

## CONSTITUTIONALISM OR POPULISM: VALUE AND INSTITUTIONAL CHOICE UNDER DEMOCRATIC TRANSITIONS

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### *Abstract*

The authors have conducted the political and legal analysis of such phenomena in modern civilization as constitutionalism and populism, their value and institutional foundations, and the negative impact of populist parties on the constitution transformations under democratic transition. The article proves that populists treat any legal procedures and institutions negatively, particularly those that cannot satisfy their goals. A means of political struggle populist parties resort to is the diminution of judiciary independence and the role of constitutional jurisdiction bodies. The experience of Central and Eastern European countries shows that it is almost impossible to combine populist legislation with the independence of constitutional jurisdiction bodies. The article emphasizes that populist parties, which enjoy a high credit of public trust, are trying to expand their powers by adopting populist constitutions.

*Keywords:* constitutionalism, populism, constitutional justice, constitutional crisis, policy.

### **I. INTRODUCTION**

Populists use the constitution as a facade to hide their true goal - concentration and retention of power. They are willing to sacrifice the constitution if it ceases to serve their purposes. Populist constitutions lose their legal essence and ability to be a constituent act of the people. When the populists initiate nationwide discussions on the amendment or adoption of constitutions, they pay no regard to the alternative opinions of the minority and political opposition. Populist constitutions become a political tool whereby a separate party rules solely and monopolizes the right to

represent public interests. It has been established that populist regimes tend towards direct democracy, and to this end, they proclaim the policy of "true democracy." This policy involves adopting a number of legislative acts that provide for the direct popular initiative. However, the populists offer such a democracy that cannot be equated with a participatory one.

A participatory democracy provides for the active participation of interested citizens in the social and political life of the country (region). The number of participants in such democratic processes

and the form they are conducted matter so do the reasons that motivate people to take part in them. The authors conclude by the systematic analysis based on the axiological approach that an effective mechanism for preventing political populism under transition is the legal ideology of the state relying on the principles of constitutional patriotism. This legal ideology combines the constitutional tradition and modern values of constitutionalism, which are as follows: the dignity of a human and nation; personal freedom and people's sovereignty; democracy and minority rights; limitation of the discretionary powers of public authorities, ensuring judicial independence. Constitutional patriotism lays the foundations for a new identity and a strong political nation and acts as an effective mechanism to prevent populism under constitutional transformation.

Constitutionalism is an indisputable asset of modern European civilization. This phenomenon represents a certain hierarchy of values based on human dignity and freedom. The values of constitutionalism are usually associated with the basic principles of a democratic state governed by the rule of law: the rule of law, the human rights priority, the sovereignty of people; distribution of functions of public authorities; independence of the judiciary. Constitutionalism includes a set of expectations on the conduct of legitimate government, while the constitution is a political and legal construct. As one of the main constitutionalism attributes, the constitution represents a result of social relations. It reflects the legal consciousness of the bearer of constituent power (people), common consensus on social values provided by the established legal order.

Modern constitutionalism faces many threats. It is often defined as a liberal ideology aimed at limiting public authority. Representatives of conservatism and radical ideologies (authoritarian nationalism and communism) claim that liberalism weakens public power, while the state must remain strong and have an exclusive coercive right. However, limitation on authority powers does not necessarily lead to the weakening of the state. Any political community may need protection

from enemies. However, when this problem is solved, the notion of "force" is no longer a determining factor in the relationship between society and the state. The key to legitimate constitutionalism is not fear but trust.

A. Sajo and R. Witz /1/ consider populism and excessive fascination with direct democracy to be one of the threats to modern constitutionalism. Populism is an antipode to constitutionalism, although it often resorts to the interpretation of constitutional values to achieve political goals. Populism has an authoritarian nature as its ultimate goal is the absolute concentration of power by manipulation of public consciousness. Populism always hostilely treats the mechanisms and values of constitutionalism, namely the system of checks and balances, the restriction of majority will and the minority protection, and even fundamental rights /2/. There is an ever-growing volume of research on incompatibility and even hostility of constitutionalism and populism in modern civilization /3/, /4/. However, the negative impact of political populism on forming new constitutional democracies, both at the value and institutional levels, has yet to be systematically explored.

