b, 104c, 125c, 143e GG, federal financial support for the states; 15 November 2019: Art. 72, 105, 125b GG, implementing a legislative competence of the Federation concerning property taxes.

pressure (Corrias, 2016). As regards the composition, there are two ways to influence the membership of the body. The first is to pack the Constitutional Court with government-friendly judges (Fournier, 2019); in this case, the new members are elected by the governmental side, and probably these people will be most loyal to those from whom they received their mandate (Fleck et al., 2011, pp. 4–7). The second way is to change the selection rules and give the populist government sole authority to appoint new judges. The usual target is to appoint judges by a simple majority instead of qualified majority and, with this method, the inherent attitude of the whole body will be changed after some years.

As far as the competences are concerned, there are again two main instruments to neutralise the counterbalancing role of the Constitutional Court. First, the rules on standing before the Constitutional Court can be amended in such a way that fewer cases are heard by the Constitutional Court, especially with less political weight. The best example in this regard is the adoption of the Hungarian Fundamental Law, which significantly amended the powers of the Hungarian Constitutional Court (Stumpf, 2017). The *ex-post* constitutional review initiated by *actio popularis,* i.e. by any citizen, has been substituted with a direct individual appeal, which can be submitted only by a natural or legal person claiming a violation of its fundamental rights (Szente, 2015). More worryingly, Constitutional Court rulings based on the previous Constitution of Hungary have been repealed, which is not so understandable, since Constitutional Court decisions do not have any legal effect.[21] Consequently, instead of systematic discrepancies, the Hungarian Constitutional Court focuses mostly on individual concerns, which have beyond doubt paramount importance for the persons involved, but not from the perspective of the whole constitutional system (Chronowski et al., 2019, p. 1459).

Second, material limitations on the matters that can be subjected to the Constitutional Court judicial review are introduced. The Fundamental Law remarkably narrowed the margin of appreciation of the Constitutional Court on economic matters, providing that if the government debt exceeds half of the total gross domestic product, the Constitutional Court may review budgetary acts for conformity with the Fundamental Law "exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights".[22]

In addition to these approaches, the general attitude of populist leaders towards constitutional courts should be taken into account: these politicians tend to overrule decisions not in their favour by amending the constitution, as we have already noted earlier.

[21] Fourth Amendment of the Fundamental Law of Hungary, Art. 19 (2) (2013) (https://mkogy.jogtar.hu/jogszabaly?docid=a1300325.ATV).

[22] The Fundamental Law of Hungary, Art. 37 (4) (2011).

5. Attempts to undermine the independence of the judiciary

Populist regimes also attempt to reorganise the judicial system, and it is regularly interpreted as efforts to undermine the independence of the courts. Again, two main measures can be identified through which populist politicians may extend their influence. Sometimes, an establishment of separate administrative tribunals is envisaged, and this could weaken the traditionally elaborated independence of the judiciary.[23]However, a more meaningful direction is to extend the powers of the executive *vis à vis* the judiciary, as regards the appointment of judges, the internal administration and the budget of the courts. In parallel with this, the powers of judicial self-government bodies are put under pressure (Waldron, 2006). Such steps have been taken in many European States, especially in Greece, Hungary, Poland and Spain (Kazai, 2019) and their evaluation is very mixed. The supporters of these reforms call for a more efficient and faster judicial review, while their opponents treat these steps as serious attacks on judicial integrity. The issue is quite difficult, as even the Venice Commission acknowledged that the same model with the same involvement of the executive might be problematic or even acceptable, depending on the social, political and legal context.[24]

6. The relationship of national law with international law, and with the law of the European Union

Finally, some words should be directed to the populist consideration of the role of international and European Union law. According to populist rhetoric, national sovereignty shall have priority over these aspects (Chronowski, 2012) but usually, populists do not intend to amend the legal regulations concerning the relationship between national and European Union law.

