Introduction

Migrants' Rights, Populism and Legal Resilience in Europe

STIJN SMET AND VLADISLAVA STOYANOVA

We live in an age of populism, with a troubling impact on migrants' rights and on liberal constitutional democracy.[1] Migrants are detained *en masse*, while border walls are erected in Hungary and the United States; migrants lose their lives at sea, while politicians in Europe advocate for the 'Australian model' towards 'boat refugees' in the Mediterranean; and migrants' rights to be reunited with their families are gradually taken away, while a host of countries – including Italy and Austria in Europe – pull out of the Global Compact for Safe, Orderly and Regular Migration.

At the same time, a steady decline in the quality of democracy has spread across the globe.[2] In 2020, one in three persons in the world lived in a country in which democracy is decaying.[3] A decade earlier, in 2010, this was only six per cent of the world's population.[4] On a global scale, democracy is in crisis.[5] Or, put differently, we are in the midst of a third wave of autocratization.[6] Authoritarian populism is an important causal factor in this democratic decline, including in Europe. In countries like Poland and Hungary, authoritarian populists have packed the highest courts with government-friendly

[1] Cf. Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Dangers and How to Save It* (Harvard University Press 2018) 3 ('we are going through a populist moment. The question now is whether this populist moment will turn into a populist age').

[2] See the data produced by the V-Dem Institute, EIU's Democracy Index, and International IDEA's Global State of Democracy Indices.

[3] V-Dem Institute, 'Autocratization Turns Viral: Democracy Report 2021', www.v-dem.net/media/filer_public/74/8c/748c68ad-f224-4cd7-87f9-8794add5c60f/dr_2021_updated.pdf.

[4] Ibid.

[5] Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

[6] Anna Lührmann and Staffan I. Lindberg, 'A Third Wave of Autocratization Is Here: What Is New About It?' (2019) *Democratization* 1095.

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judges, rewritten electoral rules to sustain (super)majorities, and silenced critical voices through media buyouts and legislation targeting NGOs and universities.[7]

In short, three forces – populism, restrictive migration policies, and democratic decay – have been on the rise in Europe, and the world at large.[8] There are, moreover, clear linkages between these forces. As the Secretary General of the Council of Europe notes, populists exploit public anxieties over migration by depicting migrants as the dangerous 'other', while criticizing 'the corrupt elite' for failing to protect 'the pure people' from the threat posed by migrants.[9] Migrants are, in the populist narrative, excluded from 'the pure people' that populists claim to *exclusively* represent. As such, the populist turn in European politics appears to have paved the way for evermore restrictive migration policies, whose compliance with human rights law is questionable.[10]

In at least some European countries, the populist turn also presents an immediate threat to liberal constitutional democracy. Some authoritarian populists have seized the momentum created by the confluence of three crises – an economic crisis (post-2008), a terrorism crisis (ongoing since 2001, but accelerated in Europe since 2015) and a 'migration crisis' (since 2015) – to undermine structural features of liberal constitutional democracy, including judicial independence, the separation of powers, and the rule of law.[11] An opposing force to liberal constitutional democracy – Viktor Orbán's 'illiberal democracy' dubbed 'Christian democracy'[12] – is gaining ground in Europe.[13]

[7] See for instance Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

[8] We define the central concepts – populism, democratic decay and legal resilience – further on in this introductory chapter.

[9] Council of Europe, 'State of Democracy, Human Rights and the Rule of Law. Populism How Strong Are Europe's Checks and Balances?' (2017); Council of Europe, 'Ready for Future Challenges – Reinforcing the Council of Europe' (2019). See also Neil Walker, 'Populism and Constitutional Tension' (2019) 17 *International Journal of Constitutional Law* 515.

[10] See also T Alexander Aleinikoff, 'Inherent Instability: Immigration and Constitutional Democracies' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 485.

[11] Rogers Brubaker, 'Why Populism?' (2017) *Theory and Society* 369. The precise nature of the interrelationship between populism, migration and democratic decay is one of the central research questions of this edited volume and is discussed at length below.

[12] Gabor Halmai, 'Populism, Authoritarianism and Constitutionalism' (2019) *German Law Journal* 296, 307–308.

[13] Scheppele (n 7).

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1.1 CONTEXT, OBJECTIVES AND RESEARCH QUESTIONS

Against this complex and troubling backdrop, this edited volume seeks to analyse the interrelationship between populism, democratic decay and the restriction of migrants' rights in Europe. The need for such analysis is evident from the tragic trajectory in Hungary,[14] where anti-migration discourse and policies have sustained support for Fidesz during and after the 'migration crisis' of 2015, in turn emboldening the populist party to further undermine liberal constitutional democracy to consolidate Orbán's hold on power.[15] Poland has been on an analogous, albeit somewhat different route towards democratic decay, in which the perceived or constructed threat of migration has also played a predominant role.[16]

It is tempting to dismiss Hungary and Poland as isolated cases. To assume that 'we' (i.e. the rest of Europe) can somehow quarantine 'them' so they will not infect 'us'.[17] In resisting that urge, this edited volume seeks to consider – in earnest – to what extent the 'we' are also at risk of suffering from democratic decay, what role populism and restrictive migration laws and policies play in this regard, and what – if anything – can be done to avoid this trajectory.

In the past few years, disquiet has grown over potential onset of democratic decay in countries like Romania, Bulgaria, Slovakia, Italy and Austria. Similarly, concern has increased about the resurgence of radical-right parties in countries like Germany, France, Belgium, the Netherlands and Sweden. Aside from populism, migration is a central theme running as a red thread through these processes, which occur across the entire European continent.[18] Yet unlike populism, the precise role of migration remains underexplored. The contributors to this edited volume, therefore, tug on the red thread of migration in an attempt to unravel the interrelationship between populism, democratic decay, and migrants' rights. But they do not stop at the level of diagnosis. Instead, they also seek solutions by identifying strategies of legal resilience against restrictive migration laws and policies, in particular.

[14] See for instance Gábor Halmai, 'A Coup against Constitutional Democracy: The Case of Hungary' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 243.

[15] This autocratization process has accelerated further under the guise of the need for extensive emergency powers to combat COVID-19. See Chapters 6 and 8 by Wouters and De Ridder and by Kovacs and Nagy.

[16] See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019). See also Chapter 9.

[17] The activation of the article 7 TEU mechanism against Poland and Hungary could be understood in this sense.

[18] See, for instance, Mounk (n 1); Aleinikoff (n 10).

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To achieve the above objectives, we have brought together scholars of migration law and scholars of constitutional law. The first group of scholars has been analysing ever-growing restrictions of migrants' rights for a long time.[19] Scholars of migration law have drawn attention to how curtailment of migrants' rights has become 'the new normal' in Europe, as well as to how such restrictions are often incompatible with fundamental legal principles, including human rights and the rule of law. In doing so, they have noted a link with the rise of populism in Europe. Scholars of constitutional law, by contrast, have – with important exceptions – only started focusing on the threat of populism to liberal constitutional democracy over the last few years, once authoritarian populists began using the law to incrementally dismantle constitutional structures in countries like Hungary and Poland.

Thus far, however, scholars of migration law and constitutional law have not engaged in concerted dialogue on these issues, which is remarkable since they are studying closely related phenomena. More important, dialogue is also necessary because examining separately (as has been done so far) migration and restriction of migrants' rights, on the one hand, and constitutional democracy and its stability, on the other, can keep us from identifying and understanding the actual problems. At the same time, dialogue can better equip both migration law and constitutional law scholars to contextualize the phenomena that they study.

To address the existing gap in the literature, we have gathered scholars representing both sub-disciplines and from across Europe at a two-day workshop at Lund University, organized in February 2020. We were, and remain, convinced that these scholars have much to gain from sharing each other's perspective, in terms of diagnosing problems, identifying lasting implications and finding possible solutions. Our shared objectives at the workshop, and in this volume, have been to piece together a nuanced picture of the interrelationship between populism, democratic decay and the restriction of migrants' rights; as well as to identify strategies of legal resilience against (overly) restrictive migrations laws and policies.

Further on in this introductory chapter, we briefly explain the origins and structure of the edited volume (Section I.4). The bulk of the Introduction,

[19] See, for example, Gregor Noll, *Negotiating Asylum. EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000); Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015); Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016); Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum System' 53 (2016) *Common Market Law Review* 607.

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however, is intended as a road map to contextualize the volume's objectives and explain its research questions (Sections I.2 and I.3).

I.1.1 *Research Questions*

The burgeoning literature on democratic decay has been dominated by scholars of constitutional law and political science. This has brought with it a somewhat skewed perspective on the role of migration, which is often considered to be 'merely' a contributing factor to democratic decay, in the sense that (authoritarian) populists have seized on the 'migration crisis' to further undermine liberal constitutional democracy. Yet, in our estimation the relationship between the three forces is likely to be more multifaceted and complex. We, therefore, put these two research questions to our contributors:

1. To what extent do restrictions of migrants' rights represent a form of democratic decay in populist times? Or, put differently, what is the conceptual and empirical relationship between restrictive migration laws and policies, populism and democratic decay?
2. What are the possibilities for and limitations of legal resilience to safeguard migrants' rights against (further) erosion in populist times?

Throughout this introduction, we explicate both research questions. We first define and explain the central organizing concepts: populism, democratic decay, and legal resilience. Having defined the organizing concepts, we discuss the state of the art in relation to each research question, before deducing potential positions on each question from the literature. We finally identify, in broad terms and general categories, the different approaches our contributors have taken to each research question.

I.2 POPULISM, DEMOCRATIC DECAY AND MIGRATION: THE INTERRELATIONSHIP

Our first research question concerns the interrelationship between three forces – populism, democratic decay and migration – that are exerting enormous pressure on Europe's liberal constitutional democracies.

1. To what extent do restrictions of migrants' rights represent a form of democratic decay in populist times? Or, put differently, what is the conceptual and empirical relationship between restrictive migration laws and policies, populism and democratic decay?

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In conceptual *and* empirical terms, there are undeniable linkages between populism and restrictive migration policies, on the one hand, and between (authoritarian) populism and democratic decay, on the other hand.[20] But do systemic restrictions of migrants' rights introduced by populist parties – or by mainstream parties in an effort to 'outbid' the populists – inevitably follow Hungary's tragic trajectory towards democratic decay? Put differently, might the drastic curtailment of migrants' rights act as a sort of 'canary in the coalmine' that foreshadows future attacks on democratic structures?

It is tempting to reject this suggestion as overly reductive, but we should arguably not dismiss it out of hand. Across Europe, authoritarian and nativist populists have taken to criminalizing migrants *and* targeting those who resist restrictive migration policies. Migrants are often a primary target, but courts, civil society and the media are a close second. Populists attack the media for being 'leftist' or bringing 'fake news' on migration, brandish judges who rule in favour of migrants as being 'estranged' from the will of the people and undermine NGOs and independent agencies by labelling them 'biased' in favour of migrants at best and 'enemies of the people' at worst. This worrying pattern is not confined to just a few countries. It is replicated in a wide range of constitutional democracies in Europe.[21]

Could, in that respect, a confluence of *all three forces* be posited, in the sense that systemic restrictions of migrants' rights, introduced by or under the influence of populists, could be considered a mark of democratic decay? Or are both phenomena – the undermining of migrants' rights and the decay of liberal constitutional democracy – conceptually and empirically distinct? Moreover, what is the exact relationship between populism and restrictive migration laws and policies? Is populism a causal factor in systemic breaches of migrants' rights or 'merely' an accelerant in processes that were well underway before the populist surge?

These are some of the questions that preoccupy the contributors to this volume (see Section I.2.3), as they seek to untangle the complex relationship between populism, democratic decay and migration (see Section I.2.2). But before we are in a position to unpack these questions, a clear understanding of the structuring concepts of populism and democratic decay is in order (see Section I.2.1).

[20] These linkages were discussed (briefly) in Section 1 and are explained further on in this section, on the basis of a literature review and the contents of the volume's chapters.

[21] See Chapters 8–13 in Part III of this volume.

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I.2.1 *Defining Populism and Democratic Decay*

Two central concepts in our first research question – populism and democratic decay – require a definition and initial explanation. It could be argued that the same holds true for the third central concept: migration. Patricia Mindus, however, takes on the difficult charge of pinpointing what migration is, exactly, in Chapter 2. We, therefore, leave that concept aside here. As to restrictions of migrants' rights, we understand this to not only include limitations of human rights as guaranteed in a relatively general way in the European Convention on Human Rights and the EU Charter of Fundamental Rights, but also curtailment of rights as formulated more concretely in EU law (e.g. the EU instruments forming the Common European Asylum System) or national legislation.

I.2.1.1 Populism: Simpliciter, Authoritarian or Nativist?

