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### **The Populist Challenge to the European Court of Human Rights**

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# **The Populist Challenge to the European Court of Human Rights**

Jan Petrov\*

## *Abstract:*

The past decade gave rise to serious criticism of the ECtHR. This article analyzes the position of the ECtHR with regard to a more recent phenomenon challenging the ECtHR – an unprecedented wave of populism in Europe. The article argues that the rise of populism not only intensifies the pressure on the ECtHR; it poses a serious and distinctive challenge to the ECtHR since supranational judicial review is at odds with the populist ideology. What makes the populist challenge to the ECtHR distinctive is the combination of the ideological basis of populism, its wide appeal and capacity to reach ordinary people, and populists' tendency to change the institutional landscape and remove limitations on power. With respect to the last point, the article takes stock of the ECtHR's institutional setting through the prism of the populist challenge. It concludes that the Strasbourg Court is quite well-equipped to prevent or withstand eventual populist attacks targeting the structural features of the Court or the judicial personnel. The main features of the ECtHR's resilience are decentralization of the system, rather high level of judicial self-government and institutional safeguards of judicial independence. However, due to exploiting the “narrative of blame”, populism is very strong in another anti-court strategy – achieving gradual erosion of an institution through change of public discourse and delegitimization. This strategy is particularly threatening for the ECtHR due to its vulnerability to legitimacy challenges manifested in the past decade. As a result, the populist challenge will likely require careful management of the ECtHR's social legitimacy and changes to the ECtHR's legitimacy-seeking strategy.

## **1. Introduction**

The European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR or the Strasbourg Court) have been labelled as “the most effective human rights regime in the world”<sup>1</sup> or as “the crown jewel of the world's most advanced

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international system for protecting civil and political liberties.”<sup>2</sup> However, for some time, the Strasbourg Court has been “under substantial pressure”<sup>3</sup> resulting from criticism and resistance against the ECtHR. Contemporary social and political developments in Europe do not suggest that the pressure is going to ease anytime soon. Particularly the “populist explosion”<sup>4</sup> may likely result in even greater pressure imposed on the Strasbourg Court, as the unprecedented rise of populism arguably amounts to the largest political transformation of Europe since the end of the Cold War.<sup>5</sup> Despite all that, the populist challenge to the ECtHR has not yet been much studied. This article aims to partially bridge this gap and explain how and why the rise of populism challenges and may eventually threaten the ECtHR’s independence, authority and legitimacy.

The article argues that the rise and electoral success of populist actors have been growing towards a major change of the socio-political context of European supranational adjudication. More specifically, the article claims that the populist challenge to the ECtHR is distinctive due to the combination of the ideological basis of populism, its wide appeal and capacity to reach ordinary people, and populists’ tendency to change the institutional landscape and remove limitations on power. Populism provides an ideology addressing how “real” democracy should work and, thereby, offers an alternative to the liberal democratic system. Populism tends to include (international) courts in the populist “narrative of blame”, which explains who is responsible for the current problems of the ordinary people and how to resolve them. With this appealing narrative that increasingly resonates in the general public, populists possess a capacity to shift the prevailing norms

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<sup>1</sup> Alec Stone Sweet & Hellen Keller, *Introduction: The Reception of the ECHR in National Legal Orders*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 11 (Hellen Keller & Alec Stone Sweet eds., 2012).

<sup>2</sup> Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *EJIL* 125, 125 (2008).

<sup>3</sup> PATRICIA POPELIER, SARAH LAMBRECHT & KOEN LEMMENS, *CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS LEVEL* (2016).

<sup>4</sup> JOHN JUDIS, *THE POPULIST EXPLOSION* (2016).

<sup>5</sup> Martin Eiermann, Yascha Mounk & Limor Gultchin, *European Populism: Trends, Threats and Future Prospects*, Institute for Global Change (Dec 29, 2017), <https://institute.global/insight/renewing-centre/european-populism-trends-threats-and-future-prospects>

concerning political non-interference with the judiciary. At the same time, implementation of the ideological principles of populism leads the populist leaders to a specific constitutional project; when in power the populists tend to get rid of limitations on their power or even capture the checks and balances institutions.

All those aspects imply that populism presents a major challenge for the ECtHR. Hence, it is apt to examine how well the ECtHR is situated to withstand the populist threat. The article examines the Strasbourg Court's institutional setting through the prism of two major anti-court strategies – limiting a court's ability to interfere with the given agenda (e.g. by jurisdiction stripping, paralyzing the court), and “taming” the court by targeting the judicial personnel. It concludes that the ECtHR is quite well-equipped to prevent or withstand eventual attacks on its structural features and judicial personnel thanks to decentralization of the system, rather high level of judicial self-government and institutional safeguards of judicial independence. However, the populist era makes another, less straightforward anti-court strategy particularly threatening – sidelining the court through achieving gradual erosion of its authority and social legitimacy on the domestic level. Such a strategy is particularly threatening for the Strasbourg Court since the populist main strength matches the ECtHR's weakness in vulnerability to delegitimization.

The rest of the article proceeds as follows. Part 2 reconstructs populism as an ideology and a constitutional project in order to understand the populist irritation with independent (international) judicial review. Since populists in power tend to consolidate their positions and eliminate limitations on their rule, Part 3 examines the Strasbourg Court's institutional setting and assesses the risks and resources in the ECtHR's design. It revisits the Strasbourg Court's design through the prism of major anti-court strategies and points out the main strengths and weaknesses of the ECtHR *vis-à-vis* the populist challenge. Part 4 concludes and suggests directions for responding to the populist challenge.

## **2. Populism as an ideology and constitutional project: A threat to international human rights courts?**

In the discourse of practical politics, populism is regularly used as a label to humiliate political opponents and blame them for demagoguery or opportunism.<sup>6</sup> However, populism amounts to something more; scholars have described populism as a particular political style, political movement, as a strategy or discourse.<sup>7</sup> In this vein, populism has been associated with strong political mobilization of the masses by a charismatic leader,<sup>8</sup> with radicalization of the emotional element in politics,<sup>9</sup> with seeking exercise of power based on “direct, unmediated, uninstitutionalized support from large number of mostly unorganized followers.”<sup>10</sup>

Besides that, populism has been studied as a distinct political ideology.<sup>11</sup> It is a thin ideology that does not aim to offer a complete map of the world like liberalism or socialism. Populism rather provides a set of ideas “about how democracy can and should work, and how leaders can and should relate to the people.”<sup>12</sup> Mudde put forth the following influential definition of populism as an ideology:

[A]n ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the *volonté générale* (general will) of the people.<sup>13</sup>

Similarly, other authors point out populism’s emphasis on exaltation of popular sovereignty, majority rule, homogeneity of the people and antagonism towards the elites.<sup>14</sup>

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<sup>6</sup> Cas Mudde, *The Populist Zeitgeist*, 39 GOVERNMENT AND OPPOSITION 542, 542-543 (2004).

<sup>7</sup> See examples in Takis Pappas, *Modern Populism: Research Advances, Conceptual and Methodological Pitfalls, and the Minimal Definition*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (2016) [goo.gl/kSZieT](http://goo.gl/kSZieT).

<sup>8</sup> MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 1 (1998).

<sup>9</sup> CARLOS DE LA TORRE, *POPULIST SEDUCTION IN LATIN AMERICA* 4 (2010).

<sup>10</sup> Kurt Weyland, *Clarifying a Contested Concept: Populism in the Study of Latin American Politics*, 34 COMPARATIVE POLITICS 1, 14 (2001).

<sup>11</sup> There are different versions of populism across the world and even across European regions. However, this paper mostly pursues the ideational approach to populism and concentrates on the unifying core of populist ideological underpinnings. On the ideational approach to populism see Cass Mudde, *Populism: An Ideational Approach*, in THE OXFORD HANDBOOK OF POPULISM 27 (Rovira Kaltwasser et al., 2017).

<sup>12</sup> Aziz Z. Huq, *The People Against the Constitution*, 116 MICHIGAN LAW REV 1123, 1132 (2018).

<sup>13</sup> Mudde, *supra* note 6, at 543

<sup>14</sup> E.g. Margaret Canovan, *Taking Politics to the People: Populism as the Ideology of Democracy*, in DEMOCRACIES AND THE POPULIST CHALLENGE 25 (Yves Mény & Yves Surel eds., 2002); Nadia Urbinati, *The Populist Phenomenon*, 51 RAISONS POLITIQUES 137 (2013).

Jan-Werner Müller adds an important element. In addition to being anti-elitist, populists are also anti-pluralist as they claim the exclusive representation of the people and the popular will: “[P]opulists claim that they, *and only they*, represent the people.”<sup>15</sup>

As an ideology, populism is based on a specific understanding of fundamental concepts of constitutional and political theory. I argue that the combination of specific vision of the people, popular will, concept of the political and constitutional identity leads populists to a constitutional project, which is at odds with checks on the unmediated will of the ordinary people. In order to understand the distinctiveness of the populist challenge, it is first necessary to examine the populist vision of those concepts to understand how a political system should be designed according to populism.

### **A. The People**

The populist view of the people is exclusive, anti-elitist, anti-pluralistic and anti-individualistic. While liberal constitutionalism aims to bring together all the members of the pluralist society through the notion of the people, the starting point of populism is the bipolar account of society. According to populists, the society is divided into two groups: the (common, ordinary or real) people and the elite. Accordingly, not all the members of the society form the people in the populist sense.<sup>16</sup> The elite is defined broadly as the establishment – political, economic, cultural and media elites deforming the will of the real people.<sup>17</sup> Mudde and Rovira Kaltwasser explain that the populist notion of the people is both unifying and divisive. It aims to unify the majority and mobilize it against a common enemy – the elite.<sup>18</sup>

The populist notion of the (common) people is extremely vague, even fictional.<sup>19</sup> Invoking the concept of (common) people often refers to an undefined group allegedly excluded from power – the people oppressed by the elites. Such a blurred conception allows populists to unite different social groups and generate their shared identity.<sup>20</sup> Moreover,

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<sup>15</sup> JAN-WERNER MÜLLER, WHAT IS POPULISM 20 (2016).

<sup>16</sup> MÜLLER, *supra* note 15, at 21.

<sup>17</sup> CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 12 (2017).

<sup>18</sup> *Id.* at 11; see also Canovan, *supra* note 14, at 34.

<sup>19</sup> *Id.* at 20.

