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Does the number of ECtHR constitutional and administrative law cases rise in periods with right-wing populist governments in power?

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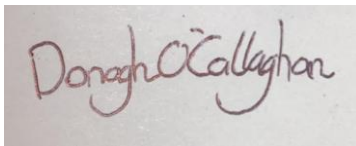
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Authorship Declaration

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I acknowledge the supervision and guidance I have received from Prof. Dr. rer. pol. Jerg Gutmann. This thesis is not used as part of any other examination and has not yet been published.

13th August 2025

Donagh John O'Callaghan

A rectangular image showing a handwritten signature in red ink. The signature is written in a cursive style and reads "Donagh O'Callaghan".

Abstract

To what extent does the number of ECtHR constitutional and administrative law cases change in periods with right-wing populist governments in power? Right-wing populist governance in Europe seemingly poses threats to the underpinning values of European international law architecture. These threats arise in the form of erosion to the rule of law, itself a core pillar of democracy, and restrictions to certain human rights protected by the ECHR such as freedom of expression and assembly. Using a cross-country panel data on 28 European states between 2006 and 2022 and constructing a cabinet-level data set of political right-left orientation, this study tests whether the number of ECtHR cases rises in years with higher populist influence in the respective governing coalition. The results suggest no significant effects of either right- or left-wing populist governments' rule on the number of ECtHR cases. Explanation on potential moderating effects causing these results is positioned and further research on these effects is certainly warranted.

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1. Introduction

Policies in the United Kingdom initiated by the previous Conservative Party government such as The Illegal Migration Act, Safety of Rwanda (Asylum and Immigration) Act and Northern Ireland Troubles (Legacy and Reconciliation)¹ Act fostered plenty of criticism in relation to both human rights and rule of law.² Case proceedings arose within the state (rising to the Supreme Court) and applications were made to the European Court of Human Rights (ECtHR). Additionally, administrative law cases were taken against this government which reached courts such as the Belfast High Court.³ Interestingly, the Conservative Party's resolve to continue implementing these policies was never fully tested following their electoral defeat to the UK Labour Party, who quickly discontinued such policies.⁴

These policies pose questions in relation to their constitutionality, their compatibility with international law obligations and inspired debate on what exactly lies within the competency of the UK parliament.⁵ It is also worth mentioning that the UK is not the only European state to undergo such critique and litigation in recent years, with other states such as Hungary and Poland also receiving quite some attention.⁶

¹ McKenzie Gallagher, 'Amnesty Laws in Modern Peace Agreements: An Analysis of the Northern Ireland Legacy Act Under International Law' (2024) 39(2) American University International Law Review 327.

² Valsamis Mitsilegas and Elspeth Guild, 'The UK and the ECHR after Brexit: The Challenge of Immigration Control' (2024) 5(1) European Convention on Human Rights Law Review 116.

³ Conor MacAuley, 'Kneecap Win Discrimination Case against UK Government' *RTÉ News* (29 November 2024) <<https://www.rte.ie/news/2024/1129/1483717-kneecap-discrimination-case/>> accessed 21 June 2025.

⁴ Sam Francis, 'Starmer confirms Rwanda deportation plan 'dead'' *BBC News* (06 July 2024) <<https://www.bbc.com/news/articles/cz9dn8erg3zo>> accessed 21 June 2025.

⁵ Syed Raza Shah Gilani, Ali Mohammed Al-Matrooshi and Aisha Nayab Qureshi, 'Supremacy of the Parliament and the Rule of Law in the UK: An Analysis' (2024) 40(1) *Journal of Europe* 15.

⁶ Jan Petrov, 'How to detect abusive constitutional practices' (2024) 20(2) *European Constitutional Law Review* 191, 195.

As such we will seek to empirically examine if there is a tendency of right-wing populist governments to pursue policies that are later challenged on constitutional or administrative law grounds. We will examine trends in ECtHR's jurisprudence, relating to administrative and constitutional legal cases that can be connected to the rule of law. These are used to test the correlation of governments with populist influence and the number of cases arising in their term.