Populism, so it is said, is an essentially contested concept.[22] Ordinarily, this qualification implies deep-seated 'contestation at the core' about the 'content and implications' of the concept at issue, with 'people advancing and defending (and criticizing and modifying) rival conceptions of the concept'.[23] Yet in the case of populism it is not so much its *content* that is contested, but the *form* it takes.[24] Some view populism as a discursive practice,[25] others claim that it is a political strategy,[26] and others still consider it to be a (thin) ideology.[27] But regardless of how populism is understood – as a discourse, strategy or ideology[28] – there appears to be widespread agreement on its

[22] Brubaker (n 11), 358; Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 2.

[23] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) *Law and Philosophy* 137, 149–150. See also, and originally, Bruce Gallie, as cited in David Collier et al, 'Essentially Contested Concepts: Debates and Applications' (2006) 11 *Journal of Political Ideologies* 211, 214 (stating that the essentially contested nature of concepts 'inevitably involve[s] endless disputes about their proper uses on the part of their users').

[24] For an overview, see Mudde and Kaltwasser (n 22).

[25] Benjamin De Cleen, 'Populism and Nationalism' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 342, 345; Jan-Werner Müller, 'Populism and Constitutionalism' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 590, 591.

[26] See Mudde and Kaltwasser (n 22) 4 (describing this 'more recent approach' as being 'particularly popular among students of Latin American and non-Western societies', without endorsing this conception of populism themselves).

[27] Ibid., 6.

[28] Other viewpoints may exist. Yet these are probably the most pertinent ones for our purposes.

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constitutive elements: populism relies on a constructed image that divides society, in antagonistic terms, between 'the (pure) people' and 'the (corrupt) elite'.[29]

How does one get from this general understanding of populism to describing its role in the incremental undermining of liberal constitutional democracy, on the one hand, and its contribution to the enactment of evermore restrictive migration laws and policies, on the other hand? In making that bridge, legal scholars often find it useful to draw on one of the most widely endorsed conceptions of populism: the ideational approach of Cas Mudde and Cristóbal Rovira Kaltwasser.[30] In the ideational approach, populism is understood as

> a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the volonté générale (general will) of the people.[31]

Some contributors to this edited volume clearly draw on this understanding of populism, either explicitly[32] or implicitly.[33] As will become clear, however, a 'thicker' understanding of populism as inherently anti-pluralist, proposed by Jan-Werner Müller, might actually be more pertinent in the migration context, given that most contributors seem to consider anti-pluralism a highly salient factor in their analyses.[34]

Under the ideational approach favoured by some contributors to this edited volume, populist parties and politicians can hardly be populist and nothing more, since as an ideology populism is too thin to support an electoral programme. It, therefore, tends to be combined with other ideologies such as nationalism or xenophobia, and lends itself extremely well to such combinations.

[29] See Mudde and Kaltwasser (n 22) 5–6; Cas Mudde, 'Populism: An Ideational Approach' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 27, 32; De Cleen (n 25) 345.

[30] Mudde and Kaltwasser (n 22) 2; Mudde (n 29) 28.

[31] Mudde and Kaltwasser (n 22) 6.

[32] See, for instance, Chapter 1 by Stoyanova.

[33] See, for instance, Chapters 6 and 12 by Wouters and De Ridder and by Desmet and Smet.

[34] See, among others, Chapters 2, 8, 9 and 13. A minority of authors favours a somewhat looser understanding of the concept. In Chapter 11 on Austria, Ammer and Kirchmair, for instance, view populism 'as a phenomenon constituting an important challenge to discursive and institutional pluralism'. This suggests an understanding of populism as a political strategy or practice intent on undermining democratic essentials, which seems to be particularly instructive to understand the peculiarities of the Austrian case (see also 2.2).

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In Western, Northern and Southern Europe, populism indeed tends to go hand in hand with nationalism and/or xenophobia.[35] It thus takes the form of *right-wing* or *nativist* populism. Some contributors to this edited volume seem to understand populism in these terms.[36] They note that populists construe the people as a 'bounded collectivity' that is being threatened by the 'other'.[37] Mindus, for instance, notes that '[p]opulism exploits the blurring of the [...] distinction [between People-as-a-part and People-as-a-whole]: the populist framing of anti-migration policies pitching "them" versus "us" is a case in point'. Migrants are, on this understanding, depicted by populists as the enemy of the people, threatening the homogenous collective.[38] This explains why, in the populist imagination, migrants are *excluded* from the bounded collectivity. Kovacs and Nagy seem to rely on a similar understanding of populism, when they claim that

> today's populist authoritarian nationalists concentrate on the concept of identity as a tool for determining who belongs to the mass that may be defined in ethnic, religious or linguistic terms. They use the language of the malign 'other', in which the other is a group considered not to belong to the mass because it differs in some key characteristics.

The understanding of populism favoured by Mindus and by Kovacs and Nagy, among others, appears to bake the relationship between populism and migration into the very concept of populism itself, thereby potentially conflating

[35] See De Cleen((n 25) 348–349. Since we are interested in the relationship between populism, on the one hand, and democratic decay and migration, on the other, we leave aside left-wing varieties of populism in this introductory chapter and throughout much of the edited volume. The reason is that left-wing populism tends to be linked to economic recession and claims of distributive justice. As such, it does not come within the purview of our analysis. This is not to say that these are unimportant instances of populism, nor to claim that they cannot pose dangers to liberal constitutional democracy. The case of Venezuela shows that they can. See David Landau, 'Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 161; Steven Levitsky and David Ziblatt, *How Democracies Die* (Broadway Books 2018) 4–5; Günter Frankenberg, *Authoritarianism: Constitutional Perspectives* (Edward Elgar 2020), *passim*.

[36] See, apart from the example discussed in the text, also Chapters 3, 7 and 10 (the latter chapter analyses the Italian case through the lens of what the authors call 'PopSovism', a contraction of populism and sovereignism, in which '[t]he populist component [...] puts itself on the side of "the people", defined as a country's native ethno-cultural group(s), which must be defended against both national and transnational "elites" and against other "outsiders" such as immigrants.').

[37] Brubaker (n 11) 363.

[38] Mudde and Kaltwasser (n 22) 34.

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populism and nationalism.[39] Benjamin De Cleen has claimed, in this regard, that labelling the construction of an insider-outsider perspective of society as a core feature of populism *simpliciter* 'misses the point [. . .] for these parties [which propagate this view] cannot be understood through the notion of populism alone'.[40] It is, by contrast, their right-wing or nativist ideology that is doing the work of constructing the insider-outsider dichotomy.[41] Strictly speaking, on a narrow understanding of the concept, populism *exclusively* targets 'the elite' – not just the political elite, but also the media, the academy and the cultural elite – for instance chastising these elites for choosing the plight of migrants over the concerns and the will of 'the people'.[42]

Yet, somewhat 'thicker' understandings of populism, such as proposed by Jan-Werner Müller, accommodate the seeming conflation of nationalism and populism by insisting that populists are *per definition* anti-pluralist.[43] Since populists label a constructed homogenous collective as 'the people', Müller notes, they inevitably draw insider-outsider boundaries in plural societies (which all European countries are to a greater or lesser extent).[44]

Mindus, in Chapter 2, draws on Müller's understanding of populism 'as an exclusionary form of identity politics'. Thorburn Stern and Lind do the same when they identify two common denominators of populism: criticism of elite and anti-pluralism. At least some contributors to this volume thus seem to consider 'thicker' understandings of populism more germane to understanding the interrelationship between populism and migration in Western, Southern and Northern Europe. Thorburn Stern and Lind, for instance, emphasize that

> Another factor central for populism is *crisis*, real or perceived, which acts both as a hotbed for populism, creating a space for its emergence [. . .] and as a tool for populists to create a situation in which 'the people' can be united against a threatening Other, and be more susceptible to arguments in favour

[39] De Cleen (n 25) 342. Note that Stoyanova at times seems to do the same in Chapter 1, for instance when she claims that '[p]opulists who perceive membership as static and the polity as culturally homogeneous, not only tip the balance as to how migrants are treated, but also compromise more generally democratic ideals by perpetuating fictions of internal homogeneity and promoting nativist narratives of belonging.' (internal citations omitted) and argues that '[t]his compromises the values of the community because "identitarian assumptions" about who belongs to the "the pure people" quickly lead to the targeting of other groups who do not fit within these assumptions'. See Chapter 1.

[40] De Cleen (n 25) 349.

[41] Brubaker (n 11) 363; Mudde (n 29) 33; De Cleen (n 25) 344.

[42] Mudde and Kaltwasser (n 22) 14; Mudde (n 29) 33. Cf. also Brubaker (n 11) 364.

[43] Müller (n 25) 590.

[44] Ibid.

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> of strong leadership and fast political action in order to prevent the crisis from getting worse.[45]

Although Thorburn Stern and Lind write about Sweden, their understanding of populism appears to fit the circumstances in Central and Eastern Europe (CEE) more snugly. In CEE countries, nativist strands of populism have long struggled to gain traction, largely due to the limited number of migrants that choose to remain in CEE.[46] This has, however, not stopped populist leaders from seizing upon the 'migration crisis' of 2015 to paint an image of a wave of migration, especially from Muslim countries, threatening to sweep away the majority's culture and population.[47] In these instances, the threat of migration is arguably deployed as a discursive strategy to prop up support for the incumbent populist leader.[48] In that sense, the link between nativism and populism is weaker, or at least more contingent, in CEE countries than in other parts of Europe.

Indeed, populism in CEE is often described as *authoritarian* populism, a variety intent on undermining democratic essentials to secure the populist's hold on power.[49] The threat of migration is, in this narrative, *instrumentalized* to strengthen the authoritarian populist's grip on the state apparatus. In Chapter 8, Kovacs and Nagy construe the role of populism in this sense. In discussing the Hungarian case, they consistently speak of 'populist authoritarian nationalist' who rely on Schmitt's understanding of 'an indispensable, unitary sovereign, who, at the moment of an unpredictable crisis, can break free of the rule of law and assert his pre-legal authority'. Here, the linkages to democratic decay are evident, in contrast to what is the case for nativist populism, which need not undermine the structures of liberal constitutional democracy.

[45] Emphasis in original.

[46] Ben Stanley, 'Populism in Central and Eastern Europe' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 140, 146–147.

[47] See Chapter 9 by Mikolajczyk and Jagielski ('In contrast to Western and Southern Europe, the migration crisis of 2015–2016 largely bypassed Poland. This is a kind of paradox because, despite the low risk of waves of migrants from Syria and Africa arriving in Poland, Law and Justice managed to skillfully exploit the migration crisis in Europe').

[48] Halmai (n 12) 310 ('The populist approach to constitutionalism [in CEE countries] appears as an instrumental one that uses nationalist and religious definitions of the nation to promote an ultimately authoritarian project.')

[49] Bojan Bugarič, 'Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism' (2019) *International Journal of Constitutional Law* 597, 599 ('While ethnonationalism is present in most of Western European cases, it is [...] authoritarianism, which sets the ECE type of populism apart from other European cases').

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At the same time, it is striking that, in the broader literature, the term *authoritarian* populism is generally used to describe those instances of populism that have already led to democratic decay (e.g. in Hungary and Poland), whereas *right-wing* or *nativist* populism tends to be reserved for instances that entail drastic curtailment of minority rights – including migrants' rights – but do not target the structures of democracy as such (e.g. in Belgium and Sweden).[50] In other words, there seems to be an element of contingency in the qualifiers we add to the label 'populism'. Populism is labelled authoritarian once democracy is being undermined, whereas it is called right-wing or nativist if that is not (yet) the case.

This dichotomy can also be observed in this volume. Whereas Kovacs and Nagy speak of authoritarian populism in discussing the Hungarian case, Desmet and Smet as well as Thorburn Stern and Lind write about right-wing or radical right populism in Chapters 12 and 13 on Belgium and Sweden. What is to say, however, that right-wing or nativist populists in Sweden and Belgium would not pursue the same avenue as their authoritarian cousins in Hungary, if given the opportunity? This makes it all the more pressing to evaluate the precise linkages between populism, democratic decay, and migration as well as to identify strategies of legal resilience. First, however, we need to be clear on what we mean by 'democratic decay'.

I.2.1.2 Democratic Decay: Incremental But Purposive

Unlike populism, the concept of democratic decay is not essentially contested.[51] There exists, in fact, widespread agreement on its definition and core elements. If anything, the literature includes an abundance of concepts that more or less describe the same thing. Democratic decay, democratic backsliding, democratic erosion, democratic decline and other cognate terms all refer to an incremental, yet deliberate process of undermining the fundamental principles, basic structures and central institutions of liberal constitutional democracy.[52] We will expand on *what precisely* is being eroded – or what

[50] Cf. Stephen Gardbaum, 'The Counter-Playbook: Resisting the Populist Assault on Separation of Powers' (2020) *Columbia Journal of Transnational Law* 1, 3 (distinguishing between two types of populism, one of which operates within the structures of constitutional democracy whereas the other assaults these structures).