<sup>20</sup> MUDDE & ROVIRA KALTWASSER, *supra* note 17, at 9-10.

the bifurcation of society is further reinforced by the moralistic appeal. The common people are labelled as morally pure, whereas the elite as corrupt.<sup>21</sup>

## **B. Popular will**

The homogenous view of the common people as a united political entity forms the basis for conceptualization of the popular will. The populist account of the popular will is essentially monist – there is one united people, with one set of interests and one will.<sup>22</sup> The one will of the people is also well cognizable for the populist leaders since it stems from the shared consciousness of the people – the common sense. In other words, politics is about the issues of the common people being resolved according to the common sense.<sup>23</sup> Hence, the content of the popular will is not necessarily recognized through formalized processes of constitutional democracy, but rather intuitively deduced from the common sense shared by the real people.<sup>24</sup> Such popular will is then perceived as normatively and morally supreme.<sup>25</sup>

As a matter of practical politics, the popular will should be cognized and implemented in an *authentic* way.<sup>26</sup> According to populism, the main task of politics is to make the opinion expressed by the popular will identical to the authority expressed by the state.<sup>27</sup> The populist understanding of popular will is hence characterized by monism, self-evidence, moral correctness and the demand for its authentic enforcement. Authenticity of popular will's materialization brings us to the next element of populist constitutional doctrine – the specific vision of the concept of the political.

## **C. Concept of the political**

Populists criticize liberal democratic structures and constitutional procedures for deforming the popular will and depriving it of authenticity. The institutions and procedures of constitutional democracy have allegedly led to the replacement of politics

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<sup>21</sup> MÜLLER, *supra* note 15, at 24.

<sup>22</sup> Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 EUCONST 6, 11 (2016).

<sup>23</sup> Mudde, *supra* note 6, at 547 and 560.

<sup>24</sup> MÜLLER, *supra* note 15, at 26 and 102. See also Canovan, *supra* note 14, at 32.

<sup>25</sup> Ben Stanley, *The Thin Ideology of Populism*, 13 JOURNAL OF POLITICAL IDEOLOGIES 95, 101 (2008).

<sup>26</sup> *Id.* at 104-105.

<sup>27</sup> Urbinati, *supra* note 14, at 140.



with mere administration.<sup>28</sup> In combination with the restrictions of policy choices coming from the international realm and from the liberal language of political correctness,<sup>29</sup> liberal constitutionalist structures turned the polities into “democracies without choices”, according to populists.<sup>30</sup>

Populism aims to bring the authenticity of popular will back to politics. Therefore, it stands against the alleged depoliticization in liberal democracies and aims to repoliticize the public sphere.<sup>31</sup> Populism builds on the Schmittian concept of the political.<sup>32</sup> With regard to the populists’ conception of the people, it polarizes political conflict. Politics is driven by antagonism between the people and the elite. Such an antagonism and contestation is the core of politics. Without it, there is no politics, just administration.<sup>33</sup> Accordingly, the populist constitutional project refuses “the endless litigiousness” of liberal constitutionalism<sup>34</sup> and the democratic limitations in-built in the design of a constitutional democracy.<sup>35</sup> The same argument goes for limitations stemming from the international level.<sup>36</sup> Overall, populism proclaims “primacy of politics over law.”<sup>37</sup> Furthermore, populism tends to ignore the distinction between ordinary and constitutional politics<sup>38</sup> which leads to primacy of the popular will even over the constitution.<sup>39</sup> The Schmittian ideas are again invoked – according to populists the constituent power of the people does not vanish once the constitution is adopted. It is always present and can be exercised by the people: “In a democracy the people is the sovereign; it can break through the entire system of constitutional norms.”<sup>40</sup>

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<sup>28</sup> Mudde, *supra* note 6, at 555.

<sup>29</sup> *Id.* at 554 and 561.

<sup>30</sup> Ivan Krastev, *The Strange Death of the Liberal Consensus*, 18 JOURNAL OF DEMOCRACY 57, 60-61 (2007).

<sup>31</sup> Mudde, *supra* note 6, at 555.

<sup>32</sup> See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (1996).

<sup>33</sup> Stanley, *supra* note 25, at 97.

<sup>34</sup> Urbinati, *supra* note 14, at 147.

<sup>35</sup> Margaret Canovan, *Trust the People! Populism and the Two Faces of Democracy*, 47 POLITICAL STUDIES 2 (1999); Mudde, *supra* note 6, at 561.

<sup>36</sup> Paul Blokker, *Populist Constitutionalism*, VERFASSUNGSBLOG (May 4, 2017), <http://verfassungsblog.de/populist-constitutionalism/>.

<sup>37</sup> Gábor Halmai, *Populist Constitutionalism – An Oxymoron?* EUI BLOG (Nov 14, 2017) [goo.gl/Pz3s3C](http://goo.gl/Pz3s3C).

<sup>38</sup> Paul Blokker, *The Populist Threat to Democratic Constitutionalism*, EUI BLOG (Nov 14, 2017) [goo.gl/628t3w](http://goo.gl/628t3w).

<sup>39</sup> Halmai, *supra* note 37.

<sup>40</sup> CARL SCHMITT, *VERFASSUNGSLEHRE* 275 (1928). See also Heiner Bielefeldt, *Carl Schmitt’s Critique of Liberalism*, in *LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM* 23, 28 (David Dyzenhaus ed., 2014).

## D. Constitutional identity

Another element of the populist thinking is constitutional identity. According to Jacobsohn, constitutional identity “represents a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within the society who seek in some ways to transcend that past.”<sup>41</sup> Constitutional identity then serves as the basis for the construction of social and legal relationships in a given polity.<sup>42</sup> Similarly, Rosenfeld argues that constitutional identity is a reflection of an imagined community that needs to construe a “distinct self-image”.<sup>43</sup> Constitutional identity serves as a “frame of reference and a narrative allowing it to perceive itself as a constituted imagined community.”<sup>44</sup> Construing a specific narrative amounting to constitutional identity is crucial for populism. Unity of the common people implies a united constitutional identity.<sup>45</sup> Such a constitutional identity often takes a form of a (mythical) historical narrative about the greatness of the people.<sup>46</sup> More generally, populist constitutional identity often manifests as a “localist counter-movement[...] that profess to represent a given polity’s, region’s or a community’s ‘genuine’ identity.”<sup>47</sup>

The historical dimension of constitutional identity is often complemented with what I call “the narrative of blame”. Populism often rises from the discontent with the current situation and thrives due to the people’s anxiety and fear for the future. Accordingly, there is a demand for the political forces opposing the current system.<sup>48</sup> The supply side of populism – populist leaders – provides narratives explaining the causes and the meanings of the anxiety: “[H]ere is what is happening, this is why, and these are the people doing it to you.”<sup>49</sup> Hence, the populist constitutional identity narrative will likely be antagonistic

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<sup>41</sup> GARY JACOBSON, *CONSTITUTIONAL IDENTITY* 7 (2010).

<sup>42</sup> *Id.* at 8.

<sup>43</sup> Michel Rosenfeld, *Constitutional Identity*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 756, 759 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>44</sup> *Id.* at 759. See also MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* (2010).

<sup>45</sup> Corrias, *supra* note 22, at 13.

<sup>46</sup> *Id.* at 13; Urbinati, *supra* note 14, at 139.

<sup>47</sup> Ran Hirschl, *Opting Out of “Global Constitutionalism”*, 12 *LAW & ETHICS OF HUMAN RIGHTS* 1, 35 (2018). For a particular example see Gábor Halmai, *National(ist) Constitutional Identity? Hungary’s Road to Abuse Constitutional Pluralism*, EUI DEPARTMENT OF LAW RESEARCH PAPER NO. 2017/08 (2017).

<sup>48</sup> Dani Rodrik, *Populism and the Economics of Globalization*, 1 *JOURNAL OF INTERNATIONAL BUSINESS POLICY* 1, 24 (2018).

<sup>49</sup> *Id.* at 24.

and will seek to identify and blame those guilty of causing the anxiety of the common people – the elites.<sup>50</sup> The narrative can be based on the social class differences (leading to left-wing populism), ethno-national or cultural differences (leading to right-wing populism) or on the combination of both.<sup>51</sup> The dominant cleavage then co-determines who are the guilty ones – from multinational corporations (MNCs) to international elites imposing politically correct and progressive policies.<sup>52</sup> According to the populist narrative, the elite are to be blamed for the problems and anxiety of the people, which can be remedied by bringing back the authenticity to the popular will.

### **E. Populist constitutional project: Against courts, technocrats and the supranational?**

Combination of the populist understanding of the mentioned four elements has a major implication for constitutional politics – populists' unease with the idea of limiting power through checks and balances. Liberal constitutionalism values checks and balances as a desirable concept, which aims to limit the government and prevent tyranny, increase expertise of governance, and ensure legitimacy for the government policies.<sup>53</sup> Checks and balances also protect the people from their own temporary and possibly erroneous momentary passions by making the system of decision making decentralized and time-consuming.

Populism either does not see these values as desirable or does not believe that checks and balances deliver them. The populist constitutional project is against the liberal proceduralism and structures limiting the government. The description of the populist vision of the people, popular will, the political and constitutional identity explains this. According to populists, checks and balances actors compromise the authenticity of the popular will. Moreover, they are unnecessary and ineffective because the solution of the ordinary people's problems is simple and self-evident.<sup>54</sup> Thus, within the ideational view the populist constitutional project is against the constraints imposed upon the will of the

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<sup>50</sup> See e.g. Krastev, *supra* note 30.

<sup>51</sup> Rodrik, *supra* note 48, at 24-25.

<sup>52</sup> Canovan, *supra* note 14, at 32.

<sup>53</sup> Jenny Martinez, *Horizontal Structuring*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 547, 548 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>54</sup> Canovan, *supra* note 35, at 6.

(common) people – represented by the populist leaders – and tends to criticize and reject pluralism, minority rights and institutions designed to protect them.<sup>55</sup> Those legal structures and institutions are often included in the narrative of blame as sources of the people’s anxiety.<sup>56</sup>

In practice, populism often leans towards centralization of power, decline of checks and balances, disregard of the opposition,<sup>57</sup> and erosion of institutions protecting fundamental rights.<sup>58</sup> Those institutions are reformed or replaced in the name of the instant, effective and authentic enforcement of the united and homogenous popular will. For the same reasons, the populist constitutional project is against technocratic and non-majoritarian institutions, which can be easily portrayed as “institutionalized elitism and a threat to democracy.”<sup>59</sup>

Courts come to the forefront in this regard. Even though the judiciary has been one of the traditional three branches forming *trias politica*, it has undergone significant developments since 1945. The global spread of judicial review of legislation implies that constitutional or supreme courts have become one of the central actors of democratic lawmaking.<sup>60</sup> Certain issues were taken out of majority control and placed under the protection of judges. Also the ordinary courts lacking the power of constitutional review regularly influence and fine-tune public policies, as a result of judicial review of administrative acts and review of consistency of statutes with international human rights treaties or EU law.<sup>61</sup> Since courts and judges are generally more powerful and have greater say in the system of democratic governance, many populists leaders tried to control the courts once they got into power.

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<sup>55</sup> Mudde & Rovira Kaltwasser, *supra* note 17, at 81.

<sup>56</sup> *Id.* at 95.

<sup>57</sup> Urbinati, *supra* note 14, at 137.

<sup>58</sup> Mudde & Rovira Kaltwasser, *supra* note 17, at 84. Especially in the case of populist actors leaning to authoritarian populism, see Bojan Bugarcic & Alenka Kuhelj, *Varieties of Populism in Europe: Is the Rule of Law in Danger?* 10 HAGUE J RULE LAW 21 (2018).