Studying this question empirically, with a scope of analysis incorporating comparable jurisdictions over a lengthy period, could help examine the challenges made by right-wing populists to the rule of law and European legal system.

1.1. Research question and definitions

This study aims to answer the following research question: *Does the number of ECtHR constitutional and administrative law cases rise in periods with right-wing populist governments in power?*

We intend to examine the volume of cases of the ECtHR that might be resultant from actions of right-wing populist governments. The scope of the study is specifically limited to constitutional and administrative law to only include jurisprudence related to civil rights.

The understanding of civil rights in this study follows Blume and Voigt's definition of relating to participatory rights and censorship.⁷ The relevant European Convention on Human Rights articles to be used in the empirical section of our analysis will be determined by examining the literature in this field more deeply. Constitutional and administrative law is also mentioned as this study as we will examine in this context, how right-wing populist governments approach constitutional and administrative law restraints.

The periods of right-wing populist governance refer to the term durations of cabinets which can be considered right-wing populist in nature. This study will also quantify what is considered a right-wing populist governments by seeking available data on historic ideological positions of political parties.

1.2. Research approach

The approach this study undertakes is as follows. Having introduced the research question and explained the motivation for it in Section 1, Section 2 provides

⁷ Lorenz Blume and Stefan Voigt, 'The Economic Effects of Human Rights' (2007) 60 *Kyklos* 509, 513.

further context to the institutional architecture and legal order discussed in this study.

The literature review in Section 3 aims to identify what tangible challenges right-wing populist rule has on the rule of law and European legal order and how previous empirical studies have addressed these challenges. Section 4 contains an application of economic theory to design hypotheses for empirical testing. Section 5 includes an explanation of the empirical analysis contained in this study and the strategies that informed it. In Section 6, the results of this study are interpreted and applied to the research question for a deeper discussion. We then conclude with an overall reflection of this study and its results in Section 7.

2. Political context and institutional status quo

Over the past two decades a plethora of right-wing and other forms of populist governments have taken charge in member states of the European Union (EU) and the former EU member state, the United Kingdom.

As has been well documented in both academia and popular news media, ‘the kind of populism that is predominant in Europe [...] is right wing and nationalist’.⁸

As has been noted by Petrov, in the wake of these developments, there has been more academia examining on ‘the rise of authoritarian populism, abusive constitutionalism and ensuing democratic decay’.⁹ The reasoning for this academic interest is clear. Following the Second World War, the development of European law and integration upholds values ‘against totalitarianism [...] through commitments to values of dignity, freedom and the rule of law.’¹⁰

This has resulted in the development of a human rights system adjudicated by two distinct courts, the European Court of Justice (CJEU) whose jurisdiction is tied to the Charter of Fundamental Rights (CFR), as became obligatory for EU member states along with the Lisbon Treaty in December 2009, and the European Court of Human Rights (ECtHR) which upholds the European Convention on Human Rights (ECHR).¹¹ The latter’s jurisdiction includes the EU member states and other European states who are members of the Council of Europe (CoE). ‘European integration is understood in a wide sense, as referring to not only the EU but also other regional organisations, notably the Council of

⁸ Marcela Prieto, ‘Populist governments and international law: A reply to Heike Krieger’ (2019) 30 *European Journal of International Law* 997, 1001.

⁹ Jan Petrov, ‘How to detect abusive constitutional practices’ (n 6), 195.

¹⁰ Kate Nash, ‘Politicising human rights in Europe: Challenges to legal constitutionalism from the Left and the Right’ (2016) 20 *International Journal of Human Rights* 1295, 1296.