[51] Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) *Hague Journal on the Rule of Law* 9.

[52] Ibid., 17; Nancy Bermeo, 'On Democratic Backsliding' 2016 *Journal of Democracy* 5, 14–15; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (The University of Chicago Press 2018) 39; Aziz Z Huq, 'A Tactical Separation of Powers Doctrine' (2019)

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exactly is decaying – further on, when we unpack the state of the art on the interrelationship between democratic decay, migration and populism. For now, a general understanding of democratic decay suffices.

Processes of democratic erosion or democratic decay are often explained in contradistinction with the 'traditional' coup d'état, in which democracy is overthrown by a sudden violent event, following which an authoritarian form of government – generally a dictatorship or military junta – is immediately installed in democracy's stead.[53] As the term indicates, democratic decay is a process (not an event) that takes place much more gradually (not suddenly).[54] The means used also differ from those of a coup d'état, in that liberal constitutional democracy is no longer overthrown by use of force, but incrementally undermined through legal means by – generally populist – politicians who have been democratically elected.[55]

Democratic decay is the most prominent form of autocratization today.[56] Democracy is much less often overthrown in our populist times than it is slowly, yet steadily, eroded. The ultimate aim, however, remains the same as in a coup d'état: securing the populists' hold on state power, which they concentrate in the executive branch of government.[57] Hence, Nancy Bermeo identifies 'executive aggrandizement' as a core feature of democratic erosion.[58]

In Europe, Hungary and Poland are the prime examples of countries suffering from democratic decay at the hands of authoritarian populists bent on executive aggrandizement. In both countries, authoritarian populists have 'weaponized the law' to undermine the independence of courts; rewrite electoral rules to make it (much) more difficult for the opposition to win elections; silence the media; effectively ban a university; suppress critical

Supreme Court Review 19, 24; Mudde and Kaltwasser (n 20) 91; Melis G Laebens and Anna Lührmann, 'What Halts Democratic Erosion? The Changing Role of Accountability' (2021) *Democratization* 3; Scheppele (n 7) 547.

[53] See, for instance, Bermeo (n 52) 10.

[54] Ibid., 14–15; Daly (n 51) 17; Ginsburg and Huq (n 52) 39; Huq (n 52) 24; Mudde and Kaltwasser (n 22) 91; Laebens and Luhrmann (n 52) 3; Scheppele (n 7) 547.

[55] Bermeo (n 52) 15

[56] Anna Lührmann and Staffan I Lindberg, 'A Third Wave of Autocratization Is Here: What Is New About It?' (2019) *Democratization* 1095, 1105 (stating, with reference to data from the Electoral Democracy Index of V-Dem, that democratic erosion accounts for 70% of all cases of autocratization in the world over the past decades).

[57] Scheppele (n 7).

[58] Bermeo (n 52) 10.

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NGOs; and drastically curtail a range of minority rights.[59] To both countries, a separate chapter is dedicated in Part III of this volume, along with countries that seemed to be heading on a similar trajectory towards democratic decay but have avoided reaching terminal velocity (Austria and Italy), as well as countries in which liberal constitutional democracy appears secure but in which right-wing populism is nevertheless a force to be reckoned with (Belgium and Sweden).

I.2.2 *State of the Art*

As the preceding discussion indicates, it would be farfetched to insist that all six countries analysed in Part III of this volume – Poland, Hungary, Italy, Austria, Belgium and Sweden – are experiencing democratic decay. It would also go too far to suggest that liberal constitutional democracy in each of these countries is or was equally vulnerable to executive aggrandizement by authoritarian populists. Clearly, there are salient differences between the six countries. But they also share commonalities: in each of these countries, populists have seized upon the 'migration crisis' of 2015 to expand their support base and, more significantly, each country has adopted evermore restrictive migration laws and policies over the past decade (or more). These commonalities are what has prompted us to ask: what is the precise nature of the interrelationship between populism, democratic decay and migration?

As stated earlier, there are clear linkages between these forces: between populism and restrictive migrations laws and policies, on the one hand, and between populism and democratic decay, on the other. In respect of the first relationship, *nativist* or *right-wing* populism has contributed to evermore drastic curtailment of migrants' rights in Europe (see Section I.2.3). Its contribution has been direct in countries where nativist populist parties have been in government (e.g. in Italy), whereas it is indirect in countries where the electoral pressure of nativist populist parties has pushed mainstream parties to co-opt some of their policies in a bid to cut off their electoral support (e.g. in Belgium).[60] In some countries, both phenomena can be observed simultaneously (e.g. in Austria). In further countries still, authoritarian populists have

[59] Scheppele (n 7); Ginsburg and Huq (n 52), Ch 4 in particular; Wojciech Sadurski, 'Populism and Human Rights in Poland' in Gerald L Neuman (ed) *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge University Press 2020) 60. See also Chapters 8 and 9.

[60] Cf. Brubaker (n 11) 379 ('Both substantive themes and stylistic devices from the populist repertoire are routinely appropriated by "mainstream" political actors', a political strategy Brubaker labels 'poaching'). Cf. also Rosalind Dixon and Anika Gauja, 'Australia's Non-Populist Democracy? The Role of Structure and Policy' in Mark Graber et al (eds)

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instrumentalized the constructed threat of migration as part of their strategy to undermine liberal democratic structures and further entrench power in their hands (e.g. in Poland and Hungary). In these countries, the second relationship – between populism and democratic decay – becomes evident as well.

Scholars of migration law and scholars of constitutional law have taken note of different linkages between restrictive migration laws, populism and democratic decay. Migration law scholars have by and large failed to engage more profoundly with the relationship. Their engagement has been limited to the observation that populism has led to (or has posed the risk of leading to) further restrictions of migrants' rights.[61] As a response to the populist threat, migration law scholars have tried to demonstrate that populist attacks on human rights law as applied to migrants are unfounded since human rights law actually acknowledges and accommodates states' entitlements to control borders. In this sense, in many respects human rights law accommodates the restrictions advocated for by populists.[62] At the same time, and ironically so given its acknowledged limitations, human rights law is constantly invoked as a source of solutions.[63]

But by focusing primarily on the relationship between populism and the restriction of migrants' rights, migration law scholars might have overlooked wider structural problems, including the problem that we have framed as

Constitutional Democracy in Crisis? (Oxford University Press 2018) 395, 397 and 412 (discussing the same phenomenon in the Australian context).

[61] See for example, Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68(1) *Current Legal Problems* 143, 148 ('"Migration exceptionalism" is a dangerous political move: non-citizens usually cannot vote, it is all too easy for populist anxieties about the negative consequences of immigration and misunderstandings about refugee protection to hold sway; xenophobic reflexes easily become entrenched, and the government's strongly perceived need to demonstrate control over migration to their electorates can lead to all manner of repressive reactions. When we place the resultant practices in a category of their own, we create a space for exceptional, repressive practices.')

[62] Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015); Vladislava Stoyanova, 'Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights' (2018) 10(2) *European Journal of Legal Studies* 83; Marie-Bénédicte Dembour, 'The Migration Case Law of the European Court of Human Rights. Critique and Way Forward' in Başak Çalı, Ledi Bianku, and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (Oxford University Press 2021) 19.

[63] See also Helena Hofmannová and Karel Řepa, '"Othering" in Unconcerned Democracies and the Rise of Anti-liberal Political Divisions' in Moritz Jesse (ed), *European Societies, Migration and the Law* (Cambridge University Press 2020) 43, 44 (arguing that since restrictions of migrants' rights might be contrary to human rights law, such restrictions endanger 'the core normative structures of modern post-war constitutionalism').

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democratic decay. This may appear logical, since the will of the majority expressed through democratic procedures (procedures in which migrants cannot take part due to their status as non-citizens) is often viewed with suspicion by scholars of migration law, which explains the resort to non-majoritarian fora to defend migrants' interests. Yet, the possibility of decay of these very democratic procedures, as caused by the impact of populism on constitutional structures, seems to have largely escaped the radar of migration law scholars.

As this volume shows, scholars of migration law have every reason to worry about the state of liberal constitutional democracy in Europe. This is so, because the relative health of liberal constitutional democracy influences a number of pertinent factors: (i) whether authoritarian populists are able to seize power and begin to systematically undermine migrants' rights (as well as the rights of their supporters); (ii) the extent to which restrictive migration laws and policies can be adopted under the direct or indirect influence of nativist populism; and (iii) the room there is for legal resilience against ever-growing restrictions of migrants' rights, regardless of whether they are introduced by populists or mainstream parties (see Section I.2.3) .[64]

Scholars of constitutional law, by contrast, have largely focused on the relationship between populism and democratic decay.[65] This, as well, appears logical, given that these scholars are preoccupied with the extent to which populists are responsible for the incremental dismantling of liberal constitutional democracy (or threat thereof), not with their impact on migrants' rights. Impact on concrete rights is considered to be of minor significance when constitutional structures are crumbling under the weight of populism. Scholarship in constitutional law is also, and increasingly so, focused on finding ways to make liberal constitutional democracy more resilient against the threat of authoritarian populism, either through constitutional design or by instilling democratic norms.[66] But constitutional law scholars have paid little attention to the implications of populism and democratic decay for migrants' rights.

What is thus largely missing in the literature, at present, is concerted analysis of the interrelationship between *all three* forces: populism, democratic decay *and* migration.

[64] See Sadurski (n 59) 60 (explaining that in Poland, the main challenge to human rights is that '"the legal environment" important for the protection of human rights is being eroded').

[65] See, for instance, Scheppele (n 7); Ginsburg and Huq (n 52); Huq (n 52); Graber et al (n 5); Daly (n 51).

[66] Gardbaum (n 50); Bugarič (n 49); Sadurski (n 59); András Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law' (2020) *Constitutional Studies* 5.

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Although the literature in constitutional law focalizes on just part of this interrelationship, it nevertheless has some pertinent insights to offer. From this literature, broadened to include political science, a number of baseline positions have been deduced for our contributors to engage with. When constitutional lawyers and political scientists analyse democratic decay, they naturally begin by identifying what, exactly, is decaying. Democratic decay itself may not be an essentially contested concept, but democracy very much is.[67] Most constitutional lawyers and political scientists agree that it is not so much 'minimalist' or 'procedural' democracy that is the target of authoritarian populists, but the liberal constitutional accretions to thin conception of democracy.[68] In other words, the primary targets of authoritarian populists are not elections or majority rule, but liberal constitutional structures such as the separation of powers and institutions like independent courts.[69]

Constitutional lawyers and political scientists agree that incremental dismantling of the separation of powers and systemic undermining of judicial independence are symptoms of democratic decay.[70] By contrast, the extent to which violations of human or fundamental rights can be considered a symptom of democratic decay is contested. When assessing the existence of democratic decay, most constitutional lawyers and political scientists define liberal constitutional democracy with reference to a rather limited set of essentials.[71] Apart from free and fair elections and the rule of law, these include freedom of association and freedom of expression but generally do not extend to other human rights.[72]

Guided by a narrow understanding of democratic decay, most scholars consider systematic targeting of opposition parties and the free press as

[67] See, among others, David Collier et al, 'Essentially Contested Concepts: Debates and Applications' (2006) *Journal of Political Ideologies* 211, 212 (discussing two applications of Gallie's framework on essentially contested concepts: democracy and the rule of law).

[68] Mark Graber, Sanford Levison and Mark Tushnet, 'Constitutional Democracy in Crisis? Introduction' in Mark Graber et al (eds) *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 1, 6; Mudde and Kaltwasser (n 22) 81; Mounk (n 1) 8–9.

[69] Mudde and Kaltwasser (n 22) 91; Neil Walker, 'Populism and Constitutional Tension' (2019) *International Journal of Constitutional Law* 515.

[70] See, for instance, Gardbaum (n 50); Jakab (n 66); Ginsburg and Huq (n 52); Walker (n 69).

[71] See, for instance, Gardbaum (n 50) 9; Jakab (n 66) 11.

[72] See, for instance, Ginsburg and Huq (n 52) 43 (defining democratic erosion as 'a process of incremental, but ultimately still substantial, decay in the three basis predicates of democracy – competitive elections, liberal rights to speech and association, and the rule of law' and stating it is 'only when substantial change occurs across all three necessary institutional predicates of democracy that the system-level quality is likely to be imperilled').