Populism most acutely influences the countries where liberal democracy has only just come into force. These are the so-called Nations in Transit - the countries that have abandoned the authoritarian past and are on the way to building a new democratic society /5/, /6/, /7/, /8/, /9/, /10/, /11/, /12/. They are also called "hybrid democracies" since they have proclaimed democratic values, but the public legal consciousness still preserves the remains of paternalistic ideology due to external factors. The researchers point out several factors that pose a threat to hybrid democracies from authoritarian populism, and they are as follows: extractive institutions /13/, informal (corrupt) relations within the political establishment /14/, the inability of the national elite to resist authoritarian politicians in an orderly manner /15/, /16/, the weakness of civil society /17/, the lack of public confidence in the current government and the crisis of legitimacy /18/.

These processes are directly related to the crisis of national legal identity, which is accompanied by social anomia, the transformation of the value system, resentment feelings, intolerance, and xenophobia. It may entail populist parties to manipulate the public consciousness since they, focusing on sensitive and significant problems of public life, offer simple and, at first glance, no alternative ways to solve them in the short term. To achieve the goal of usurping public authority, populists can use both left and right ideologies. The experience of Central and Eastern Europe and former Soviet republics shows that populists often adopt national-patriotic slogans to use their mobilizing potential and create the illusion of identity.

The scientists in various fields of knowledge - lawyers, political scientists, sociologists - outline this feature of populist regimes. Thus, Francis Fukuyama /19/ points out that the basis of populism is nationalism, which divides people into "us" and "them" ("foreign"). Populism creates the illusion of identity, which represents a threat to liberal democracy in any of its forms. In this view, national identity comes as an exclusively negative phenomenon that is an integral part of the policy of populism. However, the authors consider this understanding of the connection between populism and identity somewhat simplistic and one-sided, as it does not take into account the following fact: the national idea is only a means for populism to achieve the main goal - the absolute concentration of power. Populists do not focus on the national state but the authoritarian one. They differ significantly since a modern political nation with a sense of dignity is that which unites people, while an authoritarian nationalist state is that which divides them.

## II. METHODOLOGY

The main objective of the study is to examine such phenomena in modern civilization as constitutionalism and populism, their value and institutional foundations, the negative effects of populist parties on the constitution transformations under democratic transition, and possible ways to prevent them. In particular, the article focuses on

national legal identity since it forms the basis for the ideology of constitutional patriotism, which is an effective mechanism to prevent the manifestations of populism, namely legal nihilism and civic indifference. The authors reveal how populism policy destructively influences the institutional level of Central and Eastern European countries and Ukraine under constitutional transformation and suggest ways to prevent it.

To achieve the set goal, a system-axiological analysis was used based on the priority of values that make up a certain hierarchy using the communicative theory of law. This methodological approach regards dignity and freedom, the fundamental values of this hierarchy, as an integral part of the legal personality not only of a human but also of the nation. In turn, constitutionalism represents the values and institutions formed in social communication. It reflects the legal consciousness of the bearer of constituent power (people), public consensus on established priorities, legal tradition, and socially significant behavior.

The scientific knowledge of constitutionalism and populism requires appropriate tools to be carefully selected - principles, tools, and methods of research that constitute its methodology. Constitutionalism and populism are complex political and legal phenomena, and its subject of scientific research has an interdisciplinary character. It cannot be studied within legal or political science solely. In this study, systematic analysis along with methodological pluralism was used.

