

# POPULIST CONSTITUTIONALISM OR CONSTITUTIONAL POPULISM: THE PERPETUAL DILEMMA

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## Abstract

Modern democracy presents a baffling range of operational dynamics. Canonical constitutions of the world which have been enriched with the principles of constitutionalism are increasingly witnessing a great deal of acculturation at the hands of aspirational society. This is against the backdrop of mob violence spawning instabilities across different societies and democracies in the world. The source of all political power and the ultimate possessors of political power are both vested in the hands of the people. This principle forms the constitutional genesis of many of the major democracies across the world. This resulted in the embedment of populism in most modern democracies. Modern constitutionalism is a mixture of populism and elitism, with an attempt to conform with republican principles.

Democracies across the world are witnessing the emergence of several charismatic leaders whose modus operandi is to villainize opposition leaders, disparage institutions and claim the mantle of the people. This paper attempts to analyse whether the emergence of such populist regimes is healthy for constitutions across the world. The authors have first provided an analysis of the concepts of populism and constitutionalism. Subsequently, the difference between populist constitutions and constitutional populism is discussed. The paper also analyzes whether populism and constitutionalism can exist in isolation or co-exist? And if they can, than what is the ideal degree of interface between the two through several modern-day examples, particularly of the democracies in eastern and central Europe and India. The paper concludes with recommendations and suggestions from the authors based on the analytical research conducted on populism and constitutionalism.

**Keywords:** Populism, constitutionalism, democracy, rule of law, institutions.

## INTRODUCTION

As early as in 1981, Greek leader Andreas Papandreou remarked that “*there are no institutions. Only the people exist.*” He opposed Greece’s membership in NATO and the European Economic Community while also accusing those in power of “*national betrayal*” for enacting the new constitution. He promised to govern solely on the basis of the common good of the people and do what the majority favoured. This led to a rise in his power, just as was the case of many charismatic leaders across the world. Populism movements have taken place in several countries across the globe, sometimes being

described as counter-intuitive and counter-productive. They have rebelled against monarchies, monopolies, anarchy and a wide variety of powerful institutions and have also led to the creation of constitutionalism in different political societies.

The engagement of the government with constitution-making and reforms in several countries across the world is almost undeniable and at the same time, unacceptable. Such engagement and interference have been perceived to be a threat to democracies across the world. In today’s world, the rise of right populist democracies has been massive,

particularly in East-Central Europe and India. Populist constitutionalism represents distinct constitutional practices which frequently threaten basic constitutional tenets such as fundamental values, human rights, representative democracy and rule of law.

Torre (2017) has reported that in the recent decades, there is a visible increase in the engagement of populists with constitutionalism, particularly in countries such as Latin America and the New European Union member states. As a matter of fact, the effect of populism on constitutionalism is not just felt in more recently developed states but also in well-established democracies such as United Kingdom and the United States (Thornhill, 2019). Several scholars across the world have called for attention on the depleting state of democracies across the world due to the interference of populism with constitutionalism. Thus, the problem in this regard is two-fold, viz: several basic tenets of democracy in countries where populism engages with constitutionalism seems to be threatened and rule of law seems to be dwindling in such countries. However, at the same time, certain benefits in terms of identification and correction of basic structural flaws of a liberal democracy is also the result of active engagement between the two. Hence, the problem as to the perfect balance of interference between both these concepts has emerged.

The authors have undertaken a doctrinal research involving comparative and historical approach which is interspersed with a detailed analysis and synthesis of primary and secondary material.

This paper is primarily divided into three aspects: Firstly, the paper elucidates the concepts of populism and constitutionalism and how the two are intrinsically interlinked. The existing literature on this subject is analysed in detail for this purpose. Secondly, the concepts of populist constitutionalism and constitutional populism are differentiated and analysed. The advantages and disadvantages of both the paradigms are discussed in detail with the help of modern-day examples. Finally, the paper concludes with certain recommendations and suggestions of the authors for an ideal engagement between the two.