Instead of this, constitutional courts in populist-ruled countries have become champions of the defence of the national constitutional framework and national identity against the attempts at enforced integration (Rodrik, 2018). An attempt to present the national constitution, or at least some part of it, as superior to EU law has been made by several European courts, above all by the constitutional courts of Germany, Italy and Spain. While these courts merely seek to enhance the level of protection of fundamental rights at the EU level, the Hungarian and Polish constitutional courts put in place a fully-fledged confrontation with the EU. These constitutional courts clearly asserted their competence to review an EU act against the national constitution, and eventually declare its unconstitutionality (Blokker, 2016b). Consequently, in the debate between the Court of Justice of the European Union ('the ECJ') and the national constitutional courts,

[23] 8th amendment of the Constitution of Cyprus (Law 130(I)/2015) on the establishment of a new first instance administrative court.

[24] Venice Commission, opinion no. 943/2018. on the administrative justice reform of Hungary, par. 27–29 (2019) (https://bit.ly/3XS4eeh).

populists give priority to the national constitutions, and sometimes outlaw some elements of European Union law.[25] Those constitutional courts, which have members with some populist background, as they have been thus packed by their respective governments, share this approach. From the near past, a case might be highlighted here. The Hungarian Constitutional Court has elaborated a detailed concept of constitutional identity, which has been added explicitly to the constitutional framework by the seventh amendment of the Fundamental Law of Hungary.[26] This amendment also stipulated that:

> [b]ased on an international treaty, Hungary may exercise its certain powers jointly with the other Member States via the institutions of the European Union to the extent necessary for the exercise of its rights deriving from the founding treaties and for the performance of its obligations in order to take part in the European Union as a Member State. The exercise of its powers pursuant to this Section shall be consistent with the fundamental rights and freedoms laid down in the Fundamental Law, and shall not limit Hungary's inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation.[27]

This approach properly embodies the populist vision in this regard, claiming that certain core elements of the national constitutional identity shall impose substantial limitations on the margin of movement of the European Union.

7. Conclusions

In this contribution, we envisaged a new methodology to analyse the impact of populism on the constitutional framework, and selected some European countries to demonstrate how this research could be completed in a broader sense, across the European Union, or even across the whole European continent. Populism is currently considered the most important challenge to liberal constitutionalism, and is the consequence of numerous social and economic factors, and the various failures of liberal democracies. The link between populism and constitutional law has been evaluated by many scholars; nevertheless, a well-elaborated system with the aim of completeness has not been provided. Our aim with this research was to suggest a complementary method of research, including empirical research based on a uniform set of questions. This kind of comparative approach to populist constitutional ideas mean the main innovation of our academic piece is to seek a deeper understanding of the populist view of

[25] As an example please see The Sound of Economics (2020).

[26] "We hold that it is a fundamental obligation of the state to protect our self-identity rooted in our historical constitution." (The Fundamental Law of Hungary, National Avowal, 25.04.2011.)

[27] Seventh Amendment of the Fundamental Law of Hungary, Art. 2 (2018) (https://mkogy.jogtar.hu/jogszabaly?docid=A1800628.ATV).

constitutionalism, which could help to reconsider which elements of liberal constitutionalism may need to be reshaped. In our view, populism is supported by wide social layers due to its successes, mostly in the economic field (Burai et al., 2017, p. 9), and liberal democracy would be again the primary choice if it could articulate such mechanisms within its traditional standards, which could provide the same sense of comfort for the citizens (Ginsburg et al., 2018). A well-founded analysis of populism could serve this necessary reform process of liberal democracy, as the most urgent demands might be identified more easily. In this way, comparative research would not only have academic and theoretical significance, but would also show those fields of constitutional life, where populism has put forward alternatives, and where liberal constitutionalism needs to be reconsidered if it is to retain its former positions. Our contribution could, we hope, be a modest contribution to these crucial endeavours.