In particular, the authors applied both general and special legal methods of cognition. The main method among the above was the comparative legal method, which allowed analyzing the features of the constitutional transformation in Central and Eastern European countries and the negative effects of political populism on this process. By the historical and legal method, the authors examined the role of the legal tradition in the formation of national identity as a protector against the spread of populism. Psychological means to cognize law allowed explaining the role of civil

legal consciousness in overcoming the imaginary ideologies of populism, in particular, regarding identity. The formal legal method helped to determine the legislative limits of discretionary powers of public authorities under modern constitutionalism. The forecasting method was used in summing up the results of this study. The article examines the constitutions and constitutional laws of Central and Eastern Europe and Ukraine and the practice of constitutional reform in some of them. The article also involves judgments of the European Court of Human Rights and the European Court of Justice. The practice of constitutional jurisdiction bodies of Nations in Transit takes an important place in the study.

### III. RESULTS

The greatest hidden threat to modern constitutionalism is populism. Populism does not constitute a holistic ideology but only uses its ideas and fragments: "This is not an ideology but political logic - a way of thinking about politics" /20/. This is a system of psychosocial attitudes, which provides for a special type of behavior of society and the elite under crises and the anomia of social structures. Populism is based on negative social mobilization caused by the loss of public confidence in the government. In this view, populism is an identity crisis, amorphous state of ideology, destructive crowd behavior; broken public expectations, egalitarian policies, lack of social and historical responsibility.

The populist way of thinking is always linked with the substitution of values and the crisis of legal identity. Political populism views a person as a passive participant in a historical process who does not realize himself or herself as part of a particular legal culture. Such a person is a kind of "legal cosmopolite," whose personality formation does not depend on established tradition. Dignity, freedom, and justice are examined as self-sufficient values independent of the social context. Thus, self-respect and glorification of individual "self" are sufficient for a person's dignity and do not depend on the assessment of the "other." Freedom is measured by the ability to do anything at sole discretion without any

regulatory restrictions. Instead, everything that brings the greatest possible benefit to an individual is fair, regardless of the possible negative consequences for others. The core of populism is legal nihilism.

Alternately, communication is decisive for a person as a legal entity. The communicative orientation of the human person creates the natural preconditions for the existence of law, which presents a result of intersubjective interdependent relations. The human "self" has an immanent legal meaning, which is manifested only through communicative interaction /21/. Human subjectivity is constituted simultaneously through an autonomous status toward the "other" and correlation with the "other." In a social context, a person subject to law is a holder of rights, inalienable from the subject as a participant in social communication. The law is manifested only in society as a particular order of social relations with the participants, who have social freedom of action, enshrined in the duties of others. The extent of this freedom (limits and content of rights and duties) are determined by socially recognized and universally binding rules of good conduct /22/.

According to populism, a person stays out of both the legal identity and the democratic process. In this regard, a person is indifferent to civic life and the strategic perspectives of the home state. An integral part of a person becomes egocentrism, psychological hedonism, and consumerism. Populist parties use this feature of human psychology to mobilize their supporters against political opponents who seem to pose a threat to their "self," holding the interests of "others." They also resort to ethnic, cultural, and religious differences to make public sentiment radical. Populism is a threat to a person since it treats him or her as a means of achieving absolute political power. If a person stays out of the legal tradition, he or she becomes vulnerable and weak and falls under imaginary identities, artificially created by populists. This causes an "escape from freedom" /23/. The ideologists of authoritarian regimes resort to the populism policy, and consequently, it forms the social basis of authoritarianism.

On the contrary, the legal tradition forms the basis of an identity, which can unite a political nation and prevent legal nihilism. Thus, C. Varga /24/ states: "Tradition is an awareness of the inherited mode of culture, serves as inspiration for identification with the community, and requires the durability of an incentive or explanatory force... It is only a meeting of two parties, a choice of a fragment in the past or an assessment of the phenomena attributed to it so that the present viewed through the future can be associated with the past as its worthy continuation, given inherited values". As H. Patrick Glenn /25/ rightly points out, tradition is the transmission of information through time. Such information is called communicable (communicable information). Traditions determine the content of the social and people's identity. If the values of constitutionalism are viewed through the methodology of tradition, one can identify the mechanisms of their formation and replication in both legal consciousness and constitutional jurisprudence.