### **DUAL DIALECTS OF DEMOCRACY: POPULISM & CONSTITUTIONALISM**

Both Populism and Constitutionalism have played a role in the shaping and reshaping of Democracy. Populism is a political approach centred on appealing to the general public or “*ordinary people*” who generally feel that their concerns are disregarded by “*elitist group of people*” (Mudde, 2004). Such a leader typically seeks to gain popularity by developing a strategy to enhance charismatic appeal and to garner approval and support of people. However, the terms “*popular*” and “*populist*” are not necessarily synonymous (Mudde & Kaltwasser, 2013).

The term populist is identified through the existence of two categories of people: “*pure people*” and “*the corrupt elite*.” Despite these terms being grossly misused in the modern era, in its truest essence, a populist leader is unified by the “*will of the people*” and aims to tackle the “*liberal elite*” (Mudde, 2004). The urge for popular validation is so compelling that often a populist political leader’s close connection with the common public tends to destroy the traditional political structures and organisations (Jansen, 2011). The degree of modifications within the political structures and organisation as well as populist mobilisation largely depends on the civil society and political parties in general (Roberts, 2014).

The link between leaders and the general public is described to be “*plebiscitarian*” by certain political scientists where the voters view the person contesting the elections as representing them and who is therefore responsible for all decisions taken for them, rather than the political party or its ideology (Barr, 2009). Therefore, simply put, populism is that movement which generally propels marginalised sectors or classes of people into the centre of political action, on the premise of a nationalistic rhetoric and ascribing validity to the ordinary or “*pure people*” and at the same time, disapproving the elitist narrative. The popular narrative, the marginalised sector and the strategy used are all a “*flexible way of animating political support*” (Jansen, 2011).

*“Populism, a nightmare state of democracy, can result in electing someone very foolish, or perhaps criminal, or even, perhaps, both.”*

The aforementioned line was tweeted by Mr. William Gibson, a well-established American-Canadian writer. Over the recent decade, there has been a considerable divide in the populism narrative, with two very different and apparent views emerging- notably, the left populism and the right populism.

#### **RIGHT & LEFT POPULISM V. CONSTITUTIONALISM**

Right populism is characterised through emotionally enriched political appeals and addressing of crisis through *“neonationalism, masculinism, othering, bordering, xenophobia, sexism, racism, phantasmatic ethnic golden-ageism, a disregard for liberal democratic norms, and so forth”* (Muller, 2016). It is owing to such features that several observers have come to identify right populism to be antithetical to a liberal democracy (Fraser, 2017).

On the other side of the spectrum stands the left or progressive populism, which is a more subtle in form and not blatantly antithetical to the institutionalised processes of democracy. It rather helps in deepening the legitimacy of the existing democratic system by *“upholding civic, political, and economic rights alongside material egalitarianism”* (Tamás, 2017; Tormey, 2018). Many a times, this kind of populism results in formulation of transparent and inclusive policies like immigration and refugee policy, environmental and taxation policies etc which are adversarial to those in positions of power and privilege, particularly the industrial giants, who are often responsible for income disparity and environmental degradation (Dzur & Hendricks, 2018).

More often than not, no populist regime strictly conforms to the right or left notion, and generally lies in the grey area in between the two, depending on the political movement. Therefore, it is often possible to have a populist movement which is a mixture of disparate aspects such as a political movement which may result in significant economic growth and progress of the nation, but is extremely xenophobic or sexist (Canovan, 1982). As a result, in this case, the populist

regime’s credentials in terms of upholding the true spirit and ideals of democracy is a matter of speculation and doubt.

Constitutionalism is, very simply put, the bible of a democratic country. In most cases, constitutionalism defines and limits the scope and authority of every official conduct through pre-determined laws. Therefore, constitutionalism is the principle that determines the legitimacy of a particular action taken while performing an official duty. Merely having a constitution does not determine the existence, or absence of constitutionalism. Rather, states with an unwritten constitution may depict constitutionalism, while states with a written constitution may depict a total lack thereof.