Annex. Text of the questions

Survey evaluating the impact of populism on constitutional and representative democracy

1. What kind of constitutional changes have taken place in the last ten years in your country? Please specify the date and content of constitutional amendments. (Please specify all constitution-making acts in the past ten years in your country. If there were any changes in the constitutional text, please briefly describe their topics and motives.)
2. Is there a prohibition of imperative mandate in your national constitution?
   2a. If yes, is there any formalised or unformalised proposal to amend the constitution as to remove the prohibition or introduce the possibility of 'recall'?
3. Is there in your country the possibility to hold a referendum to propose a bill? (Please specify the source of law.)
   3a. If no, is there any formalised or unformalised proposal to amend legislation to introduce this possibility?
4. Is there in your country the possibility to hold an abrogative referendum? (Please specify the source of law.)
   4a. If no, is there any formalised or unformalised proposal to amend legislation to introduce this possibility?
5. Is there in your country the possibility to hold a consultative referendum? (Please specify the source of law.)
   5a. If no, is there any formalised or unformalised proposal to amend legislation to introduce this possibility?
6. Does your national constitution provide for mandatory participation of the people in the constitutional amending process? (If yes specify the form.)
   6a. Is there any formalised or unformalised proposal aimed at enhancing the role of the people in the constitutional-amending process?
   6b. If yes, through which instruments (e.g. ex-ante referendum, direct involvement in the revision process, ex-post referendum).

7. On what matters have national referendums been held? What other forms of citizen's participation are used in your country (in practice)?
8. Is there in your country any formalised or unformalised proposal to introduce forms of participative democracy? If yes, please specify at which level (constitutional, legislative, regulatory act).
9. Is there in your country any formalised or unformalised proposal to amend the constitution to reduce the number of MPs?
10. Is there in your country any formalised or unformalised proposal to switch to a mono-cameral system or vice versa?
11. Have there been, in the last ten years, any changes in electoral laws? (In replying to this question, the practice of changing electoral boundaries, campaign financing rules, and the rules guiding political advertisements might be particularly important.)
11. Which kind of electoral system your country has?
    11a. Is there any formalised or unformalised proposal to change it in a more proportional one?
    11b. Is there any formalised or unformalised proposal to introduce a majority bonus system?
12. Does the voter, in your country, have the possibility to express his/her individual preference in national elections?
12a. If not, is there any formalised or unformalised proposal to introduce such a possibility?
13. Which form of government does your country have?
    13a. Is there any formalised or unformalised proposal to change the rules for electing the heads of the government and of State?
14. Is there a limit of presidential mandates in your national constitution?
    14a. If yes, is there any formalised or unformalised proposal to amend the constitution as to remove the limitation?
15. Is there in your country any formalised or unformalised proposal to reduce the rights of the opposition (e.g. abolition of qualified majority voting for certain acts; enhancement of thresholds for triggering ex-ante judicial review of legislation; initiative aimed at reducing parliamentary discussions)?
16. Is there in your country any instrument of 'militant democracy' (e.g. possibility for constitutional courts to outlaw political parties, norms declaring illegal extremist ideas)?
    16a. Is there any formalised or unformalised proposal to introduce such instruments?
    16b. Is there any formalised or unformalised proposal to abolish such instruments?
17. How constitutional judges are appointed in your country?
    17a. Is there any formalised or unformalised proposal to amend the composition and powers of constitutional courts?
18. What is the composition of your national council of judiciary?
    18a. Is there any formalised or unformalised proposal to amend its composition and powers?

19. How the members of the main independent authorities (e.g. central banks, telecommunications regulatory bodies) are appointed?
    19a. Is there any formalised or unformalised proposal to modify the rules of appointments?
20. Is there in your country a norm on the relationship between national and EU law? (Please specify the source of law.)
    20a. If yes, is there any formalised or unformalised proposal aimed at reaffirming the primacy of national law (in particular constitution) above EU law?
21. What is the procedure for the ratification of international treaties in your country?
    21a. Is there any formalised or unformalised proposal to introduce a mandatory referendum for the ratification of international treaties?
22. Is there any formalised or unformalised initiative to hold a referendum about the continuance of your country's membership of the EU?
    22a. Is such a proposal present in the programme of parties?

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