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Autocratization outbreaks: the Polish and
Hungarian responses to the Covid-19
pandemic and their early effects on
democracy in comparison to Italy
Magister (MA) Thesis

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Abstract

The unexpected COVID-19 pandemic demanded a strong and firm state response in order to curb the unprecedented, multilevel crisis caused by the spread of SARS-CoV-2. The arrival of the virus in the EU in early 2020, including the terrible Italian first-wave outbreak, incited the primacy of health and life over any other right or freedom. Although understandable, this scenario raised concerns over the possibility of instrumentalization of the pandemic by the populist governments, given the affinity between the rise of populism discourse and practices in the event, or narrative, of crisis. With consideration of the conditions of the rule of law in the European Union, the quasi-autocracies of Poland and Hungary become interesting research objects. The present work describes these countries' measures and analyses their legality and compliance to the rule of law, together with considerations to the impact of said measures upon these countries' democratic institutions. Furthermore, the same operation will be performed for the Italian scenario, which leads to a comparison to be made between the three countries' pandemic managements, and, ultimately, a comparison between the Central-Eastern European populism and Western European populism. Due to the novelty of the subject, there is a lack of work on the topic of the instrumentalization of the pandemic, as well as the usage of such scenarios to highlight the practical differences between the two types of populism. In order to make a substantial consideration of these populisms, this work initially

concentrated on an extensive description of the recent political and epidemiological pasts, relating each country to its respective populism cluster. Three separate content analyses on the collections of each country's measures provided with a view on instrumentalization or legal compliance. This was followed by a qualitative comparative analysis directly derived from the previous three analyses. The analytical approach reveals each country's idiosyncrasies and differences in managing the pandemic and, eventually, instrumentalizing it. Through comparison of the three cases, the thesis' hypotheses were met. Poland and Hungary demonstrated an active instrumentalization of the pandemic in order to fulfill their needs. In addition, it was also noted that said needs are shaped by the countries' political, legal and institutional conditions, and, secondarily, the epidemiological context. Under these conditions the Italian pandemic response is also better understood. As initially imagined, the different rationales between Western and Central-Eastern populism determined their *modus operandi* in fighting the pandemic and in exploiting the emergence scenario in their favor.

Keywords: Populism; COVID-19 pandemic; instrumentalization of crisis; autocratization; COVID-19 pandemic response.

Streszczenie

Niespodziewana pandemia COVID-19 wymusiła na krajach stanowiącą odpowiedź w celu zniwelizowania efektów bezprecedensowego, wielopoziomowego kryzysu spowodowanego rozprzestrzenieniem się wirusa SARS-Cov-2. Pojawienie się wirusa w Unii Europejskiej na początku 2020 roku, w tym tragiczna pierwsza fala we Włoszech, skłoniło rządy krajów europejskich do przełożenia zdrowia i życia człowieka ponad wartość jaką jest wolność indywidualna. Choć wywołany koniecznością, scenariusz ten wzbudził szereg obaw, co do możliwości instrumentalizacji pandemii przez rządy populistyczne, biorąc pod uwagę pokrewieństwo między powstaniem dyskursu populistycznego a praktykami i narracjami kryzysu. Uwzględniając warunki praworządności w Unii Europejskiej, quasi-demokracje takie jak Polska i Węgry stały się wyjątkowo interesującym obiektem badań. Niniejsza praca opisuje środki zastosowane przez oba kraje, analizuje ich legalność, zgodność z prawem, zawiera również spostrzeżenia dotyczące wpływu tych środków na państwowe instytucje demokratyczne. Podobna analiza przeprowadzona jest w stosunku do Włoch. Pracę konkluduje analiza porównawcza dotycząca sposobów zarządzania pandemią we wszystkich trzech krajach, uwidaczniająca różnice pomiędzy populizmem środkowo i wschodnio-europejskim, a modelem zachodnioeuropejskim.

Nie istnieje wiele źródeł dotyczących instrumentalizacji pandemii, które pozwoliłyby zrozumieć różnice występujące między wyżej wymienionymi

odmianami populizmu. Niniejsza praca stawia sobie za cel wypełnienie tej luki. Praca rozpoczyna się opisem sytuacji epidemiologicznej oraz politycznej, w tym odnosi się do dyskusji na temat różnych rodzajów populizmów w Europie. Następnie omawiane są środki zapobiegawcze zastosowane przez wybrane do analizy kraje, uwzględniające przykłady instrumentalizacji, jak i zgodności z prawem, którą konkluduje jakościowa analiza porównawcza. Analityczne podejście ujawnia idiosynkrazję każdego z państw oraz różnice występujące w procesie zarządzania pandemią, jak i ostatecznie, jej instrumentalizację. Przeprowadzona analiza potwierdza hipotezę pracy. Polska i Węgry wykazały aktywną instrumentalizację pandemii w celu zaspokojenia swoich potrzeb. Ponadto zauważono, że wspomniane potrzeby kształtowane są przez uwarunkowania polityczne, prawne i instytucjonalne krajów, a w drugiej kolejności kontekst epidemiologiczny. W tych warunkach lepiej zrozumiała jest również włoska reakcja na pandemię. Jak początkowo sobie wyobrażano, różne uzasadnienia między zachodnim i środkowo-wschodnim populizmem europejskim determinowały ich *modus operandi* w walce z pandemią.

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1. Introduction

The COVID-19 pandemic started in China in early December 2019 and completely shaped the world's political developments. In Europe, the rapid spread of the virus deeply impacted normality for populations and governments. By the end of March 2020, two months after the first infection, Italy had the highest number of both cases and death toll in the world (WHO, 2020b). The European Union became the epicenter of the pandemic, with Italy being the hardest impacted and the precursor of national restrictive measures. Many EU states followed the Italian measures example and the World Health Organization recommendations while attempting to balance them with their economic needs. Among the countries that introduced restriction procedures of suspending flights, lockdowns, and forced quarantines, were Hungary and Poland. Restrictions and monitoring were prioritized by these countries even before the WHO declared a worldwide COVID-19 pandemic on 11 March 2020. The clear goal was not to be caught by surprise like Italy was.

Although Italy was the most unfortunate scenario, the outbreak became a crisis for the EU as a whole, and countries that had a low rate of infections and deaths, like Hungary and Poland, pre-emptively adopted mitigation measures. Some of these measures restricted the EU's principle of free transit, and could trigger a crisis of the European ideal, however, as life and health are unanimously seen as a priority, the unprecedented crisis is primarily sanitary.

To see the pandemic as a crisis – or better yet, as *another* crisis – makes the topic particularly interesting to be analyzed in countries where their current government has been elected – and in some cases also re-elected – during a crisis. The current government in Hungary is composed by the right-wing populist Fidesz in coalition with the reactionary Christian Democratic People's Party (KDNP) and led by Fidesz's strongman Viktor Orbán, who since his election, in 2010, has used the idea of crisis in different ways to create the notion of an imminent threat, in which Fidesz-KDNP would be on the Hungarian people's side.

The structure of the PiS as the government is remarkably different from Fidesz regarding the position of the party's leader in the government. Differently from Orbán, Jaroslaw Kaczynski, ex-Prime Minister of Poland and - by the time the pandemic started - a regular member of the Sejm, is the leader of the Law and Justice party. Meanwhile, the president of Poland since 2015, Andrzej Duda, was elected under circumstances that resembled Orbán's campaign. The right-wing coalition United Right, lead by Law and Justice (PiS), appealed to the public opinion's disillusion with the EU project, which was backed by the Europhile, and at times government party, Civic Platform (PO). Once in power, Duda and his parliamentary majority initiated, in 2017, a series of obstructions to the functioning of the Polish judiciary that was justified by an alleged corrupt system in need of reforms.

Finally, after decades of corruption scandals and unkept promises in Italian politics since the late 1980s, many voters rebelled against the old, known major political forces. Two parties teamed up and a coalition between the catch-all Movimento Cinque Stelle (M5S) and the right-wing Lega was formed after both achieved an outstanding combined majority in the 2018 parliamentary election. An ally of the M5S, Giuseppe Conte, was selected to be the President of the Council of Ministers, the Prime Minister of Italy. After internal conflicts, Lega left the coalition in 2019, and Conte started his second cabinet, this time in coalition with the center-left Democratic Party (PD) and minor left-wing parties. M5S's catch-all substance mixed populist right and left rhetoric, with anti-elitist, anti-corruption, and even anti-political stances.

The cluster Hungary-Poland offers an interesting comparison when put against Italy. The rationale of the study's proposal and selection of cases lies in how they are set apart by their idiosyncrasies, mainly in consideration of the impact of their pandemic response in the legal-institutional substance during the first half of 2020. Sanitarily, among all their similarities, Italy, Poland, and Hungary have steadily suffered from defunding on the healthcare

budget, which fragilizes their health support mechanism - making them fall short of the EU average¹ (Eurostat, 2020b)- and diminishes the popular and governmental trust in the system. However, despite the pandemic eventually impacting the whole world, Italy was among the first infected countries in Europe and so had a very different experience with the pandemic when compared to Poland and Hungary. Italy became the epicenter of the global outbreak, and the healthcare system was on the verge of a collapse. While this event was a surprise to Italy, the other two countries had a few extra weeks to prepare for the arrival of the SARS-CoV-2.

Politically, although the governments in these countries are understood as populists (Lázár, 2015; Chiaramonte et al., 2018), they represent two different forms of European populism that embody their discourse, appeal, agenda, and governmental practices. The narrative of crisis and anti-systemic mission is rhetorical and operational components for populism in general, however, the degrees in which the first is instrumentalized, and the latter impacts the functioning of a democratic state differ between the Pole-Hungarian populist experience and the Italian one.

In the context of an actual crisis of unprecedented dimensions, these features of populism produce concerns over its capacity to instrumentalize the pandemic where this political expression rules a state. A populist government can undermine the state's constitutionalism to ease its maintenance and expansion of power while claiming to limit certain individual liberties in favor of a wide public safety and the primacy of life and health. The literature (Capano, 2020) does not question or express concerns over Italy's measures, especially when one considers the dreadful scenario in Northern Italy. However, concerns were addressed on the impact of the Hungarian and Polish response (Landman & Splendore, 2020; Cieselska-Klikowska, 2020).

¹ The average healthcare expenditure in the EU is 10% of GDP, while Italy spends 8.3%, Hungary 6.7%, and Poland 6.3%.

The stated concerns presented in the early literature are valid and well-based in recent political history, however, they worked like alerts on the legal and institutional developments in Budapest and Warsaw. They were done early during the first wave of the pandemic, when the infections in Europe were reaching their first crest, with Italy becoming an iconic terrible scenario, and Hungary and Poland (McKee, 2020) presenting a successful response, rule of law aside. In contrast, the present work wants to analyze both the crest and (the beginning of) the trough of the first wave, and spot not only what infringes the rule of law, but what of those infringements remains once the justification for such measures weakens.

The early literature expressed their concerns based solely on historical scenarios and primordial legal overviews – which will be used in this work as well. While the alerts condemned the Polish and Hungarian actions and alerted about the threatening nature of populism for democracy (Klajn, 2020; Szekeres, 2020), an analysis of these responses in comparison to different types of EU populist governments is yet to be done. With the emergence of this puzzle, this paper will answer the following research questions:

What were the Hungarian and Polish legal responses to the pandemic, and their instant effects on the countries' democratic institutions and rule of law? How do these responses and their respective effects differ from the ones in Italy, an EU State with and worse pandemic case?

These questions demand a content analysis applied to legal texts, with special consideration of tools from qualitative comparative analysis. For a better comprehension of the measures of the analyzed governments the application of a conceptual framework on illiberalism, rule of law, and surrounding concepts will be needed. Ultimately, this work treats legal documents as a source of data to understand a political phenomenon and is solely focused on the legal and political dimensions of this issue, meaning health and sanitary data will be overwhelmingly used simply to aid the contextualization.

This work's challenge - to understand the impact of legal decisions on the functioning of the Polish and the Hungarian states in comparison to Italy – fundamentally requires a rationale for the choice of the case studies. Italy is not selected only due to being the country with the most unfortunate outcome in the first phase of the pandemic, but most importantly due to the country's similarity in political state and development. This comparison is set with the objective to point out both the current state of the democratic institutions under the pandemic in Poland and Hungary in comparison with another EU country equivalent and how countries that have been through different pandemic situations responded differently.

1.1. Hypotheses

This paper argues that the COVID-19 pandemic is an opportunity to be instrumentalized by populist governments. Considering the autocratic nature of Central-Eastern European populism the hypothesis presented is that Fidesz and PiS will further erode the functioning of political power constraints while using their states of emergency to pursue their interests, including weakening the opposition. Meanwhile, based on the comparison between West European (WE) and Central-Eastern European (CEE) populism, M5S is not expected to instrumentalize the pandemic for political gains, instead, it will differ from the former governments by exercising strictly sanitary measures, due to Italy being the world's epicenter of the pandemic in the first semester of 2020.

1.2. Thesis structure

The research's first chapter consists of an introduction on the potential for the instrumentalization of the pandemic by the agents involved, and the surge of the research question and hypotheses. The second section is dedicated to a theoretical analysis of the concepts of populism, crisis, illiberalism, autocratization, rule of law, and unconstitutionality. The thesis' relevance, together with the contribution to the literature, will close this chapter.

The following chapter justifies the selections of the data and its sources, the theories that define our approach to the data, the methods applied, and clarification for the analytical procedures.

Chapter four is dedicated to displaying the legal-institutional recent past of the analyzed countries, considering both the context that gave space to the rise of the populist government and the states' immediate pre-pandemic political conditions. The next division concentrates on summarizing the early epidemiological scenario that incited the countries' reactions. Chapter six treats the Polish, Hungarian, and Italian adopted measures against the pandemic that infringed the rule of law and strengthened autocracy. A review of the policy and institutional responses and their legal, political, and institutional effects will be highlighted through an analysis of each countries' line of action will close the section. The work's seventh section gathers the three analyses to apply the qualitative comparative analysis. The conclusion of the thesis restates the results of the analysis conducted in the previous stages chapter, this time in comparison with the theory of populism, and the literature on the Hungarian and Polish dismantlement of the rule of law and the recent concerns in the context of the pandemic. The last section is reserved for the bibliography.

2. Literature Review & Conceptual Framework

2.1. Populism and the need for crisis

The broader conceptualization of populism is a moralized and reductionist approach to politics made by a (self-)proclaimed representative of the people, who defend the nation's collective, homogenous morality against the selfish interests and condescending behavior of the country's elite. The agreements among different authors on the definition of populism end here.