#### **POPULISM AND CONSTITUTIONALISM: A BIRD’S EYE VIEW THROUGH THE CANVAS OF RELATED LITERATURE**

Constitutional scholars over the ages have had a varied reaction to the engagement of populism with constitutionalism. *Kim Lane Scheppele (2019)* holds populism responsible for the gradual erosion of liberal constitutionalism. She points out specifically that there is no well-defined definition of populism in *strictosensu*, and argues that in this process, a quest for power takes precedence over the passion for liberalism. In particular, her article focuses on the regimes of Victor Orban of Hungary and their public criticism of liberalism and the selective populism that he gained during this tenure to the extent of winning elections. She labels such populism as a cover for autocracy and constitutional destruction particularly because of concentration of power in the hands of one leader. Scheppele’s article focuses more on one particular regime and example of populist constitutionalism. To say that populism is always the concentration of power in the hands of one leader, in the opinion of the researcher is an exaggerated view. A transnational or a historical study of the same would have provided a more authoritative backing to the conclusion of the study. Moreover, there have been several examples of authoritarian populists over the decades in countries such as Turkey, France and United States as well. However, left and right populism also have

significant differences in their methodology which have not been identified.

A more interesting and pertinent study emerges from *Paul Blokker (2019)* wherein he has focussed on the engagement of conservative, populist governments with constitutionalism and has found it to be a significant threat to rule of law and democracy. He believes that despite populism being understood as a rejection of liberal constitutionalism, it is essential to perceive it as an element of constituent politics and democracy. He discusses with particular focus on the rise in right-wing populism in East-Central Europe, through a case-study of the Democracy in Europe or the DiEM25 model as an incomplete realisation of constitutional principles. Paul Blokker's Europe specific article provides a refreshing perspective through a four-fold analysis of constitutionalism and populism. However, it ignores the authoritarian regime of populism as antithetical to constitutionalism.

*Julian Scholtes (2017)* provides a transnational perspective to the concept of populism and constitutionalism highlighting the differences in the degree and manner of engagement one with the other. He emphasises the deep-rooted animosity between the two concepts due to the intrinsic differences between them. While constitutionalism is deep rooted in authority, populism thrives on popular will and support. Nonetheless, he provides an understanding, through his support for the "*constitutional patriotism*" in Germany. He points out another distinct characteristic of populism which differentiates it from constitutionalism- the lack of constituent power, the main concern amongst constitutionalists in his opinion, being reconciliation of "*democratic aspirations with simultaneous preclusion of certain political choices from the democratic realm.*" The authors believe that the opinion of Julian Scholtes is slightly extremist in believing that populism is a complete and total lack of constituent power and constitutionalism being deep-rooted in authority.

*Akhil Reed Amar(1997)*, provides an interesting mosaic of views as a "*constitutionalist, a textualist and a populist*" and explains the triangular relationship between the three. He refers to the

Constitution as a "*dramatically populist act*" due to the historical prejudices which are often reflected in constitutional provisions, be it the exclusion of special protection for slaves, lack of equality for the "*blacks*" and even the exclusion of women from property rights in some states in America. Hence, he refers to the ratification of the Constitution as a populist act- a reflection of the society then and what would seemingly please the larger part of the society. Subsequent inclusions in the constitution and amendments thereof, are also indicative of evolving populism in his opinion. Hence, he opines that constitutionalism, in any sense, is a relation of popular sovereignty and self-government. He provides a historical analysis of the development of the American constitution, along with the analysis of the works of several great scholars in this regard.

The engagement between populism and constitutionalism has been emerging as a subject of study over the recent decades. However, from the aforementioned literature review, it is apparent that there is a lack of literature on the advantages of its interaction or a method for its peaceful co-existence. While most of the available literatures emphasize on the inevitable interplay between the two, very few have actually deliberated on the adequate and appropriate degree of interplay so as to ensure that the essence of democracy and constitutionalism are preserved.

#### POPULIST ENGAGEMENT WITH CONSTITUTIONALISM

Populists, in the opinion of Bellamy (2007), are characterised by their distinct belief in the difference between two categories of people, "*pure people*" and the "*corrupt elite.*" However, the definition of each of the group of people varies depending on the populist party, their beliefs and ideologies. They are not anti-establishment or anti-institution per se. Rather, without the existence of institutions, the survival of the populist government is impossible (Waldron, 1999). However, they believe in the reformation and transformation of the institution in tandem with socio-political developments which they strive to achieve either by tweaking the existing constitution or by enacting a new one

thereby giving a new interpretation to the Rule of Law.