Populists have neither ideology nor a cohesive group of people who can be called their voters. They can be representatives of different social strata, regardless of their preferences, affiliation, and social status. Similarly, the leaders of both the ruling and opposition parties can represent the political establishment of populist movements. Populism does not clearly differentiate between people and the elite but is characterized by conflicting relations between these two groups. In their slogans, the populists put emphasis on public fears and build policies on them, turning people against the uncompromising elite. As John B. Judis /26/ notes, they become a catalyst for political change.

### **Populism as a transnational political phenomenon**

In the context of globalization, populism has acquired the features of a transnational political phenomenon. The popularity of populist parties grows all over the world, it has gone beyond the nation-state. Populism has become a real threat to the rule of law in a state, regardless of its geographical location. The policies of Donald Trump,

Marie Le Pen, Hugo Chavez, Recep Tayyip Erdogan, Viktor Orban, and Vladimir Putin negatively affect the rule of law and democracy in the above countries.

It can be stated that society has been ill-prepared for new spontaneous challenges even in the most developed countries. Principles of the rule of law and human rights that dominate in ideology do not receive sufficient protection. Legal systems are unprepared to ensure their implementation, while political elites cannot offer effective ways to overcome crises in society and the state. Thus, the United States, a country with the most stable democracy, has faced a threat to its political and legal system due to the crisis of legal identity and democratic values. The real threat populist policy could pose to modern constitutionalism was clearly shown on January 6, 2021, during the Capitol riot.

Populism has become a characteristic feature of political regimes in Central and Eastern European countries, post-Soviet republics including Ukraine, which move toward modern constitutional democracy. It has led to the involution of constitutionalism in many of the above countries, which always entails rejecting the principles of ideological pluralism and political neutrality by constitutional jurisdiction bodies. Each country used various methods involving different technologies of constitutional revision: convening Constituent Assembly or holding a national referendum, amending the preamble of the constitution and constitution itself, their judicial interpreting. The choice of a particular technology or a combination of them depended on the level of social support for the populists and the degree of their control over government institutions /27/.

Functions of public authorities and the form of government primarily fell under constitutional transformation in these countries. To this end, various ways of finding political balance have been tested:

1) achieving mechanical stability through the dominance of the populist party (or coalition) in

parliament, followed by control over other branches of government and changes in the constitution or constitutional law (Hungary, 2012; Poland, 2015-2018; Ukraine, 2010-2013, 2019-2021);

2) the use by populist parties of political instability and conflict in the system of higher public authorities (president, parliament, government) to their benefit (Bulgaria, 2016, Romania, 2012-2015);

3) attempts to change previously established forms of government in favor of the dominant political forces.

The latter can be illustrated by the following examples: Croatia abandoned the bicameral parliament and reduced presidential powers in 2001; the Czech Republic introduced nationwide presidential elections in 2012; Poland and Romania discussed the issue of changing the form of government; Latvia discussed the changes to presidential elections, where the President is elected not by the Parliament but all citizens or the Electoral Board.

All these countries attempted to redistribute power, while Ukraine changed the system of organizing public authorities in 2004, 2010, and 2014. It was a way for the countries to overcome political apathy and instability, increase the legitimacy of power, or entrench the dominant position of the populist party by the Constitution. One of the dangers of political populism under democratic transformation is the depreciation of the principles of the rule of law and democratic legitimacy, which results in the constitutional crisis of the existing legal order. In a general context, the principle of the rule of law can be defined as a social consensus on fair laws that should limit the ruler's discretionary powers at a certain point in time. Rulers are not sovereign, unlike law, and are legitimate as long as they derive their powers from the latter /28/. In a constitutional state, power ceases to be the de facto domination of the people and is subject to the rule of law. As the Constitutional Court of Ukraine /29/ rightly

points out, the main purpose of the rule of law is to limit the state's power over a human and protect against the arbitrary interference of the state and its organs in certain spheres of life.