Two main schools of thought dominate political science: populism as a “thin” ideology, and populism as discourse. The first is mainly presented by Cas Mudde (2004), who explains the adjective is as important as the noun. By “thin” Mudde claims that while populism is an ideology due to a set of beliefs and worldviews, it is limited enough that it could (and should) be flexibly joined by a “thicker” ideology, like Bolivarianism or liberalism, since its characteristic chameleonic features allow its adoption by all types of “thicker” ideologies. Mudde and Rovira Kaltwasser (2017) claim that populism, like any other ideology, influences their adherents' worldview, as a filter on how the world is binarily perceived. The authors share the common view that populism produces a moralist and Manichean opposition between “the people” and “the elite”. These authors, specifically, proclaimed that the populist dichotomy classifies the people as intrinsically pure and the elite as unremorsefully corrupt. In this scenario, the “volonté générale” should prevail over the individualist and corrupt nature of the elite. Finally, Mudde puts “crisis” in a secondary place. He seems to be unsure whether the term should be used, perceiving it as “too harsh”. Nonetheless, he admits the “populist heartland” needs special circumstances to be combined to emerge, such as political resentment, the perception of a serious challenge to the people's interests, and a charismatic populist leader. Both authors agree that populist actors attempt to create a “sense of crisis” to engage the urgency of the need to depose the elite and restructure the institutions.

In turn, populism as a discourse – or repertoire – presents the concept as a rhetorical strategy. The binary worldview of Us versus Them is taken as a “discursive frame”, a perception of reality, being a straightforward communicative style (Aslanidis, 2015; Steger, 2019). According to Brubaker (2017b), political actors can resort to it in different degrees of intensity and repetition, ultimately meaning there are different shades of populism. Brubaker states that these degrees are not the only way it manifests, and the binary elements that constitute populism can be combined differently and in a deeper and varied manner. Brubaker directly mentions Mudde’s description of the populist dichotomy between “pure people” and “corrupt elite”, and argues that Mudde limits the combination a populist actor can apply when constructing its narrative. Rogers Brubaker proposes a Manichean opposition should have a horizontal and a vertical axis, so varied natures – or adjectives – can be attributed to both groups. Vertically, the elite does not need to be corrupt to be demonized, for instance, a supranational group can be framed as an imperialistic elite, and the threat it imposes can be of economic, political, or cultural nature.

The opposition must not be directed solely towards those on the top, but also those at the bottom, who the morally decent people see as dangerous and undesired groups. Brubaker’s horizontal axis of opposition is divided between insiders and outsiders. The first ones are “the people”, while the outsiders are the marginal groups that hold different values, like LGBTs, and may be seen as a political and economic threat, like migrants. Through these vertical and horizontal frames, Brubaker claims the homogeneity implied by Mudde’s “pureness” of “the people” does not exist.

The populist actor may simultaneously combat those on the top, on the bottom, and the margins of the good citizens. The different elaborations of vertical and horizontal oppositions are present in Brubaker’s additional elements of a populist repertoire. The first is called “antagonistic re-politicization”, meaning the claim that political control has been lost, for

instance, when abdicating political and economic sovereignty to a supranational institution. In response, populists declare the need to retake this control and establish a democratic decision-making structure that they claim fitting, and so it can take many forms, such as direct democracy and referenda.

The second element is majoritarianism, where the privileges of those on the top, and the benefits, rights, and safeguards of those on the bottom, and the margins are replaced or silenced by the interests of the majority. Anti-institutionalism is the third element. Brubaker highlights it is very selective. There is distrust on the institutions perceived as a tool of the elite: media, political parties, and the courts, which should be replaced by new, “truer” ones, or occupied by the “true” representatives of the people. Their anti-party discourse favors direct democracy and referenda, therefore, a system past the need for parties. When explaining the desire for direct communication with the people, Brubaker mentions Movimento Cinque Stelle as an example due to its focus on digital communication; when describing the populist characteristic of distrust towards the institutions’ complexity and autonomy, the author points to the subordination and alignment of the courts, media, economy, and culture under the Fidesz’s government.

The element of protectionism, meaning protecting *the people* against threats in all spheres, follows: the elite, the outsiders, and the danger they represent to the economy, security, culture. This is intrinsically attached to the rhetoric of crisis and identity, influenced by Laclau’s work and division of populism into “the people”, “the elite”, and “the crisis” (Laclau, 2005; Latsch, 2020). Brubaker claims populists dramatize threats by exaggerating and distorting them to the degree they start being perceived as an actual crisis, which only the populist actor can contain. The last element refers to their communicational style: mostly direct, simple, reductionist, unrestrained, often accompanied by anti-intellectualism.

Rogers Brubaker's approach seems more flexible and, at the same time, more complete and more specific. The ambivalence of the horizontal and vertical axis of opposition creates a wide range of combinations, and it is complemented by the final five additional elements, among them, crisis. The populist political platform is founded upon rhetorical elements of opposition and crisis, which are socially constructed (Latsch, 2020). Moreover, Laclau argues the populism cannot be identified by its contents but on the particular logic of articulation of said contents. Mudde's ideational approach of "thin ideology" uses similar elements, meaning there are no actual ideological dimensions in his analysis of populism. As put by Aslanidis, it lacks ideological projects, structures, and commitments in any indicator of ideological disposition.

Other authors complement the view on the relationship between crisis and populism. Moffitt (2015) explains that this topic is not external to populism, but an internal feature of populism. Populist actors actively attempt to propagate a sense of crisis as a mechanism to create divisions. Similarly, Rooduijn (2014) understands the construction of a crisis as the link to the narrative of a large systemic struggle between two antagonists, the people, and the elite. However, the author stresses that the proclamation of a crisis is not a characteristic of populism, but rather a consequence of its Manichaeic paradigm. The populist discourse might rise during an actual crisis, but this discourse can only survive if there is a maintenance of the "versus" in "Us versus Them". A continuous narrative of crisis is necessary. The survival of the crisis discourse and its dependence on opposition to the "enemies of the people" is agreed upon by both Moffitt and Brubaker. However, Rooduijn's statement – that crisis is solely a consequence, but not a characteristic of populist discourse – not only diverges from the other two authors but contradicts Rooduijn's perception since the author admits the populist discourse emerges during a crisis. However, as Moffitt (2016) argues, crises are not neutral, they can only exist

through an interpretative frame, therefore, for an event to be perceived as a crisis, it should be a central part of populist politics.

Beyond the populist discourse, Latsch analyses the practical effects of the populist usage of “crisis”. The crisis not only assists the creation or nomination of an enemy but acts as a justification for the need for an immediate and drastic institutional change. Essentially, “The populist instrumentalizes crisis, bringing crises to life to legitimize their unprecedented assault on the existing democratic system” (Latsch, 2020, p. 32). According to Latsch, once in power, populists leave the crisis unresolved to maintain their political leverage as saviors of the nation.

2.1.1. Western and Central-Eastern European Populism

Brubaker’s approach to populism adopted in this work considers the elements that constitute populism can be combined in varied forms. European populism is one of them, and still, within it, there are two main varieties of European populism, with different discourses, approaches, strategies, and more importantly, distinct degrees of openness to the idea of autocratization: Western (WE) and Central-Eastern (CEE). And although the most common description of populism may be addressed to both of them, the CEE type has particularities that directly relate to its impetus to autocratization, expressed by its demands and practices.

Euroscepticism is, in general, present in EU populist parties disregarding their nationality and ideology, since the supranational union is commonly perceived as the main elite behind the threats and crisis that surround their national states. However, among these parties not only Euroscepticism varies between hard and soft, but the sources for their stances also differ as well (Santana, Zagorski & Rama, 2020). Their self-representation plays an important role in creating a basis for their opposition, perception of threat and crisis, and finally, the proposed solution.

The work once again resorts to Brubaker (2017a). Similar to his work on populism’s repertoire frame, the British author proposes a gradation view on the different expressions of

populism through the vertical and horizontal axis of opposition since in each populist party the elements can be portrayed in distinct degrees. The civilizational discourse is a different perceived collectivity, that refers to another level of cultural and political space, and therefore the basis for the opposition against crises and threats is different than the nationalist terms. In Brubaker's terms, the civilizational discourse is applied in both vertical and horizontal directions, mainly against those at the bottom, and especially, against the outsiders. Many WE populists commonly present an agenda with a selective defense of liberal rights, building a civilizational, individualist, democratic, Christian-values-based secularism "Us" against Islamic migrants, outsiders culturally incompatible with the WE way of life.

Despite being (selectively) liberal, in general, these WE parties carry authoritarianism in their discourse since populists claim to represent and strive for (a monolithic and arbitrary definition of) the will of the people. The legitimacy is derivative from the "interests of the people", and so referenda are extensively pushed by populists to circumvent institutional constraints to their objectives. The populist "Us vs. Them" tactic used by WE populists frames the West's pride in democracy and individualism against the threatening illiberal Islam, which gives substance to WE populists' opposition to Islamic migration. Brubaker (2017a) importantly highlights once again that some gradation is expected. The preoccupation with a threat can be intensified or ease, while the roots for said concern do not need to be based on liberal values, meaning the civilizational can be replaced by different shades of civic nationalism, or even classical nationalism.

This transformation is seen when WE populist actors create a narrative against the European Union as a supranational elite. Although the WE populists are not anti-system neither nationally nor supranationally, they call EU agreements in question, especially those of economic order (Brubaker, 2017a). In opposition to the EU, they promote the defense of the national sovereignty against the economic effects of the European Integration since, differently

from CEE countries and to the exception of the United Kingdom, they all belong to the Eurozone. The position of WE populists towards the EU is the proposal of harder Eurosceptic solutions when compared to the CEE countries (Csehi & Zgut, 2020).

The two types of European populism share an identitarian approach to Christianity to sustain an anti-Muslim discourse, nevertheless, the CEE opposition to Islam has also nationalist and securitarian bases. Since the CEE populists do not address any type of secularism or liberalism in their narrative, Muslim migrants are not a threat to pluralist values. Instead, the danger perceived is that these outsiders will harm the country's homogeneity. Contrarily to the populists from Western Europe that see Islam's illiberal religious values as a danger to their free and plural societies, CEE populists adopt a different criticism, claiming it is mainly Brussels' liberalism that threatens their countries' cultural and religious values. Their case for national sovereignty is based on anti-imperialist nationalism. As Krekó and Enyedi (2018) explain, they frame the EU as an authoritarian force that threatens the national identities by imposing liberal values and "ideologies" on homogeneous, hierarchical societies that unapologetically disdain and distrust egalitarianism and multiculturalism. The economy has a secondary role in their argument, which is far from surprising considering these countries are the biggest beneficiaries of the EU budget (Kovacevic, 2019). However, as shown by Csehi and Zgut, the renationalization of key industry sectors plays a big role in their economic agenda. The state-controlled economy is justified as a protective tool against the domination of global capitalism and the sovereignty-threatening EU.

2.2. Autocratization, rule of law, and (un)constitutionalism

As mentioned, there is a big difference between WE and CEE populism regarding their respect to the *rule of law* and, once in power, their tendency towards *autocracy*, moving away from *democracy*. To identify the potential of autocratization during the pandemic, these

concepts will be defined. Following Lührmann and Lindberg (2019), autocratization is understood similarly to what Lust and Waldner (2018) call backsliding from democracy, meaning the decline of democratic aspects as a process, and not a state of affairs, that changes the rules of elections, the functioning of institutional checks and balances and accountability, and civil rights. In a more generalist approach, Mark Tushnet's (2015) analysis of authoritarian regimes argue authoritarians flagrantly undermine established laws and institutions if it serves the regime's ampliation and consolidation of power. This movement goes in opposite direction to the maintenance of democracy, which is understood as a system that provides the rights to information and active participation to its citizens-voters in an environment of political competition together with the potentiality of alternation in office. Moreover, it possesses flexible and sometimes participatory mechanisms and structures to facilitate political accountability (Pasquino, 2005).

Bugaric (2019) points out that there are four symptoms of a democracy degradation: curbing checks and balances in the legislative and executive powers; weakening the range of free media; hurt civil rights and liberties; deterioration of the electoral process. This is reinforced by Sadurski, who argues the actual legal, institutional, and political developments conducted by populists governments in Poland and Hungary imply more autocratic definitions of populism. Sadurski uses the original understanding from Muller (2016) that they are anti-pluralists in the terms that it puts itself as the sole representative of the people.

The target of this autocratization should be defined as well. The rule of law is a recurrent subject in legal, political, and sociological theories (Krygier, 2007). For a political analysis through legal texts, it is important to resort to Lacey (2019) and Waldron (2008) that classify four different ways to understand and define the rule of law, each of them stricter than the other. Therefore, the first way, called formal or legalist conception, that emphasizes governance values, such as clarity, predictability, universality, publicity, and determinacy

should all be present in the expressed law, while the actual administration of the law should be congruent with what is written.

The procedural view on the rule of law considers the composition of the legal system as essential to determining the compliance of a state with its legal expressions. The many bodies within this system are expected to guarantee that the actions not only comply with the established rules but also respect the procedures. Said procedures are understood as safeguards to individual rights and liberties. Beyond procedural rules, constitutional constraints and institutional arrangements such as separation of powers, checks, and balances, and the independence of the judiciary are unseparated from the rule of law (Selznick, 1961).

The third view goes deeper into substantive values to define the concept by entailing human rights and other values connected to liberal democracies (Baer, 2019). Differently from the procedural view, where the only individual rights inherently attached to the rule of law are the rights within the court environment, a substantive view draws on liberties such as the freedom of assembly and association; freedom of expression; and the right to vote. The fourth view is functional, which features contextualism, and maybe pragmatism, by understanding the content of the rule of law is shaped by cultural, institutional, and political conditions. Here rule of law is seen teleologically, aiming mainly to counterbalance power. It limits the range of idealism that can influence the construction of the rule of law, by insisting that the values aspired can only be met when considering social, political, and cultural systems (Krygier, 2009; Lacey, 2019).

The problem with the formal definition lies in the fact it does not take the substance of the law into account. Here, the only requirement for a legal procedure to be within the rule of law is that the action follows the governance and formal values mentioned. Any authoritarian or undemocratic state would be considered a rule of law-abiding as long as the restrictions are imposed in an orderly and normative manner (Waldron, 2008). The procedural view is broader

but still limited to values of a court environment, such as argument and reason, leaving other individual rights out. The substantive view matches the understanding and expectations of the European Union regarding the legal practices and arrangements, such as the Copenhagen Criteria and the Charter of Fundamental Rights of the European Union. The rule of law must be addressed with consideration beyond institutional liberties and procedural safeguards, including greater emphasis on individual liberties.