Chambers (1998) opined that populists' often claim to be representatives of the common public and therefore, strive to overcome any legal hurdle which may be in their way of direct engagement with them. In the process, many a times a number of principles of constitutionalism such as separation of powers, independence of judiciary and entrenchment of norms are deliberately diluted or violated. Consequently, the principle of *popular sovereignty* and *majority rule* are the high points of populist constitutional regime. Undoubtedly, it comes across as a rejection of liberal constitutionalism, of principles such as pluralism, inclusiveness and civic participation (Stumpf, 2014). Perhaps one of the biggest reasons for the apparent incompatibility between populism and constitutionalism in a democracy is the perception of the common man that the courts are complex and inaccessible, a "*cult of formalism*" where common man has no say.

Another noteworthy dimension between populism and constitutionalism is the populist prioritization of constituent politics, rendering it inevitable that the two are intrinsically linked (Blokker, 2019). *Post 1945, constitutional developments* across the world developed out of a distinct imagination surrounding the post-war era that of emphasising stability and order (Ginsburg et al, 2018; Gyorf, 2016). This laid the foundation for legal constitutionalism and also pushed several countries to adopt left or right-wing orientation (Goldoni, 2014). It also gave rise to an era characterised by strong constitutions, judicial independence and robust judiciaries (Tushnet, 2018). When one analyses these constitutions through the historical lens, and against the competing constitutions from all across the world, it becomes evident that populism is merged with the constitutional idea and practice as well as the evolution of rule of law in the country over the years. This is clearly visible in the contrasting state of affairs in Hungary and Poland as was elucidated by Kelemen and Pech (2018).

Constitutionalism in most cases also echoes with minorities and rights for the

underprivileged. Populism on the other hand, thrives on discrimination, generally on xenophobic grounds as in Western Europe. Thus, constitutional populism relies on identity politics (Sajo & Uitz, 2017).

### OUTCOMES OF POPULIST CONSTITUTIONAL REFORMS

Participation is the key behind the success of both populism and constitutionalism. Some populist regimes as those in *Latin America*, which have been elaborated below, have helped developed a constitution with maximum participation of people and through an inclusionary approach with the final drafts been approved through a referendum (Bernal, 2014). There are also provisions put in place for frequent elections, referenda, plebiscites and increased vertical accountability but decreased horizontal accountability. Such a radical development have led to two consequences: increased civic participation and increased powers in the hands of the president- an oxymoron in terms of a democratic representation.

A significant criticism of populism for democracy stems from criticism of a more people-engaging government and a representation deficit government. Thus, a populist government takes a *plebiscitarian form*- legitimizing the rule of the populist leader or government (Weyland, 2018). Another aspect of constitutional reforms with which populist governments are forced to engage with is the rapid backsliding of liberal constitutional orders or prevention of such retrogressions, with the constitutions being reflections of the socio-political climate and the ideologies of the populist (Bień-Kacała et al, 2017). It has been additionally observed that in countries where populist constitutionalism exists, there is a *relatively weak embedment of constitutional ideas* and reforms. Moreover, this is further stimulated by the relationship between the populist government and the opposition and manifests itself in four forms: civic engagement, local societal problems, constitutional resistance and constituent power (Laszlo, 2017).

In a nutshell, populist constitutional reforms manifest a mixed bag of perplexing outcomes. A tabular representation of the juxtaposition

between what 'ought to be' and 'what actually is' has been given below which is also

followed by detailed explanation thereafter:

Outcomes of Populist Constitutional Reforms	What 'ought to be'	What 'actually is'
Civic Engagement	Constitutional mechanism for participatory democracy	The means of 'civic engagement' are heavily controlled and censored
Societal Pluralism	Promoting peace and harmony while respecting heterogeneity, religious, linguistic, cultural and ethnic diversity	Accentuating the divide/disparity between the so called majority/dominant class and the other
Constitutional Resistance	Constitutional means of expressing dissent	populist regimes suppress citizens' basic right to constitutional resistance
The Central Nature of Constituent Power in Populist Projects	Popular Sovereignty	Overlooking the importance of people not only in political discourse but also in constitutional politics

