

Populism, Constitutional Courts and Civil Society¹

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Introduction

The antagonism of populist governments to apex courts is, as I will show, a matter of historical record. It started with Peronism, the first time that an openly populist movement established its own government.² In section 1 below I will summarize current efforts by dominant executives to pack and disempower supreme and constitutional courts in Peru, Russia, Venezuela, Israel, Hungary, Turkey and Poland. After a preliminary definition of populism in section 2, I will consider, in the next section, the reasons why populist movements once in government attack the independence of apex courts. *I will argue that such an effort is a key indication of populism in government moving toward establishing itself as a regime.* I will next try to summarize the harm involved in these cases to constitutional democracy. In the final fourth section, using the examples of Poland and the United States, I will maintain that the way to oppose populist authoritarianism and its attack on courts requires a strategy that is both legal and political, based on the mutual support of associations and initiatives of civil society and courts. I will argue that such an effort requires facing the democratic deficit of liberal representative democracy, and reliance on an alternative conception, namely the “plurality of democracies.”

I.

Admittedly, no current populist government has gone as far as Peron’s in 1947 when he has initiated the impeachment and trial of 4 out of 5 Supreme Court justices, with one of them resigning before impeachment succeeded.³ As indicated by the table below, removal and/or packing are only two of the possible forms of bringing a court under government control. Jurisdiction reduction is another form, and so is the changing of the voting rules by which a court can invalidate or force the reconsideration of a statute or decree. Combining these forms may seem superfluous, since appointing many friendly judges and controlling appointments means that pro-government decisions will likely follow in all jurisdictions and

¹ I thank Gábor A. Tóth, Enrique Peruzzotti, Nicolas Figureoa and Martin Plot, as well as Jean Cohen and F. Finchelstein, for suggestions that went into this article.

² F. Finchelstein *From Fascism to Populism in History* (Berkeley: U. of California, 2017)

³ Helmcke G. *Courts under Constraints. Judges, Generals, and Presidents in Argentina* (Cambridge: CUP, 2012) and 63-65. There were legitimate complaints against the Court for having recognized de facto governments established in military coups, of which however Peron himself was one beneficiary. But Helmcke makes clear that the goal of Peron was to govern as he saw fit, including harass and persecute political opponents.

according to any voting rule. Yet, as in Hungary recently, a government may plan both for the short run, when only the composition of the court may matter, and also for the long term when there may be either a new legislative majority or a court may decide to reassert its independence irrespective of who appointed the members. Nevertheless, if an executive wants a court to be an active instrument on its own behalf at some point in the future, it would be an avoidable mistake to alter anything else than composition. Thus even populist governments may face difficult choices when fighting apex courts. While the presidents of Argentina, Venezuela (initially) and Peru opted to tamper only with court composition, Hungarian, Turkish and now Polish governments moved against their apex courts in several dimensions all at once. The difference may be due to that between presidential governments in the first three, and parliamentary ones in the others.⁴ In other words, a plebiscitary presidency may be more optimistic about the long term than an executive controlling a parliamentary majority. Put another way a populist presidential government may have a better chance of establishing a populist regime, than a parliament dominated by populists.

The creation of a populist regime may require the making of a new constitution, *de jure* or at least *de facto*. Indeed, another issue differentiating among the relevant cases is whether the attempts at executive control of courts take place through the amendment or even statutory process, or they are preliminary to or even part of the attempt to produce a new constitution. Of course new constitutions are made for a variety of reasons, and the reduction of the powers of the courts may not be a major motivation of the actors. Yet, several cases, e.g. South Africa and Egypt, show that even the making of a new constitution need not imply the dismissal of existing courts whether created by old (Egypt) or interim (South Africa) constitutions. Thus, this form is included in my comparative chart, whenever as in Peru 1992, Russia 1993 and Hungary in 2011 there is clear empirical indication that by-passing, disciplining or suspending courts is an important motivation for the constitution maker(s). In many cases however (Turkey, Hungary at first and Poland) the preferred instrument to deal with hostility to apex courts has been constitutional amendment, and, where possible, simple statutes. Impeachment though often an available instrument, has not been recently used. Of course, I do admit that either mode of action, amendment or “replacement” need not necessarily achieve its desired result, the complete domestication of the apex courts. It is for this reason, that in several cases, the various modalities are re-iterated, with amendment preceding or following replacement. As we have seen recently in Venezuela, even constitutional replacement may be repeated a second time. Re-iteration of acts of attempted court capture is thus an important sign of moving toward a populist regime, rather than merely a government.

⁴ The type of government, whether presidential or parliamentary, may significantly effect how populism in power may work. See B. Moffit *The global rise of populism: Performance, political style, and representation*. (Stanford: Stanford University, 2016).

The chart below does not attempt to include all contemporary cases that would be relevant. There are simply too many of them . They are however chosen from three regions of the world to indicate the seriousness of the attack on constitutionalism today. In some of the cases I leave out subsequent history, after, as in Venezuela and Russia in particular, populist governments have definitively established populist regimes, a difference that I will explain below. I also leave out cases where there are significant populist movements that have never won a national election, as in the case of the National Front in France, and also where an election has put in power a clearly populist leader like D. Trump, but where we cannot (yet) speak of a populist government. I did however decide to include Israel, where there is certainly a populist led coalition in power, even if it has been unable so far, despite many attempts, to destroy the independence of the apex court. Yet I left out Egypt during the year (2011-12) under President Morsi, an important case of religiously based populist government, linked to constitution making, because of its rapid collapse and replacement by a military regime.⁵

Country (one date for each event)	Removal (-) and/or Packing (+)	Jurisdiction reduction	Manipulation of rules of Appoint.	Change of voting rules
Peru	1992-3 ⁶			
Venezuela	1999 ⁷ ; 2003 ⁸		2000 ⁹	
Russia	1993			
Turkey ¹⁰	2010		2010	2010
Hungary ¹¹	2010, 2011	2010, 2011, 2013	2011	
Israel	proposed	proposed	Proposed	Proposed
Poland	2015 (2017)			2015

⁵ While one could say that the Supreme Constitutional Court was a winner of the confrontation with Morsi, this was a byproduct of a military coup initially with wide popular support. On this see my *Adventures of the Constituent Power* (Cambridge: CUP, 2017) chapter 4

⁶ Kenney C. *Fujimori's Coup and the Breakdown of Democracy in Latin America* (South Bend: U of Notre Dame Press, 2004)