The selected approach, the substantive one, also relies on constitutional values (Baer, 2019), which displays its adequacy to the present work, where the constitution of each country plays a fundamental role. The classical perception of modern constitutionalism is shaped by private and public autonomies that have pre-eminence in conceptual, normative, and institutional spheres. Private autonomy refers to the guarantee of personal rights and liberties, while the public one is connected to the definition of the self-rule of the state, which in a democracy means political-institutional rights (Dimitrijevic, 2015). It is expected from a constitution to introduce rights through both positive and negative models. The first designates the fundamental functions, purposes, authority, and commitments of the state (Brandon, 2015); the later model limits the scope of the same functions to protect the rule of law and to evoke personal and private autonomies (Thio, 2012). These models also build a framework of action against “the destructive potential of the crisis” (Dimitrijevic, 2015) through the identification and counteraction of a threat to the constitutive primacy of the autonomies, while maintaining its self-limitation nature.

Nevertheless, considering the work’s hypotheses, the opposite conditions are expected to be found, mainly in Hungary and Poland, during the execution of measures – supposedly – against the pandemic. David Landau (2013) assists this work with his conception of abusive constitutionalism. The author sees it as the usage of constitutional amendments as well as constitutional alterations to keep the appearance of liberal democracy when in reality the

mechanisms that make a constitutional liberal and democratic are no longer there. This describes the Hungarian case, however, the same cannot be said about Poland, which has had the same constitution since 1997 and was last amended in 2009. Nevertheless, Poland constantly acts between the limits of legality and extra-legality. PiS has invaded and rewritten the electoral and judicial systems, replacing the constraints to the political power with constraints to the organization of the opposition, which is what Schepelle (2018) calls autocratic legalism. These actions move beyond unconstitutionality and can only be described as anti-constitutional. The path these parties followed put them as “illiberal democracies”, as a hybrid system between the two previously defined concepts, democracy and autocracy (Krekó & Enyedi, 2018; Sadurski, 2019). In conclusion, abusive constitutionalism and autocratic legalism are important concepts to understand infringements to modern constitutionalism.

2.3. State of Exception

The concerns over the instrumentalization of the pandemic for political gains are rooted in the academic understanding of the “state of emergency” and its consequences. Lührmann and Rooney (2020) point out that states of emergency allow wannabe autocrats to create, maintain and extend the right circumstances to erode democracy since it “helps leaders to subvert the constraints of democratic procedure and the separation of powers”. The autocratization through emergency equates to Agamben’s (2005) “state of exception”, which is understood as the government’s immediate response and adaptation to a threat by a suspension of norms. Among these suspensions, Agamben points out civil rights and separation of powers as the most easily perceptible. Here, individuals’ lives are subject to the direct interest of a state, while the government absorbs surrounding powers, both vertically and horizontally. Ultimately, the exception becomes the rule, and a permanent state of emergency emerges.

2.4. Contribution to the academic literature

The pandemic is expected to produce a diverse set of crises soon (Heisbourg, 2020; Moldicz, 2020). Detecting and understanding the impact of political developments in the legal and institutional orders of democracy during the first period of the pandemic will help future analyses of the governments' capacities, decisions, and reasonings when dealing with future social, economic, and political crises. The relevance of this research is placed on the analysis of the confluence of two novels, unprecedented phenomena: the response of populist EU Members to the COVID-19 pandemic, and its threat to the rule of law within the European Union. By comparing three populist countries, inserting the Italian populist context, this work offers a new perspective on COVID-19 management among the EU Member States. Mainly, it will contribute to the literature on European populist governments by improving the understanding of the dynamic of populist autocratic practices, and offering a comparison between Central-Eastern European and Western European populist practices in a moment of crisis, more specifically, their response to the pandemic.

3. Research Design

3.1. Selection of cases, period, and data

The three cases meet two criteria. The first criteria are their political situation, which is relevant due to the similarity the three countries have regarding populism. Nonetheless, the governments present a gradation of populist rhetoric and action. The selection of these countries is dedicated to express the differences between Western European and Central Eastern European populist governments. The position of Italy as a founding member and Hungary and Poland as new members states – part of the fifth enlargement – is another way the West-East Europe divide is present within the EU.

The presence of Hungary and Poland is due to the continuous backsliding of their democratic institutions since 2010 and 2015, respectively. They are clear examples of CEE populist governments and represent an important contrast to their Western counterparts, which appear solely as oppositional political forces. This situation changed in 2018, when Italy elected the first populist parliamentary majority in Western Europe. The right-wing Lega and the catch-all party Five Star Movement formed a coalition to govern Italy led by M5S's ally, Giuseppe Conte. Domestically, Conte's government and M5S MPs were, until the surge of the pandemic, actively seeking to maintain the image of a moralist, anti-establishment party fighting against the corrupt elites. They tried to implement anti-corruption laws; a financial support scheme for the poor (Giuffrida, 2019); and cut the pensions of former lawmakers (Jones & Gavin, 2018). Still, the legalist approach that claims to rely on the judiciary to protect the people's interests and the rule of law is also seen by some as a move towards illiberalism. The referendum for constitutional reform emerges from this scenario.

The second condition aims to highlight the discrepancy in the epidemiological scenarios. Compared to other EU countries, Hungary and Poland presented a below average

number of both cases and deaths by COVID-19 in the first half of 2020². Meanwhile, Italy had a much worse pandemic experience in that same period, being the second most infected country in the EU and the one with most deaths among all the EU countries (WHO, 2020c). This can be partially explained by it being among the first contaminated countries, and so, it did not have time to prepare for this unexpected event. Another point of confluence among the countries is the fragile state of their healthcare system³, combined with general popular distrust towards it (Gruszczynski, Latonski & McKee, 2021), which may help understand both the rationale behind the decision of these countries' governments and the general scenario of fear of the Coronavirus in Hungary and Poland, which lead them both to rank together with the most affected EU countries, as shown by IPSOS (2020) in a monitor on the public opinion's biggest concerns, published on 29 April 2020. This is important because the recent literature sees that this distrust and fear are connected to compliance with the rules. The idea of testing the two groups' responses is based on Zinn's (2020) argument that collective fear creates greater tolerance to harsh measures that may curb individual rights and liberties in the name of collective well-being.

The period of analysis will be 31 December 2019–30 June 2020, meaning, from the first COVID-19 cases reported by Chinese authorities to the WHO, to the month in which the EU presented guideline to aid Member States lift travel restrictions (WHO, 2020d). This paper understands this as the first phase of response from the EU and its members, matching the emergence of the virus in the world and the beginning of the trough of the first wave of the pandemic in Europe.

² By the end of June 2020, the average number of cases in EU countries was 52.790, Poland had 34,154 and Hungary had 4,145 cases. The EU average number of deaths for the same period was 4,930, and Poland had 1,444 and Hungary had 585 fatalities.

³ This work understand that a fragile healthcare system is one that encounters difficulties to provide a satisfactory service, meaning barely possessing enough equipment or personnel as well as not being able to meet the patients' service expectations.

3.2. Methods

The argument of the present work on the instrumentalization of the pandemic crisis by populist Hungary and Poland is based on the countries' recent political history, similar to scholars that expressed their concerns and alerted about potential rule of law violations (Simon, 2020; Heisbourg, 2020; Ciesielska-Klikowska, 2020). The presentation of such a historical overview is considered essential to attach the concepts in the literature review to the actual scenarios. The historical review of Hungary, Poland, and Italy allows the development of this work's key argument on the political, legal, and institutional changes produced by the three populist governments, ultimately highlighting their illiberal features. Moreover, this descriptive exercise stresses their differences in political, legal, and institutional modifications. Similarly, the health system and epidemiological conditions are described to present both the COVID-19 topic and the discrepancy between Italy and the Hungary-Poland cluster, which helps the evaluation of illiberal measures being adopted by the latter. The descriptive consideration of the recent historical developments is also valuable to demonstrate the interplay between the conditions of the states' mechanisms and the populist actors' exploitation of exogenous critical junctures.

The proposed research questions require an investigation through three different legal collections. To suit this need, the content analysis of legal texts is selected as the right method to be used since it can identify harms to the rule of law or moves towards autocratization, which would take form as infringements to the constitutions and, to a lesser degree, to other domestic laws, as well as incongruencies in the actions of the states and their public authorities that were supposed to safeguard their citizens. For methodological and analytical purposes, these violations must be unlawful if they threaten or infringe written legal interests.

The research will analyze primary sources - collectively referred to as measures – such as decrees, laws, acts, orders, and ordinances issued by the selected governments, that relate to a response to the COVID-19 pandemic. The Italian government’s measures and legislations will be reviewed and analyzed in the original language, while the version in English of the measures of Poland and Hungary will be used to understand the scenarios in Warsaw and Budapest⁴. The analysis of the actions’ legality in comparison to the countries’ constitutions is further allowed due to the existence of official translations in the English language of these constitutions. Moreover, only laws that contradict the countries’ domestic laws will be considered in the analyses, with special regard to the illegal derogation of civil liberties previewed in the constitution. Secondary sources such as academic sources, media, and government reports that relate to the legal, political, or institutional aspects of the pandemic in these countries will be used to assist this work’s analyses and eventually give substance to the reviews on the political and epidemiological context in the three countries. The analytical part will be completed with qualitative comparative analysis. The two analytical approaches selected can be understood as the most appropriate methods for this study due to their validity and replicability in legal texts.

Understood as the most appropriate methods for this study, considering its objects and the nature of data to be gathered, systematic content analysis of legal research (SCA-LR) and qualitative comparative analysis (QCA) were selected for their validity and replicability in legal texts. The former is an effective way to analyze many legislative texts of common types of sources with a defined subject matter (Salehijam, 2018). SCA-LR will be used to enhance

⁴ Available at Online Database of Polish Legislation, the Hungarian National Legislation Database, Legislationline - the Organization for Security and Co-operation in Europe’s legislations database -, the civil society organization Rule of Law in Poland’s archive, the Human Rights Watch’s database, About Hungary - the Hungarian International Communications Office’s website-, the Organisation for Economic Co-operation and Development’s panel for Policy Responses to the pandemic, and the Document Library of the European Commission.

differences, helping the QCA process, which will aid in understanding the impacts of different responses.

4. Recent Political Context

In order to offer expectations for the governments' actions, it is important to highlight the state of the democratic and political institutions, with special attention to the ones subject to alterations by or during the government of the analyzed parties, as well as indicating each party's values, behavior, and position within its national political environment.

4.1. Hungary and Poland

The Hungary-Poland cluster is derivative from the many similarities in political development they share, and is better understood when looking to a wider assembly within the European Union, the Visegrad Group, formed by four Central Eastern European countries: Czechia, Hungary, Slovakia, and Poland. They combined forces in 1991, during their common postcommunist transition after the iron curtain fell in 1989 (Visegrad Group, 2006), and jointly acceded the EU in 2004. Nowadays the government of these four countries politically sympathize with each other. This group's worldview is not homogeneous, however, they are united by a delusion with the European project since the 2008 crisis, producing different degrees of soft Eurosceptic and populist stances,

The Eurosceptic perspective in the Polish and the Hungarian populations is a perception found in different authors (Sadurski, 2019; Kréko & Enyedi, 2018), who partially attach it to a disenchantment concerning the promises of the free-market world and the Western standards of living did not come. At the same time, it is also related to fear of how globalization and neoliberalism can affect national identity, independence and sovereignty, and, the economy. Culturally, since before accession for both countries, Western liberal thoughts were feared to harm traditional Christian values (Mazzini, 2018; Lázár, 2015; Rech, 2018).

The rise of the parties is well documented. Gessler and Kyriazi (2019) state that Fidesz's trajectory from a new challenger and opposition party to a government leader, successful in elections is closely attached to the corruption crisis that occurred earlier in 2009 and 2010. It

deeply affected public trust in the Socialist Party's government and the political system. Therefore, corruption was a central topic at the 2010 elections. Fidesz exploited the political scandal to weaken the government and to create a "quasi-identitarian" (Sadurski, 2019) narrative on corruption, typical of its condition as a catch-all party. After Orbán was elected, he enjoyed a weak opposition, connected with the highly fragmented parliament, which saw the emergence of the far-right Jobbik and the green LMP. Since then, as nationalism and Euroscepticism found their place in the party agenda, Fidesz is classified as a right-wing populist party.

Viktor Orbán's first term as Prime Minister, from 1998 to 2002, partially and early demonstrated his populist ways of governance that he would put in practice from 2010 onwards. A corruption scandal arose in 2006 when the Socialist Party was in power. The Fidesz-KDNP 2010 electoral campaign was, unsurprisingly, dedicated to bash the political system and to claim the crisis in the democratic system could only be resolved through the removal of the corrupt elite and a new structure of power. It worked. The coalition achieved two-thirds of the parliament, and with this supermajority, Orbán reformed the Constitution, through which he concentrated more powers into his position as Prime Minister and the Parliament majority, composed by his party (Latsch, 2020). The new constitution removed the need for the participation of a coalition partner for a majority party to approve any legislation, effectively turning Fidesz – the majority party in the parliament – an unchallengeable power (Illés, Körösnéyi & Metz, 2018).

Orbán continued his illiberal reforms using the argument they were a response to a crisis. The Hungarian Prime Minister argued the 2008 financial crisis had shown that the Hungarian National Bank, as well as supranational entities like the International Monetary Fund and the European Commission, were tools that perpetuated a failed system (Latsch, 2020). And the answer to what was in the transformation of the country's macroeconomic

policy (Illés, Körösenyi & Metz, 2018). The core action was the nationalization of key sectors, including the media industry, that was heavily affected. As a result, Orbán ultimately was able to control media competition, exposure, and content, which facilitated the opposition to be silenced.

As noted by Latsch, Hungary did not suffer a particularly heavy impact by that financial crisis in 2008 (like Greece or Spain), but still a crisis and insecurity were felt. Orbán was able to dramatize the situation's severity and use it to justify the expansion of its power through unrelated means, like the nationalization and partisanship of media. In 2015 another crisis was heavily exaggerated and instrumentalized. The refugee crisis in Europe portrayed by Fidesz as an imminent threat from Islam and the EU authorities against the Hungarian economy, security, culture, and society. The narrative of danger culminated in a terror threat level being raised in March 2016, despite the low number of migrants who sought asylum in the country. Latsch explains that the enacted policies and the dramatization of the reality mutually incited each other. The crisis also worked to strengthen the "Us versus Them" rhetoric, which was used both against the Muslim migrants and the EU, and the need for concentration of power in the hands of the Prime Minister.