<sup>59</sup> FRANK VIBERT, *THE RISE OF THE UNELECTED: DEMOCRACY AND THE NEW SEPARATION OF POWERS* 3 (2007). See also YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY* (2018).

<sup>60</sup> E.g. ALEC STONE SWEET, *GOVERNING WITH JUDGES* (2000); Ran Hirschl, *Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* (Gregory Caldeira et al., 2008).

<sup>61</sup> Leonard Besselink, *The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All*, 9 UTRECHT LAW REVIEW 19 (2013).

Besides judicializing politics through domestic courts, the post-1945 era brought about another trend – proliferation of international adjudication.<sup>62</sup> International courts (ICs) were designed to influence state behavior and shift states towards compliance with international law. During the past decades many ICs have undergone significant transformations. Scholars even refer to a paradigm shift in their creating and using.<sup>63</sup> The “new” ICs, or at least some of them, have become more powerful. They fulfil roles going far beyond mere resolvers of inter-state disputes, there is wider access to ICs, further domestic embeddedness, and some ICs have gained a higher degree of independence from the nation states' control.<sup>64</sup> As a result of these changes, the authority of ICs – the ECtHR among them in the forefront – and their power to alter domestic politics has notably increased during the past decades.<sup>65</sup>

A related issue is the populist resentment towards international human rights law, especially towards its universalistic aspirations. International human rights norms are viewed as particularly non-democratic and individualistic obstacles to domestic governance in the name of the people.<sup>66</sup> As a result, the international human rights courts and quasi-judicial bodies are attacked, as well as NGOs helping to bring the cases before those bodies.<sup>67</sup>

The rise of ICs illustrates a more general tendency – internationalization of limits imposed on majoritarian governance. Globalization, increase of influence of international organizations, international NGOs and corporations – all those limitations stemming from the international realm have been understood by populists as external obstacles constraining the realization of the authentic popular will of the common people by the international unaccountable elites. It is thus a commonplace that populists include international actors and the national leaders supporting them in the narrative of blame.

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<sup>62</sup> Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 NYU J INT'L L & POL 79 (1999).

<sup>63</sup> KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW COURTS, POLITICS, RIGHTS* 3 (2014).

<sup>64</sup> Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 IO 457, 469 (2000); Karen Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37 (2008).

<sup>65</sup> Karen Alter, *Tipping the Balance: International Courts and the Construction of International and Domestic Politics*, 13 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 1 (2011). But see Part 3 below for numerous examples of pushback and backlash against ICs.

<sup>66</sup> Blokker, *supra* note 36.

<sup>67</sup> Philip Alston, *The Populist Challenge to Human Rights*, 9 JOURNAL OF HUMAN RIGHTS PRACTICE 1 (2017).

Latin American populism, for instance, is often aimed against opening of markets, entry of MNCs to sensitive domestic sectors or IMF policies.<sup>68</sup> In Europe, populism is regularly coupled with Euroscepticism criticizing the elitist and non-representative nature of the European integration.<sup>69</sup>

According to Posner, recent events even show that the post-Cold War liberal internationalism might have reached its limits.<sup>70</sup> The benefits of globalization were not equally distributed and many have the feeling of being left behind by globalization and international institutions.<sup>71</sup> The populist leaders have been able to argue that international decision makers act in the interest of elites, not ordinary people. As a result, “international institutions have provided a convenient target for populists, as have the national leaders who have supported them. The populists have been able to blame globalization and international law for insecurity and economic dislocation as a way to undermine the establishment elites who constructed them.”<sup>72</sup>

#### **F. Distinctiveness of the challenge posed to the ECtHR by populism**

ICs, and the Strasbourg Court in particular, have always been challenged.<sup>73</sup> In fact, during the recent past, the Strasbourg Court has been criticized by many audiences including national governments, domestic judges, scholars, mainstream media and even the Pope.<sup>74</sup> And although such criticism has sometimes made use of some elements of the populist logic, this article argues that the populist challenge is distinctive.

The distinctive challenge of populism as an ideology is a result of several features. First, although a thin ideology, populism provides a complex view of how democracy should work. Unlike some of the previous resistance to the ECtHR, it is not limited to several

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<sup>68</sup> Rodrik, *supra* note 48, at 25.

<sup>69</sup> Paul Taggart, *Populism and representative politics in contemporary Europe*, 9 JOURNAL OF POLITICAL IDEOLOGIES 269, 270 (2004).

<sup>70</sup> E Posner, *Liberal Internationalism and the Populist Backlash*, PUBLIC LAW AND LEGAL THEORY WORKING PAPERS 1, 15 (2017). Available at SSRN.

<sup>71</sup> MICHAEL J. TREBILCOCK, DEALING WITH LOSERS (2014).

<sup>72</sup> Posner, *supra* note 70, at 15.

<sup>73</sup> KANSTANTIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 146 (2015).

<sup>74</sup> *Id.*, at 147. See also part 3.C below.

salient areas, such as national security or immigration.<sup>75</sup> Neither is it “merely” disputing the correct place of decision making about public policies as some of the previous critique did – at home rather than in Strasbourg, in parliament rather than in a courtroom. Populism provides for a new constitutional project addressing how democratic governance should work. That project as such is in contrast with independent, effective and progressive international human rights adjudication. High impact of an international human rights court is seen not only as unsuitable, ineffective or lacking democratic legitimacy. Populism as an ideology provides a basis for criticizing such practice as immoral, and hostile to the people and democracy as such.<sup>76</sup> As a result, it offers an alternative constitutional project competing with pan-European liberal constitutionalism.

Another distinctive feature of the populist ideology is its apparently broad appeal and capacity to mobilize masses.<sup>77</sup> Çalı and others have suggested that issues concerning the legitimacy of ICs are most often formulated by elite actors from legal and political spheres.<sup>78</sup> Indeed, a lot of criticism of the ECtHR has been verbalized by academics, or individual governmental and judicial figures.<sup>79</sup> However, populism elevates this to another level. Populist political parties and their leaders have become powerful actors with wide access to the media. Given their growing political strength, style of communication (including exploitation of the irrational and emotional aspects of politics,<sup>80</sup> and misleading and fake news<sup>81</sup>) and the general appeal of the anti-elitist narrative of blame, the capacity of populism to distort public support for the ECtHR is extremely high. That is crucial since populism can mobilize the people and feed the hate against an IC. It is

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<sup>75</sup> See Marc Bossuyt, *Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers*, 3 INTER-AM. & EUR. HUM. RTS. J. 3 (2010).

<sup>76</sup> See Müller’s argument on the moralistic and anti-pluralistic nature of populism, *supra* note 15.

<sup>77</sup> *Supra* notes 8-10.

<sup>78</sup> Basak Çalı, Anne Koch & Nicola Bruch, *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 HUM.RTS.Q. 955, 962 (2013).

<sup>79</sup> See examples from the Netherlands quoted in Barbara Oomen, *A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands*, 20 IJHR 407 (2016). See also Lord Hoffmann, *The Universality of Human Rights: Judicial Studies Board Annual Lecture*, (Mar 19, 2009) <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2013/hoffmann.pdf>; Marc Bossuyt, *Is the European Court of Human Rights on a Slippery Slope?*, in *THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH 27* (Spyridon Flogaitis, Tom Zwart & Julie Fraser eds., 2013).

<sup>80</sup> De la Torre, *supra* note 9.

<sup>81</sup> Anthony Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57 (2017); Mounk, *supra* note 59, at 149-150.

especially so since mere perceptions, rather than the actual performance of an IC, often trigger resistance.<sup>82</sup> Moreover, the popular sentiment can in turn affect the attitude of political representatives.<sup>83</sup> Even the non-populist actors can be pushed by the public sentiment towards a harsher attitude to the Strasbourg Court.

As a result, populism as an ideology provides a basis for distorting the ECtHR's legitimacy and explaining why resisting or attacking the Court is justified, appropriate or even necessary. Generally, the likeliness of attacking courts and resorting to court-curbing is influenced by two main factors: institutional setting of a court and norms regarding political (non-)interference with the judiciary.<sup>84</sup> Building on the previous sections, it seems that the main challenge of populism for ICs is the populists' ability to change the prevailing norms concerning the political interference with the judiciary. Populism tends to alter these norms and legitimize anti-court behavior. The supply side of populism is crucial in this respect. Populists are able to come with an appealing narrative explaining who is guilty of the people's current problems. Moreover, the populist political style has a wide appeal and tends to mobilize masses. Populists provide a widely appealing "narrative of blame", make the IC a part of it and thereby distort the diffuse support for the court. Although such attacks may be largely instrumental, the ideology of populism provides an appealing justification for them.

### **3. Stocktaking the ECtHR's independence safeguards through the prism of the populist challenge**

Populism as an ideology is at odds with checks and balances and with intermediary institutions that are claimed to compromise the authenticity of the popular will. However, when in power, populist use institutions in an instrumental way.<sup>85</sup> They oppose and attack those institutions whose outcomes are not in line with their interests. As Müller put it, "[p]opulists are only against specific institutions – namely those which, in their view, fail

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<sup>82</sup> Mikael Rask Madsen, Paula Cebulak and Micha Wiebusch, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT. J.L.C. 197, 212 (2018). See for instance the case ICTY, Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUST. 427 (2004).

<sup>83</sup> Madsen et al, *supra* note 82, at 205.

<sup>84</sup> R. Daniel Kelemen, *The political foundations of judicial independence in the European Union*, 19 JOURNAL OF EUROPEAN PUBLIC POLICY 43-44 (2012); GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY (2009).

<sup>85</sup> Blokker, *supra* note 36.



to produce the morally (as opposed to empirically) correct political outcomes. But this form of ‘anti-institutionalism’ is only articulated when populists are in opposition. Populists in power will be fine with institutions – which is to say: *their* institutions.”<sup>86</sup>

In practice, the rise of populism has resulted in an increasing number of attacks against actors promoting values of liberal constitutionalism in practice.<sup>87</sup> Courts are usually among the first targets of the populist quest against checks and balances.<sup>88</sup> Powerful independent courts – especially those that can review legislative acts – are apparently at odds with the populist ideology and, moreover, courts have proven to be capable of countering the populist agenda in the past.<sup>89</sup>

Nevertheless, populists in power do not need to abolish courts. The populist constitutional project aims to get rid of limits on power and for that purpose it is sufficient to prevent courts from imposing such limits. Two strategies are most often used to achieve that: 1) limiting a court’s ability to interfere with the given agenda (e.g. by jurisdiction stripping, paralyzing the court), and 2) “taming” the court by targeting the judicial personnel and harmonizing its outcomes with the populist objectives.<sup>90</sup>

What do the ideological underpinnings of populism and the tendency of populists in power to attack courts imply for the ECtHR? Many of the reasons for populist irritation with powerful domestic courts are relevant for ICs too, especially for the Strasbourg Court. The ECtHR has elevated human rights standards in Europe through its dynamic interpretive methods.<sup>91</sup> Its case law has permeated the jurisprudence of domestic courts,<sup>92</sup> influenced national statutes and constitutions<sup>93</sup> and, more generally, altered domestic political and

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<sup>86</sup> Jan-Werner Müller, *Populism and Constitutionalism*, in THE OXFORD HANDBOOK OF POPULISM 590, 598 (Cristóbal Rovira Kaltwasser et al., 2017).