⁷ Brewer-Carias *Dismantling Democracy in Venezuela* p. 59; 76

⁸ This time it was the Administrative Court that was dismissed: *ibid* 129; 180-181

⁹ *Ibid.* 230-231

¹⁰ Arato *Post Sovereign Constitution Making* (Oxford: OUP, 2016) 250-252

¹¹ See my chapter 4 of *Post Sovereign Constitution Making*, as well as articles by Bankuti, Halmai and Scheppele as well as Lembcke and Boulanger O. Lembcke and C. Boulanger 'Between Revolution and Constitution: the Roles of the Hungarian Constitutional Court' in G.A. Toth ed. *Constitution for a Disunited Nation* (Budapest: CEU, 2012)

To anticipate two serious criticisms, let me first note that there are transitions, generally when post sovereign requirements of inclusion and consensus are satisfied¹², that a new or interim constitution establishes a strong court where previously there was at best a relatively weak one, without formal powers of invalidation of legal acts and especially amendments. This happened in Turkey in 1961; in Chile 1981; in Hungary in 1989; in Colombia in 1991; in South Africa's interim constitution of 1993; and in Tunisia 2014. In many of these instances, such court strengthening was clearly an attempt to pre-empt populist or other authoritarian threats to the new constitutional government. This was the case in Colombia, South Africa and Tunisia. But the effort itself can be authoritarian when trying to protect not so much constitutionalism, but a constitution with authoritarian reserves, and "bionic" appointments, as in the case of Chile in 1981, and in part in Turkey in 1961.

Second, it might be argued against me that the various court packing and weakening schemes are merely in response to previous struggles of governments (generally executive dominated) with apex courts, as it was certainly the case for Franklin Roosevelt's scheme in the 1930s. In such struggles, either side may be right in terms of the substantive issues, and therefore they possess no general significance. As to my cases however, I would argue that the struggles involved do not parallel procedurally and especially in substantive contents of this particularly famous historical example. In chronological order, Alberto Fujimori's suspension of the Supreme Court during his self coup (*autogolpe*) of 1993 was a key component of his struggle against a parliament he did not control, and part of the beginning of his effort to call a constituent assembly to establish a much more presidential constitution. Similarly, the fight of Yeltsin with the new Russian Court (poorly) led by Zorkin in 1993, also leading to a self-coup, involved the Court supporting parliamentary vs. presidentially led constitution making efforts. Whatever their ideological interests, both legislative and judicial leaderships strongly opposed the efforts of Yeltsin to establish a plebiscitary form of presidential government, and supported the impeachment of the President. After the latter won, the main reason to suspend and then abolish the Court by two executive decrees in 1994, had to do with the interests of the new plebiscitary presidency. This was reflected in the subsequent difficulties of Yeltsin, till 1995, in the face of parliamentary resistance, to appoint members to the new court as established by the presidential Constitution of 1993 (art. 125), that has since then been subverted by Putin.¹³

In Venezuela, on the contrary, the Supreme Court was highly permissive regarding the presidentially led effort to replace the inherited constitution in an extra-legal manner, by way of a plebiscite. While the Court did not permit Pres. Chavez to enact by decree his own rules for electing the Constituent Assembly, it did allow (very much mistakenly) doing the same by way of a plebiscite. The attack on the Court

¹² See my *Adventures of the Constituent Power* on some of these cases

¹³ See Partlett, W. The Dangers of Popular Constitution-Making (September 9, 2011). 38 Brooklyn Journal of International Law 193 (2012). 210-226

came only when the Constituent Assembly moved to replace all constituted powers (even formally the president whose status was however immediately re-confirmed!). The Supreme Court responded by insisting that the Constituent Assembly had only “derived” rather than “original” and therefore limited constituent powers. It was then that the immense presidential majority, achieved through electoral rule manipulation, moved to assert its sovereignty and to replace judges and pack the Court. The act of packing was then repeated on at least two more occasions, in the face of even the slightest show of independence of the new apex court established by the Constitution of 1999.¹⁴ The result was so successful that the Supreme Tribunal of Justice recently became the main instrument against a new parliamentary majority opposed to the presidency.¹⁵

Admittedly, in Turkey, the efforts of 2010 to alter the membership, jurisdiction and voting rules of the Constitutional Court came after the adverse decision of the Court in 2007 concerning the validity of the so-called headscarf amendments. But the same Court subsequently, in 2008, voted against dissolving the ruling AKP (Justice and Development Party). The amendments of 2010 had to do rather, in my view¹⁶, with the establishing of a new, plebiscitary presidentialist constitution that could have been blocked by the old Court in reference to the eternity clauses of the inherited constitution. That this interpretation was correct has been confirmed by the introduction of presidential government first *de facto*, and then *de jure* in 2017, again by way of amendments confirmed by plebiscite.

In Hungary, Poland and Israel the conflicts involved were within parliamentary forms of government. Yet in Hungary too, the making of a new more authoritarian constitution was an important stake. While the Constitutional Court tried to recover some of its former guardianship of the Round Table Constitution under the FIDESZ government of 2010, by declaring several politically motivated statutes

¹⁴ See Brewer-Carias *op.cit*; D. Landau “Abusive Constitutionalism” (April 3, 2013). 47 UC Davis Law Review 189 (2013); FSU College of Law, Public Law Research Paper No. 646. Available at SSRN: <https://ssrn.com/abstract=2244629> and especially N. Figureoa *A Critique of Populist Jurisprudence. Courts, Democracy, and Constitutional Change in Colombia and Venezuela*. Dissertation, New School for Social Research, 2016

¹⁵ For Maduro’s constituent assembly and the role of the Court in defending it see the three part blog entry Jung M; Buck H and Haimerl M “A Constituent Assembly Only in Name?” Parts I, II and III on Venezuela’s Constituent Assembly, *VerfBlog*, 2017/11/23, <http://verfassungsblog.de/a-constituent-assembly-only-in-name-part-i-on-venezuelas-constituent-assembly/>

¹⁶ See Arato “Democratic Constitution-Making and Unfreezing the Turkish Process Philosophy & Social Criticism, Vol. 36, Nos. 3-4, 2010; and Chapter 5 of *Post Sovereign*.