The narrative of the crisis was also exploited in favor of the use of extraordinary measures. In 2015, in the context of the migration crisis in Europe, a "state of migration emergency" was declared by the Orbán government due to the "refugee humanitarian crisis", allowing the deployment of the army and derogation of human rights (Scheppele, 2015). The constant campaign on the threat posed by migration led this state of emergency to be arbitrarily applied many times since 2015. Moreover, a new category of emergency was introduced through a constitutional amendment: the "state of the terrorist threat" (Bard & Carrera, 2020).

Similarly, PiS-led United Right coalition enjoyed a moment of weakness of the government formed by the Civic Platform (PO) and the Polish People's Party, previously and

during the 2015 elections. It is interesting to note that Poland had outstanding economic indicators during the 2008 global crisis, being the only EU member state to pass through the crisis holding positive economic growth rates. Therefore, no crisis opening occurred within the Polish political or economic scenarios at that moment, meaning there was nothing to be exploited. This changed in the following years, when PO suffered from “quasi-corruption” scandals, as well as the fluctuating ideologies shown in its catch-all strategy, which eroded the party’s popularity. Meanwhile, PiS adopted clearer right-wing markers for its agenda. PiS’ anti-corruption stance was led by the twin brothers Lech and Jaroslaw Kaczynski. PiS acquired electoral victories already in the same year it was created, in 2001, however they have directly inherited political experience from their previous party, the Center Agreement. By 2005 it formed a government, with Lech Kaczynski as President (since December 23, 2005 till April 10, 2010) and his brother as Prime Minister (since July 14, 2006 till November 16, 2007). Due to the challenges of acquiring a parliamentary majority and maintain a stable coalition the government was short-lived.

In this short time span an earlier autocratic behavior was already noted, however, the attempts to centralize the state and curb the checks and balances were met with a strong Constitutional Tribunal (Bustikova & Guasti, 2017). Soon, Jaroslaw Kaczynski was replaced by Donald Tusk, from the Civic Platform, in 2007. After the Smolensk air catastrophe that victimized President Lech Kaczynski, in 2010, Tusk became a target of PiS’ accusations of mismanagement in the international and domestic arenas and was held suspect of many of the conspiracy theories surrounding the catastrophe.

Jaroslaw Kaczynski took control of the party after his brother’s death, however, differently from Orbán in Hungary, he chose to be more discreet. For the 2015 presidential election, Jaroslaw Kaczynski managed the party backstage, while Andrzej Duda ran for office. Duda’s campaign was centered in an anti-establishment narrative, appealing to the fatigue felt

towards the PO's liberal and Europhile stance, framed as a demonstration of elitism, and, therefore, a representative crisis. Moreover, the migration crisis that started around 2014 had a central spot in the European media, Poland included, and might have added to the Eurosceptic pot of disillusion and disconnection that many Poles might have felt towards the EU (Szabo, 2020; Krzyzanowski, 2020). Once in power, the new president, Andrzej Duda, and the PiS-dominated public media created a new crisis narrative, this time against the Supreme Court. Sadurski explains that the "smear campaign" against the judiciary portrayed this power as partial, slow, and corrupt. Unsurprisingly, the government had the solution and the right project of reforms to counter these issues. In reality, the reforms restructured the judicial system by introducing controls from the president, the Ministry of Justice, and the both PiS-dominated Senate and Parliament over the National Council of the Judiciary's (KRS) composition. As put by Sadurski, it effectively erased the KRS's *raison d'être*, which was to protect the independence of the judiciary. In addition, the rhetoric of fear of migrants, Islam, and terrorist attacks was instrumentalized. Anti-terrorist laws were passed, increasing the Polish state's control and surveillance of its citizens.

In 2016, the government, through the "National Media Council Act", acquired powers to interfere in the boards of the public media. This time, the context behind this reform does not lay on a narrative of crisis, but instead of a "mission" of cultural "counter-revolution", composed of two plans. Firstly, to centralize the control of the public media, so its content could be almost directly regulated and the so-called liberal and non-Christian values would be erased from it (Surowiec, Kania-Lundholm & Winiarska-Brodowska, 2019). Secondly, the idea of "repolonization" of the media is still an important mission for the party since it still has not been achieved. This goal targets the foreign media companies and conglomerates that dominate the Polish market. The need for reform and nationalization of the media rests on the

allegation that the foreign media in Poland, as a tool of the foreign elites, campaigns against traditional and national values.

With a difference of 5 years between their rise to power, Fidesz and Law and Justice achieved many things in common. Hungary has served as a model for Jarosław Kaczyński's Law and Justice regime in Poland. Back in 2011, regarding Fidesz's recent parliamentary victory, Jaroslaw Kaczynski affirmed his compromise in being copycat: "Viktor Orban gave us an example of how we can win" and stated, "the day will come when we will succeed, and we will have Budapest in Warsaw" (Buckley & Foy, 2016). Step by step, Fidesz and PiS were able to approve a new media legislation that allows a broadcast closer to the party's values and ideologies; laws that allowed them to replace opposing judges with allies by changing the system of the composition of the judiciary and the restrictions to the retirement age of the judges⁵; restrictions to the freedoms of assembly and speech; and finally, essential changes to the functioning of the electoral system that directly benefited the parties in power (Mikuli, 2018; Krekó & Enyedi, 2018; Rech, 2018; Wyrzykowski, 2019; Sata & Karolewski, 2020).

Each of these measures was achieved earlier and resulted in more successful proximity to autocracy in Hungary than in Poland, thanks to Fidesz's earlier rise to power. During that time Fidesz was able to approve a new constitution, in 2011. Through the 2013 amendments, Fidesz restricted the freedom of speech by criminalizing hate speech in a broad and subjective sense, where it includes any violation of "the dignity of the Hungarian nation". The amendments also altered the composition of the constitutional court by increasing the number of judges, prolonging their terms of office, and removing the retirement age. Besides constitutional amendments, new laws served to safeguard Fidesz from internal political instability, especially protests.

⁵ In the case of Poland these refers to the judges of the Supreme Court, while for Hungary, the changes affected the judges of the Constitutional Tribunal.

Meanwhile, PiS was not able to change the constitution, but this did not stop it to implement statutes that directly contravened the 1997 constitution. Instead, as explained by Sadurski, with a statute on the Supreme Court, the party lowered the retirement age of the judges to anticipate the replacement with pro-PiS judges. Once said replacement was done, the Supreme Court adopted a series of statutes that essentially transformed the Constitutional Tribunal into a supportive device, and effectively curtailed the judiciary (Bugaric & Kuhelj, 2018).

The electoral transformation of both countries is fundamental to understand the degree of autocratization present in Warsaw and Budapest. Orbán changed the electoral system in 2013 through a series of different methods such as gerrymandering, reduction of the number of seats in the parliament, requiring a higher threshold to join the parliament. As a result, Fidesz guaranteed 66% of the votes in the 2014 election. The Polish PiS gained institutional advantages through an amendment to the electoral law that delegated more power over the electoral mechanisms to the parliamentary majority and the executive power.

This cluster does not equalize the countries. As seen earlier, the Hungarian government acquired greater control over the opposition, silencing them both in the parliament and the national media. Undoubtedly, PiS expanded its control on these areas as well, but it is not equivalent to Budapest.

4.2. Italy

The Five Star Movement has been the subject of many investigations regarding its idiosyncratic populism, which should not be taken as a surprise since Italy has been classified as fertile soil for this political phenomenon (Tarchi, 2015; Albertazzi & Mueller, 2013; Bobba & McDonnell, 2015). Lega Nord and Berlusconi's Forza Italia raised to prominence in the early 1990s, during a sequence of profound fiscal and corruption crises that resulted in the end of many traditional parties that used to dominate Italian politics (Mascio, Natalini & Cacciatore,

2020; Bertero & Seddone, 2021). One decade of scandals under Berlusconi, and the dissatisfaction with the leftist governments that followed him – especially due to the fiscal austerity measures that followed the 2008 Eurocrisis – created a political void surrounded by a general distrust against state and partisan institutions in the early 2010s.

Founded in 2009 by the comedian Beppe Grillo, the self-entitled grassroots movement advocated a strong anti-establishment, anti-elite, and, more importantly, anti-political message, which many Italians, tired of corruption, agreed. Ideologically, the party was, at that moment, a vague, soft left and framed the traditional parties and media conglomerates as enemies of the people (Bertero & Seddone, 2021). Its agenda proposed deep structural changes in the political system, namely an internet-driven direct democracy to replace representative democracy. The party's "Five Stars" represent sustainable development; public water; the environment; public transport; and digital connectivity. Nonetheless, the party is known for other proposals. The anti-corruption and anti-system stances brought relevance to the party. This stance resonated with the Italian population in the 2013 parliamentary elections.

The success of 2013 moved the party towards a catch-all position within the left-right spectrum. From then on, anti-migration and soft sovereigntism were added to its agenda. Even though it did not occupy the party's central electoral narrative, this new position was more decisive than the "Five Stars". A wider fraction of the Italian population was drawn towards the points added to the populist discourse, and as a result, the independent M5S and the right-wing coalition led by Lega Nord acquired a majority in the Italian parliament in 2018, the first populist parliamentary majority in Western Europe, and an M5S-Lega coalition was formed. In common, the two parties had a sovereigntist attitude, seeing the EU with distrust, resonating with the Italian public opinion. Giuseppe Conte was chosen as the new Prime Minister and condoned the M5S-Lega position on the EU. The Italian government adopted an unequivocally anti-EU position on topics like the EU single market; the open borders policy and distribution

of migrants; and especially, the Economic and Monetary Union (EMU), its regulations, and the fraction of the Italian contribution to the EU budget (Fabbrini, 2021).

The Conte I cabinet demonstrate significant fidelity with some defining issues of the M5S's message, namely anti-corruption and suspicion towards the political powers and agents. In opposition to the situation in Hungary or Poland, M5S celebrates and maintains the rule of law when it resorts to the established institutions to dismantle the "corrupt parasites" in the Italian political system. By relying on the judiciary for audits and second opinions, the party presents a legalist reasoning, which is to be perceived as impartial and objective instead of ideological, as Corso informs. Moreover, Law n. 3 of 9 January 2019 called "corruption sweeper" was enacted and provided greater penalties to crimes related to corruption.

Nonetheless, many scholars (Giannetti, Pedrazzani & Pinto, 2018) had already detected the incongruencies between the two parties were far greater than the stances that brought them together. As a result, a new government was formed in September 2019, and although Conte still headed it, the center-left Democratic Party (PD) replaced Lega in the coalition and achieved a parliamentary majority. The cabinet Conte II has repositioned Italy within the EMU, the choice of conformism over sovereignty was met with joy by the European Union, but not so by the Italian public opinion.

The anti-political stance did not perish. Instead, it resulted in a proposal for constitutional reform, in 2019, that aimed to reduce the powers and privileges of the representatives while inserting greater popular participation, in line with the party's defense for direct democracy. It did not succeed in reducing the MPs' salaries, but important changes ended up in the final proposal. The clearest one is the reduction of the number of members in both chambers of the Italian parliament. Secondly, it pushes the Parliament into voting bills proposed by citizens. According to Corso, these elements of direct democracy could foment a form of plebiscitary democracy, which not only practically delegates the political responsibility

to the people – potentially shielding political actions from public backlash – but also creates an environment where minority rights are not respected, and their voices are not heard.

A few months before the arrival of the SARS-CoV-2 in Italy the public opinion was, in general, dissatisfied with the switch in the relationship with the EU, but still hopeful that constitutional reform could bring significant domestic changes. On 28 January, a couple of days before the first detected infection in Italy, a decree established the constitutional referendum to take place on 29 March.

5. Epidemiological Context

The year 2020 is already defined by the COVID-19 pandemic that struck every corner of the world. The virus transmission to humans was first detected in Wuhan, China in early December 2019. By late January, the first cases of SARS-CoV-2 infections were detected in France. Within six weeks, all EU member states were recording cases. Italy was one of the early affected EU countries, and in less than two months it had more than double active cases compared to any other country. Less than ten days later Italy already surpassed China in absolute numbers, becoming the most infected country in the world and contributing to transform Europe into the epicenter of the pandemic in that period (WHO, 2020b).

During this development, on March 11, the WHO officially declared the worldwide COVID-19 cases a pandemic. From then on countries started issuing different types of restrictions based on WHO's guidelines to fight the pandemic, for example, improving preventive measures and applying restrictions on travel and assembly (WHO, 2021). This led the European Union to close all its external borders on 17 March.

The perception of an unknown threat was shared by the states and their peoples. Zinn explains that the conjecture of the actual viral scenario - the media coverage; human behavior towards an unknown threat; the position of knowledge authority of those recommending the restrictions - reinforces a communal understanding that life should be protected at all costs. A second common thought is a concern on overloading the national healthcare systems, this was not only feared by the population and spread by the media but shaped the measures adopted by countries like Poland and Hungary (Krastev & Leonard, 2020). Moreover, the media reports on the Italian case increased the concerns of the Poles and Magyars. IPSOS demonstrates these two countries led the greatest levels of worry regarding their national healthcare system, which is justified since, at that time, both the pathophysiology of COVID-19 and adequate response methods were unknown (WHO, 2020d).

5.1. Italy

Regionalism is a characteristic that helps to understand Italy in many respects, from economy and electoral behavior to the state of the Italian healthcare and the political system. The healthcare system is highly decentralized in Italy, following the decentralized and regionalist nature of the Italian state as provided by the Constitution (Capano, 2020).

The COVID-19 outbreak in Italy followed the same characteristics. Northern regions were hit the hardest, indicating an asymmetrical spread of the virus in Italy that transformed Northern Italy into the most dangerous cluster in the world at the time (Cherkaoui, 2020). Soon, Italy as a whole was detecting an increasing number of cases and deaths, and on 19 March the country had reached 35713 total cases; 2978 deaths, the second highest number of confirmed fatalities in the world at the time; and 4207 new cases, more than double activity when compared to any other country (WHO, 2020a). The infection rate was steady until the end of the semester, when Italy reached 240,436 total cases, and 34,744 deaths, the second highest number of fatalities at the time (WHO, 2020c).