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symptoms. But other human rights violations, even when they occur systematically and target minorities, are generally considered beyond the purview of a narrow understanding of democratic decay.[73] Drastic curtailment of migrants' rights is thus regarded as a matter of 'ordinary' constitutional law and politics, at least by a majority of scholars.[74]

For most scholars of constitutional law and political science, migration thus remains but one of several causal factors in the global spread of populism and concomitant crisis of democracy.[75] In that sense, populism, democratic decay and migration *are* interrelated, but only contingently: migration is an empirical reality on which populists have seized to gradually undermine democratic decay, but nothing more.

In other words, the majority position in the literature insists that democratic decay and the systemic undermining of migrants' rights are separate phenomena.[76] Taken on its own, the systemic targeting of migrants' rights cannot constitute democratic decay, it is intimated, for otherwise most countries in Europe would be suffering from democratic decay.[77] Indeed, as almost all contributors to this edited volume point out, systemic violations of migrants' rights have become a core feature of liberal constitutional democracies – the 'new normal' – regardless of whether these democracies are governed by mainstream parties or being eroded by authoritarian populists.

A minority position in the literature, however, employs a somewhat broader conception of democratic decay that also includes *systemic* violations of human rights.[78] On this broader conception, systematic targeting of migrants by drastically curtailing their rights could be considered a distinct form or

[73] Ibid., 108 ('horrific and gross violations of human and constitutional rights [do not] necessarily [constitute] a failure of democracy per se').

[74] Graber, Levinson and Tushnet (n 68) 6; Aleinikoff (n 10) 485.

[75] See, for instance, Graber, Levinson and Tushnet (n 68) 3; Brubaker (n 11) 374 and 377; Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) *The Oxford Journal of Legal Studies* 435, 444; Samuel Issacharoff, 'Democracy's Deficits' (2018) *The University of Chicago Law Review* 485, 507.

[76] Aleinikoff (n 10) 485. Cf. also Stefan Rummens, 'Populism as a Threat to Liberal Democracy' in Cristóbal Rovira Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017) 554, 561.

[77] Ginsburg and Huq (n 52) 184 (discussing the example of the Netherlands and arguing that co-optation of populist rhetoric and policies by mainstream parties 'can lead to morally despicable policies, but seems unlikely to conduce to democratic erosion').

[78] Michaela Hailbronner, 'Beyond Legitimacy: Europe's Crisis of Constitutional Democracy' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 277, 279–280.

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symptom of democratic decay.[79] This remains, however, a marginal position in constitutional law scholarship.[80]

I.2.3 *Different Approaches to the Interrelationship*

The preceding literature review has revealed two main positions on the interrelationship between populism, democratic decay and migration.

The majority position views migration as one of several contributing factors to processes of democratic decay, in the sense that populists intent on undermining liberal constitutional democracies instrumentalize 'migration crises' to drum up electoral support for their 'cause' (couched in terms of 'the will of the people'). Yet both phenomena – democratic decay and restrictions of migrants' rights – should be distinguished, since the relationship does not operate in the opposite sense. Instead, restrictive migration laws and policies are part of 'ordinary' law and politics. Such laws and policies may be morally loathsome, but since they reflect 'common' understandings of international law principles, they should not be equated with erosion of democracy. Even systematic targeting of migrants and drastic curtailment of their rights do not, in the absence of other measures such as capture of the judiciary, constitute democratic decay.

A minority position in the literature, by contrast, employs a broader understanding of democratic decay, which does include systemic human rights violations. On the minority approach, systematic targeting of migrants and drastic curtailment of their rights could thus be considered a distinct form of democratic decay. If adopted, this broader understanding of democratic decay inevitably leads to the conclusion that (even) more countries are suffering from democratic decay than is currently assumed to be the case.

All contributors to this volume were asked to indicate their favoured approach to the interrelationship between populism, democratic decay and migration: the majority or minority position (or a third/fourth position). Since contributors were given the freedom to focalize their chapter around one *or*

[79] Cf. also Müller (n 25) 592 (claiming that 'populism and normative constitutionalism – understood as pluralism-preserving and rights-guaranteeing do *not* go together' without stating, in so many words, that undermining fundamental rights *ipso facto* undermines constitutionalism as well).

[80] Cf. also Bugarič (n 49) 607 ('The third plank of liberal democracy that comes under populist attack are civil rights and liberties.') *Compare* Veronika Bilková, 'Populism and Human Rights' (2018) *Netherlands Yearbook of International Law* 143, 144 (arguing that '[p]opulists usually do not reject the concept of human rights expressly [but] embrace a rather selective and instrumental approach to it, seeking to adjust human rights to their needs').

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both research questions (see Section I.1.2), some have chosen not to take sides in this particular debate, electing to focus on the legal resilience question instead (see Section I.2.3). But most chapters do evaluate whether restrictions of migrants' rights might constitute (a form of) democratic decay. The answers diverge. They are also, broadly speaking, formulated at two distinct levels: the conceptual and the empirical.

Contributors who present general or theoretical arguments in their chapter tend to view the interrelationship between populism, democratic decay and migration in conceptual terms. They also provide nuanced perspectives on the interrelationship. Both Stoyanova and Mindus argue that migration law is a key factor that influences the constitutional nature of a given political community. Both authors focus on the interdependence between constitutional identity and migration policies to determine who is included and excluded from the community and how welcoming that community is to outsiders.

In explaining this interdependence, Stoyanova's focus is on diversity. She argues that migration is an important constitutional matter since it is linked with how the political community responds to diversity and how it treats any group that might express different opinions. Diversity is also of concern for Mindus, who explains that under populism 'People-as-a-part is taken to embody the People-as-a-whole [by which] the irreducible pluralism of individuals [...] is muted'. Mindus considers the anti-pluralism inherent in populism as an 'important expression of democratic decay', to the extent that it is given effect in migration law. Both authors thus seem to agree that restrictions of migrants' rights can be considered as a form of democratic decay. Therefore, constitutional law scholars have good reasons to expand their scope of concern. Instead of viewing restrictions of migrants' rights as normal and inherent to liberal democracy, such restrictions should be rather considered as constitutive for the political community.

Gregor Noll in Chapter 3 goes even further in explaining the relationship between restrictions of migrants' rights and democratic decay. Such restrictions are not simply constitutive, he claims, they are in fact *destructive* for the foundations of European societies. European societies are decaying not only in terms of breaches of the rule of law (a problem that has traditionally been the focus of constitutional law scholars). In light of migration policies pushed by populists, these societies are also decaying in economic terms, through depletion of their own demographic resources. On Noll's account, ageing populations trap European countries in a vicious cycle of economic decline that results in the introduction of evermore restrictive migration laws and policies. This is ironic, to the extent that migration could be part of the

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solution but is unlikely to be favoured in the current political climate dominated by populism. '[A]dd population ageing to the consideration of migrant rights', concludes Noll, 'and see how the diagnosis of *democratic decay* is pushed far beyond the rule of law alone':

> Democracy is decaying not only as a particular way of organizing politics (with a loosening of the self-restraint built into it), but also as a depletion of the demographic and economic resources on which any such politics rests. Seen as such, restrictions on migrant rights reach their apex at a moment when the resource base on which democracy rests in ageing societies is giving way.

By explaining the links between ageing, growth and migration, Noll establishes a close relationship between restrictions of migrants' rights and democratic decay. As to populism, while he sees its role as a catalyst and 'an indicator of a deeper crisis,' he is clear that *populism is not the cause*: 'Indicating it as the primary culprit of this failure would be to make too much of it'. The basis of the failure predates populism, since historically European societies have been following the exclusion rationale in their migration policies.

Spijkerboer in Chapter 4 helps us to understand this historical background further. He explains the deep historical origins of how migrants have been denied legal protection, offered diminished protection or legally governed through emergency powers, even under human rights law. With these historical insights, Spijkerboer seems to indicate that current-day linkages between populism, democratic decay and restrictions of migrants' rights are of less relevance than the origins of the problem, which he locates in the law as such. Chapter 4 could thus be read as an attempt at historicizing the law to better understand and critique the current situation.

The interrelationship between populism, democratic decay and restrictions of migrants' rights can be examined not only at the national level of the political community organized as a nation state. It can also be analysed at the supranational level, which is important given the close integration of migration policies within the structures of the EU and the EU's competence in the area of migration governance. An important starting point, as Loxa and Stoyanova explain in Chapter 5, is acknowledgment of the distinctiveness of the EU as a form of governance beyond the nation state. At the EU level, the interrelationship between migration and democratic decay, therefore, must be of a different nature. While this relationship might not be straightforward at the level of the nation state, the position of the EU is different:

> because if the EU cannot guarantee compliance with its rules (such as those in the CEAS) in a context where mutual trust among the Member States

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> must be assumed, Member States will resort to self-help [which] ultimately defeats the purpose of having a Union.

Loxa and Stoyanova argue that the EU's failure to uphold the rule of law in the area of migration and asylum – as evident from the myriad instances of non-compliance, non-enforcement and informalization of the acquis – indicates that the Union *itself* is in the midst of a constitutional crisis. The authors, therefore, see a linkage between democratic decay at the EU level and restriction of migrants' rights across the Member States, since the latter has led to undermining the core foundations of the EU as a project. As to populism, similarly to Noll, Loxa and Stoyanova view it as a core feature of the current political climate, which hinders solutions that can respond to the empirical reality.

While Loxa and Stoyanova approach the restriction of migrants' rights as an indication of a wider constitutional crisis within the EU, in Chapter 7 Grabowska-Moroz and Kochenov rather refer to a vicious circle: they argue that the EU has been suffering from a more general constitutional crisis due to the undermining of the rule of law, which in turn has led to deterioration of migrants' rights. Upholding these rights, the authors posit, is necessary to successfully handle rule of law backsliding in EU Member States.

Contributors to the country studies in Part III, in contrast to the preceding authors, consider the interrelationship in empirical terms. Some favour the majority position in the literature. Desmet and Smet as well as Thorburn Stern and Lind insist that the Belgian and Swedish cases, respectively, show that restrictive migration laws and policies are not a symptom of democratic decay *per se*. 'Even when restrictions of migrants' rights are widespread and far-reaching, this phenomenon does not amount, in and of itself, to a dismantling of the constitutional-democratic order', claim Desmet and Smet.

Other contributors, by contrast, align with the minority position in the literature. Kovacs and Nagy, for instance, find direct links between democratic decay and restrictive migration policies in Hungary. They explain how, in the wake of the 2015 'migration crisis', 'a genuine international commitment [on migration] gave way to an exclusionist, ethnicist position' in Hungary. 'This development', they go on to state, 'has been coupled with [a] discourse of the "threatening other" [which in turn] enables the oppression of various democratic actors, including human rights defenders and NGOs helping refugees'. Here, Kovacs and Nagy locate a distinctive trait of the Hungarian case: authoritarian populists have pushed the envelope further than in other European countries by criminalizing civil society organizations that operate in the area of migration. The authors thus identify important synergies in

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Hungary between restrictive migration laws and policies, on the one hand, and other legal measures aimed at undermining constitutional democracy, on the other. Rather than disentangle both, Kovacs and Nagy clearly consider this to be part of an overall populist strategy to destroy liberal constitutional democracy.

In Chapter 9 on Poland, Mikolajczyk and Jagielski in essence arrive at the same conclusion. The authors view democratic decay and restrictive migration laws and policies as complementary phenomena: '[t]hey seem to interact with each other'. Mikolajczyk and Jagielski explain:

> The populist attitude to the migration crisis and asylum seekers [by PiS] appeared to be a litmus test of the resilience of democratic values and human rights. It was used to check how far the policy of division into 'us' and 'them', 'nation' and 'aliens', 'common welfare' and 'betrayal of national interests' would catch on in society, and whether it could be pursued in further politics. Unfortunately, this policy and model of narration has come to be seen as a successful tactic in elections and has been continued with other minority groups (e.g. LGBT).

In other words, on Mikolajczyk's and Jagielski's conception of the relationship between populism, democratic decay and migration,

> decline in the level of protection for individuals under the rule of Law and Justice and problems with the treatment of migrants cannot be separated. These are phenomena that function simultaneously, two sides of the same coin.

The authors conclude by advocating for 'a "strong" relationship between populism, the crisis of constitutional democracy and migration policies', on which 'restrictive migration policies [are] an element of democratic decay'.