unconstitutional¹⁷, FIDESZ used the amendment structure of the old constitution and its supermajority manufactured by the electoral rule to pre-emptively discipline the Court through devices of court packing, jurisdiction limitation and a majoritarian transformation of the structure of appointment. The amended structure was then lifted into the Basic Law of 2011, the new constitution. When even this move did not produce the desired result, further amendments were used to lift invalidated statutes and even quasi-constitutional “transitional” provisions, into the main text of the Basic Law.¹⁸

In the Polish case the new Law and Justice (PiS) government did not have a constitution amending majority, as did FIDESZ in 2010. Here the attack on the Court was enabled by a very unfortunate attempt in 2015 at pre-emption by the outgoing liberal (Civic Platform: PO) government, under a new law. This involved the legal though normatively questionable replacement of 5 justices, 3 of whose terms according to the previous procedure would be up only after new elections. In response, the new right wing PiS government tried to block not only these 5 appointments, but also to appoint 5 new judges as well as change the process of judicial invalidation of statutes from majority to 2/3 of a high quorum (13 out of 15).¹⁹ Without going into the complicated horse-race between government and Court that followed, the intention of the PiS led by Kaczynski was to remove a limitation on parliament to control and possibly amend by extra-legal statutes Poland’s 1997 Constitution, and to found a so-called 4th Republic free of the supposed taint of earlier round table negotiations with the Communist reformers.

Finally, in Israel, where the Supreme Court has been long a thorn in the side of Likud led governments, it would take only an absolute majority of the Knesset to pack the

¹⁷ In particular a law establishing retroactive taxation of pensions of public officials that ingeniously applied only to persons in government before FIDESZ’ coming to power in 2010. (Decision 37/2011) For this and several other decisions invalidating parliamentary statutes in 2011 See O. Lembcke and C. Boulanger ‘Between Revolution and Constitution’ 287-290.

¹⁸ See *Post Sovereign* chapter 4, ; Lembcke and Boulanger ‘Between Revolution and Constitution:’ op.cit. ; and Bánkuti, Halmai and Scheppele “From Separation of Powers to Government Without Checks” also in *Constitution for a Disunited Nation* (Budapest: CEU, 2012). Also: K. Kovács ‘Changing Constitutional Identity via Amendment’ in *Rule to Change Constitutional Identity* P. Blokker ed. *Constitutional Acceleration within the European Union and Beyond*(London: Routledge, 2018)

¹⁹ Koncewicz, T. T.: *Constitutional Capture in Poland 2016 and Beyond: What is Next?*, *VerfBlog*, 2016/12/19; Mazzini, M.: *For Central Europe’s Illiberal Democracies, the Worst is yet to Come*, *VerfBlog*, 2017/7/16, and especially Sadurski, W.; Steinbeis, M.: “*What is Going on in Poland is an Attack against Democracy*”, *VerfBlog*, 2016/7/15; and Mikuli, P. *An Explicit Constitutional Change by Means of an Ordinary Statute? On a Bill Concerning the Reform of the National Council of the Judiciary in Poland*, *Int’l J. Const. L. Blog*, Feb. 23, 2017. ,

Court, to reduce its jurisdiction, or even to establish a new “constitutional tribunal” replacing its functions of guardianship of the weakly entrenched basic laws. Given the electoral system however, and the requirements of maintaining coalitions, such efforts, in spite of much rhetorical heat by Ministers of Justice, have remained so far on the level of projects. In the near future, a new right wing government based on religious and nationalist parties alone may very well realize some or even all of these plans.²⁰

Without doubt these cases of constitutional struggle between apex court and the political powers were different in context, the exact stakes and outcomes. What unites them all however is a political project that has been in each case rightly characterized as authoritarian populism.²¹ To make this case however we cannot rely either on polemical texts, nor especially on the self description of the main actors, who with exception of Venezuela perhaps would eschew the populist label. The case must be made on the bases of theoretical considerations, and to this I now turn.

II.

What is populism? Given the pervasiveness and loose journalistic use of the term, attempts to define the phenomenon by induction are doomed to fail.²² It is better in my view to immanently criticize the best ideological attempt to justify populist politics, and thus reconstruct the main dimensions of the phenomenon from a logically coherent systematic argument. I have done this using the work of Ernesto

²⁰ Stopler G., Introduction to *I-CONnect/ICON-S-IL Symposium: Constitutional Capture in Israel?*, Int'l J. Const. L. Blog, Aug. 20, 2017. Whether Israel is on the verge of a “populist capture”, remains controversial, as this symposium shows. I find most convincing the views expressed in Nadiv Mordechay & Yaniv Roznai, *Constitutional Retrogression in Israel*, Int'l J. Const. L. Blog, Aug. 23, 2017; and Alon Harel, *The Triumph of Israeli Populism*, Int'l J. Const. L. Blog, Aug. 22, 2017

²¹ Koncewicz, T. T.: A Constitution of Fear, *VerfBlog*, 2017/11/16; Steinbeis, M.: Enemies of the People?, *VerfBlog*, 2016/11/04; Oder, B. E.: Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular, *VerfBlog*, 2017/5/02,

²² For some incomplete attempts: see the fine books of C. Mudde, B. Moffit and J.W. Mueller. All of these leave out at least one dimension needed to understand the main cases of today. Mudde, C. (2004). The populist zeitgeist. *Government and opposition*, 39(4), 541-563.; Müller, J. W. (2016). The Populist Moment (); and Moffitt, B.. *The global rise of populism*. In their definitions if not descriptions, Moffitt neglects popular *sovereignty*, Mueller and Mudde try to do without embodiment in a leadership. As against Moffitt and Mudde, who define populism as a style and an ideology, I think of it as a political identity defined by these four dimensions.

Laclau²³, and have derived four important elements of the *political identity* called populism. These are:

1. Populism legitimates itself in terms of *popular sovereignty* by referring to a part of the population that supposedly incarnates the people as a whole.
2. Constructs a rhetorical chain of equivalences, from heterogeneous and incompatible demands of the segments of “the people” so identified;
3. Establishes friend and enemy relations, over a frontier of radical antagonism, thereby extricating (C. Lefort) “the people” from its enemies within the population as well as outside;
4. Identifies the will of the extricated genuine “people” with the will of a group, and to avoid the possibility of a division, almost always with the name and will and even body of a single leader, generally the chief executive.