The verge of collapse of the health care system can be attributed to its decentralized model that delegates strategic responsibilities to the regional divisions (La Foresta & Dziakiewicz, 2020). These authorities are not only responsible for the allocation of resources, but they are also in charge of the formation, organization, and delivery of health services, meaning the type, quality, and availability of services are asymmetrical, adding as another inequality in the North-South divide in Italy (Sanfelici, 2020). The national government is left with little active leadership to timely coordinate remedies against a pandemic, and the regions developed their response plans, approaching different, sometimes discrepant, strategies. This situation is worsened by the fact Italy has quantity of hospital beds below the EU average⁶ (Eurostat, 2020a).

⁶ In 2018 the EU average is 392 beds per 100,000 inhabitants. Italy had 258.

5.2. Poland and Hungary

The emergence of COVID-19 cases and their severity are discrepant when one compares Western Europe and the Visegrad group, especially considering the number of deaths. Poland's first detected case was on 4 March (ECDC, 2020), however, the day before, a special act already stipulated preventive measures (Wilczek, 2020). In addition, the government had already formalized a monitoring team by early February. This preparation indicates an uneasiness related to national healthcare, which has been constantly defunded throughout the years even before PiS came to power. Processes of decentralization and outsourcing, and then, recentralization and renationalization in the early 2000s fragilized the healthcare system (Roj, 2020).

Hungary's first detected case was on the same day as Poland. Orban precautionary created an "Operational Group" responsible for monitoring the epidemiological situation and coordinate responses to the threat of an outbreak (Nemec, Drechsler & Hajnal, 2020). A concern surrounding the imminence of a COVID-19 outbreak was the unreadiness of the national healthcare system. And Orban himself is to blame, as Burke (2020) explains, the Ministry of Health was abolished during Orban's second government and integrated into the Ministry of National Resources as a secretary, which caused physicians, specialists, and staff to leave the country. As the administration of the state health became more centralized, its budget suffered a steady decline in the last years.

In common, Poland and Hungary hospital beds above the EU average⁷ (Eurostat, 2020a), while at the same time being among the EU member states with highest rates of patients' unmet needs for medical services⁸ (Eurostat, 2021). However, the pandemic struck

⁷ In 2018 the EU average is 392 beds per 100,000 inhabitants. Hungary had 426 and Poland 473.

⁸ 3% of the EU population aged over 16 had an unmet need for a medical service in 2019. However, this perception was shared by 8.8% of Poland's population and 6.5% of Hungary's.

these countries differently. While Poland saw 34,154 cases and 1,444 deaths, the pandemic in Hungary was less harsh, with only 4,145 cases and 585 deaths by the end of the semester.

6. Measures & Effects

Fighting the virus had direct impacts on constitutional liberties, however, the extraordinary circumstances, the situation of generalized fear, and the primacy of health and life allowed the derogation of rights to be seen as secondary. This scenario of crisis and the early measures issued by populists Poland, Hungary, and Italy stimulated the production of this work. Now, both the bases for the core analyses, namely, the measures, and the analyses will be displayed.

6.1. Poland

Although the first case on COVID-19 in Poland was confirmed only on 4 March 2020, the government had already implemented a few, but important, preventive measures. Two days before the first detection the “COVID-19 Act” was introduced by the government. After the approval by the Sejm (the lower chamber of the parliament) and by the Senate (higher chamber), the COVID-19 Act was put in practice immediately. Its official name may place it as a package of action solely against the pandemic and therefore seemed to be a justified announcement. However, not only the provisions for prevention and counteraction against the COVID-19 were deemed unconstitutional, but they also restricted rights and liberties without any relation to a fight against an epidemiological threat, and more importantly, without the backing of the constitution.

That affected many labor topics, but more importantly and unrelatedly to it, the Prime-Minister was granted greater powers, affecting the state administrative units, such as the Voivodeships, and temporarily derogating the Public Procurement Law (PPL). Moreover, it restricted the right to access public information. It should be noted that this act, as an ordinary law, could not derogate laws.

Throughout March harsher measures were adopted. On the 9th, border sanitary control and restriction of events and business activities were introduced. On 14th, a “state of epidemic

emergency” came into force, based on the Infectious Disease Act of 2008 (IDA), that provides a “state of epidemic threat” and a “state of epidemic”. Based on IDA, borders were restricted. However, such restrictions could only be performed through extraordinary measures, among them, the “state of natural disaster”, to act against natural catastrophes or technological accidents. Therefore, in the event of a pandemic and the need for derogation of liberties that derives from such a situation, the “state of natural disaster”, should have been implemented.

The reason for circumventing the Constitution seems to lie in the upcoming presidential election supposed to happen on 10 May, which could not take place during and after an extraordinary state is introduced. The reasoning is easily seen through the government actions. For instance, the electoral responsibilities were transferred under the control of the Ministry of Defence, and, through the 2 June Act the 2020 election was set through hybrid voting (Serowaniec & Witkowski, 2020; OSCE, 2020), and shorter deadlines for contesting election results were established. In parallel to these proceedings, it is important to note the Sejm moved further to restrict citizen’s rights, more specifically women reproductivity’s ones, when an initiative stored in Sejm’s archives since 2017 was brought out to light again.

A series of acts presented as economic packages, or “shields”, also provided unconstitutional measures within. In general, these “Shields” packages had mainly provisions to stimulate the economy, mitigate negative economic results of the pandemic to entrepreneurs and companies, while reconfiguring labor relations. (Pseudo-)Sanitary actions were included to a lesser degree in these “Shields”, and it is mainly here where the controversies are. Apart from COVID-related measures on matter of economy and health, laws unrelated to the pandemic were also incorporated. The first Shield reinforced the derogation of the PPL by exempting public officials of liability (Baker McKenzie, 2020) during the purchase of goods or services to fight the viral outbreak.

The second Anti-Crisis package allowed citizens to be tracked as a measure to fight the pandemic. Furthermore, this Shield updated the Criminal Code, which now punishes the non-compliance and resistance towards police officers with fines or arrest (DLA Piper, 2020). The third Anti-Crisis Shield ended the term of office of the President of the Office of Electronic Communications, who had some conflicts with the Council of Ministers. This Shield also set the appointment of his position outside of the Senate's responsibilities, leaving it directly to the PiS-dominated Sejm (Baker McKenzie, 2020). The Anti-Crisis Shield 4.0, *inter alia*, introduced restrictions to the acquisition of national enterprises by foreigners. Finally, with the approach of the elections, by June the government started gradually lifting the restrictions imposed, including movement, assembly, and business activity.

6.1.1. Analysis

Despite the parliamentary approval of the "COVID-19 Act", it contradicted constitutional provisions. For instance, the act's Article 6 derogated the Public Procurement Law by allowing quicker purchasing of supplies to counteract the viral outbreak. It also means an actual lack of punishment for corruption. A public official in charge of the purchase of supplies against COVID-19 does not need to follow the regulations since the official is acting for the public interest, meaning said official is authorized to acquire overpriced goods. The right of access to public information was restricted and state institutions and bodies are allowed to ignore requests for access to public information, which is an infringement of the guarantees provided by the Constitution's Article 61. More importantly, while the provision of information is suspended, the lack of response by state institutions cannot be contested in court, which severely harms the right to access to justice, provided in Article 233 of the Polish Constitution (PC). Finally, this act shall last for 180 days, however, the PC restricts their duration up to 90 days. All the mentioned measures are not constitutional since the act is classified as ordinary

legislation, and, according to Articles 22, 31, and 92 PC derogation of laws and restriction liberties can only be established by statute.

Another way to restrict freedoms is through extraordinary measures (Chapter XI PC), such as “martial law”, “state of emergency” or “state of natural disaster”. Among those, the latter seems to fit the pandemic scenario, since “mass occurrence of infectious diseases among humans” is a category that justifies the implementation of this state (Polish Constitution, Chapter XI, Art. 228). Still, the government chose to go after another type of measure. Despite its name, the “state of epidemic emergency” is not among those extraordinary measures, and therefore, cannot derogate freedoms. Nonetheless, it came into force, based on the Infectious Disease Act (IDA). On the next day, the borders were restricted, directly contradicting the IDA’s limitations, which allows only a temporary restriction on the nature or manner of movement, but not a full prohibition. In addition, the IDA is dedicated to technical regulations, nonetheless, decrees on economic and business restrictions were being issued under the basis of this Act. All these restrictions of constitutional guarantees, such as movement and labor, directly violate Article 31(3). Interestingly, the IDA was amended by the COVID-19 Act of March 2nd and included Article 46b, which made the limitations on liberties vaguer and, therefore, wider. From this article derived tougher restrictions on movement, assembly, and business activities. Therefore, both acts combined (the COVID-19 Act and a modified state of epidemic emergency) introduce a “state of natural disaster” de facto, but not de jure.

This pseudo-extraordinary measure did not happen by mistake. It is highly beneficial for the government, and it has been engineered to be so having the upcoming presidential elections in mind. By introducing any extraordinary measure, the elections would have been postponed. The PC provides that no elections or referenda can take place when an extraordinary measure is active, as well as within 90 days following its termination. Therefore, declaring any extraordinary state would delay the elections for at least 4 months. Postponing the election was

neither in the best interests of Andrzej Duda, nor Law and Justice party, which saw the active and successful fight against the pandemic as an opportunity to achieve a decisive victory. Later measures also benefited the President-candidate. For instance, on 31 March assemblies were banned. Since there was no alteration on the election date, the scheduled public electoral campaigns of Duda's rivals were effectively outlawed and therefore violates the condition of conducting equal elections. Moreover, Andrzej Duda, in his condition as President could still move freely.

With the 2 June Act confirming the impossibility to vote for the presidential candidates, a new election date was set. It also allowed hybrid (presential and postal) voting, exclusively for the 2020 election. Among those who were to vote by post were the population over 60 years old, one of the PiS's electorates, while excluding Poles abroad – which violates the principle of universal elections. These changes are illegal as the Polish Electoral Code forbids any alteration of the rules six months before an election. As a practical example of the characteristics of a CEE populist government, PiS's arbitrariness raised from the *de facto* extraordinary measure and were expanded further with the electoral provisions, exposing a classical backslide from democracy and towards an “illiberal democracy”, as well as the usage of autocratic legalism against enemies and rivals.

The government strategy of passing COVID-19-unrelated laws inside acts designed to fight the virus would become repetitive and evident during the implementation of the different Anti-Crisis Shields, measures focused on mitigating the effect of the pandemic on economic and labor topics. There, miscellaneous measures were inserted within the “Shields”, and many of them would be problematic, especially regarding an effective blind-eye for corruption and harming transparency and accountability. For instance, the first shield's Article 6 reinforced the derogation of the PPL by exempting public officials of liability in abuse of power offenses during the purchase of goods or services to fight the viral outbreak. To protect and benefit the

government's partisans and allies while disrespecting institutional proceedings is a CEE characteristic that fits this scenario.

Within the Anti-Crisis 2.0 package, permission for tracking citizens was implemented and telecommunication companies were obliged to disclose the location of the electronic device of infected and quarantined persons to the state authorities, during both a "state of epidemic threat" and a "state of epidemic". Consent to acquire the information was not needed. Although controversial, it is allowed by Article 51 of PC, and similarly adopted in other countries. This Shield updated the Criminal Code, which now punishes the non-compliance and resistance to the Police or Border Guard officers with fine or arrest. Clearly, it benefits the government with greater leverage of intimidation through the state's monopoly on violence. Weakening protest powers directly aids PiS's movement towards creating a state of exception without formally introducing it.

The third Anti-Crisis Shield shortened the term of office of the President of the Office of Electronic Communications, Marcin Cichy. Cichy, who had some conflicts with the Council of Ministers during the last years, saw his mandate end two weeks after the introduction of the Anti-Crisis Shield 3.0, when he was expected to be ahead of the office until 2021. The shield's Article 61 states that until the next selection of President of this office, a deputy indicated by the Prime Minister will be in charge. Moreover, another important alteration is that the Senate - where PiS is a minority - will no longer have a voice in the selection of the President, which will be the sole responsibility of the Sejm and the Prime-Minister. Regular public administration officers were also targeted. Article 15 establishes a plan on reducing employed officers from all levels of the state. Interestingly, appointed servants are exempted. The removal of Cichy and state officers represents PiS's reforms towards an allegiance uniformity, a characteristic of CEE populists, obsessed with purging the enemies while at the same time

running over state institutions through a partisan hijack, ultimately removing all their check-and-balance powers.

The Anti-Crisis Shield 4.0, *inter alia*, introduced restrictions to the acquisition of national enterprises by foreigners. Moreover, it reinforced state protection introduced controls on the key sectors of the national industry, such as telecommunications, data collection, and software. Both actions move towards a subject of special attention to PiS's and other CEE populists. By movements towards renationalization and protectionism, the government tries to fulfill its desire for total control over the key institutions and industries, representing financial and political powers.

While the Anti-Crisis Shield 4.0 was introduced in early June, by that time restrictions on assembly and movement were gradually lifted since May, in a clear preparation for the upcoming presidential elections, and the creation of an environment of "back to normality". It means that the usage of the crisis narrative was not generalized, instead, they it was cherry-picked. Declaring (and recognizing) a pandemic under regular constitutional provisions and procedures would go against PiS's electoral interests. Nonetheless, beyond this short-term higher goal, a pandemic crisis suited and justified measures that expanded their powers and control over the institutions and the citizens, while shutting down the liability and accountability of public officials.

Before things went back to normal, the Sejm dominated by PiS had an important role in following the party's interests during the pandemic. In April 2020, a forgotten and publicly ostracized legislative initiative regained the spotlight. It previewed the prohibition of abortive procedures in cases of fetal impairments, meaning a virtual total prohibition of abortion in the country with the most restrictive abortion laws in the EU. This proposal was first presented in 2017 and suffered hard opposition from the Poles. Now, during a pandemic, this proposal was deemed relevant to be revived for legislative deliberation. It is not a far stretch to consider that

the approval of this law, and its subsequent conduction to the partisan-dominated Constitutional Tribunal, had directly benefited from the restriction on assembly, as well as the hardest consequences applied to those that resist officers' orders. This context was certainly forecasted by PiS when deciding to reheat this frozen proposal. This choice of action is in line with the expectations on CEE populist behavior, where a traditional understanding of family play a role as one of the cornerstones of preservation and sovereignty of the nation.