<sup>87</sup> Hirschl, *supra* note 7, at 15; David Landau, *Populist Constitutions*, 85 U.CHI.L.REV. 521, 532 (2018).

<sup>88</sup> See Bojan Bugarič & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 JOURNAL OF DEMOCRACY 69, 73 (2016); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 78-81 (2018).

<sup>89</sup> See e.g. Ben Stanley, *Confrontation by default and confrontation by design: strategic and institutional responses to Poland's populist coalition government*, 23 DEMOCRATIZATION 263, 273-4 (2016).

<sup>90</sup> Those strategies were visible for instance in the strategies against constitutional courts in Hungary and Poland – see Bugarič & Ginsburg, *supra* note 88.

<sup>91</sup> Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GLJ 1730 (2011).

<sup>92</sup> IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECtHR IN NATIONAL CASE LAW 86 (Janneke Gerards & Joseph Fleuren eds., 2014).

<sup>93</sup> THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN STATES PARTIES - SELECTED EXAMPLES (2016).

human rights agendas.<sup>94</sup> Specifically in the new democracies of Eastern Europe, the ECtHR's case law has also served as a human rights textbook,<sup>95</sup> and an instrument to lock-in the democratic developments and prevent backsliding.<sup>96</sup> In addition, the ECtHR's case law is built on values that are at odds with the populist constitutional project. The Strasbourg jurisprudence is centered around individual rights, pluralism in democratic societies and protection of minorities. All those features documenting the ECtHR's liberal-democratic ideological underpinnings and its authority are at odds with the populist ideology and project.

In fact, the Strasbourg Court has already countered some of the populist policies and has complicated their implementation. Already during the 2005-2007 populist era in Poland, the ECtHR ruled that Lech Kaczynski's decision to ban a gay rights march in Warsaw violated the ECHR.<sup>97</sup> More recently, the ECtHR has addressed some of the restrictions upon freedom of expression in the aftermath of the failed coup d'état in Turkey.<sup>98</sup> Several Strasbourg judgments have concerned Orbán's populist regime in Hungary too. The ECtHR found the dismissal of András Baka from the post of the president of the Hungarian Supreme Court to be a violation of the ECHR.<sup>99</sup> The Strasbourg Court has also criticized Hungary's immigration policies and treatment of migrants.<sup>100</sup> In reaction to the latter judgments, Viktor Orbán even stated that the Strasbourg Court should be urgently reformed because its judgments were a "threat to the security of EU people and invitation for migrants."<sup>101</sup>

Hence, there are good reasons to believe that the Strasbourg Court irritates populists not only in the ideational dimension, but also in the day-to-day political reality. All those

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<sup>94</sup> Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 IO 77 (2014).

<sup>95</sup> IULIA MOTOC & INETA ZIEMELE (eds.), *THE IMPACT OF THE ECHR ON DEMOCRATIC CHANGE IN CENTRAL AND EASTERN EUROPE* (2016).

<sup>96</sup> Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 IO 217 (2000).

<sup>97</sup> *Baczowski and others v. Poland*, App. No. 1543/06, EUR. CT. H. R., May 3, 2007.

<sup>98</sup> *Alpay v. Turkey*, App. No. 16538/17, EUR. CT. H. R., March 20, 2018; *Altan v. Turkey*, App. No. 13237/17, EUR. CT. H. R., March 20, 2018.

<sup>99</sup> *Baka v. Hungary*, App. No. 20261/12, EUR. CT. H. R., June 23, 2016.

<sup>100</sup> *Ilias and Ahmed v. Hungary*, App. No. 47287/15, EUR. CT. H. R., March 3, 2017.

<sup>101</sup> Orbán attacks the European Court of Human Rights, EURACTIV.COM (2017), <https://www.euractiv.com/section/global-europe/news/orban-attacks-the-european-court-of-human-rights-at-epp-congress/>.

developments show that stocktaking of the ECtHR’s resilience against the populist challenge is not merely a theoretical exercise. The rest of this article therefore examines the ECtHR’s setting through the prism of the most common anti-court techniques.<sup>102</sup> Table no. 1 summarizes those techniques. The aim is to assess the institutional resources and risks inbuilt in the ECtHR system in the context of the populist challenge.

*Table no. 1: Anti-court techniques*

Structural features of a court	Judicial personnel	Sidelining through de-legitimization
abolishing a court	removing disloyal judges	exit
jurisdiction stripping	making judges loyal	exit threats
changing access and procedural rules	appointing loyal judges	criticism
intervening in internal working of a court		non-compliance
restricting budget		
docket control		

### **A. Targeting the ECtHR’s structural features**

One of the goals of attacking the judiciary (by populists) is to limit courts’ ability to interfere with the populist agenda. The most straightforward way is to *abolish the court* and eventually replace it with a new institution.<sup>103</sup> Courts’ power can also be reduced by

<sup>102</sup> For the sake of completeness, the article takes into account anti-court techniques used both against domestic and international courts.

<sup>103</sup> For instance Hugo Chávez’s Constitutional Assembly dissolved the Supreme Court of Venezuela when he came to power in 1999 and replaced it with a new Supreme Tribunal of Justice. Levitsky & Ziblatt, *supra* note 88, at 80-81.

*jurisdiction stripping*.<sup>104</sup> A different technique used for preventing a court from deciding certain cases is *changing the rules of access*. If access to the court is made difficult – in legal or factual terms – an attacking actor can effectively control the court’s docket.<sup>105</sup> A powerful tool capable of paralyzing a court is *changing procedural rules and intervening in the inner working of the court*. Raising the majority necessary for adopting a decision, for instance, can reduce a court’s agility.<sup>106</sup>

*Reducing the budget* of a court presents another technique. Budgetary constraints or increases can be used by states and international organizations to discipline or reward a court for its decisions and overall functioning.<sup>107</sup> Besides that, insufficient budget can incrementally paralyze a court as it prevents it from proper functioning. Budgetary support has important implications for the working conditions at the courts – IT support and other equipment, building maintenance, number of scientific and administrative personnel etc.<sup>108</sup> In other words, “[c]utting budgets of international courts without limiting the number of cases that can reach them is a recipe for delays in justice, a growing backlog of cases and eventual paralysis.”<sup>109</sup>

The ECtHR is quite well protected against attacks on its structural features. The main strengths of the Strasbourg system are the *decentralization of the system*, which leads to de facto entrenchment of the fundamental features of the ECHR, and notable degree of *judicial self-government*. These two features make many of the listed anti-court techniques impossible to employ or at least make them very hard to realize in practice.

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<sup>104</sup> DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES 95-96 (2016); Keith Rosenn, *The Protection of Judicial Independence in Latin America*, 19 INTER-AMERICAN LAW REVIEW 1, 24 (1987).

<sup>105</sup> Fruzsina Gárdos-Orosz, *The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint*, 53 ACTA JURIDICA HUNGARICA 302 (2012).

<sup>106</sup> This was one of the techniques used against the Polish Constitutional Tribunal. In 2015, the parliament adopted the so-called repair bill, which required a two-thirds majority for issuing a binding decision of the court. Next, the quorum for hearing cases was raised to thirteen (the Tribunal consists of fifteen judges). In addition, the bill required that cases remain on the docket of the court for at least six months before they are decided. Those rules largely paralyzed the court. Bugarič & Ginsburg, *supra* note 88, at 73.

<sup>107</sup> Tom Ginsburg, *Political Constraints on International Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 484, 493 (Cesare Romano et al., 2013). The donors of the ICTY, for instance, pressed for winding down the functioning of the court, see Thordis Ingadottir, *The Financing of International Adjudication*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 595, 611 (Cesare Romano et al., 2013).

<sup>108</sup> KOSAŘ, *supra* note 104, at 94.

<sup>109</sup> Ingadottir, *supra* note 107, at 611.

By *decentralization* I mean the plurality of governing actors. The ECtHR is a part of the Council of Europe (CoE), which consists of 47 member states who are the masters of the ECHR. The ECHR itself regulates the most critical issues concerning the structural features of the ECHR such as the structure of the Court, its jurisdiction and competences, access rules. These features regulated by the ECHR itself can be changed only by amending the Convention. Thus, the states parties face a particularly high threshold for changing the structural features of the ECtHR. They face a “joint decision trap”,<sup>110</sup> where higher level decisions (decisions regarding the ECtHR) can be blocked by any lower level actor (a CoE state). It implies that the structural features of the Strasbourg Court, which are enshrined directly in the Convention, are *de facto* entrenched.<sup>111</sup>

The entrenchment protects the Strasbourg Court from the most straightforward attacks targeting the structural features. Abolition of the ECtHR, jurisdiction stripping as well as changing the access and (some of) the procedural rules all require the ECHR to be amended. Given the number of ECHR states parties and their political, regional and economic diversity, it is highly unlikely there would be no veto players to block an attack of this kind. However, that does not mean that individual states or groups of like-minded states cannot start a campaign against the Court and influence its functioning informally through political feedback channels.<sup>112</sup>

The second strong feature is the high degree of *judicial self-government* (JSG) in matters of the inner workings of the Court. The basic structure of the inner workings of the Court is given by the ECHR, and thus protected by decentralization. Particular decisions on the inner workings of the ECtHR are then made by the ECtHR judges themselves. Hence, the combination of decentralization and the JSG logic should contribute to protecting the Strasbourg Court from external attacks. The Rules of Court<sup>113</sup> regulate procedural rules that could eventually be misused in order to attack the ECtHR, such as the order of dealing with cases (Rule 41), voting and necessary majorities to adopt a decision (Rule 23), or

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<sup>110</sup> Fritz Scharpf, *The joint-decision trap: lessons from German federalism and European integration*, 66 PUBLIC ADMINISTRATION 239 (1988); Kelemen, *supra* note 84, at 44 and 46 (addressing a similar setting in the ECJ).

<sup>111</sup> Madsen et al. (*supra* note 82, at 204) argue that „ICs with larger membership seem more robust.”

<sup>112</sup> See part 3.C below.

<sup>113</sup> ECtHR, Rules of Court (Apr 16, 2018), [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)

details on the publication of the Court's decisions (Rule 78). As a result, trying to paralyze the Strasbourg Court through changing the procedural rules would be very complicated thanks to the entrenchment (decentralization) of the basic features and significant level of JSG in this area.