#### a. Civic Engagement

Civic awareness of legality and participation in the legal process, particularly in constitutionality, is crucial for a constitutional democracy. Citizens must not just be aware of their rights and the legal remedies available to them but also have special protective and empowering provisions for the minority. Such kind of legal education imparted through awareness programs is the responsibility of the government and social organisations. Social media and school education are some of the most powerful modalities of imparting such education, both of which are largely controlled in case of a populist government (Blokker, 2016).

#### b. Societal Pluralism

No society can ever have a completely homogenous composition. Society in itself is characterised through the cohabitation of people belonging to different classes, races, genders, identities and so on. This is what differentiates the human race and makes us so unique. The function of a democratic government therefore is to balance out conflicting interests of maintaining cultural differentiation while also promoting peace and harmony in society (Pozsar- Szentmiklosy, 2017). No group of people in a society must ever have to feel marginalised or discriminated against. Constitutional provisions must reflect

such equality among people and promote mutual respect amongst everyone. A populist government, however, is based on the division of people into two categories fundamentally, without providing any solution or scope for reconciliation and peaceful co-existence (Lefort, 1986).

#### c. Constitutional Resistance

Traditionally, the provision of free press, right to peaceful protests, a strong political opposition and freedom of speech have been upheld as some of the most basic constitutional values which define a democracy. Democracy will show signs of failure if these factors come under political control. This is when the citizens show their dissent which is one of their legitimate claims under the democratic system. However, by wielding constitutional and legal instruments in their own hands, populist regimes challenge this basic right to constitutional resistance and citizens are left without any forum to express their opinions (Halmai, 2019).

#### d. The Central Nature of Constituent Power in Populist Projects

Populists believe that liberal constitutionalism is inadequate and insufficient in promoting popular sovereignty. 'Popular sovereignty' is primarily a populist construct the objective of which is to capture the imagination of the

masses. It is here that the role of the constituent power in populist projects is emphasised. Political scientist *Kolja Möller* observes that most of the studies on populism and constitutionalism tend to disregard and overlook the importance of people not only in political discourse but also in constitutional politics, particularly in the crème-de la crème layer of the legal and political community- largely related to separation of powers and rule of law.

### **EFFECT OF GROWING POPULISM: DWINDLING CONSTITUTIONALISM**

Since 2010, there has been a rise of populist victories in democracies all across the world right from *Ergogan in Turkey, to Orban in Hungary, Zuma in South Africa and Narendra Modi in India* (Kyle & Gultchin, 2018). Thus, the impact of populism on constitutionalism can be understood through a comparison of the changes in the constitution since the populist regimes came into power. Interestingly, most of these populist regimes came into power through massive societal support- a majoritarian victory at least in their first tenure with the claim of ushering in “*real democracy*” for the “*real people*” of the countries.

Another significant observation is the destruction of basic constitutional and legal principles and tenets or at least the weakening thereof, particularly on the system of checks and balances on the executive and/or legislative power (Goldstein, 2019). For example, *in India*, the Right to Information Act, 2005 was an extremely powerful instrument available to the common man in order to make the government and public authorities accountable. During the COVID Pandemic, a Prime Minister’s Citizen Assistance and Relief in Emergency Situation Fund was set up to allegedly help those in distress owing to the pandemic in March 2020. However, subsequent to an RTI filed on the allocation of funds in July, 2020, it was held that the PM Cares fund is not a public authority and hence, will not fall within the ambit of Right to Information. This significantly raised questions on accountability and transparency and the lack of rule of law in a democratic country, where a populist leader is able to get away with such an action. It is

significant to note that in populist movements, there is no lack or dearth of laws. Rather, there is a significant use, or misuse of the same. Another example in the Indian context is the abuse of farmers who are exercising their right to peaceful protests as guaranteed under the constitution, which has gained support from countries like Canada. However, *the UK Prime Minister, Boris Johnson*, also recognised as a populist refused to comment on this issue, also implying support amongst populists across the world for their erratic policies and abuse of law.