It is interesting to note that, although the primacy of the Executive over the Legislative in “extraordinary times” is expected and provided by the PC, no formal and *actual* extraordinary measure was introduced, therefore the ordinary functioning dynamics of the Sejm, Senate, and the Executive was to be maintained. Despite this, the government gave up on formal constitutional instruments and was still able to conduct most of its desired measures. This is a direct consequence of the parliamentary majority, and the previous reforms on the electoral system, and the colonization of the judiciary. In this scenario, the parliament was an important tool to support and to pass measures of governmental interest without the need of actually operating a “state of natural disaster”.

6.2. Hungary

Hungary pre-emptively adopted strategies for the upcoming viral outbreak. On 31 January, a few days after the official arrival of the virus in the European continent, Prime Minister Viktor Orbán shared an action plan, coordinated by an “Operational Group for Protection against the Coronavirus Epidemic”, to coordinate the tasks of state bodies' measures, that ranged from border monitoring to procurement of healthcare equipment.

After the first detection the government started applying restrictions in traveling, and one week later, on 11 March - when the WHO declared the outbreak a pandemic - a state of danger was announced by the government. Such state is a “Special Legal Order” provided by the Fundamental Law. These orders are mainly focused on external or internal armed threats,

such as invasions, terrorist attacks, and coups d'état. An exception is the “state of danger”, reserved for natural or industrial catastrophes. After approval by the parliament, the Executive power, headed by Orbán, could effectively rule by decree (Zoltan, 2020). Once the state of danger was deployed, the government adopted a series of emergency decrees for different areas. As expected, the first restrictions were on movement and assembly. Furthermore, economic responses were introduced, aiming to support the national economy, however, together with this support came derogations to labor law.

Concerns on the state management of the pandemic arose worldwide with the introduction of the “Authorization Act” (Applebaum, 2020), which expanded the Executive powers by leaving it unchecked. The act is justified by the need to protect life, health, and the stability of the national economy. Nonetheless, its provisions do not seem to follow this logic. For instance, it referred to two crimes. A new one, penalizing the violation of epidemic confinement, while the second amends new categories on the crime of “Scaremongering”, the statement or dissemination of false information.

The unrestricted government decrees derived from the Authorization Act did not try to disguise the government’s real intentions. The decree 135/2020 of April 17 was established as a measure to support the continuous operation of companies and presented the formation of “special economic areas” (SEAs) within the territories of the municipalities. However, other than transferring the tax collection directly to Fidesz-dominated councils, it did not support municipalities or companies. Instead, municipalities were victimized by this decree. The municipality of Göd was targeted in the very next decree. A SEA was established and Göd’s revenue garnered from its Samsung factory was transferred to Orban’s allies, resulting in Göd losing one-third of its annual tax revenue, (Vass, 2020). In addition, other decrees directly affected Hungarian municipalities’ tax revenues.

Concerning private business and property rights, it is important to highlight that, based on the Disaster Management Act's provision that allows state control overtake in the case of a threat of the aggravation of the state of danger, which was indeed done (Hungarian Helsinki Committee, 2020; Hajnal & Kovacs, 2020). Moreover, the Hungarian state also took an inside role within the healthcare system. The "Operational Group", composed mainly of the military, took over the supply management and performed protection operations in hospitals across Hungary (Hungarian Ministry of Interior, 2020b; 2020c).

Information was a sensitive topic for the government, according to their Government decrees. For instance, 179/2020 suspended the provision of information to the citizens, and simultaneously lifted the obligation to notify citizens on the acquisition and processing of their personal information. Meanwhile, 181/2020 were used to expand the tracking of citizens and gather their information. Another restriction of information relates to the disclosure of details on the Chinese-funded Budapest-Belgrade Railway project, which was classified for a decade (Reuters, 2020).

Other measures unrelated to the pandemic and executed during the Authorization Act include the "Omnibus Bill" (T/99334), which restricts transgender people to use their gender designated on birth. By May the restrictions started to be lifted, including the Authorization Act and the state of danger. On a different bill, the prison population suffered from a formal and legal delay on reparations. Finally, a bill to abolish the state of danger and the Authorization Act was approved by the Parliament, but it was followed by another "state", the "state of medical crisis", a recently "re-designed" provision that was approved by the Parliament as well. It is important to note that although not being a Special Legal Order, the "state of medical crisis" offered provisions similar to it, including the capacity of derogation from provisions.

6.2.1. Analysis

Since the beginning of the pandemic, Hungary acted in ways that are barely legal to the country's Fundamental Law. The government decree 40/200 introduced the "state of danger", which, like any other Special Legal Order, enjoys an undefined duration of time, if a parliamentary majority extends it. It is important to note that, as a constitution rewritten during Orban's government, it grants broader and vaguer powers to the executive. The Fundamental Law's checks are limited and easily achievable after all the previous reforms made by Fidesz in the electoral system, such as the need for a majority in the parliament. Nevertheless, the current work has already set the validity of a substantial approach to the rule of law over a formal one. Therefore, the fact the Fundamental Law does not limit the duration of these decrees means the Hungarian constitution itself violates the expected substantial and procedural principles of the rule of law.

The basis for Orban's action, Article 53 Fundamental Law on the state of danger, was designed to counter natural disasters and industrial accidents. However, it is supplemented by the Disaster Management Act of 2011 (DMA), which justifies the activation of a state of danger, among them a human epidemic or the threat of an epidemic causing a mass illness. Although an Special Legal Order can suspend laws, the derogations shall not be arbitrary and should be based on Fundamental Law's Article I(3), which states fundamental rights can only be restricted to protect other fundamental rights or constitutional values. As seen in the vague Article 53(2), the DMA, as any other Cardinal Act, might derogate from provisions, acts, and perform other extraordinary measures. Nonetheless, the primacy of health and life was played as a trump card to arbitrarily derogate freedoms. For instance, a series of economic responses were introduced, and loans and taxes were also suspended to protect employment.

However, the suspensions also spread to some prescriptions of the Labor Code through the Decree 47/2020, which allowed employers to adopt more flexible contracts and work schedules since the decree's Article 6(4) permitted the free derogation from any provision of

the Code, and therefore the statutory law could no longer govern these new employment relationships and collective agreements, meaning both the protective function of the Labor Code and the workers' rights were null. The following decree, 48/2020, derogated the Public Procurement Act. For the exclusive case of purchases from national origins and relate to the pandemic response, the ordinary processes for procurement might not be applicable, exempting officers from liability. For instance, negotiations might proceed without the previous disclosure of a contract notice and a tender shall proceed with only one bidder.

With the introduction of the "Authorization Act", the governmental powers were significantly expanded at expense of individual rights and constitutional guarantees under the same Fundamental Law's Article 53. This act expanded the Hungarian Executive power granted by the Government Decree 40/2020 by allowing - without the need for parliamentary authorization and with an undefined duration - suspensions, derogations, and introduction of extraordinary measures to be taken by the government without bringing any restriction to the legal scope it can reach. The Act justifies itself by adding the scenario of a pandemic and the need to protect life, health, and the stability of the national economy. Moreover, it forbids elections and referenda to take place during its activity. The act also defines the Executive obligations before the Parliament, such as regular reporting on the measures taken and entirely or partially withdrawing the Act if the Parliament sees necessary. The Act's provisions of accountability and checks-and-balances form an interesting case of abusive constitutionalism. If one takes exclusively the Constitutional provisions in comparison to the issued legal work, the Hungarian rule of law might not be put in question. However, the state of the institutions shall be considered. What Hungary offers alongside the Executive power is no different from a façade of legality to shield Orbán's arbitrary actions from criticism. The Constitutional Court's independence and impartiality are null, in fact, its judges' work is no different from Fidesz's MPs, working on passing (or, in this case, not contesting) legal work beneficial to the

government, even if unconstitutional. Meanwhile, the Parliament is dominated by partisans that focus their work on approving and proposing the beneficial legislations, or giving approval to the introduction of constitutional provisions that require a parliamentary majority. Moreover, the constitution itself is shaped by Orbán's interests and, therefore, provides easy derogation of liberties, based on vague conditions that can be manipulated by the Prime-Minister and the parliamentary majority.

Through the Authorization Act, there is no effective limit on Orbán's legal power. The parliament neither has the power to abrogate it nor the authority to control it (and therefore, measures derived from the Authorization Act). Simultaneously, it limited the Hungarian citizens' freedoms. It amended new categories on the crime of "Scaremongering", the statement or dissemination of false information. This provision – on fighting spreading fake news connected to an emergency or an act of protection - stands out due to its vagueness, since no definition of "untrue fact" is given, especially because such definition is hard to be done. It is also vague when adding a specific provision that penalizes spreading fake news and other untrue information connected to "the acts of protection". Since everything can be seen as an act of protection during an emergency, from economic policies to restrictions on assembly, this act compromises the freedom of speech and the freedom of the press. In the case of the COVID-19 outbreak, the act is potentially arbitrary and easy to be instrumentalized to silence critics of the government's management of the pandemic, or any other government decision justified as protective to the best interest of the country. And here Fidesz exposed once more its autocratic, and autocratic-legalist tendencies, as shown by the "scaremongering" categorization.

Moreover, the Authorization Act violates the Disaster Management Act, the sole basis of the state of danger, which in turn bases the Authorization Act. The Disaster Management Act and more importantly, the Fundamental Law require the Special Legal Order to present a defined duration, which the Authorization Act does not provide, reinforcing the perception of

it being an unrestricted and unlimited power tool. The CEE populist line follows a disregard to any check-and-balance or other systems that limit their power, and that is certainly true to Hungary.

Government Decree 135/2020 of April 17 was justified as an economic measure to ensure the continued operation of companies during the pandemic and protect from economic decay the municipalities that base such companies. It allowed the formation of “special economic areas” (SEAs) within the territories of the municipalities. As described in the decree, the SEAs are the responsibility of the counties, which means the administration, and most importantly, the fiscal collection of such areas become duties of county assemblies.

The very next government decree (136/2020), issued on the same day, created a SEA in an industrial park in Göd and acquiring a significant revenue derived from the Samsung factory’s taxes. Later, any economically significant industrial area could be transformed into a SEA. The SEAs mean an immediate relocation of administrative powers over real-estates and territories, and their establishment does not provide any compensation for the transfer of past and future tax collection. It would be expected that a measure with economic reasons in consideration to the pandemic would mean the alleviation of fiscal responsibilities and that this decree would mean that companies within the SEAs would pay solely state-level taxes, however, this was not the case. The fiscal onus remained the same for the companies within the SEAs, the only change is that now the highest administrative level would fully receive the contributions. Just like Göd, most of the economically and demographically – therefore, fiscally – relevant municipalities in Hungary are governed by opposition parties. Curiously, Orbán issued other decrees that directly interfered with the municipalities’ fiscal collection. The Hungarian state unnecessarily abolished the parking fees; while vehicle or business taxes were taken over by the Hungarian state. These three taxes are important sources of revenues of the municipalities. These decrees constitute an infringement on property rights and its security,

not only privately, but most importantly, towards the state's administrative units. The set of measures adopted falls under the category of autocratic legalism, where these measures together act as a *carte blanche* to curb the opposition municipal governments. The impact was selective, focusing on weakening the opposition by depriving them of tax revenue. That is why the measures mostly provide how to restructure the tax collection and its flow towards the Fidesz-dominated council or directly to the Hungarian state. Meanwhile, few and vague steps for the actual recovery of industries, businesses, and municipalities are delimited in the decrees.

Another set of decrees, starting with 128/2020, targeted direct protection of key industries. 128/2020 put a packaging company under state control. Following the decree, the government commissioner who took control over the company fired its board of directors, directly depriving the shareholders of their property rights, and replaced them with Fidesz members. After this replacement, several lawsuits against the company were terminated. Moreover, the state presence in companies also took place through the Operational Group and its military composition, which were ordered to oversight over 100 companies of strategic interests, such as the food industry, medical supplies, info-communications, energy, and infrastructure. It fulfills the traditional CEE populist economic agenda. In other times it would be justified as a protection against the claws of global capitalism and in defense of the nation's sovereignty, but in the current pandemic days, the narrative is different. Renationalization is justified as an essential procedure to fulfill the best interests of the people by taking over a company and granting the continuation of its key production.

The Magyar state running companies were not the only uncanny presence produced by the decrees. The Operational Group, led by the Minister of Interior, is mostly composed of members of armed bodies, with medical doctors being a minority in the group. The Group was initially given an important position, just below Orbán, on reporting the government combat against the pandemic. At first, the communication embedded the pandemic with migration and

refugees, the latest and biggest crisis narrative applied by the government. On 8 March, the government extended the “state of migration emergency”, arguing that the mass migration was the source of the viral arrival in Hungary. As the viral outbreak spread worldwide, the narrative of the COVID-19 epidemic in Hungary being a by-product of the migration crisis could not be sustained and was replaced by a harsher perception, a comparison with a war scenario, where extraordinary measures should not be questioned in the name of maintaining public order. Consequently, this attempted to justify the presence of the military in different, unrelated spheres. It is noticeable the importance of a constant narrative of crisis in order to justify decisions or to draw attention to a scapegoat. The decisions of selecting migrants would be useful to reinforce the popular notion of its threat. Nevertheless, even if the “irregular migrant” narrative failed, it was soon replaced by a harsher one. This shows that the government, instead of a realistic approach, attempted to portray the crisis under a worse scenario, in order to amplify their political leverage. It is important to remember that the emergency measures under normal circumstances are far from being unknown in Hungary. The Orbán government is constantly using these Special Legal Orders since 2015 to maintain its political power and exploit the narrative of crisis. In reality, this led Hungary to even be under two different extraordinary states simultaneously. A double state of exception, together with the militarization of public and private key sectors, is a good real-life example of CEE populists’ unmerciful instrumentalization of crises narratives.

On 28 March, Decree 72/2020 provided the designation of military commanders to be appointed as “hospital commanders”, responsible to manage supplies and protect physical facilities in over 100 facilities across Hungary. One month later, on 29 April, the Government Decree 158/2020 amended the previous decree and allowed the head of the Operational Group, the Minister of Interior, to involve police and military bodies to inspect and protect medical equipment in hospitals, increasing the armed presence beyond the “hospital commander”. This

decree also permitted the military to monitor public adherence to epidemiological measures. The militarization also represents the rise of centralization of the responses to the pandemic to the Executive, meaning the weakening of the parliament and its checks-and-balances tools.

Other measures strengthened the executive's central position, including the management of information. The National Security Service acquired the prerogative to control electronic communication traffic of state and municipal administrations, in the preparation against cyberattacks. This was achieved by the modification the Act XXXI of 2020 imposed in the Service's law, which now violates guarantees on the protection of personal data. The government enjoyed the particular characteristic of the easily bendable Fundamental Law to practice abusive constitutionalism.