These definitional elements of course need to be supplemented by historical and contextual considerations.²⁴ Some of these follow from the definition here offered, as for example the hostility of all populisms to pluralism.²⁵ Others however are only empirical as is the very common interpretation of democratic legitimacy in a purely majoritarian manner, that is both inconsistent with the assertion that a minority can embody the people as a whole, and even tends to disregard the fact that the supposed majorities relied on can be the product of electoral rules, and/or low level of participation. Similarly, it is not inevitable, if very common, that populist movements theologize many or even all of the four dimensions of the above definition, by evoking fragments of a political theology analogous to elements of monotheism.²⁶ Sometimes this interest can gain the support of some religiously motivated supporters²⁷, but it is more generally articulated through the rhetorics and performances of their elite core of militants. It is certainly right to understand populism as a thin centered identity that needs one or another supporting ideology, for example socialism, nationalism or religion, or their combinations to sustain it.²⁸ Thus, populism can have rather obviously left and right wing forms, depending on both the supporting ideology and even more on the specific part of society is identified as the whole, and the part or parts that are deemed the enemy. For the latter, the left version tends to focus on elites and middle classes, as well as external

²³ *On Populist Reason* (London: Verso, 2005) ; see my “Political Theology and Populism” in *Social Research* (2013) v. 80 # 1. For further development, see F. Finchelstein in *From Fascism to Populism in History* op.cit.

²⁴ Here I reverse for logical reasons the stress of Finchelstein op.cit. who puts history first. I do not see how that is possible, since no history can be reconstructed without concepts. I grant that our concepts and the changing ones of the actors may be different. What is needed however is a fusion of their horizons, not a conceptless description. See Gadamer H. G. *Truth and Method* (Evanston: Northwestern University Press, 2004)

²⁵ A point stressed by Mueller and Mudde op.cit.

²⁶ See my *Post Sovereign* Chapter 6

²⁷ Arato and Cohen “Civil Society, Populism and Religion” *Constellations* (September, 2017) v. 24 # 3

²⁸ Mudde “The Populist Zeitgeist”

actors. “The people” are thus defined in Laclau’s priceless terminology as “the underdog”. Right wing populism also attacks elites and external powers, but its internal focus is generally an underclass, now including emigrants and refugees whom the elites supposedly privilege. The people, or more commonly the nation is almost always identified in ethnic, linguistic or religious terms.

Thus it may be difficult to distinguish populism of the right from fascism, and on the left from authoritarian forms of socialist mobilization, all of which seem to more or less satisfy the four criteria offered here, all being pathologies of modern popular sovereignty.²⁹ Thus, in my view, the origin of modern populism should be seen not only in the demise of fascism, but, as it is clear from the work of Laclau, also the hardening of Communism into a statist ideology, and the collapse of its orthodox social theory that was clearly falsified by historical developments.³⁰ Thus, in formally democratic settings at least Marxism-Leninism, with its authoritarian formula of democratic centralism, lost its electoral appeal unless it turned populist (as the French Communist party) or social democratic, as under Euro-Communism.

The point is right however: the rhetorical stress on democracy in populist movements is absent only in fascism,³¹ even if it was purely ritualistic under authoritarian socialism. Even this distinction is however relatively clear only with respect to populism in power. Clearly, populism almost always begins as a social movement, yet Laclau and many others are wrong to neglect the possibility of such movements achieving political power. Such “success”, as already implied, is possible in three forms. First, a populist movement may achieve the election of a leader as the head of government, who cannot or will not form a populist government for a variety of important reasons. This form applies currently to the United States. Second, a populist leader can under some circumstances, usually including an overwhelming parliamentary or legislative majority or a coup, establish a populist government capable of enacting policies supported by its heterogenous constituency. This form applies currently to Poland and Israel, and before 2010 at least to Erdogan’s Turkey. Finally, a populist government can be said to have founded a new authoritarian regime, in spite of the remaining democratic trappings

²⁹ P. Rosanvallon *Counter-Democracy* (Cambridge: CUP, 2008) 265-7

³⁰ See Arato, A. (2013). Political theology and populism. *social research*, 80(1), 143-172. where I identify Sartre as the first ideologist of such a Neo-communist populism. Indeed, shortly before he wrote *Communists and Peace*, the relevant text, the idea of People’s Democracy was invented to disguise the identity of political and economic paradigm in Central Europe with that of the Stalinist Soviet Union. There were other tools like the “popular fronts” in charge of “elections”. In China, Korea and Vietnam the populist formula of people’s republic concentrated on large peasant populations. The apparent success of Marxist-Leninism in Asia and Africa, lasting about three decades after World War II depended on military conquest of power, and the originally Maoist reformulation of the ideology to concentrate on peasant societies, quite to the contrary of the original Marxian doctrine

³¹ Finchelstein op.cit.

and rituals, when it has fundamentally changed the material, and usually formal constitution of the state, and is in a position to dominate not only courts, but also formally competitive plebiscites and elections as well as elected bodies of national and local government. In this sense Peron's Argentina, Fujimori's Peru, the Venezuela of Chavez and especially Maduro, and the Russia of Putin established populist authoritarian regimes, whether or not these were or are fully consolidated. In principle at least such a foundation of a new regime is possible without the intermediary form of a populist government but only if a revolution or a coup has taken place. Generally however a sequence can be reconstructed, first movement, then government and finally regime. We may of course insist on seeing these stages as a continuum involving increasing differences of degree. Whichever our point of view, stages or continuum, we can certainly posit that today the populist governments of Erdogan's Turkey and Orbán's Hungary are well on their way to establishing new populist-authoritarian regimes.

It is only on the level of being a government, in my view, that there is a really sharp difference between populism and other authoritarian forms, especially dictatorships. A fundamental difference may *not yet* be there in the case of populist and many other authoritarian *movements*. And it may be *no longer* be there when populism consolidates itself as a *regime*, in the sense of a new set of constitutional or quasi-constitutional principles for the operation of the political realm. It is only when populism is "only" a government that we should insist on its unique and fundamental differences from dictatorships, defined as the fundamental primacy of prerogative power.³² Indeed, while populism in merely governmental power is certainly "illiberal", it generally remains tied to electoral and plebiscitary legitimacy usually interpreted in a radically majoritarian fashion.³³ Enrique Peruzzotti is right. The role of elections here is to confirm identity and identification.³⁴ Nevertheless, this means that some constitutional rules still trump arbitrary will or decision. That stress on rules is not there under fascist governments, and authoritarian socialist forms of power, both of which in any case rapidly establish new, revolutionary regimes. Yet the same stress may slowly disappear or be gradually reduced or eroded in the case of populism in government.³⁵ It may happen abruptly and quickly

³² See e. Frankel *The Dual State* (New York: 1941); Arato "Good-bye to Dictatorships?" *Social Research* 2000

³³ F. Finchelstein op.cit. Even on the level of "government" his attempt to distinguish populism and fascism through reference to democracy/dictatorship and non-violence/violence works only partially, because 1. Populism is called authoritarian, without clearly saying what authoritarian democracy is; 2. The violence of many populism is understated; and 3. The comparison of left populism should have been with authoritarian socialism that may not be much more violent .