### **MODERN-DAY EXAMPLES OF POPULIST CONSTITUTIONAL REGIMES**

#### **A. Populist Radical Right Parties in Western Europe**

Over the decades, the *European Union* has provided some of the most prominent examples of populism, a lot of which is characterized by xenophobic tendencies. A common characteristic between all populist regimes in Europe is the definition of “*pure people*” which is a reflection of their conservative immigration policies and expulsion of ethnic minorities with a high incidence of ethnic cleansing in several countries (Blokker, Bugaric, B., & Halmai G., 2019). This right-populist mindset has also resulted in a strong anti-European sentiment in most countries, particularly post the 9/11 attacks, which has further been strengthened with every subsequent terrorist attack (Ungureanu, 2007).

These populist leaders emerge through their criticism towards the establishment regime, and their portrayal of concern for the common man. Despite its strong anti-immigration policies supported by their constitutions, in most countries, both the populist government and the opposition have allowed mass immigration, some for reasons related to creation of a larger vote base, and the other to expand their economy and business prospects along with ensuring availability of cheap labour (Mudde, 2007). This kind of approach is termed as “*nativism*” or favouritism with the ethnic minorities and portrayal of their discrimination by the elites. They portray themselves to be the true defenders of their constitutions and rule of law, particularly while propagating racial and cultural divide

and argue that the constitution favours pure European societies- without any external (immigrant) interference. Hence, they do not permit cultural differentiation and often enforce assimilation of groups to maintain purity, such as what was done in Belgium. Thus, Euro scepticism is now identified as a radical right populist society, with an increased inclination to promote referendums as the sole legitimate method of accepting international treaties and conventions which may threaten national security.

#### B. Populist leftist leaders in Latin America

In stark contrast to the radical right populism in Europe is the contrasting left populism in Latin America which has developed since 1990's. This ideology seeks to establish and develop a new democracy through the continuous mobilisation of the masses and condemnation of the influence of foreign powers. A classic example of the same are the governments of Rafael Correa in Ecuador which have been in power since 2009, *Hugo Chávez in Venezuela* who were in power between 1998 and 2013 and *Evo Morales in Bolivia* who are in power since 2006 (Houle, Christian & Kenny, Paul, 2016). This ideology has developed a far more inclusive approach by attempting to make amends to those who have been historically wronged or discriminated against, with their focus being on empowering and uplifting those who have been discriminated against, the minorities and the underprivileged (Kaufman & Stallings, 2016). This is achieved through various strategies, be it mass protests or continuous realisation of plebiscites.

The notion of "*corrupt elite*," according to Torre (2017), is particularly strong in these countries with their belief that certain leaders seek to achieve their personal gain and are unaffected by the plight of the common man. Such kind of corrupt leaders are generally identified business houses, media, the rich, traditional political houses and so on (Panizza, Francisco & Romina, 2009). This was evident during the Chavista movement in Venezuela in 2002 where an anti-imperialist sentiment was invoked to foster support for George Bust for the coup d'état against Hugo Chávez (Hawkins, 2011).

There is significant instability in such countries with respect to their *constitution* with several leaders constantly pushing for more progressive and inclusive changes to be made to the same. These governments have been striving to form a separate constituent assembly to develop a novel constitution ratified through a plebiscite in each country (Silva E., 2009). However, such constitutions have been found to be against the very ethos of a democracy, with provisions for stifling the voices of the opposition and the lack of adequate provisions for a free and fair election.