The combination of decentralization and JSG also protects the Strasbourg Court from meddling with the composition of the chambers and targeting the key personnel in the Registry. Fundamental features of the Court are entrenched in the ECHR. The Convention stipulates that the ECtHR consists of the plenary court and the chambers (Article 25), that it shall have a Registry (Article 24) and that there should be a President and one or two Vice-Presidents of the Court (Article 25). Exercising JSG, the ECtHR judges themselves (as the plenary court) set up the chambers, elect the President and the Vice-President(s), elect the Registrar and deputy Registrar(s), and, importantly, adopt the rules of the Court (Article 25). The rules of the Court then specify the inner functioning of the ECtHR with respect to the Presidency of the Court (Chapter II – Rules 8-14), the Registry (Chapter III – Rules 15-18B), forming and functioning of the chambers (sections), committees and single-judge formations (Chapter V – rules 24-30) as well as sessions and deliberations of the Court (Chapter IV – rules 19-23A).

The strategy of budgetary restrictions has not been addressed yet. The expenditure of the ECtHR is borne by the CoE (Article 50 ECHR). The Strasbourg Court does not have a separate budget; it forms a part of the CoE overall budget, which is subject to the approval by the Committee of Ministers (CoM).<sup>114</sup> CoE as such is financed by the 47 member states. The contribution of each state is fixed taking into account the population and GNP of the state.<sup>115</sup> Nevertheless, ICs are quite vulnerable regarding the budgetary constraints. It is advisable to be aware of this issue in the CoE context. According to Lambert-Abdelgawad, the Strasbourg Court is “evidently under-funded”, given its caseload.<sup>116</sup> That can get even worse as Russia – one of the major contributors – announced in 2017 it would stop contributing to the CoE budget. This decision was a response to the PACE's decision to

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<sup>114</sup> ECHR Budget, [http://www.echr.coe.int/Documents/Budget\\_ENG.pdf](http://www.echr.coe.int/Documents/Budget_ENG.pdf).

<sup>115</sup> *Id.*

<sup>116</sup> Lambert Abdelgawad argues that it has been acknowledged both by the external and internal audit of the Court. Elizabeth Lambert Abdelgawad, *Measuring the judicial performance of the European Court of Human Rights*, 8 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 20, 23 (2017).

suspend Russia's voting rights in the Assembly in reaction to the 2014 occupation of Crimea.<sup>117</sup> Moreover, Turkey also withdrew from its status as a major donor to the CoE budget.<sup>118</sup> Those developments may lead to an even further reduction in the ECtHR's "under-funded" budget and complicate its work.<sup>119</sup>

To summarize, the ECtHR is well-designed to prevent or withstand anti-court techniques targeting the structural features of the Court. The major strengths are the decentralization of the system and JSG in the procedural issues and inner-working of the Court. Decentralization helps to protect the Strasbourg Court even as regards the budgetary constraints. Yet, strong states' failure to contribute to the CoE budget can have important repercussions for the functionality of the ECtHR.

## **B. Targeting judicial personnel**

Courts consist of individual judges whose individual opinions and mutual deliberations are crucial for the court's decision-making. Many anti-court techniques thus target the judicial personnel aiming to "tame" the court. There are two basic ways to affect courts through judicial personnel – the instalment of new loyal judges or making the incumbent judges loyal. Appointing loyal judges requires the removal of disloyal judges, or the possibility to "pack" the court – increase its size and fill the bench with loyalists.<sup>120</sup>

Judges can be removed using various techniques. First, judges can be impeached in retaliation for their rulings.<sup>121</sup> A similar goal can be achieved by misusing *disciplinary motions*.<sup>122</sup> A domestic judge can be got rid of also through a *transfer* to a different court.<sup>123</sup> A less straightforward move is *reducing the salary* of a judge or judicial salaries

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<sup>117</sup> PACE, Resolution 1990 (2014), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20882&lang=en>

<sup>118</sup> Jennifer Rankin, Human rights body faces cash crisis after clash with Russia, *GUARDIAN* (Mar 16, 2018), [https://www.theguardian.com/law/2018/mar/16/human-rights-body-faces-cash-crisis-after-clash-with-russia?CMP=share\\_btn\\_tw](https://www.theguardian.com/law/2018/mar/16/human-rights-body-faces-cash-crisis-after-clash-with-russia?CMP=share_btn_tw).

<sup>119</sup> Lize Glas, The Assembly's row with Russia and its repercussions for the Convention system, *STRASBOURG OBSERVERS* (Oct 30, 2017) <https://strasbourgobservers.com/2017/10/30/the-assemblys-row-with-russia-and-its-repercussions-for-the-convention-system/>.

<sup>120</sup> Andrea Castagnola & Aníbal Pérez Liñan, *Bolivia: The Rise (and Fall) of Judicial Review*, in *COURTS IN LATIN AMERICA* 278, 303 (Gretchen Helmke & Julio Rios-Figueroa eds., 2014).

<sup>121</sup> *Id.*, at 297-8.

<sup>122</sup> KOSAŘ, *supra* note 104, at 77.

<sup>123</sup> *Id.*, at 80-81; Rosenn, *supra* note 104, at 28.

as such, which may lead to the forced resignation of some judges.<sup>124</sup> Another possibility is *the reduction of the compulsory retirement age of judges*.<sup>125</sup> The last technique is the *intimidation of individual judges*. Intimidating phone calls addressing a judge or her family, threats or even physical intimidation can all create a climate of fear, which may lead judges to resign.<sup>126</sup>

Once places on the bench are vacant, the political actors aiming to tame the court can appoint loyal figures on the bench. Sometimes, though, the anti-court actors do not bother with removing the incumbent judges but rather pack the court. Court packing includes increasing the number of judges of a given court and filling the new positions with loyal figures.<sup>127</sup>

Another way of taming a court – without the necessity of replacing judges or packing a court – is making the current judges loyal. That can be done through *threats* of employing the techniques used for removing judges (threats of initiating disciplinary motions, salary reduction, intimidation etc.). Yet, using *carrots* can work as well. Incumbent judges can be promised *promotion* – to a higher court, to a position of the chamber president, or even the post of (vice-)president of a court.<sup>128</sup> Alternatively, current judges can be promised higher salaries or even direct *bribes*. An important and highly debated technique is *the reappointment of judges*.<sup>129</sup> Some courts – mostly constitutional and international courts – provide for limited but renewable terms. In such cases, the political actors can use their power of reappointment to make judges decide in their preferred direction. Finally, even if reappointment is not allowed, judges serving a limited term will likely care about their

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<sup>124</sup> Castagnola & Pérez Liñan, *supra* note 120, at 283, 296 and 298.

<sup>125</sup> See e.g. the Hungarian example – Gábor Halmai, *The Early Retirement Age of the Hungarian Judges*, in EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471, 488 (Fernanda Nicola & Bill Davies eds., 2017).

<sup>126</sup> Jessica Walsh, *A Double-Edged Sword: Judicial Independence and Accountability in Latin America*, 1, 23 INTERNATIONAL BAR ASSOCIATION REPORT (2016) [goo.gl/2eksAz](http://goo.gl/2eksAz).

<sup>127</sup> A recent example is the Orbán government's packing of the Hungarian Constitutional Court. The number of judges was raised to 15 and new loyal judges were appointed. Bugarić & Ginsburg, *supra* note 88, at 73.

<sup>128</sup> KOSAŘ, *supra* note 104, at 83, 85-86.

<sup>129</sup> Laurence Helfer, *Why States Create International Tribunals: A Theory of Constrained Independence*, 23 CONFERENCES ON NEW POLITICAL ECONOMY 253 (2005).



future careers. In this respect, they are largely dependent on the government to secure them comparable positions, which can be used to impose pressure on a judge.<sup>130</sup>

The Strasbourg Court is relatively well designed to prevent or resist even techniques targeting the judicial personnel. The main advantages of the system are *decentralization*, strong *judicial independence safeguards*, the *JSG* element in the selection of judges, and notably *JSG* in promoting and disciplining judges.

Some of the techniques for removing disloyal judges are impossible to use in the ECtHR context. Transferring an ECtHR judge to a different court is unavailable because the Strasbourg Court is the only IC in the ECHR system. Misusing the disciplinary motions is impossible to apply directly due to the disciplinary self-government of the ECtHR judges, combined with the *de facto* entrenchment in the ECHR (*decentralization*). Article 23 (4) ECHR reads that “[n]o judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.”<sup>131</sup> As a result, influencing the Court through affecting the dismissal proceedings is unlikely. It is in the hands of the ECtHR judges themselves. This safeguard is enshrined in the Convention itself, just like the criteria for dismissing a judge. Thus, the decentralization argument and the “joint decision trap” logic are applicable again. The practice confirms this. The dismissal mechanism has not been used until today.<sup>132</sup> Apart from the dismissal procedure, neither the ECHR nor the Rules of the Court provide for a disciplinary procedure related to the judges’ internal conduct. As a result, individual judges can only be named and shamed by external actors.<sup>133</sup>

As to the possibility of salary reduction, judicial salaries are linked to the pay scale for CoE staff members based in France.<sup>134</sup> According to the information provided by the Judicial

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<sup>130</sup> Erik Voeten, *International Judicial Independence*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 421, 433 (Mark Pollack & Jeffrey Dunoff eds., 2012)

<sup>131</sup> The conditions set out in Article 21 ECHR are: high moral character and professional competence, individual capacity, impartiality and incompatibility of functions

<sup>132</sup> Jeffrey Dunoff & Mark Pollack, *The Judicial Trilemma*, 111 AJIL 225, 249 (2017).

<sup>133</sup> See 3.C below.

<sup>134</sup> Article 3 (1), Committee of Ministers Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights (2009).

Appointments Commission in the UK, the gross salary is €16,613.78 per month.<sup>135</sup> The salary is not subject to income tax.<sup>136</sup> Such a financial security seems to be sufficient for securing judicial independence, especially when compared to other international human rights courts. Judgeship at the IACtHR, for instance, is not a full-time job and the judges therefore do not receive regular salaries but only “emoluments and travel allowances [...] for the importance and independence of their office.”<sup>137</sup>

The decentralization logic also applies to the eventual attempts to lower the retirement age of the ECtHR judges. The expiry of judicial office is set at the age of 70 and is “entrenched” directly in the ECHR [Art 23 (2)]. Protocol 15, however, changes this rule. It introduces a new requirement that candidate judges cannot be older than 65, which implies the age limit of 74. It shows that amending the ECHR is not impossible and that the Strasbourg Court is not beyond control. Still, bad faith amendments can be effectively blocked by a state party’s veto.<sup>138</sup>

The final technique in this section is the intimidation of judges. Such option always exists and cannot be completely prevented. At least, the ECtHR judges enjoy diplomatic immunities that can be waived only by a decision of the Court. Such immunities should protect the ECtHR judges from arbitrary detention or from intimidation through domestic legal proceedings.<sup>139</sup>

Another set of techniques concerns efforts to make incumbent judges loyal. Four major possible techniques were identified – reappointment, promotion promises, future career promises and bribes. The combination of judicial independence safeguards and of JSG protects the Strasbourg Court quite well even from attempts to tame current judges.