Other contributors, still, adopt a more nuanced position, situated somewhere in between the previous approaches. In dissecting the case of Austria, Margit Ammer and Lando Kirchmair argue that restrictions of refugee rights introduced by the ÖVP-FPÖ coalition in the period of 2017–2019 'show elements of populism and are thus interlinked with the phenomenon of democratic decay', thereby decreasing 'the functionality of Austrian democracy and the rule of law'. Ammer and Kirchmair point out, among others, that

> civil society, the media, as well as human rights activists and to some extent even the prestigious Constitutional Court, were verbally attacked, in particular by the FPÖ, which shows a clear disrespect for important pillars of institutional pluralism

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These authors thus perceive stronger linkages between the three forces of populism, democratic decay and migration than the authors on Belgium and Sweden do.[81] Yet, they also resist the conclusion, posited in the chapters on Hungary and Poland, that restrictive migration laws and policies *equate to* (a form of) democratic decay. In other words, Ammer and Kirchmair adopt a middle ground between both 'extremes':[82]

> in the Austrian case a clearcut, black or white answer to the question as to whether the restriction of refugee rights accelerates democratic decay or whether it is the other way round, cannot be provided. Both phenomena are more likely part of a symbiotic and constantly amplifying process.

It is striking – but perhaps not surprising – that the different empirical interrelationships identified in Part III of the volume correlate to the relative absence/presence of democratic decay, understood in the *narrow* sense that dominates the literature, in the studied countries.

In relation to countries that are *not* experiencing a narrow form of democratic decay, Belgium and Sweden, contributors insist on a more attenuated relationship between populism, democratic decay and migration. This makes sense, for otherwise these contributors would be forced to conclude that these countries are experiencing democratic decay even though they are generally regarded as robust liberal constitutional democracies.[83] Thorburn Stern and Lind for instance conclude that

> because the restrictive migration laws and policies [in Sweden] are not mirrored by excessively restrictive rights limitations on other groups, or attacks on the independence of the courts [...] restrictions on migrant rights and democratic decay thus do not seem to be directly linked [in the Swedish case].

In relation to countries that *are* experiencing democratic decay, by contrast, contributors view the three forces as inherently intertwined. This, as well, is a

[81] See Chapter 11 ('a lack of concern among voters for the restriction of refugee rights can be exploited by populist parties like the FPÖ. Additionally, this is unlikely to be counteracted by mainstream parties like the ÖVP since they have nothing to gain and much to lose if they would be seen as "altruistically" refugee-friendly. This is what causes the (informal) elements of democracy to crumble and lead to – or fail to prevent – further restrictions of refugee rights').

[82] See also Chapter 10 (in which the authors do not, however, fully explicate their position).

[83] See also Chapter 12 ('In Belgium, mainstream political parties are not attempting to capture the courts, control the media or shut down universities. There is, in short, no genuine risk of rule of law backsliding. Nevertheless, [...] we reveal a pattern of restrictive migration laws and policies that has caused migrants' rights to crumble in Belgium').

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logical position to adopt, given that democratic decay and migration are clearly correlated in Hungary and Poland. It is thus tempting to view both as part of a broader populist project rather than treat them as distinct phenomena. Mikolajczyk and Jagielski for instance indicate that they

> realise that this concept of a link may not be seen so clearly from the perspective of most Western European countries, where populist politicians are only aspiring to take over power, but in the case of Poland, a country where populists have already come to power, it is based on fact.

In relation to countries that at some point were at risk of sliding towards democratic decay, but ultimately avoided the threat, contributors adopt a more nuanced position. This may be due to the fact that these countries, Austria and Italy, share features with both other sets of countries: they are relatively robust liberal constitutional democracies that have, nonetheless, experienced important cracks in their constitutional armour under the influence of (nativist and/or aspiring-authoritarian) populists.

Austria, for instance, was governed from 2017 until 2019 by a coalition that included the radical-right populist FPÖ, but it is since led by a coalition of ÖVP and the Greens (*Die Grünen*). A similar scenario unfolded in Italy in recent years. Somewhat understandably, authors analysing these countries are more apprehensive of the suggestion that even systemic and drastic curtailment of migrants' rights cannot amount to a form of democratic decay. They have seen what the populist threat might lead to and choose to be nuanced in their assessment of the interrelationship between populism, democratic decay and the restriction of migrants' rights. Ammer and Kirchmair for instance conclude that the state of refugee rights in Austria discloses 'some, isolated, but nevertheless important cuts into the blueprint of liberal democracy which is generally present in Austria'.

I.2.4 *Relationship between Populism and Restrictive Migration Policy*

A salient question that emerges from this volume is: what, exactly, is the impact of populism on the restriction of migrants' rights? The *similarity* in the restrictions of migrants' rights across all country studies (see Part III), regardless of the political circumstances in which these restrictions were introduced, is striking. The salience of populism, by contrast, is clearly *different* across the jurisdictions. It ranges from an indirect influence, at best, of nativist populist parties on government policy (Belgium, Sweden), to a direct influence either through temporary participation by nativist populist in

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a coalition government (Italy and Austria) or caused by long-term solitary rule by authoritarian populists (Hungary and Poland).

Given that these different contexts have produced (seemingly) similar results, we are prompted to ask: what, precisely, is the causal connection between populism and the restriction of migrants' rights? Our contributors seem to agree on the answer: populism is *not* the cause of restrictive migration laws and policies. Many contributors note that ever-increasing restrictions of migrants' rights had become 'the new normal' in Europe long before the recent surge in (nativist or authoritarian) populism.

As Vladislava Stoyanova explains in Chapter 1, growing restrictions of migrants' rights flow almost inevitably from the logics of migration law, as it seeks to respond to central tensions inherent in liberal constitutional democracy. Stoyanova discusses two such tensions, in particular: universality *versus* statism and inclusion *versus* exclusion. She argues that the balance between both pairs of values in Europe's constitutional democracies has tipped in favour of exclusion, to safeguard bounded national communities, and of statism, to protect states' right under international law to control entry to their sovereign territory. As such, Stoyanova claims, populism cannot be held responsible for the fact that migration law is increasingly skewed against the rights of migrants. This process was long underway before populism arrived on the scene. At the same time, however, the rise of populism does *exacerbate* existing problems.[84] As Stoyanova puts it: '[i]n light of the populist trends, the concern emerges that the problem will no longer be framed as one of balancing at all, since the exclusion side might completely take over'.

This general analysis is confirmed by the country studies in Part III. A strikingly similar range of restrictions of migrants' rights is replicated across all country studies, regardless of whether the countries at issue are suffering from democratic decay at the hands of authoritarian populists (Hungary and Poland), have seen nativist populists shape migration policy in coalition government (Austria and Italy) or have witnessed, at worst, an indirect influence of nativist populist discourse on government policy (Belgium and Sweden). This leads us to conclude – or at least suggest – that the distinction between these six countries is one of degree, not in kind. In none of these countries is populism the cause of restrictive migration laws and policies, as such. At the same time, in each country populism does seem to be a catalyst, making already far-reaching restrictions of migrants' rights even

[84] Exacerbation is also suggested in Chapters 3 and 5.

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more draconic. This prompts the question: what can be done, under the law, in response?

I.3 LEGAL RESILIENCE: EXPLORING ITS POTENTIAL AND LIMITATIONS

Clear distinctions between the six countries discussed in the preceding section arise when examining the room (left) for legal resilience against ever-growing restrictions of migrants' rights in each country. Depending on the nature and degree of the populist threat, different strategies and tools of legal resilience are available in each country. Or so suggest our contributors. In essence, the more robust a liberal constitutional democracy remains, the better equipped *national* institutions and structures are to safeguard migrants' rights. Where constitutional essentials are undermined, by contrast, hope resides in finding legal resilience at the *supranational* level or in adopting *extra-legal* strategies of resistance (Section I.3.2).

I.3.1 LEGAL RESILIENCE: STATE OF THE ART, DEFINITION AND WORKING HYPOTHESES

But before we explore the strategies of legal resilience and extra-legal resistance proposed throughout this volume, we first situate the discussion in the state of the art. Our main aim is to arrive at a definition of legal resilience and propose some working hypotheses. To this end, we begin by discussing the literature on democratic decay before branching out, for reasons that will become clear in due course, to environmental law.

In recent years, the literature on democratic decay has begun to focus on its converse: democratic resilience. Democratic resilience is commonly understood as the capacity of democracy to either resist an initial assault of autocratization or bounce back after successful onslaught (e.g. a violent overthrow of democracy by coup d'état or its incremental dismantling by authoritarian populists).[85] In a recent study, Vanessa Boese et al further distinguish between two stages of democratic resilience against *initial* assaults: onset resilience and breakdown resilience.[86] Onset resilience is a property that makes democracies

[85] Laebens and Luhrmann (n 52), 4; Vanessa A Boese et al, 'How Democracies Prevail: Democratic Resilience as a Two-stage Process' (2021) *Democratization* 2 (DOI: 10.1080/13510347.2021.1891413); Martin Krygier, 'The Potential for Resilience of Institutions to Sustain The Rule of Law' (2020) *Hague Journal on the Rule of Law* 205, 211.

[86] Boese et al (n 85)

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'resilient by preventing autocratization altogether' (the authors cite Switzerland and Canada as examples).[87] When onset resilience flounders, Boese et al explain, 'democracies experience an episode of autocratization' against which they may nevertheless 'exhibit breakdown resilience by avoiding democratic breakdown' (the authors cite South Korea and Benin as examples).[88] It is only when *both* stages of democratic resilience fail, that countries slide towards full-on democratic decay (the authors cite Hungary and Venezuela as examples).[89]

Recent empirical research show that many liberal constitutional democracies are robustly resilient against *initial* assaults.[90] But the troubling cases of Venezuela, Turkey, Hungary and Poland (to name the most salient examples) remind us that liberal constitutional democracies can and do break down. Worryingly, empirical studies indicate that, once democracy has broken down, it takes on average twice as long to rebuild as it took to dismantle.[91] These data are discouraging for the future of democracy in Hungary and Poland.[92] They also disclose a pressing need to (further) strengthen liberal constitutional democracy against the populist onslaught, lest countries like the Czech Republic, Romania and Slovakia join their cousins in CEE. Or, for that matter, Italy, Austria, Belgium and Sweden.

In an attempt to (further) strengthen liberal constitutional democracy against populist assaults, constitutional law scholars have begun to put together a 'counter-playbook' of constitutional resilience against democratic decay.[93] Most pages in this 'counter-playbook' focus on elements of constitutional design: make key constitutional principles and structures unamendable (especially by inserting eternity clauses in constitutions); introduce federalism to disperse power within the state (between the federal level and the subunits); introduce compulsory voting and use an electoral system based on proportional representation to disperse power within legislatures (and thereby also the executive in parliamentary systems); ensure robust

[87] Ibid., 2.
[88] Ibid., 2.
[89] Ibid., 4.
[90] Ibid.; Laebens and Lurhmann (n 52).
[91] Zachary Elkins, 'Is the Sky Falling? Constitutional Crisis in Historical Perspective' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 49, 57–58.
[92] See also Stephen Gardbaum, 'Comparative Political Process Theory' (2020) *International Journal of Constitutional Law* 1429, 1442 ('once it [i.e. executive aggrandizement] has occurred, the institutional basis for resistance and accountability, including but not limited to the courts, may have disappeared').
[93] Gardbaum (n 55) 6.

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constitutional review (preferably through a system of diffuse review to avoid capture of the single constitutional court in the country); set term limits for political leaders (including for prime ministers and party leaders); develop a network of independent fourth or fifth branch institutions (including election commissions, human rights commissions, ombudspersons, public protectors); etc.[94]

The primary aim of these constitutional design measures is to develop an 'anti-concentration principle',[95] (further) dispersing state power to thwart populist attempts at executive aggrandizement.[96] In other words, the aim is to provide for constitutional resilience against democratic decay. Qualitative studies provide some support for these efforts, indicating that a combination of horizontal, vertical and diagonal accountability mechanisms has 'effectively halted erosion' in several countries experiencing the onset of democratic decay.[97] Quantitative empirical research also finds that '[j]udicial constraints on the executive and a country's past experience with democracy (democratic stock) are positively associated with onset and breakdown resilience'.[98]

Some constitutional lawyers, however, argue that the survival of liberal constitutional democracy is more dependent on a country's 'democratic stock' and diagonal accountability mechanisms than on constitutional design elements.[99] The experience of countries like Poland and Hungary, they claim,

[94] See Gardbaum (n 50); Ginsburg and Huq (n 52); Jakab (n 66); Dixon and Gauja (n 60); Issacharoff (n 75); Rainer Grote, 'The Role of Institutional Design in Preventing Constitutional Decline: The Radically Different Approaches in Germany and France' (2020) *Constitutional Studies* 107. This is a recent development. In what is arguably the leading edited volume on the subject, the editors (in 2018) still avoided the 'what is to be done?' question, 'believing that at this stage diagnosis is far more important, and not having any ready-made cures to offer'. See Graber, Levison and Tushnet (n 68) 8. See also Gardbaum (n 50) 5 ('Only recently has the literature begun to focus on an all-important fourth question, which is Lenin's: what is to be done? This is now, rightly, becoming the central question').