#### C. The Populist Phase in the United States

Some political scientists have claimed that no US election to date has ever seen as many invocations of populism as has the 2015-16 elections, which resulted in a resounding victory to the Trump government (Weyland & Madrid, 2019). Right from calling his impeachment a "*coup*" and a "*sedition conspiracy to overthrow the people's president*" in 2019, Trump is an ideal representation of a radical right populist (Pinto, 2018). From disregarding various constitutional provisions to developing what is arguably the most conservative immigration policy America has ever had in the recent decades, Trump believed himself to represent the common man, the "*pure people*" who was fighting against the corrupt elite, a man upon whom constitutional clauses establishing impeachment must yield since he embodies what he thinks is the "*authentic voice of people*" (Gruszczynski, & Lawrence, 2019). Trump's speeches are openly anti-establishment and he leaves no doubt of portraying himself to be a populist in a country with a decreasing voter turnout. His speeches also particularly target the Muslims and the Latinos, with several policies enacted by him to bar their entry into the country (Posner, 2017). His policies called for mass deportation of undocumented people, disregard for human rights and support to some of the most autocratic leaders of the world. His policies also disregarded the basic tenets of the constitution with widespread interference with judicial appointments (Norris and Inglehart, 2019). The Trump Government also saw a high number of executive orders being passed- another threat to constitutionalism and democracy (Thornhill, 2019).

### CONTEMPORARY PERSPECTIVES: ROAD AHEAD-POPULIST CONSTITUTIONALISM OR CONSTITUTIONAL POPULISM?

Since at least the last decade, democracies across the world have seen an exponential growth in the number of populist regimes. Right from Turkey, Brazil, Poland to the US, UK and even India, populist leaders have been garnering support in most countries. The European Union today is facing an extreme crisis of populist constitutionalism. While *populist constitutionalism* focuses on the effect that populism has had on constitutionalism, *constitutional populism* focuses on positive constitutional impact on populism. However, much of the literature available on the engagement of populism and constitutionalism is surrounding the former, particularly portraying it in a negative light. Most of the *literature* focuses on populism being antithetical to liberal constitutionalism thereby promoting autocracy and authoritarian regime within the façade of Democracy. This is evident from the Global State of Democracy (GSoD) indices (International IDEA, 2020)

In the opinion of the authors, *populism is the stress-test of constitutionalism*. In the author's analysis, many well established constitutional democracies have been truly tested with a populist government at different times. At present, many democracies, including that of India set a glaring example of their constitutional ideals being put under severe stress with the rise of the current trend in populism. The most common question of political constitutionalism is whether the *judiciary* must be vested with the power to make ultimate decisions concerning the constitution, rule of law and fundamental values (Amhlaigh, 2016). Here, in the opinion of the authors, it is imperative to recognise that constitutionalism is not defined and prescribed by a set of rules or principles. Rather, societal developments and awareness to a large extent determine such interpretations. For example, the decriminalisation of homosexuality in India was owing to the growing awareness and emphasis of equality in some sections of society. This has been a commendable decision upholding constitutionalism in the face of the populist mind-set dominating the political narrative. On the other hand, abortion related laws in the United States are reflective of the society in the respective states. This in

turn affects the constitutional interpretation of equality, the specific provisions for minorities and protective devices under the constitution for them.

While comparing the constitutional provisions *in Latin America and the European Union or US or India*, there is a stark difference in upholding constitutionalism. While in the case of Latin America, constitutionalism was strengthened during the populist rule, gradual failure of constitutionalism is evident in the right populist countries in the opinion of the authors. Radical right populism is therefore, much more antithetical to constitutionalism and must be avoided.

In response to the research questions raised in the paper, the authors believe that the engagement of populism and constitutionalism is inevitable. It is possible for populism to co-exist with constitutionalism provided that it is in a democracy where rule of law is upheld. To some extent, the engagement of populism with constitutionalism is healthy in the sense that it gives teeth and voice to those who may not have otherwise been able to express their opinion or their needs. However, this level is desirable and healthy only insofar as constitutionalism and rule of law remain superior to populism and there is a system of checks and balances in terms of the power of the populist. The authors also strongly recommend a more robust research into constitutional populism.

### RECOMMENDATION AND CONCLUSION

Populism and Constitutionalism are two very distinct concepts and are yet intrinsically linked. Suffice it to say that any aspect of government rule is likely to impact rule of law and constitutionalism in a state. This article analyses two aspects. The first aspect is populist constitutionalism, where the impact of populist regimes on constitutions across the world has been analysed. In particular, the impact of constitutional regimes of Turkey, Hungary, Europe, Poland, Latin America, US and India have been specifically analysed. The misuse and abuse of constitutional provisions during the populist rule in each of these regions have been specifically analysed. There is a stark difference in the right populist and left populist model on the constitutionalism in

a country. While the left populist model such as in Latin America does bring out several aspects of a democratic set up, be it increased free and fair elections, civic participation in constitutionalism or even a referendum for the final constitutional draft, it still offers one significant disadvantage- concentration of power in the hands of one, i.e the President.