¹¹ *Ibid.*

Europe' and as such the CoE is very much intertwined with the EU in European international law architecture.¹²

The CoE's and EU's decisions demonstrate and emphasize a clear connection between the rule of law, democracy, and human rights.¹³ Democracy requires that the rules governing society result from a democratic process involving public participation in decision-making. Human rights, in turn, give citizens the means to challenge the arbitrary or unlawful exercise of state power.

¹² Pablo Castillo-Ortiz, 'Right-wing Eurosceptic parties and the strategic use of law' (2023) 61 *Journal of Common Market Studies* 1125, 1127.

¹³ Antonia-Evangelia Christopoulou, 'Civil society and rule of law backsliding in the EU' (2022) 28 *European Public Law* 245, 249.

3. Literature review

3.1. Theoretical literature review

This literature review examines theoretical perspectives on the relationship between right-wing populist governments and litigation before the ECtHR, focusing on how political dynamics may influence constitutionalism, rule of law, and human rights.

Populist governments are fundamentally placing politics above the law, a stance that conflicts with the system of checks and balances central to the legal instruments which enshrine the minimum standards of civil rights across the continent.¹⁴ According to Zysset, 'right-wing, authoritarian ideal-type of populis[ts]' such as Poland and Hungary have taken this approach, leading to a weakening of the separation of powers.¹⁵ Zysset also notes that authoritarian populism is more likely to be observed on the 'right side of the populist spectrum' which has found popularity in eastern Europe.¹⁶ Contrastingly, populism that has been more left leaning in nature, such as in Spain and Greece, has been noted to not result in obvious indications of anti-pluralism or authoritarianism.¹⁷

In the European context, it is important to note the link between populism and European integration. As the essence of European integration lies in limiting the unrestrained exercise of popular will, and applying 'supranational constraints' to national systems,¹⁸ European integration appears incompatible with anti-pluralist authoritarian styles of populism. As noted by Krieger, populist governments

¹⁴ Jan Petrov, 'The populist challenge to the European Court of Human Rights' (2020) 18 *International Journal of Constitutional Law* 476.

¹⁵ Alain Zysset, 'Calibrating the response to populism at the European Court of Human Rights' (2022) 20 *International Journal of Constitutional Law* 976, 981.

¹⁶ *ibid*, 984.

¹⁷ *Ibid*.

¹⁸ Jan-Werner Müller, "'The People Must be Extracted from Within the People": Reflections on Populism' (2014) 21 *Constellations* 483.

challenge aspects of international law rooted in multilateralism, international institutions, and the ideal of a legal community based on shared values.¹⁹

Leaders like Orbán have referred to national sovereignty in explanation of failing to comply with EU law.²⁰ Consequently, Christopoulou claims that Europe is experiencing a 'rule of law crisis'.²¹

3.1.1. Challenges raised by right-wing populist governments

One example of this rule of law crisis is the targeting civil society organisations.²² A striking example is presented by the Hungarian transparency laws, which target the activities of non-governmental organisations (NGOs) and civil society organisations (CSOs) that express critical views of the government. This undermines the critical role of civil society as a non-institutional counterbalance to political actors; after all, what 'would be the importance of the independence of the judiciary if there were not active citizens motivated to bring their cases before the courts?'²³ Hence, the rule of law is threatened when governments impose financial or organisational restrictions on NGOs and CSOs to dominate public debate, preserve power, and avoid accountability.²⁴

Kenny notes that governments can restrict freedom of expression via eroding the freedom of media both directly and indirectly (varying from censorship to leveraging supportive media channels and orchestrating online manipulation).²⁵

¹⁹ Heike Krieger, 'Populist governments and international law' (2019) 30 *European Journal of International Law* 971, 979.

²⁰ Gábor Halmai, 'Abuse of constitutional identity. The Hungarian constitutional court on interpretation of Article E) (2) of the fundamental law' (2018) 43 *Review of Central and East European Law* 23.

²¹ Christopoulou (n 13).

²² Christopoulou (n 13).

²³ *ibid*, 247.

²⁴ *Ibid*.