The established criteria for the functioning of public authority determine the rule of law. In its report, the World Justice Project recently published its annual Rule of Law Index 2020, which is considered the world's most complete database and the only one based on primary data. It measures a country's commitment to the rule of law based on the perceptions and experiences of ordinary people. The information was obtained in 128 countries by measuring data upon 8 factors: limitation on government power; absence of corruption; open government; ensuring fundamental human rights; order and security; regulatory enforcement; civil and criminal justice (including access to it). The first five places take Denmark, Norway, Finland, Sweden, Germany, respectively. Among the countries of Central and Eastern Europe, the leading positions are occupied by Estonia (10th place), the Czech Republic (17th), Slovenia (24th), Poland (28th), and Romania (34th). Hungary, Bulgaria, and Serbia lag far behind them, being ranked 50th, 52nd, and 77th, respectively. Ukraine goes 72nd, and the authoritarian regimes in Belarus and Russia take 65th and 89th places, respectively. There is every reason to believe that the rating of these countries will fall significantly, given the 2020 Belarusian presidential election and mass protests they caused, as well as the poisoning and subsequent detention of Alexei Navalny, the opposition leader, by Russian authorities /30/.

As we have noted, the populists are trying to concentrate all power within their political force. To achieve this goal means to put pressure on the independent judiciary, the civil service, law enforcement authorities and the media, and a person in general as a subject to the law. In this context, the key is to establish control over the judiciary and involve it in the political process. This primarily concerns the Supreme and Constitutional Courts. Such populist political parties as Fidesz in Hungary and Law and Justice in Poland

introduced reforms to the judiciary systems in the first days after the election. The Council of the European Union has described these reforms as those that contradict the rule of law.

It is not without reason to believe that populists have a negative attitude towards any legal procedure and generally oppose institutions. They do not accept the idea of representation and, more to the point, prefer direct democracy, a referendum in particular. However, Jan-Werner Muller /31/ considers such statements are only partially true and apply to populist parties in opposition. Populists oppose themselves only to those institutions which, in their opinion, cannot produce political results in the moral (rather than empirical) sense of the word. The populists who came to power would have no objections to their own institutions.

Law and Justice, the ruling party in Poland, has been carrying out the judicial reform for five years, which is mainly aimed at dismissing judges disloyal to the government and ensuring control over "independent" court decisions /32/, in particular over the Supreme Court, as it has the right to consider and decide on the legality of elections. The implementation of reforms by the ruling party involved the following: the status of the Disciplinary Chamber of the Supreme Court has been enshrined in law; attempts to establish advisory councils at the courts (to ensure public control over the administration of justice at all levels); the retirement age for judges of the Supreme Court was lowered from 70 to 65. These and other initiatives bear the mark of political populism since they violate the principle of independence of the judiciary - a basic component of the rule of law. This decision in the case of reducing the retirement age was made by the European Court of Justice on June 24, 2019, and the European Court of Human Rights on November 5, 2019 /33/.

#### **Populism in Ukraine: theoretical principles and problems of studying the phenomenon**

The situation is similar in Ukraine, where each newly elected president reorganizes the system of

public authorities on the grounds of political expediency. This process was especially intensified during the presidential term of Petro Poroshenko and Volodymyr Zelensky. Thus, the President P. Poroshenko and the Petro Poroshenko Bloc "European Solidarity" initiated the Verkhovna Rada of Ukraine to adopt the Law of Ukraine "On Amendments to the Constitution of Ukraine (regarding justice)," which entered into force on June 2, 2016. Instead, the President of Ukraine V. Zelensky and the political party Servant of the People, which forms the parliamentary majority, are initiating amendments to the legislation on justice. These amendments should ensure control over the Supreme Court, the High Council of Justice, and the High Qualifications Commission of Judges. As in neighboring Poland, attempts to reform the judiciary have caused concerns among the domestic experts and those from the European Commission for Democracy through Law /34/.