While the government acquires more data on its population, it actively used the Authorization Act to violate the freedom of information. On 4 May, the government suspended the rights to access and the protection of personal data. Decree 179/2020 suspended the obligations on freedom of information provided by the Act CXII of 2011 upon state authorities, meaning requests for data can be ignored until the end of the state of danger. It also suspended the obligation of authorities to notify citizens regarding the collection of their personal data. Like other decrees, this suspension is connected to the prevention of the spread of coronavirus. At the beginning of the state of danger, before the Authorization Act, the Hungarian government infringed the right to data protection by issuing, on 16 March, the Decree 46/2020, where it orders, inter alia, high schools, and universities to disclose personal data on students of medical programs to police. The decree, based on Fundamental Law's Article 53(2) and 15(1), argues the integration of suitable personnel is part of the actions to counter the epidemic.

Access to other types of information was restricted as well. For instance, key details on the Chinese-funded Budapest-Belgrade Railway project were classified for a decade, on May 19th (Reuters, 2020). It should be added that this project is the most expensive railway

investment in Hungary's history, amounting to two billion euros. Moreover, Lorinc Meszaros, known for winning many varied and valuable investment contracts from his childhood friend, Prime Minister Viktor Orbán, was, once again, the tender to proceed with this project together with Chinese companies.

Another infamous violation of rights allowed by the Authorization Act relates to the LGBT community. Among all the amendments, Article 33 of the so-called Omnibus Bill (T/99334) precludes transgender people from legally changing their gender by restricting it to the gender designated on birth. The prison population was also targeted. On June 8, through a bill, the Hungarian parliament extended the deadline for the state's compensation payment to inmates for inhuman or degrading prison conditions. Both measures fall into the agenda expectations of a CEE populist's illiberal agenda. Moreover, it reinforces the usefulness of choosing to work with Brubaker's axis of opposition, which considers the place of "outsiders" in the populist practices.

Nevertheless, the regular, hard-working people were also directly affected by laws that claimed a direct connection to the fight against the pandemic. The government decree 47/2020, Article 6 introduced free, unrestricted derogations of the Labor Code, claiming it to be a way of flexibly maintaining employment and production running. Despite the FL only previewing derogations on Constitutional provision, and the Act itself being justified strictly under constitutional articles, it introduced derogations on a set of laws separate from the constitution.

Finally, in June the Authorization Act ended with the T/10747, which was then followed by the Act LVIII of 2020. This act proposed new temporary rules connected to the lift of the state of danger, also, it amended the Act CLIV of 1997 on healthcare, focusing on its "state of medical crisis", which can be introduced by governmental decree. The Disaster Management Act was also amended to include *carte blanche* characteristics similar to the Authorization Act. But overall, it is more critical than the previous measures since any freedom,

institution, and the facility can be restricted if deemed as a threat to health, without exceptions. This provided the government with greater powers at the expense of constitutional safeguards. And since the government no longer needs to resort to cardinal acts - such as the Disaster Management Act - to derogate freedoms, it is not hard to imagine that this vague and therefore powerful condition can be instrumentalized under farfetched legal understandings.

By transforming the “state of medical crisis” into a *de facto* Special Legal Order, but without being regulated by the FL, and therefore, enjoy less constitutional and institutional constraints. In fact, the parliament has no control over issuing or extending this state, fundamentally it renders the Special Legal Order, and to a lesser extent the FL and the Parliament, pointless. Greater powers were granted to the government than the previous Authorization Act. *Inter alia*, the Transitional Act allowed the Hungarian military to use weapons on the civilian population, meaning it directly contradicts the FL’s principles and safeguards. As seen, the development of the Hungarian legal collection has surpassed the need for attempting to keep an image of legality and respect to the rule of law. As more laws are passed and encounter each other they also contradict each other, even when the provisions are vague enough to allow a broad legal interpretation. The government no longer cares about how explicit its intentions are, and therefore, the state of medical crisis was ordered instantly, as soon as the Act LVII was approved by the parliament as of 18 June. And so, from a state of exception and rule-by-decree scenario new and stronger tools were forged by and for the government, presenting what Lührmann and Rooney would call a scenario of autocratization by decree, and fulfills Agamben’s prediction where the exception becomes the rule, and a permanent state of emergency emerges.

In addition, due to the harsh restrictions on the entry of the country and the global development of the crisis, the narrative that blamed the migrants and refugees for the epidemic was dismissed. Nonetheless, as soon as the revocation of the Authorization Act was submitted

to the parliament (26 May) and expected to come into force in the upcoming weeks, the concerns on the supposed threats migrants represent to the Hungarian nation returned. On 27 May, Decree 233/2020, still based on the Authorization Act, imposed that the submission of applications for asylum-seekers would only be available in Hungarian diplomatic missions outside of the country, the decree also forbid the entrance of asylum-seekers that do not possess a positive response in the asylum-seeker application. This was later reinforced with Act LVII, which declared that asylum seekers may only apply for refugee in Hungary outside the country. Therefore, yet again, another example of not only an instrumentalization of the crisis scenario and narrative to target outsiders and undesirables, but also a clearly unconstitutional Act. Paragraphs 2 and 3 of Article XIV FL protect individuals from being collectively expelled while establishing the right to seek asylum. Naturally, the Fidesz-dominated Constitutional Court did not present any complaints.

The situation with the Constitutional Court is similar to other spheres of policy and decision-making in Hungary. They all acted to guarantee the approval of the fitting measures, creating a scenario of “autocratic legalism”. The central position of the government as a decision-maker during the pandemic was supported by Fidesz’s institutional partisans as well as the Executive-driven Fundamental Law. For those within the state, but marginalized by the state for their opposition stance, further marginalization was to be expected. For instance, the municipalities not only had no power over the pandemic response, but has their fiscal autonomy and rights overran by Fidesz’s interests.

6.3. Italy

Italy started nationwide mitigation measures through the Ministry of Health, which ordered the monitoring of sea and air traffic on January 25th and the banning of flights from China on January 30th, the same day the first domestic cases were identified. On the next day, a nationwide state of emergency was introduced– the first in Europe. Besides allocating 5

million euros to the National Emergency Fund, it also states the goal to strengthen the capacity of reaction of the National Health System on air and sea traffic.

The Italian constitution does not foresee a state of emergency, and so, the declaration was based on a 2018 legislative decree (the Civil Protection Code, or CPC) that provides certain conditions for the declaration of such state, them being anticipating natural or man-made dangerous events or in case it is clear the authorities cannot deal with the event through regular measures. To better handle the emergency, this emergence provision gives the national government the ability to intervene on other administrative divisions, from regions and provinces to municipalities, and coordinate responses through the Department of Civil Protection, which is subjugated to the orders of the President of the Council of Ministers, known as the Prime Minister. The declaration of emergency allows ordinances to be issued.

In the context of the state of emergency, the freedom-restrictive responses to the pandemic were initiated through decree-laws, provisional decrees adopted by the government, and issued by the President of the Republic. As the outbreak spread across the country in February, the most affected locations, on the north, began imposing local lockdowns (La Repubblica, 2020). Meanwhile, no similar decision has been implemented by the Italian state. This changed on 23 February with the decree-law 6/2020, which broadly ordered “competent authorities” to adopt “appropriate and proportionate measures of containment and management” against the viral spread and evolution.

This decree-law, as well as the others that followed, set the responsive measures to be adopted, including the quarantine and lockdown periods. Once the decree-laws were converted into law by the parliament, they provided the basis and legitimization for the government’s next measures, including the Decrees of the President of the Council of Ministers (DPCM). Lastly, it subjugated all regions to the same response mechanisms, with no possibility of deviating from the Italian state’s measures.

As noted by many authors, the Italian government continuously resorted to *decreti-legge*, *ordinanze* and *decreti del Presidente del Consiglio dei Ministri*, with the first expanding the derogation powers of the last two. The latter is an instrument delegated to the Prime Minister that is not subject to parliamentary approval. DPCMs generally cannot derogate rights, still, it was used to imposed severe limitations on constitutional freedoms. Based on the decree-law 6/2020 many DPCMs restricted movement, business activities, and assembly.

On 25 March, the PM's quasi-unrestrained powers ended with the decreto-legge 19/2020, which, inter alia, added a sunset clause and limited the restrictive powers of the PM's DPCM derogation power, initiated over a month earlier through the decree-law 6/2020. The decree-law 19/2020 also restored regional autonomy to respond to the pandemic, as Article 3 allows regions to introduce harsher restrictive measures than the national state.

Due to the pandemic, the parliament's work was restricted and, while the DPCMs were beyond parliamentary control, the Italian MPs were using their limited working time to mainly analyze, modify and transpose decree-laws. Among these decree-laws were "packages" such as "Cura Italia" and "Rilancio", which interfered in many aspects of the government's responsibilities and the daily life of Italy's inhabitants. On March 17, the decree-law 18/2020 – known as "Cura Italia" – focused on economic remedies through improved social security for workers and tax deferrals for companies. Moreover, it also introduced derogations to rules on public procurement, in the special case of COVID-19-related purchases. Moreover, the decree suspended the requests for access to information. "Cura Italia" also extended the deadline for calling the constitutional referendum, which was expected to take place in March but the pandemic forced its call to be revoked.

The decree-law 33/2020 of 17 May established a phase of relaxation of prohibitions and setting a goal to orderly reopen and restart people's lives and the country's economy. In this context emerges May's 34/2020 "Rilancio" decree-law, a package of measures that aimed

for the restoration of the national economy. Nonetheless, within the decree, an article provided a discriminatory regularization of undocumented migrants. Still, on the matter of irregular migrants, they have been prohibited from arriving at Italian ports from migrant-rescue boats. The DPCM of 11 June set a period of restoration of normality when it reestablished nationwide free movement while leaving it to the discretion of the Regions to further restrict said measures based on their epidemiological situations.

6.3.1 Analysis

Before the declaration of a state of emergency, all preventive measures were declared based on the constitution. For instance, the Ministry of Health's ordinances were based on three different constitutional articles. Meanwhile, since the Italian constitution only previews a state of war, the state of emergency is not found in the constitution, instead, it relies on the 2018's CPC legislative decree, which previews disasters of natural origin or deriving from human activity can be countered by CPC's state of emergency, lasting up to 24 months if postponed. Even though the CPC's state of emergency has been used multiple times throughout the history of the Italian Second Republic, it is important to note that the issue of ordinances is authorized through the CPC, which can, limitedly, derogate from provisions, with the methods indicated in the resolution of the state of emergency. The Constitution specifies intangible rights such as the indivisibility and unity of the Republic, and compliance and alignment with international law and organizations. Therefore, the constitutional limits over derogations affect all levels of law, including the state of emergency set on a legislative decree.

As the CPC creates a form of permission, the state of emergency falls on a gap of unconstitutionality filled by the Constitutional Court that reviews the legislations based on the Civil Protection Code. However, legislative and administrative emergency instruments are already provided by the constitution. For instance, Article 77 allows the issue of *decreti-legge*. These decree-laws are provisional decrees adopted by the government and issued by the

President of the Republic. This type of executive law-making has force of law and must be transposed into law by the parliament within 60 days in order to keep their legal effect. A *decreto-legge* must not derogate from the constitution and can only be issued with prior parliamentary approval, except in extraordinary conditions of urgency and necessity.

However, while ordinances would be fitting within the scenario of a state of emergency, other instruments were used. Decree-laws and DPCMs were a central part of the State's decision-making. In this context surges March's decree-law 6/2020, which would set the base of the next measures. It provided a wide margin of discretion, which called "all competent authorities" to adopt "proportionate and fitting measures", provided the functioning basis of the future DPCMs. This decree-law neither established a list of derogation powers nor a sunset clause. Lastly, it subjugated all regions to the same response mechanisms, with no possibility of deviating from the Italian state's measures. Article 117 of the constitution indicates health protection is a concurrent competence of both the State and the Regions, however, public order and security, as well as "international prophylaxis" are an exclusive competence of the State, meaning the State can set the rules to be abided by the Regions and coordinate a unitary exercise.

Moreover, the decree-law's Article 3 gave derogation powers to the DPCM, an instrument that should not exercise such powers. And, although the decree-law was subjected to parliamentary control and the "conversion into law" instrument was used, on 5 March, the broad and constitutionally challenging language was not modified, as the violations *tanquam non esset*. Apart from this, the DPCMs had no substantive legal guidelines. This means all the freedom-restricting DPCMs based on this decree-law are harming the principle of legality, seen in Article 23 of the Italian Constitution, that provides derogations can only be done by the force of law. Instead of going after a governmental decree or an ordinance, the government chose to hybridize the DPCM with the ordinances, without any legal basis. These legal mutations can

be translated as a subversion of the legislative path. Here, a statutory decree was able to introduce emergency measures, avoiding deliberation with the cabinet or presidential review.

During the first months of the pandemic, each DPCM increasingly restricted the Italians freedoms. DPCMs from 8, 9, 11, 22, and 23 March impacted rights on movement, assembly, education, worship and carrying out economic business. The Constitution allows these freedoms to be restricted for reasons of health or security, but only under measures with force of law, which is not the case for the DPCMs. Nevertheless, they, together with *decreti-legge*, were the main measures adopted. The decree-law 6/2020 not only defined the government response strategy, but also the relationship with the Parliament and the Regions. The DPCM dominated decision-making and transformed decree-laws into *de facto* primary sources of law. This diminished the Parliament, Regional Presidents, and other constitutional bodies' roles while granting a kind of prime-ministerial autonomy. Therefore, at the beginning of the pandemic, the powers were verticalized, with the Executive being on top. The Parliament's activity was reduced to convert decree-laws into laws, while other parliamentary initiatives and deliberations were on a halt, slightly resembling Agamben's view on the absorption of surrounding powers, which was not fully exercised in Italy.

The decree-law 6/2020's lack of precision was fixed only over a month later, on 25 March, through the decree-law 19/2020, which listed all possible derogations. Moreover, Regions regained autonomy in deciding to impose further restrictions within their territory. Furthermore, it also validated the provisions of previously adopted DPCMs since they are now based on provisions with force of law, and therefore consistent with the rule of law. In addition, more control was given to the Parliament, since it was established the executive should report to the Chambers every fifteen days on the DPCMs adopted based on this new decree-law. Still, it is far from following an ordinary legislative path, in fact, such path is reversed, and deliberation limited.