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<sup>135</sup> Judge of the European Court of Human Rights - Information Pack, [https://www.judicialappointments.gov.uk/sites/default/files/sync/basic\\_page/information\\_pack\\_final\\_0.pdf](https://www.judicialappointments.gov.uk/sites/default/files/sync/basic_page/information_pack_final_0.pdf)

<sup>136</sup> Article 18b of the General Agreement on Privileges and Immunities of the Council of Europe.

<sup>137</sup> Article 72 ACHR.

<sup>138</sup> Geir Ulfstein & Andreas Føllesdal, Copenhagen – much ado about little? EJIL TALK! (Apr 14, 2018), <https://www.ejiltalk.org/copenhagen-much-ado-about-little/>.

<sup>139</sup> Cf. for instance ICJ, Advisory Opinion of 29 April 1999, Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights (“Cumaraswamy case”); and Advisory Opinion of 29 April 1999, Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights (“Cumaraswamy case”).

As to the reappointments, after several instances of governments' alleged revenge (non-reappointment) against their national judges for "wrong" opinions<sup>140</sup> and scholarly criticism, the possibility of reappointment was abolished.<sup>141</sup> Since 2010, judicial terms at the ECtHR have been for nine years and non-renewable.<sup>142</sup> Nevertheless, reappointment is not the only career incentive a government can promise to an incumbent judge. IC judges – especially if their term is non-renewable – have to deal with the question of post-IC careers. Hence, governments can put some pressure on the judges by promising them positions in other institutions.<sup>143</sup> It is difficult to prevent this technique from the CoE level. One precaution is the pension scheme. ECtHR judges who join the pension scheme and spend at least five years in office are eligible for a retirement pension from the CoE once they reach the age of 65.<sup>144</sup> This mechanism should at least partially enhance the independence of the Strasbourg judges since it grants them the security of a pension. Other measures can be taken by the states parties. Some countries, for instance, permit judges going to the ECtHR to suspend their domestic positions with the option to return to their original jobs after serving a term in Strasbourg.<sup>145</sup>

The technique of taming judges through promotion promises is unavailable since the ECtHR enjoys JSG in this area. The selection of the President and Vice-President(s) of the Court and of the Chamber Presidents is in the hands of the plenary Court (Article 25 ECHR). Yet another, albeit pathological and criminal way to influence current judges is bribery. The possibility of corruption is always present and no formal rules can absolutely prevent it. The strength of the ECtHR system in this regard is the relative material security of the Strasbourg judges (see above). Nonetheless, it can be suggested that the ECtHR is as transparent as possible in financial matters. The aim is to prevent corruption scandals, which can have particularly damaging effects on the ECtHR's legitimacy.

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<sup>140</sup> See Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 APSR 417, 421 (2008).

<sup>141</sup> Dunoff & Pollack, *supra* note 132, at 250-251.

<sup>142</sup> See Article 23 (1) ECHR as amended by Protocol 14.

<sup>143</sup> Voeten, *supra* note 130, at 433.

<sup>144</sup> For further details see Article 10 (3) of Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights.

<sup>145</sup> Boriss Cilevičs, *Reinforcement of the independence of the European Court of Human Rights*, PACE REPORT (2014) [goo.gl/5dbd3R](http://goo.gl/5dbd3R).

From a comparative perspective, an often-used way of taming a court is court packing. However, the employment of such a technique in the ECtHR context is highly unlikely. Again, it is due to the decentralization of the system and the de facto entrenchment of the number of judges in the ECHR (Article 20).

At least, governments aiming to tame the ECtHR can try to get a loyal figure into the position of their country's judge at the Strasbourg Court. In theory, this should not be easy, especially due to two safeguards: the Advisory Panel of Experts on the selection of judges<sup>146</sup> and the election of judges by the Parliamentary Assembly of the Council of Europe (PACE). The advisory panel advises the states and PACE on whether the candidates they shortlist for the function of ECtHR judges meet the required criteria. Its views are only recommendatory though. ECtHR judges are ultimately elected by PACE, which consists of representatives from all the CoE member states and thus the decentralization logic should apply again. Yet, in practice the decentralization argument is not as strong. As Lemmens put it, "as long as the Convention hallows the idea of democratically elected judges, we have to accept the flip side of this coin: lobbying, political games, international wheeling and dealing."<sup>147</sup> Most importantly, as relatively few PACE members participate in the election vote, the threshold for lobbying and convincing other parliamentarians to vote for preferred candidates is rather low.<sup>148</sup> This shortcoming of the election process should be addressed. The election of incompetent or biased judges can largely harm the legitimacy and reputation of the Court.<sup>149</sup> Furthermore, single judges are quite powerful actors in the ECtHR context. As part of the single-judge formation, they can dismiss applications as manifestly unfounded.<sup>150</sup> Besides that, they can also publish dissenting opinions.

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<sup>146</sup> The panel consists of seven judicial experts – current or former ECtHR judges or high court judges in the states parties.

<sup>147</sup> Koen Lemmens, *(S)electing Judges for Strasbourg*, SELECTING EUROPE'S JUDGES 95, 108 (Michal Bobek ed., 2015).

<sup>148</sup> *Id.*, at 108; see also David Kosař, *Selecting Strasbourg Judges*, in SELECTING EUROPE'S JUDGES 120, 154 (Michal Bobek ed., 2015).

<sup>149</sup> Çalı et al., *supra* note 78.

<sup>150</sup> Article 27 (1) ECHR.

Besides the weakness in the judicial selection process, overall the ECtHR is quite well designed as regards eventual attacks on the judicial personnel. The main strengths are decentralization, JSG and institutional safeguards of judicial independence.

### **C. Gradual erosion through shifting the discourse and delegitimizing a court**

The two main strategies of attacking a court mentioned so far have been rather straightforward. Targeting structural features of a court aims to limit the chance of a court interfering. Taming the courts through the judicial personnel can lead to harmonizing the preferences of the attacking actors with the decisions of the court and to stripping the court of its de facto veto power. With respect to the Strasbourg Court, both those strategies seem rather unrealistic at this point. Although the situation is not perfect,<sup>151</sup> the ECtHR is rather well insulated from such attacks due to decentralization, JSG and institutional safeguards of judicial independence, as the previous sections show.

However, this does not mean that the ECtHR and its supporters do not need to worry about the populist challenge. Especially in the context of the international human rights judiciary, there is another way of attacking a court – sidelining it by shifting the discourse about the court and de-legitimizing it, which may lead to its gradual erosion. Such a strategy is slower and less straightforward. Yet, it is a more realistic and more dangerous scenario in the ECtHR context. Whereas the previous two strategies require concerted action of many CoE member states or measures that can be very politically costly, attacking the ECtHR through de-legitimization techniques is more likely.

Why does the discourse about the ECtHR matter? Public discourse about the ECtHR crucially affects the perceptions of the Strasbourg Court, which determine its social legitimacy. As Kanstantsin Dzehtsiarou argued, “[h]uman rights tribunals cannot function effectively if they are perceived to be illegitimate.”<sup>152</sup> Just like any other (international) court, the ECtHR needs legitimacy support for its proper and effective functioning. Legitimacy – as the perception that a court’s authority is justified<sup>153</sup> – is one of the crucial elements of a court’s effectiveness and ability to trigger a legal change. For legitimate and

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<sup>151</sup> See *supra* the remarks on budget or election of judges.

<sup>152</sup> Dzehtsiarou, *supra* note 73, at 143.

<sup>153</sup> Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 110 and 115 (2009).

effective functioning, courts need the diffuse support of the public, which does not depend on the short-term satisfaction with outputs of the court.<sup>154</sup> ICs have to rely on their legitimacy so that their decisions are followed.<sup>155</sup>

Drop in its social legitimacy can be very threatening for the Strasbourg Court. Decreasing support for a court, or even growing antipathy towards the court may start a process of gradual erosion leading to the court's sidelining. Delegitimizing techniques can shift the discourse about a court and initiate a dangerous spiral – lower legitimacy implies the risk of reducing effective power in future cases.<sup>156</sup> That poses a major challenge for the court's effectiveness and increases the risk of a court's marginalization. All that makes eventual attacks on the court's institutional framework and judicial personnel less politically costly and, thereby, more likely. In other words, since the social legitimacy of a court and its diffuse support serve as a bulwark of judicial independence, their loss or decrease opens windows for further attacks on a court,<sup>157</sup> for instance through exploiting the identified weaknesses such as budgetary constraints or judicial selection process.

In order to shift the discourse and delegitimize an IC, a number of techniques broadly falling within two classical categories of exit and voice can be used.<sup>158</sup> *Exit* is a straightforward but extreme technique of getting an IC out of the government's way. States can withdraw from the jurisdiction of an IC, or exit the international regime guarded by the IC.<sup>159</sup> Exit can be viewed as a delegitimizing strategy due to its broader consequences. Most importantly, it tends to decrease the social legitimacy and authority of a court. The exit-talk regarding the ICC is a recent example of this.<sup>160</sup> Moreover, one state realizing the exit option, or even seriously considering the exit option, tends to spread and encourage

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<sup>154</sup> Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES IN LAW 411, 415 (2013); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AMERICAN POLITICAL SCIENCE REVIEW 343 (1998).

<sup>155</sup> Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 THEO. INQ. L. 437, 440 (2013).

<sup>156</sup> Ginsburg, *supra* note 107, at 491.

<sup>157</sup> Kelemen, *supra* note 84, at 45.

<sup>158</sup> ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

<sup>159</sup> For example Venezuela denounced the IACtHR and Trinidad and Tobago withdrew from the ACHR. Another recent example is the exit of Burundi from the ICC. See Wayne Sandholtz, Yining Bei & Kayla Caldwell, *Backlash and International Human Rights Courts*, Paper prepared for the Contracting Human Rights Workshop (2017). Available at SSRN.

<sup>160</sup> See Laurence Helfer & Anne Showalter, *Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC*, 17 INT.C.L.R. 1 (2017).

other states to do so. Latin American countries' withdrawal from the International Centre for Settlement of Investment Disputes (ICSID) exemplifies this. In 2007, Venezuela announced it was leaving certain international organizations that it deemed imperialist. Subsequently, Bolivia actually exited ICSID, with Ecuador and Venezuela following.<sup>161</sup> In addition, exit can lead the other members of an umbrella international organization to restrict the jurisdiction of a court in order to prevent future exits.<sup>162</sup>

Even if a state does not exit in the end, mere *exit threats* can also be used to threaten an IC and send it a strong signal of discontent.<sup>163</sup> Exit threats can be a part of a more general strategy of rhetorical criticism of a court. Raising voice and *criticizing a court* is a powerful rhetorical tool, which can eventually damage the authority of a court among its compliance constituencies. It may be particularly effective with the powerful states, especially as the anti-court rhetoric tends to spread.<sup>164</sup> A specific way is mobilizing public opinion against a court,<sup>165</sup> which can be particularly effective in reducing diffuse support for a court.