³⁴ See his excellent piece "Regime Betterment or Regime Change?" in *Constellations* (September 2017) v. 24 # 3

³⁵ Thus we may speak of populism in government as a hybrid regime, containing both democratic and authoritarian elements, though consistently reducing the liberal ones implicit in modern democracy. On this see Peruzzotti "Populism as

when such a government is under threat of electoral defeat. There are few populist leaders like Indira Gandhi in 1977 who risk a completely free elections that can deprive them of authoritarian powers.³⁶ Thus, the line between dictatorship and plebiscitary populism may be difficult to retain or even draw when an elected or re-elected regime is in the process of subverting competitive elections altogether, as in Venezuela currently, and perhaps already in Turkey in 2016-2017. The democratic and rule governed dimensions are already seriously challenged under populism in government, and this tends to happen under both right and left populisms, or their eclectic combination as the carriers of Putin, Orban, Erdogan and Maduro are showing.³⁷ The logical outcome, populism as a regime, would be a type of dictatorship, one possibly as distinct from fascism and authoritarian socialism as these were different from one another. Even as we have today some likely candidates representing this type of regime, it is too early to determine whether these will belong to a single new form or represent several.³⁸

Here, I am more interested in the more common form, populism as government. Its customary neglect reveals a very important feature of the phenomenon itself: even when in political power populist leaders (and their supporters) imagine themselves to be still outside and opposed to it, fighting what is now often called a deep state and its inherited institutions: the bureaucracy, the security services, plutocrats and yes, generally the courts as well. We have seen this peculiar self-understanding surface in all the cases mentioned, including recently in the United States. External political actors and institutions can also be cast in the same role as in the case of many European populists, even before they enter government, focusing their attacks on the EU Commission as well as the European Court of Justice. But in the populist struggle against enemies, from Peron to Indira Gandhi, and from Fujimori to Orbán, the one constant is the attack against independent apex courts, that fully ceases only when such a body entirely loses its independence, and the ability to act independently, an important sign of the emergence of a populist *regime*.

III.

The attack on apex courts reveals a great deal concerning the logic of populism as defined here. Apex courts, from a democratic point of view guard the differentiation (separation and division) of powers none of which having the right to monopolize

Democratization's Nemesis: the Politics of Regime hybridization" in *Chin. Polit. Sci. Rev.* DOI 10.1007/s41111-017-0070-2

³⁶ Note however that under her emergency there were attempts led by her son, Sanjay Gandhi (with the slogan: "Indira is India, India is Indira") to establish a more permanent authoritarian regime. See: G. Austin *Working a Democratic Constitution*

³⁷ Arguing the contrary, Finchelstein relies too heavily on the case of Argentina under Peron, and later Peronism.

³⁸ One candidate for a new shared regime type is B. Magyar's Mafia State. See: *The Post-communist Mafia State* (Budapest: CEU, 2016) In my view it is too early to so identify the three different regimes of Putin, Orbán and Erdogan.

speaking in the name of the popular sovereign. Their role is therefore linked to notions of popular sovereignty significantly different than the populist interpretation in terms of incarnation. Important alternatives have been developed by R. Carré de Malberg with his notion of “national sovereignty” and in Claude Lefort’s concept of the empty space of power.³⁹ From Sieyès’ constitutional jury to Marshall’s judicial review, and from Kelsen’s court to Ackerman’s preservational function, courts have first assumed and then were formally given the role of distinguishing between the democratic constituent power and the constitutionally delegated (constituted) powers of executives and legislatures. More radically still, since the Indian Basic Structure and Colombian Replacement doctrines we are increasingly accustomed to even the differentiation of the amending and constituent powers that an apex court can enforce through amendment review. Where an amendment rule is multi-leveled, courts logically assume policing also this type of differentiation involving alternative procedures of revision. Moreover, since the South African constitution making process, we have come to understand the possible role of courts even in the making of new constitutions. In my view in any of these versions of procedure the people as an entity is replaced by ascending levels of democratic legitimacy. Assuming of course *liberal* democratic constitutions, the role of courts in the defense of individual and minority rights is as important as the anti-authoritarian interpretation of popular sovereignty. The two matters are however connected: only by defending the separation of powers and the differentiation of constituent and constituted can the rights of individuals and minorities be protected against executive and legislative usurpation, as well as constitutional abrogation.

Populism however, on its own interpretation of popular sovereignty must resist all these relevant forms of power limitation, and any agency seeking to enforce it. By identifying the genuine people’s will with its own, the populist leader or group inevitably sees the intervention of courts as linked to the secret work of an oligarchical enemy or the deep state or an external power. Once the will is incarnated, there is no reason to move to higher levels of legitimacy and to alternative procedures to test whether it is a genuine democratic will. Even the attempt to defend individual rights by courts becomes superfluous, because the members of the authentic people supposedly need no rights against themselves, and their enemies must not be given rights to oppose the sovereign will.

Thus it is an interesting research question why populist regimes that do produce new constitutions, like Orbán’s in Hungary, do not completely abolish constitutional courts that may represent the last important element of the separation of powers. Their surviving role is clearly more significant than that of elections in Soviet type societies, as we see through the surprises that even packed courts offer their packers. My hunch is that the continued existence of constitutional courts in the Venezuelan and Hungarian new constitutions of 1999 and 2011 is connected to

³⁹ See my two works cited, from *Post Sovereign* from 2016 and *Adventures* from 2017 where I discuss these matters and authors extensively.

several issues of legitimacy as well as political calculation. One of these is surely the current great international prestige of constitutional courts (“the new constitutionalism”), that was entirely absent in the period before World War II. It may also have something to do with the relative conservatism of populism⁴⁰ compared to revolutionary projects, with respect to maintaining both a competitive electoral setup, as well as some of the predictability and rationality of a capitalist order. As already argued, the abolition or complete disempowerment of constitutional courts would be at the very least an important sign of the transition from populism as a government to populism as a regime, that would be a dictatorship (open or hidden) with populist legitimization claims. Many sectors supporting the rise of populism to government may however take seriously the anti-dictatorial rhetoric of populist leaders targeting their enemies.