Although these initial measures were not exactly constitutional, a move towards autocracy is unclear, since all DPCMs depended on the Parliament's law conversion. Not only the decree-law was modified in the legge 13/2020, but also, the government fixed the decree-law 6/2020's controversial provisions through the decree-law 19/2020. On the other hand, even after its implementation, the Parliament's role remained merely procedural and secondary, which nullified its essence as a legislative body. In turn, through the decree-law 19/2020, the regional executive authorities regained autonomy powers to respond to the pandemic, based on different paragraphs of the same articles that have previously provided the State's primacy on establishing nation-wide restrictions.

If it was not for the government more or less prompt correction my considerations on Italy would certainly be different. Therefore, other factors must be included in order to address a better sustained impression on the government. The first is certainly the surprise factor that prompted a quick response in a country. However, using a decree-law would solicit a cabinet review and discussion, delaying the response. This is caused by the Italian Constitution itself. Its lack of provisions and lack of attribution of competences failed to establish a clear framework for emergencies compromising Conte's reaction. Regionalism also plays a role in the emergency provisions, as it can be seen by the fragmented division of emergency power across the different levels of government. By attempting to unitarily respond to the pandemic, Conte went against the logics and legal dynamics of the Italian legal collection.

Preceding the decree-law 19/2020, the Decreto Cura Italia, formally called the decree-law 18/2020 of 17 March, was presented as an economic package focusing on supporting individual and legal persons, as well as strengthening the healthcare system. Apart from this scope, "Cura Italia" impacted the normal functioning of the public procurement process. Its Article 75 allows the purchase of IT services without a call for tender. Furthermore, article 67, paragraph 3 derogated freedom of information by suspending FOIA requests that were not

“immediate and urgent”. Another similar package would be issued again only in May, during the Second Phase of the government response. The 19 May’s “Relaunch”, or 33/2020 decree-law, was in favor of economic recovery and the resumption of freedoms, including business activities, movement, worship, and movement. Regarding the State-Regions relations, “Rilancio” provided an even higher decision-making autonomy to the Regions. Furthermore, it included Article 103, to regularize undocumented migrants. Unfortunately, these provisions were highly divisive, highlighting a clear economic and productive need over humanitarian purposes. As this article does not mention the pandemic - neither as condition nor as *raison d’être*, and therefore -, health and safety were not part of this provision’s rationale. The previous decree 150 of 7 April includes other measures targeting migrants, but those on their way to Italy. The decree classifies Italian ports as “unsafe”, aiming to prevent the arrival of NGO-rescued migrants and asylum seekers from reaching Italian ports. This seems to be in line with the party electoral agenda, as well as the intention of WE populists of searching for ways or excuses to curb mass irregular migration.

7. Qualitative Comparative Analysis

As this work conducts a substantive approach to the rule of law, it is useful to consider the different threats different types of populism may produce. To start this comparison, the literature review will be combined with the aforementioned measures to create clusters. The first of them is “Crisis and state of exception”. Although “crisis” might be a tool to justify any measure, it is understood that all these other measures do not need a crisis to be introduced, while a state of emergency cannot be imagined outside the context of crisis. Poland is a particular case, where the crisis suited the interests of the government, however, the most adequate solution to it was not welcome by PiS since it troubled easier maintenance in power. Through a series of unconstitutional (or barely legal), far stretched measures the Polish government handcrafted a *de facto* state of emergency in order to allow a more-or-less ordinary presidential election to take place. Throughout the first half of 2020, the narrative of the crisis was actively manipulated to justify both a tranquil environment for elections and a threatening scenario in need of derogations, therefore, representing a total instrumentalization of crisis.

The Hungarian approach was certainly different, but still, it must be reinforced that it presented distinct constitutional conditions. Hungary’s autocratization process is more developed than what is found in Poland. Hungary’s Fundamental Law, where the Prime-Minister enjoys more powers or can achieve conditions for that more easily. This is seen in the lower amount of constitutional infringements in their response to the pandemic. For instance, the “Authorization Act”, comparable to a rule-by-decree, is provided by the FL. The abusive constitutionalism, a characteristic of the Hungarian response, was based on the narrative of crisis. This narrative was not only used to initiate derogative measures, but also to expand the Executive powers. In a decision like the Polish developments, a new state of emergency was created and circumvented restrictions other states of emergency were subjected to. Differently from Poland, this state was *de facto* and also *de jure*, although it contradicts

other laws and constitutional provisions. Still, Orbán's response is in line with his previous exploitation of crises and usage of the Special Legal Orders.

Just like the Eurocrisis and the migration crisis, the pandemic impacted Italy earlier and more profoundly. Not much time was given to prepare either a response or an instrumentalization, while Poland and Hungary were able to strengthen their domestic powers while disabling the opposition. The Italian government resorted to a non-constitutional but still commonly used tool of state of emergency.

Comparing the centrality of the government among the countries is important to better understand the impact of the pandemic response in the countries' institutions. Besides the municipalities, the political-legal context of Hungary was not particularly affected. In fact, the Parliament and the Constitutional Tribunal worked closely with Orbán towards greater levels of derogation, from citizens' rights to government's liabilities. Moreover, with the militarization of the response – unique among the countries analyzed – Hungary reinforced the centrality of the state, while holding the image of crisis and state of exception even towards other institutions. Besides the institutions not providing any expectation on actual checks-and-balance, the government further controlled the weak opposition. Through arbitrary acts, municipalities – mainly filled with oppositionists – were deprived from their own fiscal revenue. Finally, it reinforced any potential parliamentary and judiciary interference by creating and installing the “state of medical crisis”, a *carte blanche* more powerful than the Authorization Act, which render the constitution and the surrounding powers null in comparison to Orbán's wills.

PiS's centrality in Poland was performed without a constitutional basis by the government's own choice. By not activating the “state of natural disaster”, PiS circumvented the extraordinary measures' responsibilities but not their rights. This means that the other powers were subjugated by the Executive, although they should not without the formal

introduction of an extraordinary measure. Similar to Hungary, but to a lesser degree, Poland's Executive decision centrality was a direct consequence of the legal changes on the institutions, namely the judiciary. The long battle between one of the last opposition-lead institutions, the Supreme Court, was won by PiS during the pandemic, leading not only to the arrival of allies into the Court, but also to silencing all judges. The parliamentary majority also plays an important role in supporting the government by approving beneficial measures. The Sejm was also an important ally to PiS's maintenance of a rule-abiding image. When colonizing a new institution, the Anti-Crisis Shield passed the responsibility of appointing the institution's president directly to the lower chamber of the Parliament, without any interference of the Senate.

On the other hand, Italy did not enjoy an Executive-friendly power system or constitution. Still, once the state of emergency was introduced, the government was allowed to follow top-down measures affecting both the legislative and the Regions. In the case of the parliament, it lost more autonomy than expected since the government opted for decree-laws, making the sole purpose of the legislative to review and approve them. Also, the government's cabinet was impacted by Comte's decision, and as a result of the decree-laws, could not actively participate in the response's decision-making. As seen earlier, with consideration to the later involvement of the regions in decision making and the improvement of the measures' legal language, it can be understood as a strategy to respond to an unknown threat intensely and rapidly. Due to the fact Italy was among the first countries hit by the pandemic, it does not seem like the government had long terms plans of instrumentalization of a crisis. The first measures, although stretching the legality of the constitution and its gaps, as well as interfering with the Regions autonomy, meant an attempt to uniformly reacted to the threat.

In comparison to the short, top-down and centralized response of Hungary and Poland, the actions in Italy lingered and were not uniform. Moreover, the Italian government backed

up from a central position to give place to more regional autonomy. The opposite movement was detected in Poland, where an active replacement of cadres was pursued, following the same strategy since 2015, to colonize and manipulate institutions to refocus their purpose into serving the government's needs and authoritarian ends. As seen, Hungary used this strategy earlier, in 2010, and has always shown a deeper degree of autocratization and colonization of the state. This wide domination over the institutions meant the pandemic was not instrumentalized solely to curb constitutional or institutional powers, because they were already null and permissive. Instead, the pandemic – and the parliament and the judiciary collaboration – was used to achieve greater political and financial powers for the executive.

The next category is on citizens' rights, which were among the first, most impacted ones in all countries' responses. However, Budapest presented more derogations than one would expect in a pandemic circumstance. More than movement and assembly, Hungary had also targeted rights of speech and press during their anti-pandemic provisions. Hungary went further with a vague prohibition on fake news that could be employed towards any type of criticism. Information was restricted as well, as the epidemiological situation called for monitoring, the government derogated protections on personal data. Simultaneously, it chose not to comply with data requests. Similarly, Poland restricted access to information while improved the monitoring of its citizens. The monitorization was not a topic of discussion in Italy, however, freedom of information was indeed restricted. Measures to silence the press and the opposition, masked as a containment of the spread of disinformation, were a particular Hungarian feature, since developments of this matter were not registered in Poland or Italy.

Moreover, labor law was partially derogated, justified within the measures against pandemic-related economic decay. Still, their target was delaying tax payment deadlines and providing stimuli to employers and employees. But Hungary pursued another plan through labor flexibilization, which was in fact the potential complete derogation of the Hungarian

Labor Code, turning workers' rights nonexistent. Simultaneously, specific groups had their rights impacted by the countries' response, targeting the "outsiders". Hungary used its parliamentary majority to restrict transgenders' rights, as well as migrants. In Poland, the PiS majority in the Sejm decided to revive a frozen proposal on reproductive rights. While Italy introduced measures dedicated to curbing the entry of irregular migrants.

The derogation on procurement law was found among all three countries, and they all targeted the purchase of COVID-19-related. Poland introduced more exceptions on liability than Hungary or Italy, consequently, turning a blind eye on overpriced purchases while protecting the liable officers from different types of prosecutions. Hungary limited such derogations on purchases from national sources, and Italy allowed only IT services to benefit from such derogation.

Finally, a cluster that is particular to CEE countries, as the topic is also restricted to this region's populism, the (re-)nationalization of industry. Among the measures to protect and rehabilitate the economy, PiS saw the necessity to control key industrial sectors through partisan officers, while protecting the same sectors from a foreign acquisition. In Hungary, the involvement of the military in the response conduction was present in the occupation and overseeing of key companies.

Through the three previous analyses and the cluster, the current analysis offers it is possible to confirm this thesis' hypotheses. The Polish and Hungarian scenarios showed the progress of an illiberal, autocratic rule through COVID-19-related measures. The right-wing ideological agenda was considered by these governments, leading to the restriction and derogation of fundamental constitutional rights, as well as human rights. Both countries resorted to the derogation of rights in a context very different from the Italian scenario. These measures could not be justified even in consideration of the fragile healthcare system in both Poland and Hungary.

The development of autocratization in these countries is not completely mirrored. Hungary managed its response by eventually using the military, which was partly allowed by the executive-centric Fundamental Law, heavily shaped by Orbán's interests, in an exemplary case of abusive constitutionalism. In turn, Poland could not undertake a constitutional change in the past, therefore, PiS resorted to autocratic legalism and blatant anti-constitutionalism, given the not-so-developed autocratization process in Warsaw. Due to that, instrumentalization was important for the PiS government to overcome some institutions' resistance against the autocrat push. Again, this reinforces the understanding these antecedents on institutional and legal status determined the nature of constraints, strategies, and targets of their crisis instrumentalization.

Italy was far from demonstrating anything near these developments. The first measures to fight the pandemic were problematic but resided in the rationale of disabling an unexpected threat, meaning the crisis in Italy was tangible and the strategy to better contain the epidemiological threat shaped Conte's decisions. Nonetheless, just like its healthcare system, regionalism was an active concept that limited the centrality of the state's policy-making. The government approach was gradient into severity and back to quasi-normalcy, as it soon adjusted its provision based on rule of law safeguards, leaving to regions to determine, to a certain degree, their measures' flow and levels. And although the Parliament was initially restricted to reviewing and approving executive measures, it had active participation in putting decrees back into legality and constitutionality.

8. Conclusion

As the four analytical steps demonstrate, the hypotheses on the instrumentalization of the pandemic by the Polish and Hungarian governments stand. Such instrumentalization did not start a process of autocratization, as seen in the literature review the phenomena started in the dawn of PiS and Fidesz, meaning the conditions for illiberalism predated the surge of the virus. These same conditions influenced much more the response strategy than the pandemic itself. And as seen, the selection of distinct strategies and targets between the two countries exposes their different stages of illiberal rule and institutional-legal conditions.

If one takes exclusively the Constitutional provisions in comparison to the issued legal work, the Hungarian rule of law, for instance, might not be put in question. Similarly, at a first glance, the Polish Sejm might be understood as a functioning checking mechanism to counter the government's arbitrariness. However, the state of the institutions shall be considered. That is why the institutional context and the presentation of concepts designed to understand CEE populists' behaviors are valuable tools for this work's analyses. By resorting to these tools, the actual legal and institutional situations can be presented, with the rule of law not being as protected as one might have thought and instead of their partisan domination function simply to play pretend.

While this thesis recognizes that illiberalism is a spectrum, it has also defined through its conceptual framework that the rule of law should not be understood in this same way. Having defined what is a rule of law and a constitutional infringement, it was detected that both countries present similar ambitions regarding a move towards autocratization, and so, they were able to exploit the contingencies of a scenario of crisis, and its management was important to cover or safeguard unconstitutional or unethical measures. As seen, the conditions of the countries' healthcare systems together with the generalized fear over the virus played an

important role not only in implementing the needed measures but also in justifying arbitrary derogation of freedoms.

The comparison between WE and CEE populism demonstrates that their particular set of discourses and demands corresponds to their *modus operandi*, meaning the WE's more liberal and civilizational approach discursively deposits importance to democracy, rule of law, and liberties and acts accordingly with that. This is seen in the Italian measures, where the institutions and constitution were mostly respected despite the unexpected urgency and the strategic troubles to counter it, nonetheless, controversial measures were adopted, but targeted "outsiders", such as irregular migrants. Meanwhile, the CEE operation was mainly preoccupied with establishing an uncontestable power, in agreement with their distrust towards the institutions and non-partisans. Therefore, the CEE rationale drove Hungary and Poland towards the cherry-picking instrumentalization of the pandemic crisis, leading to another crisis, now on rule of law and constitutionalism. Their autocratic legalism, abusive constitutionalism – or blatant anti-constitutionalism – weakens the political system, and, similarly to a virus, autocracy can exploit a weak democracy in order to infect it.

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