On the one hand, ICs have always been criticized. Such criticism is not necessarily bad for an IC. Questioning IC's conclusions and providing alternative interpretations of international law serves as an important feedback channel.<sup>166</sup> Hence, ICs should not be insulated from criticism. Contestation of ICs' case law contributes to the development of international law and, if an IC shows it actually listens, the criticism may be even fruitful for its own legitimacy.<sup>167</sup> Thus, not all the criticism of the ECtHR should be seen as unjustified populist demagoguery. Consequently, a distinction between fair critique of the ECtHR and the populist contestation has to be made. While a clear line can be hard to find, I believe that the following factors help to distinguish the two categories. First,

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<sup>161</sup> Ginsburg, *supra* note 107, at 493.

<sup>162</sup> See the example of the SADC Tribunal – Ginsburg, *supra* note 107, at 492-3; Karen Alter, James T. Gathii & Laurence R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EJIL 293, 314 (2016).

<sup>163</sup> Ginsburg, *supra* note 107, at 491.

<sup>164</sup> Philip Leach & Alice Donald, *Russia Defies Strasbourg: Is Contagion Spreading?* EJIL: TALK! (Dec 19, 2015) <https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/>.

<sup>165</sup> Ginsburg, *supra* note 107, at 493.

<sup>166</sup> Mikael Madsen, *Bolstering Authority by Enhancing Communication: How Checks and Balances and Feedback Loops Can Strengthen the Authority of the European Court of Human Rights*, in ALLOCATING AUTHORITY 77 (Joana Mendes & Ingo Venzke eds., 2018).

<sup>167</sup> André Nollkaemper, *Conversations among Courts: Domestic and International Adjudicators*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 524, 536-537 (Cesare Romano et al., 2013).

although critical, fair contestation accepts the main rationale of the ECHR system, i.e. human rights protection beyond the state. Second, it respects the ECtHR's institutional framework and authority, especially its independence and jurisdiction over "all matters concerning the interpretation and application of the Convention and the Protocols thereto" (Article 32 ECHR). Third, the criticism should be led in language leaving space for mutual accommodation of the domestic and the ECtHR's view, rather than in moralistic and antagonist terms, typical for the populist project.

The last technique is *non-compliance* with a court's decision. Although inducing compliance with judgments is not the only goal of (international) courts,<sup>168</sup> it remains one of the central measures of a court's effective functioning, because courts tend to lose legitimacy if their decisions are "routinely and openly ignored."<sup>169</sup> To be clear, partial or delayed compliance with judicial decisions seems to be quite a standard outcome in the case of international human rights courts.<sup>170</sup> However, it can also be used to "augment challenges to a tribunal's legitimacy."<sup>171</sup> In other words, there is a difference between non-compliance resulting from the lack of expertise and institutional capacities<sup>172</sup> and non-compliance as a "nullificationist strategy"<sup>173</sup> or a partial exit.<sup>174</sup> Large-scale non-compliance can make a court ineffective, which may likely lead to a loss of legitimacy and diffuse support. Even non-compliance with a particular decision can have these effects. A particularly "noisy act of non-compliance" by a powerful state can have especially damaging consequences for a court's legitimacy.<sup>175</sup>

The ECtHR's resilience to the listed delegitimizing techniques is problematic. In fact, this area reveals the greatest vulnerability of the Strasbourg Court. The past decade gave rise

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<sup>168</sup> Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POLICY 127 (2010); Yuval Shany, *Assessing The Effectiveness Of International Courts: A Goal-Based Approach*, 106 AJIL 225 (2012).

<sup>169</sup> Voeten, *supra* note 130, at 436.

<sup>170</sup> Darren Hawkins & Wade Jacoby, *Partial Compliance: Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights*, 6 JILIR 83 (2010).

<sup>171</sup> Helfer, *supra* note 129.

<sup>172</sup> Dia Anagnostou & Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter* 25 EJIL 205, 207 (2014).

<sup>173</sup> Hirschl *supra* note 47, at 18.

<sup>174</sup> See *mutatis mutandis* Hans Vollaard, *Explaining European Disintegration*, 52 JCMS 1142 (2014).

<sup>175</sup> Helfer, *supra* note 129.



to unprecedented criticism of the ECtHR, which included most of the listed delegitimizing techniques.

The ECtHR has been subject to criticism ever since its establishment, and even before.<sup>176</sup> Recently, however, the criticism has intensified and a whole new genre of “Strasbourg bashing” has emerged.<sup>177</sup> Besides criticism focusing on the legal quality of the ECtHR’s case law and on the judicial virtues of Strasbourg judges,<sup>178</sup> contestation of the ECtHR was centered around the Strasbourg Court’s lack of legitimacy to interfere with domestic policies due to its international and judicial nature.<sup>179</sup> The criticism echoes the sovereigntist criticism of international institutions and the critique of the undemocratic nature of constitutional judicial review. The Strasbourg Court has been portrayed as a foreign court which is not well-placed to assess a domestic legal system. In addition, it has been questioned whether unelected foreign judges should second-guess decisions of legitimate domestic parliaments.<sup>180</sup>

The heightened criticism of the ECtHR and the shift towards Strasbourg bashing greatly intensified with the UK’s resistance to the Strasbourg Court’s case law concerning sensitive political topics – the expulsion of terrorists, the War on Terror and prisoners’ voting rights.<sup>181</sup> Heated political debate followed these rulings. The Brits accused the ECtHR of activism, intrusiveness and ignoring domestic democratic decision-making. David Cameron even said that the idea of complying with the Strasbourg case law and

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<sup>176</sup> See Ed Bates. *The Birth of the European Convention on Human Rights – and the European Court of Human Rights*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 17 (Jonas Christoffersen & Mikael Rask Madsen eds., 2013).

<sup>177</sup> Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMP. PROBS. 141, 174 (2016); Oomen, *supra* note 79.

<sup>178</sup> Wildhaber summarized the most common categories of such criticism: exaggerated judicial activism of the ECtHR, negligence of the subsidiarity principle, exaggerated human rights centralism, the unpredictable nature of the ECtHR’s case-law, lack of its clarity, and fluctuation between fact-specificity and generalizations in the reasoning. Luzius Wildhaber. *Criticism and case over-load: Comments on the Future of the European Court of Human Rights*, in Flogaitis et al., *supra* note 79, at 10.

<sup>179</sup> Dzehtsiarou (*supra* note 73, at 144) calls them international and national constitutional challenge. See also Robert Spano, *The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law*, 18 HRLR 1, 6-7 (forthcoming in 2018).

<sup>180</sup> For book-length analysis of such criticism see Popelier et al., *supra* note 3; Flogaitis et al., *supra* note 79.

<sup>181</sup> See Ed Bates, *Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg*, 14 HRLR 503 (2014).

giving prisoners the right to vote made him “physically sick”.<sup>182</sup> Tabloid media criticized the Strasbourg Court heavily too. The Daily Mail, for example, published an article where it criticized ECtHR judges one by one for their lack of judicial experience.<sup>183</sup>

The debate about “curtailing the ambitions and scope of the European Court”<sup>184</sup> spread throughout Europe.<sup>185</sup> The rising resistance to the ECtHR was embodied in the debates preceding the 2012 Brighton Conference, which discussed the long-term future of the ECHR system. Prior to the conference, a position paper by the UK was leaked to the media.<sup>186</sup> The draft included passages which read like “a subtle attempt to water-down the Court’s substantive jurisdiction.”<sup>187</sup> As a result, “a pervasive air of backlash against the Court suffused the lead up to the Brighton Conference.”<sup>188</sup> In the end, the Brighton Declaration was a moderate outcome.<sup>189</sup> Still, it emphasized the significance of the subsidiarity principle in the ECHR’s architecture and may be interpreted as an effort to reduce the ECtHR’s power.<sup>190</sup>

The Brighton Conference and the subsequent jurisprudential developments did not stop the challenges though. There were several *exit threats* – for example in the UK by Theresa May or in Switzerland by the Swiss People’s Party – or proposals severely challenging the authority of the ECtHR, such as the reform proposal by a Dutch MP Taverne.<sup>191</sup> Two more events from Russia should also be mentioned. In 2015 the Russian Constitutional Court (RCC) declared that neither the ECHR nor its interpretation by the Strasbourg Court can

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<sup>182</sup> Andrew Hough, *Prisoner vote: what MPs said in heated debate*, THE TELEGRAPH (Feb 11, 2011) <http://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in-heated-debate.html>

<sup>183</sup> James Slack, *Named and Shamed: The European Human Rights Judges Wrecking British Law*, Daily Mail (Feb 4, 2011) <http://www.dailymail.co.uk/news/article-1353860/Named-shamed-The-European-human-rights-judges-wrecking-British-law.html>.

<sup>184</sup> MP Glyn Davies, HC Deb vol 553, cols 761 (Nov 22, 2012) [goo.gl/9XKff](http://goo.gl/9XKff).

<sup>185</sup> See *supra* note 180.

<sup>186</sup> James Landale, *UK presses for European human rights convention changes*, BBC NEWS (FEB 29, 2012) <http://www.bbc.com/news/uk-politics-17201024>.

<sup>187</sup> Ed Bates, *The Brighton Declaration and the “meddling court”*, UK HUMAN RIGHTS BLOG (2012) <https://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/#more-13662>.

<sup>188</sup> Laurence Helfer, *The Burdens and Benefits of Brighton*, 1 ESIL REFLECTIONS 1 (2012).

<sup>189</sup> *Id.* at 1.

<sup>190</sup> See Protocol 15 to ECHR, and *infra* notes 201-202.

<sup>191</sup> Sarah Lambrecht, *Reform, Repeal, Replace? Sarah Lambrecht: Criticism of the European Court of Human Rights: A UK Phenomenon?*, UK Constitutional Law Association (Jul 27, 2015) [goo.gl/LngWmm](http://goo.gl/LngWmm).

take precedence over the Russian Constitution.<sup>192</sup> The Russian Parliament then followed the RCC's suggestion and adopted a statute introducing the RCC's power to declare the execution of an international obligation impossible if it contradicts the Constitution. Since then, the RCC has used this power twice - in 2016 in relation to the ECtHR's judgment in *Anchugov and Gladkov* and in 2017 with regard to the *Yukos* case. Both these Strasbourg judgments were found to be contrary to the Russian Constitution.<sup>193</sup>

Next, in reaction to the occupation of Crimea, PACE decided to suspend Russia's voting rights in the Assembly. In response, Russia stopped contributing to the CoE's budget, left PACE, and some Russian politicians even suggested reconsideration of Russia's membership of the CoE.<sup>194</sup> Regarding the ECtHR's authority, the chair of the Duma said that "Moscow will not consider itself bound by the judgments of the European Court of Human Rights (ECHR) in Strasbourg if Russia is not allowed to participate in the selection of judges."<sup>195</sup>

Yet another step challenging the ECtHR came recently from Denmark. In November 2017, Denmark took over the CoE's chairmanship. Denmark announced that its main goal would be the reform of the ECHR system, including limitations on the dynamic interpretation of the ECHR.<sup>196</sup> The subsequent draft Copenhagen Declaration addressing the future of the ECtHR was depicted by human rights lawyers as an instrument institutionalizing political pressure on the ECtHR and an "attempt to handcuff the Strasbourg judges."<sup>197</sup> The final Copenhagen Declaration turned to be a much more

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<sup>192</sup> Russian Constitutional Court, 14 July 2015, No. 21-Π/2015. English summary is available at: <http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-Π.pdf>. See also Lauri Mälksoo, *Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-Π/2015*, 12 EUCONST 377 (2016).