Finally, preserving relatively strong constitutional courts at least on paper may also have to do with the two dimensions of time I have already stressed. Again, in the short run, a packed court is no danger to its packers, and in the long run it may become a form of imagined defense of authoritarian “enclaves” as in Chile under the 1981 constitution, or attack on anti-authoritarian enemies, as in Venezuela currently, as long as a “bionic” (i.e. extremely long term) appointment structure keeps judges in office long after the appointing government having been possibly voted out of office. I should of course stress, that the court is not the only enemy of authoritarian populism. Paradoxically, in a possible future after a lost election with a new and different challenge coming from parliament, the grass roots or the street, a court may even become a useful ally. We have just seen this alliance work in Maduro’s Venezuela, where a not yet consolidated populist regime has now definitively replaced populism merely in government. The trick however is to assure both the apex Court’s lack of independence and its loyalty.

The trick may not always work. Having an apex court even a packed one carries a risk as we know from US history. Even President Roosevelt, who in the end appointed 9 judges could not count on their collective loyalty, in a case such as *Korematsu*. The Warren court was an even greater surprise to the president who appointed Earl Warren as chief justice. Without identifying with one another the different political forms and contexts, Viktor Orbán too was sorely disappointed by (the perhaps very few) acts of defection of justice István Stumpf who was originally one of his closest collaborators.⁴¹ Beyond mere formal existence, the occasional flashes of independence of these courts are connected to the important social and now international status of judges. Here we may have another significant distinguishing mark of populist government from populist (as well as fascist and communist) regimes, and also military dictatorships all of which certainly abolished

⁴⁰ Finchelstein op.cit.

⁴¹ See Arato *Post Sovereign*; Boulanger and Lembcke op.cit. I am grateful to G. A. Toth for reminding me that in general Stumpf was a reliable supporter of the government on the Court. To me however (and probably to Orbán) even one major act of defection is significant.

both judicial independence, and sometimes apex courts where they existed previously.

The fact that an apex court may retain a still significant jurisdiction should not deflect us from the harm to constitutional democracy in attacks on courts by populism as a government even short of establishing a new, undemocratic regime. The goal is to make the judiciary pliant instruments of the executive, unable to police the separation of powers or to defend the rights of individuals and minorities when populist governments, true to their principles come to threaten them. Moreover even what is sometimes only the partial success in accomplishing these goals by populists should not fill anyone with confidence. Where one round of packing and jurisdiction weakening does not do the job more rounds can and will likely follow, themselves enabled by even stepwise destruction of judicial independence. We have seen this logic of reiteration in several countries, eventually weakening the possibility of free and fair elections even where they are not abolished.

How likely is the completed transition from populist government to populist regime? All populist executives will seek by almost by definition victory over the other branches of power and over societal pluralism. It depends on the context and on other forces in society whether a populist government would feel the need for and even more importantly risk the transformation of political identity into a populist regime, i.e. a type of dictatorship. If such a government and its leader are willing to take the risk, the key identity change can come in a revolution, or coup as in the case of Peru under Fujimori or Russia under Yeltsin. But it may be coupled with a series of reiterated reformist steps including the marginally legal making of a new partially authoritarian constitution as in Hungary under Orbán and Venezuela under Chavez, or even with a series of *unconstitutional* amendments or statutes that become possible once the apex court is fully deprived of its ability to act, as in Turkey and recently in Poland. These steps may be resisted, but the question is how effectively.

IV.

In his debate with Kelsen concerning constitutional review, Carl Schmitt depicted a “horse race” (Wettkampf) between constitutional court and the political branches, a competition with the sovereign that in his view a court must lose. He was probably right for most cases, but not inevitably. Inspired by depictions of a long ago battle between the South African Appellate Division and the apartheid government concerning the entrenched principles of the constitution,⁴² I have come to see the same horse race in terms of several rounds, where the early ones can be won by courts. Something similar can be shown to have happened in Venezuela, Turkey and

⁴² D. Davis and M. le Roux *Precedent and Possibility. The (Ab)use of Law in South Africa* (Capetown; 2009) chapter 2; I. Loveland *By Due Process of Law* (Oxford, 1999)

Hungary.⁴³ Formally speaking, the battle is always between constitutional review and the amending power. The former can attempt to invalidate amendments, and enabling legislation. The latter can amend the membership, composition, form of appointments and jurisdiction of apex courts. There is only one such a contest, the Indian Supreme Court vs. Indira Gandhi, that the executive eventually lost, and this only after a lost election that, in the style of a populist government craving democratic legitimacy and approval, the PM felt constrained to call.⁴⁴ On the contrary, after early setbacks, Chavez, Erdogan, and Orbán seemingly managed to tame their apex courts. We do not yet know the final outcome in Poland, or in the case of for Trump for that matter, after the latter's very significant early losses. But the interesting question is why courts can win in one phase, and yet wind up losing in the next or in subsequent ones. It may not be simply a matter of early and late phases of the conflict.

I offer a hypothesis initially based on the already mentioned South African example, having to do with the attempt of the apartheid government to deprive colored voters of their franchise, an act limited by the "entrenched clauses" of the Constitution (South Africa Act) of 1910. In 1952 the Appellate Division (Harris I) invalidated a statute that sought to by-pass the entrenchment clauses. The government responded first by trying to turn the legislature into a higher court, and, after another defeat (Harris II), by packing the senate to achieve the majority required. For good measure the apex court itself was packed, but it had another opportunity to declare the senate packing unconstitutional. Not only the new members, but most of the judges responsible for the two earlier decisions now went along with the government. (*Collins v. Minister of the Interior*, 1956) What happened? As an explanation, Dennis Davis and Michelle le Roux point to the dramatic decline of social mobilization that initially supported the court decisions.⁴⁵

My two hypotheses then are the following, First: that courts can win their battle against authoritarian populists as long as they have the strong support of initiatives within civil society. And second: civil society initiatives against populist regimes not only can re-enforce the role of courts, but can gain new strength for themselves in such effort.⁴⁶

Populism in my view is particularly susceptible to civil society challenge, obviously more so than classical Fascist or Stalinist regimes. This is so because of both the link

⁴³ See my *Post Sovereign Constitution Making and Adventures of the Constituent Power*

⁴⁴ Both Finchelstein and Moffit insist on this characteristic that I believe applies to populist government but no longer to the regime form.