[95] Gardbaum (n 50) 6.

[96] See Boese et al (n 85) 10 ('Recent trends suggest that attacks on democracy are often driven by a concentration of power in the executive, even in parliamentary democracies. [...] The extent to which the executive is constrained de facto varies considerably, and executive aggrandizement affects both presidential and parliamentary systems').

[97] Ibid., 2. Laebens and Luhrmann (n 52) (studying Benin, Ecuador and South Korea). Horizontal accountability refers to the principle of separation of powers (e.g. parliamentary and judicial oversight of the executive branch of government). Vertical accountability refers to electoral design (e.g. electoral competition by opposition parties leading to a turnover in rule). Diagonal accountability refers to the presence of non-state actors promoting democracy and monitoring abuse of state power (e.g. civil society and the media).

[98] Ibid., 2.

[99] Bugarič (n 49); Wojciech Sadurski, 'On the Relative Irrelevance of Constitutional Design: Lessons from Poland', Sydney Law School Research Paper No. #19/34 (2019), available at https://ssrn.com/abstract=3403327. Most scholars agree that constitutional design elements

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shows that the primary problem – at least in CEE countries – is lack of a strongly embedded democratic culture and robust civil society, not a failure of constitutional design.[100]

Nevertheless, the 'anti-concentration principle' – and the constitutional resilience it seeks to provide – holds potential for several contributors to this edited volume. These contributors rely on the separation of powers, especially the presence of robust and independent courts, to provide for legal resilience against restrictive migration laws and policies (see Section I.3.2). Some of our authors put their trust in pre-existing constitutional frameworks, because they are not concerned with 'saving' liberal constitutional democracy as such. Instead, one of their aims – and of the volume overall – is to identify strategies of legal resilience against ever-growing restrictions of migrants' rights. This aim is *narrower* than that of contemporary constitutional law scholarship (not preventing democratic decay, but counteracting systemic undermining of migrants' rights), while the means used to reach the objective are *broader* (not just constitutional resilience, but legal resilience overall).

Since this volume aims to analyse the room for *legal* resilience – not *constitutional* resilience – against ever-growing restrictions of migrants' rights – not democratic decay in the narrow sense – we need to reach beyond constitutional law scholarship for insights. We have found inspiration in the scholarship on environmental law, which has developed a relatively robust conception of legal resilience.

Scholars of environmental law have drawn on insights from the discipline of ecology to develop a (partially developed) legal theory of resilience.[101] Resilience is commonly defined in ecology as 'the capacity of a system to absorb disturbance and still retain its basic structure and function'.[102] This definition reflects the difficulties in predicting the evolution and behaviour of ecosystems in future. Predictions not only need to factor in the individual components of the ecosystem and their interactions, but also 'the feedbacks between the elements of the system and how those feedbacks in turn transform the component parts'.[103] The analogy to democratic decay is clear: as explained above, the stability of liberal constitutional democracy depends on

alone are insufficient to avert democratic decay. See Gardbaum (n 50) 7; Jakab (n 66) 15; Grote (n 94) 124; Huq (n 52) 23–24.

[100] Bugarič (n 49); Sadurski (n 99). See also Krygier (n 85) 211.

[101] Tracy-Lynn Humby, 'Law and Resilience: Mapping the Literature' (2014) *Seattle Journal of Environmental Law* 85, 89; Jaye Ellis, 'Crisis, Resilience, and the Time of Law' (2019) Canadian Journal of Law and Jurisprudence 305.

[102] C S Holling, as cited in Humby (n 101) 90. See also Ellis (n 101) 305.

[103] Humby (n 101) 90.

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interaction and feedback between multiple accountability mechanisms (horizontal, vertical *and* diagonal).

But the analogy to democratic decay does not end there. The reason why environmental law began to focus on resilience has to do with the reality that ecosystems, when pushed off balance, can 'flip' to a different but nonetheless stable state.[104] 'The potential for multi-stable states', explains Tracy-Lynn Humby, 'means that a system will not necessarily "bounce back" after a shock or disturbance but may cross a threshold to a new state; i.e., undergo a "regime shift".'[105] Moreover, once the threshold has been crossed, Humby posits, it is difficult or even impossible to return to the previous state. As Gary Marchant and Yvonne Stevens explain, resilience thus covers two dimensions: (i) 'the capacity of the system to minimize the extent, severity, and duration of harm when something goes wrong' and (ii) 'the capacity to recover when harm occurs'.[106]

The analogy to onset and breakdown resilience against democratic decay – as well as their failure – should be clear. If onset resilience is successful, the harm is minimized and liberal constitutional democracy remains intact. If onset resilience flounders, but breakdown resilience is successful, liberal constitutional democracy 'bounces back' from a populist assault. If breakdown resilience also fails, however, a threshold is crossed and democracy shifts to a new state: autocracy. Moreover, once this shift has occurred, it can be difficult to restore liberal constitutional democracy. The clear analogy between ecological resilience and democratic decay makes it pertinent to explore resilience thinking in environmental law further.

Originally, the aim of resilience thinking in environmental law was to identify how the law could be adapted to – or cater to – the resilience of ecosystems. 'A resilience approach does not try to maintain stability or an equilibrium', explain Marchant and Stevens, but 'tries to manage and adapt' to the inevitable changes that will occur in complex systems.[107] Environmental law thus needed to become more flexible, dynamic and adaptable so as to respond effectively to potential harms to the resilience of ecosystems. Transposed to the context of democratic decay, it is *constitutional* law that needs to adapt to the new reality of (authoritarian) populism to ensure

[104] Ibid.
[105] Ibid., 90 (with reference to the work of Brian Walker and David Salt).
[106] Gary E Marchant and Yvonne A Stevens, 'Resilience in Environmental Law: Existing Measures' (2017) *National Resources and Environment* 8.
[107] Ibid.

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democratic resilience. Thus far, the analogy to environment law remains neatly aligned with the recent analyses in constitutional law discussed above.

But we had intended to move *beyond* that literature to propose a definition of legal (not constitutional) resilience and develop working hypotheses on the possibilities and limitation of legal resilience against restrictive migration laws and policy (not democratic decay). Particularly relevant, in this respect, is that the environmental law literature *also* provides a bridge between the constitutional resilience of liberal constitutional systems, on the one hand, and the relative (in)ability of such systems to safeguard migrants' rights in the face of populism, on the other.

The environmental law literature has not only sought ways in which law can contribute to safeguarding the resilience of ecosystems. It has also applied the theory of resilience *to law itself*, evaluating what is needed for legal systems to be resilient.[108] 'Because legal systems both govern and co- evolve with other systems', claim J B Ruhl et al, 'they can contribute to, or diminish, the resilience of these other systems'.[109] But to fulfil its function of safeguarding the resilience of other systems, law must itself be resilient as well. 'The idea', explain Niko Soininen and Froukje Platjouw, 'is that law's [own] resilience and adaptive capacity will support and maintain valuable resilience characteristics in social ecological systems the law seeks to steer'.[110]

A key feature that makes legal systems resilient, posit Ruhl et al, is the lack of a single point of control: 'systemic organization of law without a single master is one of the foundational elements of many legal systems'.[111] The authors go on to identify the separation of powers, procedural safeguards and the rule of law as core elements that ensure the resilience of law by ensuring that 'no one institution would have all the keys to control the development of law'.[112]

Legal resilience, in the sense of resilience of the legal system itself, can thus be defined as 'the ability of the legal institutions and the legal instruments they produce to experience shocks while retaining essentially the same function,

[108] See especially J B Ruhl, 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems – With Applications to Climate Change Adaptation' (2011) *North Carolina Law Review* 1373; J B Ruhl et al, 'Resilience of Legal Systems' in Michael Ungar, *Multisystemic Resilience* (Oxford University Press 2021) 509.

[109] Ibid., 509–510.

[110] Niko Soininen and Froukje Maria Platjouw, 'Resilience and Adaptive Capacity of Adequate Environment Law in the EU: An Evaluation and Comparison of the WFD, MSFD, and MSPD' in David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance: Perspectives from Europe and Beyond* (Brill 2019) 17, 20.

[111] Ruhl et al (n 108) 511.

[112] Ibid.

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structure, feedbacks, and therefore identity'.[113] At the same time, however, the concept of legal resilience also refers to the capacity of the law to safeguard the resilience of *other* systems.

Transposed to our research questions – in which we are confronted with the confluence of populism, democratic decay and migration – we propose a two-stage analysis to evaluate the possibilities and limitations of legal resilience against (overly) restrictive migration laws and policy.

In the first stage, it should be determined how resilient the legal system itself has been in the face of populist onslaught. This stage of the analysis thus focuses on the relationship between populism and democratic decay. Has democratic decay at the hands of authoritarian populists affected the resilience of the legal system, for instance by undermining the independence of courts? Or have these efforts not yet materialized, so that the legal system remains robustly resilient? Or, finally, have these efforts failed, leading the legal system to 'bounce back' after attempts at shifting it in a more authoritarian direction?

In the second stage, once we know how resilient the legal system as a whole has proven to be, we can identify the extent to which it provides for legal resilience against restrictive migration laws and policies. Since we are now concerned with the impact of populism on migration law and policy, this second stage of the analysis evaluates the relationship between populism and restrictions of migrants' rights. If, and when, the resilience of the legal system has been pierced by authoritarian populists, the national legal system can hardly be expected to provide for legal resilience against even drastic curtailment of migrants' rights. It thus makes sense to look for solutions elsewhere, either at the supranational level or in extra-legal strategies of resistance. But where the legal system retains – or recovers – its resilience, national legal systems should be able to safeguard migrants' rights against populist assault, potentially in tandem with supranational and extra-legal mechanisms.

The environmental law literature finally confirms a risk that is also noted in this volume (see Chapters 3 and 14): instead of being a source of resilience against threats, law may *itself* constitute the threat. In other words, the law we reach for to secure legal resilience against restrictive migration laws and policy may well contain characteristics, biases and defects that exacerbate the problem instead of curing it. Law may even be at the root of the problem.

An instructive example from environmental law concerns the resilience of freshwater ecosystems. As Soininen and Platjouw explain, hydropower operations are responsible for the decay of migratory fish stocks in Finland, since

[113] Ibid., 514.

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all major rivers have been licensed for damming to generate electricity.[114] At the same time, Finnish law shields hydropower operations from strict application of administrative law, given that annulment of their licences would cause significant economic costs.[115] As such, Finnish administrative law actually stands in the way of 'the restoration of ecological flows and migratory fish species to the Finnish rivers'.[116] Could the same be occurring in the migration context in Europe? Some of our contributors surely suggest so, while others do find sources of legal resilience within the law.

I.3.2 *Different Approaches to Legal Resilience*

From the preceding literature review, we have deduced a number of vantage points from which we invited our contributors to evaluate the potential for and limitation of legal resilience:

1. Identification of external factors that limit the ability of the law to provide for legal resilience against restrictive migration law and policies;
2. Evaluation of the ways in which the law is being harnessed – or could be harnessed – to provide for legal resilience against drastic curtailment of migrants' rights;
3. Critical interrogation of law as a contributing factor to the incremental undermining of migrants' rights, instead of a source of resilience.

These three vantage points roughly correspond to the working hypotheses presented in the preceding section, while being broad enough to cover contributions that range from the theoretical to the country-specific. The first vantage point includes, but is not limited to, instances in which national legal systems have been weakened by authoritarian populists (Section I.3.2.1). The second vantage point corresponds to instances in which legal resilience operates optimally, as well as those in which legal resilience *could* operate optimally in theory but does not in practice (Section I.3.2.2). The third vantage point, finally, refers to situations in which law is at the root of the problem, rather than being a source of resilience (Section I.3.2.3).

In what follows, we discuss the different approaches our contributors have taken to each vantage point by categorizing them into: (a) theoretical/general

[114] Soininen and Platjouw (n 110) 23.
[115] Ibid.
[116] Ibid., 24.

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approaches, (b) approaches focalized on the supranational level and (c) approaches situated at the national level. We refer the reader to the individual chapters for full accounts.

I.3.2.1 External Factors That Limit the Ability of the Law to Provide Resilience

At the general or theoretical level, some contributors claim there are inherent limitations to the resilience law can provide against restrictive migration policies, given the settings within which it operates. Noll, in particular, argues that the law may be 'a useful tool to remedy single cases of rights violations in the short term', but cannot provide for structural resilience since it 'emerges from the same foundational assumptions that lie behind a long-term and amplifying trend of restrictionist politics'. What Noll seems to indicate, here, is that law cannot escape from the vicious cycle of ageing populations, economic decline and restrictive migration policies that he identifies in Chapter 3. Noll's claim aligns, to some extent, with findings from the country studies in which authors do locate specific elements of legal resilience but argue that these often remain limited (Section I.3.2.2).