A means of political struggle populist parties resort to is the diminution of independence and the role of constitutional jurisdiction bodies. A vivid example of achieving this goal is the populist reorganization of the Constitutional Court of Hungary. The 2012 Constitution and amendments to it significantly limited the powers of the Constitutional Court of Hungary, its independence, and a place in the system of higher public authorities. The Court was deprived of the right to declare laws on amending the constitution as unconstitutional if voted for by a qualified majority, namely two-thirds of the constitutional composition of parliament. All decisions of the Constitutional Court adjudicated before 2012 were recalled. At the same time, the positions of the Supreme Court and the Prosecutor's Office were strengthened /35/.

Constitutional jurisdiction is subject to political attacks now, and this has become a feature of the modern constitutional process in Ukraine. Its culmination was the initiative of President V. Zelensky to terminate the entire Constitutional Court within the Draft Law of Ukraine "On Restoring Public Confidence in Constitutional

Proceedings," which was registered as No. 4288 on October 29, 2020. The Draft Law was the reaction of the President of Ukraine to the decision of the CCU, which invalidated Article 366-1 (inaccurate declaration) on October 27, 2020. The majority of domestic and foreign experts in constitutional law believed such a way to restore public confidence in the Constitutional Court had all the signs of unconstitutionality. Only the civic position on this issue forced the Head of State to withdraw the proposed draft law from the parliament.

The situation testified to the political crisis in the system of functioning of public authorities, at the center of which was the Constitutional Court. The Venice Commission offered legal ways to overcome the existing situation in its opinion as of December 9, 2020 /36/. However, the constitutional conflict between the President and the Constitutional Court is political in nature. In general, the body of constitutional jurisdiction has three possible options to oppose the attempts to involve it in the political process:

- 1) the Court makes fair and balanced decisions, thus restoring public confidence on its own (as it was in the early years of independence);
- 2) the Court distances itself from the political process and delegates the solution of important social issues to the parliament, in fact, to the parliamentary majorities - coalitions (Bulgaria and Romania during the parliamentary crisis);
- 3) the Court itself expresses populist sentiments within society (Hungary and Poland during the rule of populist parties).

The situation becomes even more complicated since the populist parties involve the public in attacking the constitutional courts under the so-called "fight against corruption in the judiciary." Since higher public authorities have little knowledge of legal tradition to respect the independent judiciary, and the society possesses a low level of legal culture concerning the inviolability of constitutional institutions, it poses a threat not only to constitutionalism but also to state

sovereignty. This negative phenomenon can be prevented if the state conducts a consistent law policy aimed at raising legal awareness of citizens. The prevention of such a phenomenon can also be the use of criminal liability for attempts to undermine the foundations of the state's constitutional order to those senior officials who act as its guarantors.

The rule of law in a constitutional state is achieved primarily through the rule of the constitution. Populist parties, which enjoy a high credit of public trust, are trying to expand their powers by adopting populist constitutions. Populists use the constitution as a facade to hide their true goal - concentration and retention of power. They are willing to sacrifice the constitution if it ceases to serve their purposes. Populist constitutions lose their legal essence and ability to be a constituent act of the people as citizens participate in their adoption only formally. When the populists initiate nationwide discussions, they do not account for the alternative opinions of the minority and political opposition. Populist constitutions become a political tool whereby a separate party rules solely and monopolizes the right to represent public interests.

Thus, a nationwide deliberative discussion preceded the adoption of amendments to the Constitution of Hungary, 2012. According to the information released by the current authority, 920 thousand citizens participated in it. Fidesz, the populist party, could interpret the results of this discussion as an indicator of the legitimacy level obtained during the 2010 election when it won a majority (two-thirds of seats) in parliament. Although the actual voting results showed that it received 53%, i.e., 2.7 million votes out of 8 million voters /37/. The opposition was not involved in the discussion of the new text of the Basic Law, and all the suggested innovations concerned the expansion of powers of the Prime Minister of Hungary and the ruling party. On the contrary, powers of the Constitutional Court and some individual rights (prohibition of abortions, same-sex marriages, etc.) were significantly restricted due to the amending of the Constitution. Victor

Orban took the comments of the UN and the Council of Europe on the updated constitution as a “criticism not of the authorities but the Hungarian people” /38/.