In comparison, however, the right populism does not seem to offer any significant advantage, with several significant changes made in the constitution, legal provisions particularly those related to civil participation and immigration, with a tendency to make the policies highly conservative and discriminatory. Instances of human rights violations have often been disregarded in such states, be it the European Union or India, with large scale exploitation of the minority. The rule of law and the role of the judiciary in such countries have become highly insignificant, with an extremely questionable independent judiciary. However, one thing is for certain- not all populist regimes affect the constitution in the same way. Constitutional populism studies the impact that the constitutional provisions may have on populist regimes, primarily through certain safeguards such as the freedom of speech and expression, right to peaceful protest and so on.

In the light of the aforementioned, the authors propose the following recommendations:

- a. It would not be apt to presume that a populist government offers absolutely no advantages. A populist government helps the common man connect with those who are in power, and also helps them understand the issues that they are facing. Such an advantage of populism ought to be exploited. Constitutional interpretation and legislative framework must be enacted in the most inclusive manner possible for the pure definition of nationalism- inclusion of all members belonging to that particular nation.
- b. An extension to the aforementioned recommendation and perhaps a more important one is that constitutionalism must always prevail over populism. Rule of law is defined as the supremacy of the law and its equal application to all individuals,

irrespective of constitutionally determined grounds of discrimination and/ or political position as per Tamanaha (2012) and Scalia, A. (1989). So long as constitutionalism prevails over it, and people are assured of the safeguards of the constitution, a populist regime may still be beneficial at least to a few. This means that the basic protections and rights, including the right to freely express opinion, the right to dissent, the right to have a strong opposition in a democracy, the right to peacefully protest, right to equality and other fundamental rights cannot be compromised. All the executive actions of the populist leader must be just within the framework of such constitutional protection as the actions of other citizens of the country.

- c. Independence of the judiciary is one of the basic aspects of a democracy and is imbibed in constitutionalism. This aspect cannot be compromised. Judicial appointments cannot have any kind of political nexus. There must be no kind of political gain, whether during or after the tenure of any member of the judiciary. Only the judiciary may interpret the constitution and not the executive or the leader.
- d. Civil empowerment through civil awareness must be encouraged. The Poland model, as elucidated by Scheppele L. Kim (2018), in this respect is ideal, wherein constitutionalism is taught right from primary school education. This is imparted in different means and forms, reinforced from time to time. Constitutionalism, as indicated above is also characterised by this civic awareness, without which it would be non-existent. Thus, all populist governments must resolve to ensure that such an education is provided right from the primary levels and that freedom of speech and expression is not curbed.
- e. Almost every democratic constitution encapsulates the principles of separation of powers, a system of checks and balances to ensure that no one branch of a democracy gets

unfettered power. Separation of powers requires an independent judiciary and an executive which cannot change constitutional principles. Such values cannot be compromised on by a populist regime.

- f. With respect to immigration policies, populist constitutions generally depict a peculiarly conservative attitude. They do not seem to favour increased assimilation and are extremely territorial. This is the case with the US immigration policy during the Trump Administration, the recently enacted CAA in the case of India and the European Union policies in this regard. This matter is however, a state concern and hence, cannot be dictated by any normal grundnorm. Nonetheless, the authors strongly believe that even in such policies, the constitutional values cannot be disregarded. Right to equality must prevail and immigration policies must not be on the basis of religion, race, gender and so on.

Thus, to conclude, the solution to extreme populism is not to attack them but rather to reinforce constitutionality. Populist governments help provide a voice to those who may not otherwise have one. Constitutional populism may not always deviate from constitutionalism. Rather, it may create a healthier constitutionalism while criticising constitutional reality such as in the DiEM25 model of the European Union or in the Latin American Model.

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