<sup>193</sup> Russian Constitutional Court, 19 April 2016, no. 12-Π/2016. English translation available at: [http://www.ksrf.ru/en/Decision/Judgments/Documents/2016\\_April\\_19\\_12-P.pdf](http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf).

<sup>194</sup> Glass, *supra* note 119.

<sup>195</sup> *Russia To Reject Strasbourg Court If Not Allowed To Help Select Judges*, RADIO FREE EUROPE (Oct 14, 2017) <https://www.rferl.org/a/russia-to-reject-strasbourg-court-if-not-allowed-to-select-judges/28794729.html>.

<sup>196</sup> Jacques Hartmann, *A Danish Crusade for the Reform of the European Court of Human Rights*, EJIL: TALK! (Nov 14, 2017) <https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/>

<sup>197</sup> Alice Donald & Philip Leach, *A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten*, EJIL: TALK! (FEB 21, 2018) <https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/>. For a different view of the draft Declaration see Mikael Madsen & Jonas Christoffersen, *The European Court of Human Rights' View of the Draft Copenhagen*

balanced document addressing the Strasbourg Court's core problems.<sup>198</sup> Still, the draft declaration exemplifies that the changing discourse on the ECtHR has affected even the highest levels of CoE politics addressing the Strasbourg Court's long-term future.

All the mentioned instances illustrate that the ECtHR is vulnerable in the area of legitimacy challenges. Exit proposals, questioning of the ECtHR's reputation, attempts to curtail its authority, and principled refusals to implement the Strasbourg Court's rulings have all taken place in the ECHR system in the last decade and have affected the Strasbourg Court. Those developments arguably led to a shift of the center of gravity in the system in the direction of national law and politics.<sup>199</sup> Some authors describe it as entering the age of subsidiarity and procedural embeddedness,<sup>200</sup> Others argue that the ECtHR became more restrained due to the states' backlash in order to retain the support of its traditional allies.<sup>201</sup> Madsen showed that the Strasbourg Court tends to grant states a wider margin of appreciation.<sup>202</sup> Stiansen and Voeten support this conclusion and claim that since the Brighton Conference, states have also tended to appoint judges that are more restrained.<sup>203</sup> Nevertheless, this tactic has apparently not stopped the growing domestic resistance, as the most recent events show.

The rise of populism makes the situation critical since the ECtHR's greatest weakness matches the populist greatest strength. Populism is well equipped to delegitimize courts by including them in the narrative of blame and exploiting the storyline about foreign unaccountable elites replacing the will of the ordinary people. Populist ideology provides justification for anti-court attacks and the populist political style makes such attacks more appealing to the people. The delegitimizing strategies can result in shifting the discourse

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*Declaration*, EJIL: TALK! (FEB 23, 2018) <https://www.ejiltalk.org/the-european-court-of-human-rights-view-of-the-draft-copenhagen-declaration/>.

<sup>198</sup> Ulfstein & Føllesdal, *supra* note 138.

<sup>199</sup> Jonas Christoffersen & Mikael Rask Madsen, *Postscript: Understanding the Past, Present and Future of the European Court of Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 230 (Jonas Christoffersen & Mikael Rask Madsen eds., 2013).

<sup>200</sup> Robert Spano, *Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity*, 14 *HUM. RTS. L. REV.* 487 (2014); and Spano, *supra* note 179.

<sup>201</sup> Øyvind Stiansen and Erik Voeten, *Backlash and Judicial Restraint: Evidence From the European Court of Human Rights* (2018), available at SSRN.

<sup>202</sup> Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?* 9 *J.I.D.S.* 199 (2018).

<sup>203</sup> Øyvind Stiansen and Erik Voeten, *Backlash and Judicial Restraint: Evidence From the European Court of Human Rights* (2018), available at SSRN.

and reducing diffuse support for the court. The spread of fake, misleading or one-sided news, which is common for the populist strategies,<sup>204</sup> can be particularly effective in decreasing the diffuse support. Such strategies may open windows for further attacks as low diffuse support makes the anti-court behavior less costly. In sum, the rise of populism throughout Europe makes the abovementioned scenario of gradual erosion more likely and threatening.

Although the critique of the Strasbourg Court has already found the breeding ground, and although some of the sovereigntist and counter-majoritarian criticism of the ECtHR includes some elements common with the populist ideology, the populist “explosion” has taken it further. Rise of populism has been rewriting the political map of Europe.<sup>205</sup> The populist challenge takes resistance to the Strasbourg Court to a different level. In many countries, especially in Eastern Europe, populists have a direct influence on the government policies as they either rule the country or participate in the government as coalition partners.<sup>206</sup> Even if populists are not in government, there is a risk of indirect influence on state policies since they tend to push even the mainstream parties towards hardline positions.<sup>207</sup> Hence, the populists’ capacity to shift the discourse and actually harm the ECtHR is much higher.<sup>208</sup>

These developments have been incrementally growing towards a major change in the socio-political context of European human rights adjudication. The resistance to the ECtHR is now backed by a coherent (although thin) populist ideology and a political style appealing to the masses. The critique is not limited merely to academic debates or tabloid criticism anymore, but affects the highest levels of domestic politics and public debate in a number of European countries. It is even more intense since the ECHR system apparently suffers from the heightened populist critique of the European Union too. The lack of general understanding of the relationship between the EU and the CoE and the lack of awareness of the Strasbourg Court not being a part of the EU contributes to the spillover

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<sup>204</sup> See *supra* note 81.

<sup>205</sup> Eiermann et al., *supra* note 5.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* For a particular example see Oomen, *supra* note 79, at 415).

<sup>208</sup> Cf. Hirschl (*supra* note 47, at 2) who also singles out the populist challenge and argues that it is distinguished from earlier grievances against globalization and global constitutionalism.

effect of criticism paid to the EU.<sup>209</sup> In sum, the populist challenge is particularly troubling for the ECtHR due to its high capacity to promote general resentment against the Strasbourg Court in the political sphere and within the general public.

#### **4. Conclusion**

The ECtHR has been criticized from several positions for some time now. This article has argued that the recent populist explosion in Europe poses an even greater challenge to the Strasbourg Court. The rise of populism does not imply only intensified critique of the ECtHR. The combination of the populist ideology and political style has been incrementally leading to a shift in the socio-political context of the ECtHR's functioning, which questions some of the basic rationale of the ECHR system.

The article argued that the challenge posed to the ECtHR by populism is distinctive due to the combination of its ideological basis, its wide appeal and capacity to reach ordinary people, and populists' tendency to change the institutional landscape and remove limitations on their power. Nevertheless, the subsequent stocktaking of the ECtHR's institutional design showed that the Strasbourg Court is quite well protected from the most common anti-court strategies targeting structural features of a court and judicial personnel. The high number and diversity of the ECHR's state parties (decentralization), rather high level of judicial self-government and institutional safeguards of judicial independence insulate the ECtHR relatively well from attempts to prevent the court from effectively reviewing domestic policies (jurisdiction stripping, paralyzing the court) or attempts to "tame" the court. However, there is another strategy of contesting the ECtHR – sidelining the Strasbourg court through achieving the gradual erosion of its authority and social legitimacy. The gradual erosion scenario is particularly troubling for the ECtHR in the context of the populist challenge. Populists' greatest strength – widely appealing narrative criticizing counter-majoritarian institutions and providing justification for attacking courts – meets the Strasbourg Court's greatest weakness – vulnerability to legitimacy challenges.

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<sup>209</sup> Johan Karlsson Schaffer, Andreas Føllesdal & Geir Ulfstein, *International Human Rights and the Challenge of Legitimacy*, in *THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES* 1, 11 (Andreas Føllesdal, Johan Karlsson Schaffer & Geir Ulfstein eds., 2014).

This article has focused on the diagnosis of the populist challenge to the ECtHR. The next logical step is to suggest how to face the challenge. However, that is a complex task that deserves a separate analysis. Still, based on the conclusions of this article, it is possible to set at least the basic directions for responding to the populist challenge. It is clear that it will not be an easy task. Since the roots of the problem lie deep in the pan-European or even global political and societal developments, no easy solutions seem to be available. Hence, countering the populist challenge will rather be a slow process of managing the ECtHR's social legitimacy, which should take seriously the distinctiveness of the populist challenge.

The distinctiveness of the populist challenge might require changes to the ECtHR's legitimacy-seeking and communication strategies. So far, the Strasbourg Court's success and extensive authority have been based mainly on its partnership with national courts.<sup>210</sup> The populist challenge will likely require extending the partnership strategy beyond state actors (and NGOs), and aiming at the general public. I believe that the rise of populism, augmented by social media and the related "cognitive mobilization" of the people,<sup>211</sup> poses an incentive for the Strasbourg Court to revisit its communication practices. To support the Court, the public has to be aware of the ECtHR's existence and affiliation, and understand its basic mission and functioning.<sup>212</sup> Besides that, the ECtHR, CoE actors and other supporters of the Strasbourg Court should stand against its inclusion in the "narrative of blame". As misleading and fake information often form an essential part of the populist strategy, pro-ECtHR actors should be active in providing a counter-narrative.<sup>213</sup> It should be welcomed that the CoE and the ECtHR have already been working on their communication practices. The Strasbourg Court, for instance, operates a Twitter account, YouTube channel, offers webcasts from hearings, or educative

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<sup>210</sup> Jan Petrov, *Unpacking the Partnership: Typology of Constitutional Courts' Roles in Implementation of the European Court of Human Rights' Case Law*, 14 EUCONST (forthcoming in 2018).

<sup>211</sup> MUDDE & ROVIRA KALTWASSER, *supra* note 17, at 103 (referring to Inglehart).

<sup>212</sup> Cf. James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AMERICAN POLITICAL SCIENCE REVIEW 343, 356 (1998).

<sup>213</sup> Research on fake news shows that a detailed debunking message containing counterarguments is the most effective way of fighting misinformation. See Man-Pui Sally Chan et al., *Debunking: A Meta-Analysis of the Psychological Efficacy of Messages Countering Misinformation*, 28 PSYCHOLOGICAL SCIENCE 1531 (2017).

resources about the ECHR system.<sup>214</sup> However, the greatest challenge is to make sure that this information reaches beyond the ECHR community and gets to the general public as the key audience in the context of the populist challenge.

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<sup>214</sup> ECtHR, Information Documents,  
[https://www.echr.coe.int/Pages/home.aspx?p=court&c=#newComponent\\_1346150506208\\_pointer](https://www.echr.coe.int/Pages/home.aspx?p=court&c=#newComponent_1346150506208_pointer)