At the supranational level, the primary problem seems to be either a failure to harness the full power of the law to provide for resilience (Section I.3.2.2) or even that supranational law is itself at the root of the problem (Section I.3.2.3). As Loxa and Stoyanova point out, however, the role of EU law is also restricted by an external factor: the framing of the 2015 'migration crisis' as an emergency. As a result of this framing, the EU Treaties framework has been sidelined in favour of 'informal cooperation and the adoption of soft law [to ensure] the necessary expediency and flexibility to address the situation on the ground'. Informal cooperation has in important respects 'become the governance paradigm', claim Loxa and Stoyanova, with the EU-Turkey agreement as the leading example. This has created 'spaces of liminal legality', argue the authors, which are picked up again by Thomas Spijkerboer. In Chapter 4, Spijkerboer views EU law and ECHR law as part of the problem, even if they do provide remedies in certain situations (see Section I.3.2.3).

At the country-level, finally, Chapters 8 and 9 on Hungary and Poland conclude that national legal resilience has largely been compromised as a result of the incremental undermining of liberal constitutional institutions by authoritarian populists. Kovacs and Nagy find, in relation to Hungary, that 'democratic decay and the dismantling of the rule of law leaves little room for legal resistance and resilience'. Mikołajczyk and Jagielski also state, in relation to Poland, that 'it is difficult to consider "legal resilience" as a mitigating

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factor', since once 'populists take full power, no one can count on self-safeguards included in the internal law'.

Given that the resilience of the national legal system has been compromised in Hungary and Poland, all four authors put their hope in a combination of legal resilience at the supranational level and extra-legal means. In terms of the latter, Poland, Mikołajczyk and Jagielski retain faith in 'the will of the people expressed at elections' to cause a shift in political power, which may lead to restoration of legal resilience at the national level. Kovacs and Nagy, by contrast, engage in out-of-the-box thinking by proposing 'unconventional' mechanisms of resistance in Hungary: the feudal tradition of free cities and the socialist tradition of samizdat. We refer the reader to Chapter 8 on Hungary for details on these important out-of-the-box solutions.

I.3.2.2 Harnessing (the Potential for) Legal Resilience

Although many contributors remain sceptical of the ability of the law to provide for legal resilience against drastic curtailments of migrants' rights in populist times (see Sections I.3.2.1 and I.3.2.3), several authors do find sources of resilience in the law. Or at least the potential thereof.

In countries that have not (yet) suffered democratic decay in the narrow sense, our contributors locate *actual* instances of legal resilience at the national level. Given the dominance of anti-migration discourse, laws and policies in the executive and legislative branches of government, such legal resilience is often situated in the courts.

In analysing the Belgian case, for instance, Desmet and Smet adopt the two-stage analysis of legal resilience described above (Section I.3.1). They first conclude that, since 'the Belgian constitutional framework provides relatively robust protection against democratic decay', the separation of powers remains intact. At the same time, they note, 'most of the constitutional safeguards that prevent a *hypothetical* slide towards authoritarianism [in Belgium] only provide weak constraints, at best, against the *very real* and systematic undermining of migrants' rights'. The authors then move to the second stage of the analysis to assess the room for legal resilience. '[U]nlike in countries like Poland and Hungary', they find, 'civil society actors [in Belgium] have been able – and often forced – to resort to the independent courts in a bid to safeguard migrants' rights in the face of restrictive laws and regulations'. In practice, however, this has led to mixed results, in the sense that courts have only safeguarded 'minimal respect for migrants' rights' rather than adopting a 'maximalist interpretation'.

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These findings are by and large replicated in the Chapters on Italy and Austria. Ammer and Kirchmair argue that, although Austrian constitutional law may at first sight seem 'rather toothless' in that it is 'deeply influenced by Kelsenian positivism', in practice the Constitutional Court has delivered some important judgments, for instance by ruling that cutting social assistance for recognized refugees is unconstitutional. In relation to Italy, Zirulia and Martinico also discuss important instances of legal resilience provided by courts. Of particular note is a ruling by the Court of Cassation that has 'implicitly recognized a sort of "right of resistance"' for civil society actors against police activities that contravene the hierarchy of norms. In the case at hand, the captain of a vessel holding migrants rescued on the Mediterranean was found *not* to have committed a criminal offence by breaking a navy blockade to disembark at the port of Lampedusa. Instead, the Court of Cassation ruled, she had acted 'in fulfilment of the duty of rescue at sea'.

Among the country studies, Sweden is the odd one out, in that the Swedish courts do not seem to play a major role in providing for legal resilience.[117] This can be explained by the distinct constitutional model adopted in Scandinavia, which does not follow the Montesquieuan understanding of the separation of powers. Since 'all public power in Sweden proceeds from the people', explain Thorburn Stern and Lind, the country does not have a constitutional court, let alone one with strong powers of constitutional review. Although a Council of Legislation does scrutinize the constitutionality of legislation, its role is strictly advisory and plays out entirely during the legislative process. Even if its reports are 'usually accorded considerable weight by the government', the authors note, the Council's 'devastating criticism' of migration bills was often ignored during and after the 2015 'migration crisis'. The primary source of resilience in the Swedish system instead appears to reside in the independence of the public administration, which is 'closely linked to the ideal of *the public servant as the guardian of democracy*'.[118] We refer the reader to Chapter 13 on Sweden for details.

Whereas several contributors locate *actual instances* of legal resilience at the national level, at the supranational level there instead seems to be a lot of *unharnessed potential*. Most contributors who analyse supranational law and mechanisms identify possible sources of legal resilience, but immediately conclude that these are not being used to their full potential.

[117] Even if the authors do discuss a notable judgment of the Migration Court of Appeal. See Chapter 13.
[118] Emphasis in original.

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Stoyanova for instance argues that (European) human rights law should at the very least respect the 'fundamental right to justification' of migrants *qua* moral agent. She claims that failure to provide a justification for measures that affect migrants, especially when their claims for inclusion in the bounded national community are rejected, misrecognizes the personhood of migrants. Stoyanova thus sees a lot of potential for human rights law to provide, if not substantive justice for migrants in all instances, at least a right to justification in each case. In practice, however, this potential remains largely unfulfilled. As Stoyanova explains, the European Court of Human Rights often fails to demand a (full) justification for restrictive migration measures adopted by states. Stoyanova discusses three situations in Chapter 1: admission to territory, immigration detention and migrants' right to family life. In respect of the former, for instance, she notes that '[s]tates are not required to offer any forms of justification' since the ECtHR generally finds that territorial jurisdiction under article 1 ECHR has not been triggered. Without jurisdiction, no human rights law obligations arise. Spijkerboer argues, in Chapter 4, that the interpretation of jurisdiction in human rights law is thus part of the problem, given that it pre-empts any attempt at providing for legal resilience against restrictive migration laws and policies (see Section I.3.2.3).

The problem of unharnessed potential for legal resilience at the supranational level is not limited to ECHR law. It extends to EU law. Wouters and De Ridder for instance argue that, although EU law provides for a multitude of tools to address democratic decay and decline in migrants' rights, EU institutions have by and large failed to use these tools to their full potential. The authors discuss, among others, the well-known problems with the rule of law framework of the European Commission and design flaws inherent in the article 7 TEU mechanism. Although Wouters and De Ridder are more optimistic about the use of infringement proceedings by the European Commission against Member States, they conclude that these 'actions have mostly proven insufficient in improving migrants' rights'.

Loxa and Stoyanova add an important critical perspective to the largely descriptive analysis by Wouters and De Ridder. 'The problem is not that there are no enforcement mechanisms' in EU law, note Loxa and Stoyanova, but that 'there is often no interest in activating them'. In particular, they argue that the European Commission has not taken the constitutional crisis on migration afflicting the EU sufficiently seriously. In support of their claim, Loxa and Stoyanova refer to two findings: (i) the fact that the Commission waited until 2015 to initiate infringement proceedings against Southern and Eastern European states for failure to comply with EU law on migration, even though the countries at issue had 'defied EU law in a systemic manner' for years and

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(ii) the complete failure to initiate any infringement proceedings against Western, Central and Northern European countries for breaches of the migration acquis.

Contrary to what some contributors writing at the country-level suggest, notably in relation to Hungary and Poland (see Section I.3.2.1), the potential for supranational remedies to redress breakdowns of legal resilience at the national level may thus be more limited than hoped for. Worse, supranational law may even be part of the problem.

I.3.2.3 Law at the Root of the Problem

Whereas most contributors who analyse the supranational level conclude that EU and ECHR law fail to provide sufficiently robust legal resilience against the undermining of migrants' rights, Spijkerboer goes one step further by 'interrogat[ing] European law as actively contributing to such undermining since its inception'. Arguing against the common interpretation of recent CJEU and ECtHR judgments as 'constituting a state-friendly rupture with its earlier case law promoting the human rights of migrants', Spijkerboer views these developments in the case law as 'a *continuation* of a pre-existing characteristic – as new inflections of a more long-term tendency to privilege the interests of European states over those of migrants'.

Such privileging of state interests over the human rights of migrants, Spijkerboer argues, originates in colonial thinking about cross-border movements by non-Europeans. Under this thinking, migrants continue to be treated as former colonial subjects that must be excluded from full and equal application of human rights law by subjecting them to 'a split form of legality that was perfected at the end of the colonial era'. Former colonial subjects are thus relegated, concludes Spijkerboer, 'to sub-standard legal protection by either excluding them from the application of [the ECHR and EU] treaties altogether [. . .] or by lowering the standards [generally applicable under these treaties]'.

An analogous interpretation of law as part of the problem, rather than the solution, is offered by Bas Schotel. In reviewing all country chapters in Part III of this volume, Schotel finds that several contributors put excessive faith in the ability of administrative law to provide for legal resilience against restrictive migration policies. He argues that, in contrast to civil and criminal law, administrative law is 'distinctively well-suited to produce restrictive migration laws'. In other words, the legal architecture used to govern migration makes drastic curtailment of migrants' rights possible in the first place. To buttress his claim, Schotel discusses a number of examples, including wide-scale use of

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alien detention. Unlike in the criminal law context, he explains, administrative detention of migrants is not surrounded by sufficient safeguards against abuse and takes place without efficient means of judicial review. This is 'not merely a matter of the failure of human rights [law]', Schotel argues, but 'largely due to the fact that alien detention is a matter of administrative law [which is characterized by] limited judicial protection'. The root of the problem thus resides in the legal architecture itself. Legal resilience against drastic curtailments of migrants' rights 'will remain marginal and incidental', concludes Schotel, 'as long as the legal profession fails to critically examine and challenge the basic features of the legal infrastructure underpinning migration policies, i.e. administrative law'.

Taking this critical argument to the most general level, that of legal theory, Mindus argues that the nature of the problem resides in the conflation of empirical facts and institutional facts in law. She explains that migration is not an empirical fact, but a legal construct (i.e. an institutional fact). In other words, migration does not exist as an empirical reality in the world out there, but is 'merely' a status generated by the law. Movement of human bodies in space, by contrast, is the empirical fact. What law does, posits Mindus, is attach a broad range of legal concepts to such movements: 'national belonging, citizenship, residence, habitual dwelling, migration and population [are] institutional facts [attached to the empirical fact of movement, as] determined by particular constitutive rules [...] set up in the law'. Qua institutional facts, these legal concepts are 'a question of convention, not of empirical necessity'. The law applicable to the empirical reality of movement of human bodies in space could thus have been very different from what it is today. Instead, a deliberate choice was made to ascribe or deny rights to individuals on the basis of their movement in space. In other words,

> it is the law—our law—that we have designed in such a way that bans visa-free travel and prohibits asylum applications to be filed with the embassy. Mobility does not per se create a 'migration crisis', the law does.

The law is of course created under certain historical circumstances that imply particular socio-economic conditions and political structures of representation. Rights, including the rights of migrants, are contingent on these political circumstances.[119] As circumstances change, the rise of populism being one

[119] On the political contingency of human rights, see more generally Martti Koskenniemi, 'Human Rights, Politics and Love' (2001) 4 *Mennesker og Rettigheter* 33, 38; Gregor Noll, 'The Exclusionary Construction of Human Rights in International Law and Political Theory' IIIS Discussion Paper 2003 10.