Under authoritarianism, the participation of citizens in adopting or amending the constitution is even more formal. Thus, amendments to the Constitutions of Belarus (2004) and the Russian Federation (2020) provided for the extension of the maximum presidential term were adopted in a nationwide referendum. The main goal of the referendum was to usurp power in the country, although its initiators publicly emphasized its public importance. Thus, amendments to the Constitution of the Russian Federation were announced to citizens as the President’s initiative to improve the social standards of the population. Criticism from the opposition was presented, on the contrary, as propaganda directed against people and state sovereignty and was persecuted by law enforcement officials.

The Constitution of Ukraine adopted in 1996 has undergone significant changes for twenty-five years. In general, the amendments to the Constitution of Ukraine can be divided into two types: those that changed the form of government and those that concerned only separate legal provisions. In the first case, the example can be the amendments to the Constitution of 2004, which caused the substitution of a parliamentary-presidential form of government by a presidential-parliamentary one. In both the first and the second case, the amendments to the Constitution were initiated by the ruling political party, represented by the President of Ukraine. Citizens remained passive participants in this process, although their representatives were involved in the advisory board’s activities to develop further amendments to the Constitution under the President of Ukraine: the National Constitutional Council, the Constitutional Assembly, the Constitutional Commission, and the Law Reform Commission.

A social poll on the attitude of Ukrainians to the Constitution, conducted in June 2019 by the Center for Political and Legal Reforms, proved the

formal participation of citizens in amending the Constitution of Ukraine. According to its results, 46.6% of citizens did not read the Constitution of Ukraine, and 9.6% read about the Constitution in the media. When asked what was the purpose to read the Basic Law, 50.9% of citizens answered they wanted to figure out their rights, 22.4% checked the compliance of public authorities with the Constitution, 17.6% discovered what would be the political system, and 31.7% read the Constitution as it was necessary for study or work. When asked who is the only bearer of sovereignty and the source of power in Ukraine, 46.4% of Ukrainians called the people, 34.3% named the President of Ukraine, 9% mentioned the Verkhovna Rada, 8.1% could not answer, and 2.2% named the Supreme power (God) /39/.

An active civic position in adopting or amending the constitution as a constituent act of the people is important for at least two interrelated reasons. Firstly, it contributes to forming a single political nation, and secondly, it prevents the manifestations of populism in the constitutional process. Legal identity based on national constitutional patriotism is the most effective tool to prevent the concentration of state power within a single populist party. National constitutional patriotism involves combining two interrelated values - the dignity and freedom of each individual and national dignity and collective security. Such a dichotomy of values lays the foundation for the legal ideology of the modern constitutional state, especially at the stage of its formation.

Populists openly conduct the “colonization” of the state power as if they have a moral right to do so on behalf of the “one whole people.” This is what makes them different. In other words, the ruling parties, Fidesz or Law and Justice, are not just building a state focused on their political force but also trying to create the one whole people of Fidesz or Law and Justice by declaring themselves “their servants.” Populists try to create the same “one whole people” or “true nation,” homogeneous and uncontroversial, on whose behalf they can constantly act /40/. In favor of the “true nation,” populists hold national

referendums where they affirm the idea of their special status in relation to “false nations” and thus implement the policy of nativism. An example can be the EU refugee quota referendum held in Hungary, 2016.

Populist regimes tend to direct democracy and consider it as a means of manipulating consciousness. To this end, they proclaim the policy of “true democracy,” which involves adopting several legislative acts provided for the direct public initiative.