⁴⁵ In *Precedent and Possibility* pp. 32-33

⁴⁶ This thesis, N. Figureoa kindly reminds me, is supported by the case of the Colombian Constitutional Court's victory over the right wing populist President Uribe, that would not have been possible without extensive democratic protest and mobilization. See his already cited New School dissertation for this case.

and the fundamental difference between civil society based and populist movements. Here Rosanvallon has offered the most interesting argument. Representative democracy, he rightly stresses, has fundamental legitimation problems, to which alternative democratic inputs respond. He calls these, somewhat misleadingly, as “counter-democracy”.⁴⁷ We have stressed most of what he has in mind as the influential politics of civil society.⁴⁸ In an argument anticipated by Rawls and Habermas⁴⁹, one of the most important democratic channels are according to both our argument and Rosanvallon’s the courts, that can be and are often utilized by civil society based initiatives.

At the same time, however the anti-political trends within civil society can be radicalized by populism. Moreover, civil society has an ambivalent relation to courts, not only empirically but also structurally. Where liberal rights are constitutionally established and even where they can be interpreted into constitutions, courts can be their major defenders. The institutionalization of a strong civil society is dependent on fundamental rights of personhood, communication and participation.⁵⁰ Thus civil society is dependent on the courts especially when its groups and initiatives assert their rights.

But civil society can assert rights and claims in advance of their institutionalization, or even prior to defense by courts, as in the case of many social, economic and cultural rights. Since courts can be conservative concerning a given constitutional and legal order, conflicts can emerge between initiatives from below and judicial bodies. This is especially the case in terms of the outer limits of civil society action, namely civil disobedience, strikes and boycotts. As in the United States in the so-called Lochner period, courts can indeed play a very conservative role, when their actions are rightly and strongly opposed by unions and civil initiatives. Thus it depends on a given context whether or not courts will assert the rights of civil society, and whether civil society based mobilization will emerge in defense of threatened courts. Moreover, movements and initiatives have a life cycle. Thus persistent and long term mobilization on behalf of constitutionalism is less likely, than on behalf of social issues of more immediate interest.

Finally, even if the politics of civil society as against populism is inevitably and self-consciously plural, some of its forms (e.g. at times the working class movement) can view themselves as monolithic, as the incarnation of the people as a totality. Just as there are anti-party parties in politics, we also have anti-civil society movements in civil society. When this happens, movements will be inevitably suspicious of courts, whether or not these have played a conservative role. When that suspicion goes as

⁴⁷ *Counter Democracy*, misleading because he makes it appear as if the forms of counter democracy were not democratic, thereby reducing against his own intentions, democracy to majority rule.

⁴⁸ *Civil Society and Political Theory* (Cambridge, Mass. 1992)

⁴⁹ Rawls *Political Liberalism*; Habermas *Between Facts and Norms*

⁵⁰ For this argument see Cohen and Arato *Civil Society and Political Theory*

far as attacks, we are facing not simply movements of civil society, but most likely populism as movement.

Of course the situation changes once again when populism elects a leader and especially when able to form a government, with the tendency at least to found a new regime. If and when a populist segment emerging from civil society becomes the government, the plurality of civil society will still likely survive, or re-emerge both because of the conservative limits of populism, and especially when the chain of equivalences proposed by populism falls apart, as it must. Unlike under fascism or authoritarian socialism (except their stage of dissolution), we have almost everywhere seen strong civil society based challenges to populism in government. The time to act however is when populism is only a government, since once a populist regime is founded and consolidated it will become much more difficult.

To be able to act against a populist government partly stemming from civil society, relying on democratic elections, and even democratic slogans like majority rule is difficult. A different theory of democracy is thus needed, as an alternative to monolithic, majoritarian doctrines of popular sovereignty. A stress on civil society helps, by indicating that voice and participation from below, inevitably plural, cannot be monopolized from above, especially by a leader or leadership.

The idea of a plurality of democracies is equally important.⁵¹ According to this, democracy ought not and cannot work through a single channel of representation. The legislature, and an elected president are two important channels. Whether united as under parliamentarianism, or separated as in presidential government, these are however not the only means of representation. Local and regional government are other channels still. And so are the courts. In this context we should regard the famous counter-majoritarian dilemma as mainly bogus. True, courts are generally not elected, but their representative quality depends on other considerations. Elected legislatures can easily form corporate interests as Rousseau already knew, and the idea that they are the only or even best embodiment of the popular will is false. The same is even more the case for elected presidents. All elected officials must concern themselves with their re-election, or at least their party's future success. Neither depends primarily on responsiveness to public opinion. Retrospective judgement⁵² may not work to assure accountability, is negated by the advantages of incumbency, and in any case it is likely to come too late. Money and media pressure can easily trump societal forms of influence.

Of course, there is also societal influence on elected representatives. But there is also the same in the case of courts, as the recent gay rights struggle in the U.S. clearly demonstrated. Civil society's influence works best when there is a plurality

⁵¹ Ibid. pp.

⁵² See Manin, B. *The principles of representative government*. Cambridge: Cambridge University Press, 1997

of potentially conflictual political agencies that can be addressed. When it comes to constitutionally relevant issues, courts are the major relevant actors. When they are under threat or lose their independence civil society loses, irrespective of the issues at hand. On balance therefore, in spite of the importance of the cause President Roosevelt represented, it was very important that he lost his effort to pack the court and to undermine its independence. Had he won, it is possible that the American welfare state could have been more developed. But we would not have had the Supreme Court play a leading role in civil rights, rights of privacy and the limitation of presidential emergency and war powers.

Populism is a pathology of civil society, or of Rosanvallon's counter-democracy. This pathology effects pluralistic initiatives of civil society as well. Given the conservative and oligarchy defending histories of many courts, it is very possible that especially left oriented initiatives will be hostile to courts. Indeed, populist regimes too can be shielded by packed courts. And yet, court oriented action remains potentially an important channel for civil society initiatives. When representation through elections fails, courts yield a second democratic channel that becomes all the more important under a populist government. It is an important task therefore to organize on behalf of judicial independence, and to engage in forms of discourse to which courts can positively respond. Conversely, the survival of courts as serious institutions depends on their openness to civil society demands and challenges. Populist authoritarianism can be resisted. But it may take a combination of institutional and extra-institutional action to accomplish its defeat.