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indication of such change, rights also seem to give in and the possibilities for legal resilience shrink. All of this might suggest that it is the political structures and procedures of representation that might be the problem. When these structures or procedures lead to obvious injustices,[120] and even possible self-harm,[121] it is not so much the case that democracy is being eroded, which can justify the phrase 'democratic decay'. It may rather be that democracy as we currently know it, with its exclusionary structures and limiting procedures of representation, is inherently rotten. If this diagnosis is accepted, central aspects of the organization of our societies would need to be rethought. This can be a future object of investigation, both for legal scholars and those in other disciplines.

1.4 STRUCTURE OF THE VOLUME

This volume is divided in three substantive parts. The three parts are designed to move from the most general level (that is, theoretical), over a mid-level of analysis (that is, European), towards the most concrete level (that is, country-specific).

Part I 'Theoretical and Critical Perspectives on Resilience' evaluates the possibilities and limitations of legal resilience against restrictive migration laws and policies at the most general level. In this part, authors present arguments at the legal-philosophical level or from the perspective of entire branches of law (especially human rights law). From different angles, the authors identify empirical obstacles to and preconditions for the effective protection of migrants' rights.

Part II 'Resilience at the European Level' analyses the possibilities for and limitations of legal resilience at the mid-level of the supranational/regional legal orders of the Council of Europe and the European Union. Authors critically discuss both structural obstacles to and potential avenues for the effective protection of migrants' rights by EU and CoE institutions.

Part III 'Resilience at the National Level: Case Studies', finally, looks for elements of legal resilience at the most concrete level by analysing the situation in Hungary, Poland, Italy, Austria, Belgium and Sweden. These jurisdictions were selected for two interrelated reasons: (a) substantive representation (that is, they display varying levels of interlinkages between – and

[120] The harm inflicted upon migrants in terms of loss of life and family separations is just one illustration. Other examples can include food insecurity and exploitation of labour.

[121] See Chapter 3. Inequalities within states can also be considered as an example of such self-harm.

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intensity of – populism, democratic decay and restrictive migration laws and policies) and (b) geographical diversity (that is, the case studies represent varying parts of Europe). To ensure integration of perspectives from the two sub-fields of law that are brought together in this volume, each country-specific chapter is co-authored by a migration law scholar and a constitutional law scholar.

In what follows, we summarize the contents of each part of the volume.

In Chapter 1 of Part I, Vladislava Stoyanova analyses the extent to which human rights law requires states to provide justifications for restrictive migration measures. Providing justifications to migrants is important, since this implies identification and evaluation of the empirical considerations behind decisions made. After finding that the space for such justification is currently limited, Stoyanova argues that restrictions of migrants' rights should raise more general concerns about liberal and constitutional values in our societies.

Still in Part I, Patricia Mindus takes Stoyanova's point about justifications further by offering a more philosophical analysis, based on the distinction between empirical facts and institutional facts. Mindus shares Stoyanova's point that drawing boundaries between inclusion and exclusion of migrants ultimately affects the position of everyone within the bounded community (i.e. the nation state). In Chapter 2, Mindus shows that the drawing of these boundaries is arbitrary to the extent that it is based on 'institutional facts' (e.g. citizenship) rather than empirical facts (mobility). This arbitrariness, Mindus shows, can be exploited by populists. The solution proposed by Mindus is better awareness of the empirical grounds that might justify the drawing of the above-mentioned boundary.

This suggestion is taken on board by Gregor Noll, who takes Mindus's broad-brush analysis further to expose a concrete and pressing empirical problem: ageing populations in EU Member States. This empirical reality, Noll explains, ultimately locks European societies into evermore restrictive migration policies. The 'demographics of ageing' create a paradoxical vicious circle, since what seems to be a reasonable solution – encouraging migration to counteract ageing – is in reality *resisted* for nationalist and protectionist reasons. This, in turn, further increases the economic fallout of the 'demographics of ageing', which ironically increases support for restrictive migration policies. Although it is sceptical in nature, Chapter 3 can – like Chapter 2 – also be read as an appeal for better awareness of this vicious circle and the underlying empirical reality. Noll shows how ignoring the empirical reality feeds populist anti-migration agendas.

Part II 'Resilience at the European level' starts off with a scathing analysis of the migration case law of both the ECtHR and the CJEU by Thomas

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Spijkerboer. In reviewing the case law of the Strasbourg and Luxembourg courts, Spijkerboer argues that it relies on concepts of crisis and emergency. This not only leads to justifying more restrictive policies against migrants, but – worse – serves to keep migrants outside human rights law. In this sense, Europe's highest courts actually buy into the populist rhetoric through usage of the concepts of 'crisis' and 'emergency' within their argumentative framework. These developments evoke the spectre of colonialism and divisions along racial lines running through the case law. Spijkerboer's central argument is that a historical (i.e. a postcolonial) perspective on the exclusive features of the case law offers a possible way of both understanding and challenging the reasoning of Europe's highest courts.

Chapter 5 by Alezini Loxa and Vladislava Stoyanova shifts the focus to the European Union, and the present and future of EU migration governance. In contrast to Spijkerboer, the authors do not pursue the argument that racial divisions are constitutive of EU migration policy. Loxa and Stoyanova rather aim to demonstrate that EU migration governance itself has a constitutive role to play in the EU project. In particular, the authors argue that if the EU fails to treat the migration crisis as a constitutional crisis, it might risk disintegration.

Jan Wouters and Maaike De Ridder focus on what the EU can do to counteract the wider constitutional crisis that it faces, that is the series of constitutional crises in Member States. Wouters and De Ridder describe the political and legal tools available to the EU to prevent and redress democratic decay, a key aspect of which is the undermining of migrants' rights. The authors also make suggestions as to how existing tools could be modified to be made more effective. It remains to be seen, though, whether these tools will imply any changes in the EU's and the Member States' approach to migration and migrants' rights.

In lieu of alternatives, the EU might continue the current approach, in which the interlinkages between migration policies and treatment of migrants, on the one hand, and populism and democratic decay, on the other hand, remain ignored. In contrast to the more descriptive account of EU law by Wouters and De Ridder, Barbara Grabowska-Moroz and Dimitry Kochenov adopt a much more critical and sceptical perspective on the tools that the EU has at its disposal to address constitutional crises, which the authors frame as rule of law crises. Grabowska-Moroz and Kochenov argue, in particular, that reinforcement of the rule of law is part of the answer to the migration crisis. But since the rule of law itself is in peril, the ineffectiveness of existing EU tools to address democratic decay does not bode well for legal resilience against restrictions of migrants' rights.

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The chapters in Part III 'Resilience at the National Level: Case Studies' analyse the situation in national jurisdictions from different parts of Europe (Hungary, Poland, Italy, Austria, Belgium and Sweden). In these country-specific chapters, authors analyse the linkages between populism, democratic decay and restrictive migration laws and policies in specific settings. Collectively, these co-authored chapters reveal a consistent pattern of increasingly restrictive migration policies in European countries, driven not only by populism but also by protectionism and (ethno)nationalism. Any divergences in migration laws and policy across the case studies seem to be differences of degree rather than differences in kind. The joint reading of the country-specific chapters thus confirms that far-reaching restrictions of migrants' rights have become the 'new normal' in Europe. This finding holds regardless of whether the country at issue is run by authoritarian populists bent on undermining liberal democracy (e.g. Hungary) or governed by mainstream political parties that otherwise fully uphold the rule of law (e.g. Belgium). To evaluate how ever-increasing restrictions of migrants' rights could be counteracted, each country-specific chapter focalizes on identifying techniques for resilience and means of resistance. These chapters thereby enter into conversation, and build on, the chapters in Parts I and II.

In conversation with chapters in Part II that focus on the European level, Kriszta Kovács and Boldizsár Nagy evaluate the extent to which international and EU institutions can counteract democratic decay in Hungary. Kovács and Nagy find that the fictitious 'crisis caused by mass immigration', as constructed by Orbán, clearly contradicts EU measures and breaches international asylum law. But in terms of solutions, their argument is sceptical of the supranational level. Rather than hoping for solutions from the EU, the authors take a historical turn to propose *domestic* forms of resilience, whereby techniques of resistance developed during feudalism (e.g. the tradition of free cities or "passive resistance") and socialism (e.g. samizdat) are mixed with the leftovers of the rule of law regime in Hungary (such as it is).

In Chapter 9, Barbara Mikołajczyk and Mariusz Jagielski argue that restrictions of migrants' rights should be analysed in a broader pattern of democratic decay, given that a populist party has taken over all state institutions in Poland. Within this context, the authors struggle to locate means of legal resilience in domestic law, since the safeguards it contains have either been undermined or are under the control of authoritarian populists. The authors conclude that there is no such thing as inherent resistance of the law. Mikołajczyk and Jagielski instead put their hope in the supranational level, especially the European Court of Human Rights. At the same time, they identify elections

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as a central *extra-legal* means to cause a shift in political power in Poland, which may ultimately lead to the restoration of domestic legal resilience.

In contrast to the chapter on Poland and Hungary, the authors of the chapters analysing Austria, Italy, Belgium, and Sweden do locate viable sources of resilience at the national level, albeit often limited.

In their chapter on Italy, Stefano Zirulia and Giuseppe Martinico seek to explore how recent populist waves in Italy have impacted on the management of borders at different levels (legislature, executive and judiciary). The authors focus their attention on the maritime border in the South of Italy, in particular, as this is the area in which the conflict between border protection and fundamental rights has reached the highest level of tension. Zirulia and Martinico suggest that the southern Italian border represents an ideal field of investigation to assess both the impact of populist policies on immigration law and the "resilience" of the legal system.

Margit Ammer and Lando Kirchmair analyse the lasting impact of the 2017/2019 government coalition in Austria on the state of refugee rights. They argue that migration laws and policies adopted by the ÖVP-FPÖ government feature elements of democratic decay and populism. The authors go on to examine how human rights guaranteed by the Austrian Constitution and interpreted by the Constitutional Court could provide relief. Ammer and Kirchmair ultimately suggest that a strong legal culture and support for the constitution are vital. In Austria this support is ensured by the most fundamental principles of constitutional law, which provides for a strong arsenal of legal resilience.

In Chapter 12 on Belgium, Ellen Desmet and Stijn Smet adopt a two-stage analysis of legal resilience against far-reaching restrictions of migrants' rights. They first investigate the resilience of the Belgian constitutional system against a hostile take-over by right-wing populists, concluding that the constitutional framework remains robust. As a result, the separation of powers stays intact, unlike in Hungary and Poland. The separation of powers goes on to play a central role during the second stage of their analysis, when the authors assess the room for legal resilience against restrictive migration laws and policies. Desmet and Smet show that civil society actors have been able – and often forced – to resort to the independent courts in a bid to safeguard migrants' rights in Belgium. In practice, the chapter concludes, this has only led to mixed results: the courts have safeguarded *minimal* respect for migrants' rights, rather than adopt a maximalist interpretation.

Sweden, finally, appears to be a somewhat idiosyncratic case since it has a powerful self-image as a country that protects and promotes human rights, which was also reflected in migration policy up until the middle of 2015, when

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refugees were welcomed in the country. Yet, as Rebecca Thorburn Stern and Anna-Sara Lind explain, in the course of 2015 Sweden changed by adopting a more restrictive migration policy. Since then, restrictions have become the 'new normal' in Sweden as well. As radical-right ideas have become normalized, limitations on migrant rights appear to be regarded as much less problematic by mainstream political parties. At the same time, the Swedish constitutional system promotes a set of core values that, taken together, provide for legal resilience. The authors specifically identify the core values of independence of the administration and transparency of the legislative process as powerful tools to prevent anti-democratic and anti-pluralist parties from pushing through (all of) their ideas.

Overall, this last group of chapters confirms that in some European countries, faith in the ability of the rule of law and independent institutions to respond to restrictive migration laws and policies has not yet been abandoned. This indicates that, even if the pattern of restrictions of migrants' rights is *similar* across Europe, the available techniques of resilience *differ*, depending on how those restrictions intersect with forces of populism and democratic decay.

The volume, however, concludes on a pessimistic note with Chapter 14, in which Bas Schotel draws extensively on the country studies to explain the empirical reality that the legal position of migrants is increasingly governed by administrative law, rather than civil and criminal law. He then warns that administrative law is distinctively well-suited to produce restrictive migration laws, whether enacted by populist or mainstream parties. In an important sense, the legal resilience identified in several country studies – judicial interventions by the ECtHR, CJEU and constitutional courts – signals and legitimizes the lack of legal resilience within administrative law itself. Resilience against restrictive migration laws will remain marginal and incidental, Schotel concludes, as long as the legal profession fails to critically examine and challenge the basic features of the legal infrastructure underpinning migration policies: administrative law.

There thus remain central disagreements among the contributors to this volume. Nevertheless, with this book we hope to provide some answers to the difficulties that the interrelationship between populism, democratic decay and restrictions of migrants' rights poses in Europe.

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