The 2019 election campaign of the President of Ukraine V. Zelensky also took place under the slogan of introducing an effective mechanism for democracy in Ukraine. However, the very first steps in its implementation were more populist in nature, unrelated to democratic legitimacy and constitutional procedure. Thus, the President initiated a nationwide poll on five issues of great social importance on October 25, 2020. Legitimacy and constitutionality of a poll were called into question since it was scheduled for the day of the local elections. This gives grounds to consider such a form of public will, which is not provided for by law, as a means of administrative pressure to enhance the participation of the President’s supporters in elections. Regarding the observance of the rule of law, both the purpose and the organization and financing of the initiated event remained unclear.

The adoption of the Law of Ukraine On Democracy through all-Ukrainian Referendum in 2021 continued pro-government democratic initiatives. Despite its progressive nature, it remains unclear which “public initiatives” the political establishment plans to approve as a priority. The following mechanisms for democratic legitimacy the Ukrainian people are left without are no less important than nationwide referendum: legislative regulations on the holding local referendum; public legislative initiative; functioning of the parliamentary opposition; the right to elect heads of village, settlement, and city.

The post-Soviet leaders of authoritarian-populist regimes also actively resort to the idea of democracy. Alexander Lukashenko, the President of Belarus, constantly “worries” about the fate of “hard-working Belarusians,” most of whom are employees of state-owned enterprises. In this regard, the President even signed the Decree against parasitism, provided the citizens to pay an annual fee for non-payment of taxes, 2015. The President of Russia, Vladimir Putin, periodically addresses the ideology of the “state-forming people” and the social basis of its policies both within Russia and abroad.

However, the democracy proposed by the populists should not be equated with the participatory one. The latter provides for the active participation of interested citizens in the social and political life of the country (region). The authorities cannot initiate participatory democracy since it is a conscious civic position developed to prevent manipulations from authorities. Moreover, the number of participants in such democratic processes and the form they are conducted matter so do the reasons that motivate people to take part in them. The true sovereignty of people is manifested when these reasons are focused on legal principles and values rather than political personalities or populist slogans.

#### IV. CONCLUSIONS

Thus, populism is the greatest hidden threat to constitutional values such as dignity, freedom, and justice. It regards a human as a passive participant in the political process, who stays out of the legal culture and folk traditions and shows indifference to public life and prospects for state development. It is characterized by legal nihilism and social indifference. Populism poses a threat to people and society as it destructively affects their consciousness and forms a social basis for authoritarianism and hybrid democracy.

Populist parties represent a threat to the constitutional order under democratic transit. Populists use the constitution as a facade to hide their true goal - concentration and retention of power. They are willing to sacrifice the constitution if it ceases

to serve their purposes. Populist constitutions lose their legal essence and ability to be a constituent act of the people as citizens participate in their adoption only formally. When the populists initiate nationwide discussions, they do not account for the alternative opinions of the minority and political opposition. Populist constitutions become a political tool in a race for power.

A means of political struggle populist parties resort to is the diminution of judiciary independence and the role of constitutional jurisdiction bodies. The situation becomes even more complicated since the populist parties involve the public in attacking the constitutional courts under the so-called "fight against corruption in the judiciary." The basis of the legal ideology of the modern national constitution should be the formation of a high level of public legal consciousness provided for patriotic education of society and elite and criminal responsibility of all those who undermine the constitutional order by questioning the universal and national values enshrined in the Constitution.

The spread of populism in Nations in Transit can be effectively prevented through the ideology of constitutional patriotism as the basis for developing a new identity and strong political nation. It must combine both the constitutional tradition and modern values of constitutionalism. Restoration of continuity while forming new rules for the functioning and interaction of public authorities and civil society involves compliance with many principles: the rule of law and the constitution; human and national dignity; personal freedom and the sovereignty of people; participatory democracy and minority rights; limitation of the discretionary powers of public authorities and ensuring judicial independence. The possibility of the involution of constitutionalism caused by populism depends on the value-based and institutional choices of each political nation that has faced this threat.

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