Two strangely enough related examples will indicate what I have in mind. After the beginning of the attacks on the Constitutional Court in Poland by the PiS government, a broad social movement in defense of constitutionalism was mobilized.⁵³ The public actions involved were impressive. They could no longer address the Court itself whose legal majority was struggling against a packed version. But it may not be too much to postulate that aside from the many European critiques of the erosion of Polish constitutionalism, the influence popular democratic movement had a great deal to do with President Duda's (very likely temporary) Pauline conversion⁵⁴, when he chose to veto the last government statute that could have been the final destruction of judicial independence, and thereby Polish Constitutionalism.

⁵³ <https://www.euractiv.com/section/justice-home-affairs/news/thousands-protest-coup-against-constitution-in-poland/>; <http://www.iwm.at/transit/transit-online/committee-for-the-defense-of-democracy-in-poland-rebellion-of-the-beneficiaries-of-the-transformation/>

⁵⁴ see the two blog entries by Matczak, M. : Is Poland's President Duda on the Road to Damascus?, *VerfBlog*, 2017/7/26;; *President Duda is Destroying the Rule of Law instead of Fixing it*, *VerfBlog*, 2017/9/29 The first was apparently overoptimistic, but the struggle is not yet over.

Coming closer to home, the United States, in my view Donald Trump, clearly a populist leader, has only very partially been able to establish populism in government. While some of the figures as Vice President Pence himself indeed represent his grass roots support, others, the generals and the billionaires form a government that is more plutocratic than populist, i.e. openly representing sectional elite interests. It has only become even more clearly plutocratic with the firings of Gen. Flynn and S. Bannon. On the level of policy this government's results are also mixed. Through executive order, many of the anti-immigrant demands of the right wing populist militants have indeed been decreed. Down to this day however, the courts have resisted this use of presidential prerogative, most recently in the case of sanctuary cities. On the level legislation, the president's plutocratic supporters have not been able to accomplish the signature goal of repealing the ACA ("Obamacare"), with a really huge grassroots civil society mobilization, led by the so-called "Indivisible", and powered by women having played a decisive role. But, it is now very likely, that a plutocratic tax reform involving huge redistribution from poor and middle strata to the wealthy will be enacted.

But we are facing even greater dangers in the US than more regressive taxation, and dramatically unbalanced budgets for the next period. While the attempt to form a populist government has been a mixed success, there is a short cut to a populist regime, without even formal constitutional change as in Hungary and Turkey. This short cut, that is being also attempted in Poland, is court packing.⁵⁵ I do not have in mind merely the appointment of new federal trial and appeals court judges, in a procedure that has always been highly politicized. Now it has become even more so because of the unwise removal of the filibuster in the case of at least federal district and appeals judges by frustrated Democrats.⁵⁶ Given the nevertheless successful resistance of Republicans to Pres Obama's judicial appointments, Pres. Trump now will be able to make an unprecedented number of legal appointments. As we have

⁵⁵ R. Klain "Conservatives Have a Breathtaking Plan to Pack the Courts" Washington Post, November 22, 2017; L. Greenhouse "A Conservative Attempt to Weaponize the Courts; NY Times, November 23, 2017. For the text itself: Calabresi, S. and Hirji, S., "Proposed Judgeship Bill" (November 7, 2017). Northwestern Public Law Research Paper No. 17-24. Available at SSRN: <https://ssrn.com/abstract=3067662>

⁵⁶ This resembled in possible outcome to the Polish Liberal government's failed attempt at pre-emption, already discussed. It was pushed by rightly indignant Democrats, was a huge mistake nevertheless. There is a good argument to be made, not only that the rules for constituting courts should be "constitutional" but also that judicial appointments should always be consensual. It was authoritarian populists in Hungary, Turkey and Poland who abolished or reduced consensual procedures for the appointment of judges. Some wrongly characterized some of these episodes as entirely benign or as "unpacking." See Bali A., "Unpacking Turkey's 'Court-Packing' Referendum," MERIP, November 5, 2010, <http://www.merip.org/mero/mero110510.html>.

seen in the case of Roosevelt's 9 new judges, such use of the appointment power in the US is not court-packing but only a function of the unfortunate modus operandi in place. And it would constitute only a step, open to re-iteration, toward the replacement of liberal by a new and different constitution. It is the next step that may pass the threshold to a populist-plutocratic regime. There is now a plan proposed by intellectuals of the right wing Federalist Society, a plan that Trump is bound to love to, increase the size of the federal judiciary by 30 to 50 % by the next session of Congress, given the uncertain outcome of the 2018 elections. All this can be done in the US by ordinary legislation, though in my view at least the law would not be filibuster proof. Ron Klain suggests the court packing provision could even be included in the current tax bill, one that is free from filibuster under the "reconciliation rule". I disagree, because under Senate rules only the budgetary parts of such a bill could be passed by simple majority. But: the Senate could overrule its parliamentarian, and even move to abolish the 60 vote threshold. And it may be over-optimistic to expect the current Supreme Court to judge such a statute unconstitutional⁵⁷, both because the Senate constitutionally controls its own rules, and because the size of the courts in the U.S. , including the Supreme Court, has always been a legislative rather than formally constitutional matter.

It is a similar step leading to "court capture" that has been (perhaps only temporarily) resisted by President Duda in Poland, previously a willing organ of the government. Will the Republicans in the US Senate follow the example of Democrats in 1936 who resisted Roosevelt's court packing scheme? I think possibly, and right now there may be enough of them who would wish to doom the scheme. But this will happen only if they are put under the same organized popular pressure as in the case of the health care bill. But do the organized militants realize that the health of the constitution is almost as important as the health of individuals? We will see.

It may be too early to resist populism when it is still a movement, using instruments such as "militant democracy" without attacking the pluralism of civil society itself.⁵⁸ It may however be too late by the time a new regime has been founded and consolidated. The time of resistance for both courts and civil society is during the intermediary forms: either under populism as government, or even after the election of a populist leader who tends to abuse his powers. In the United States that time is now.

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⁵⁷ Greenhouse op.cit.

⁵⁸ See the debate in Sajó A, Bentsch LR, editors. *Militant democracy*. Eleven International Publishing; 2004.

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