²⁵ Paul D Kenny, "'The enemy of the people': Populists and press freedom' (2020) 73 *Political Research Quarterly* 261.

Populist political parties more frequently utilise mass media to mobilise voters than conventional political parties, who focus more on traditional methods. Moreover, populists tend to be highly personalistic, meaning they are less concerned with the longevity of their party. In combination, these factors explain why populist leaders are less concerned with the independence of institutions that check governmental power, including the freedom of press.²⁶

Evidence of such restrictions to media freedom are illustrated in the literature on Hungary, where Orbán's government appointed fellow party members to the board of the new National Media and Telecommunications Authority which can fine news outlets who are deemed to fail to offer a balanced coverage, and Poland's 'Small Media Act' which centralised decision making of public media companies.²⁷ Bajomi-Lázár also notes that in Hungary, the passing of the 'Media Constitution and a Multimedia Act' gave way to shift from multi-party to one-party control of the media.²⁸ This type of 'media colonisation' could lead to concerning outcomes, including the increased broadcasting and access to economic resources for biased pro-government news outlets. Additionally, it can spur the appointment of journalists aligned with government interests, as exemplified by the appointments of Csaba Belénassy and Phillip Rákay in Hungary, and the strategic exclusion of political opponents from these critical resources. However, Bajomi-Lázár critically notes that such phenomena are not restricted to Hungary but also occurs across other European democracies.²⁹

3.1.2. *Legal reforms and populist constitutionalism*

²⁶ *ibid.*, 262.

²⁷ Zysset (n 15), 988.

²⁸ Péter Bajomi-Lázár, 'The party colonisation of the media: The case of Hungary' (2013) 27 *East European Politics and Societies* 69.

²⁹ *Ibid.*

Bugaric notes the popularity of authoritarian populism, citing examples of such governments within the EU in Hungary and Poland which have ‘successfully institutionalised, through legal reforms, a new version of a semi-authoritarian regime’ which combines elements of populism, ethno-nationalism, and authoritarianism.³⁰ Such governments interact with legal or liberal constitutionalism in a distinctive way, promoting a constitutional order that prioritises popular sovereignty and constituent power.³¹ Landau argues that populists’ ability to enact large-scale constitutional changes amplifies both the dangers they pose to liberal democracy and their potential as a corrective.³²

A concern raised in the literature is ‘populist constitutionalism’; utilising constitutional interpretation techniques to reinterpret provisions politically is argued to a very effective alternative to traditional mechanisms of constitutional change.³³ Populist constitutionalism excuses ‘reject[ing] constitutional restriction of power’ with ‘electoral empowerment as an expression of the will of the people’.³⁴ Whilst this practice is not just a tool used exclusively by populist governments, some states have started employing new interpretative techniques to promote populist agendas.³⁵ It has also been noted that right wing Eurosceptic parties have been able to successfully utilise this to ‘carry out a nationalist agenda

³⁰ Bojan Bugaric, ‘Could populism be good for constitutional democracy?’ (2019) 15 Annual Review of Law and Social Science 41, 45.

³¹ Paul Blokker, ‘Populism as a constitutional project’ (2019) 17 International Journal of Constitutional Law 521, 523.

³² David Landau, ‘Populist constitutions’ (2018) 85 University of Chicago Law Review 521

³³ Zoltán Szente and Fruzsina Gárdos-Orosz, ‘The impact of populism on constitutional interpretation in the EU Member States’ 1141, 1150.

³⁴ Zoltán Szente, ‘The myth of populist constitutionalism in Hungary and Poland: Populist or authoritarian constitutionalism?’ (2023) 21(1) International Journal of Constitutional Law 127.

³⁵ Szente and Gárdos-Orosz (n 33), 1147.

through legal rhetoric and legal tools' to the extent that they are openly challenging the European supranational courts.³⁶

3.1.3. *Judicial independence*

Striking examples of such usage of constitutional tools come from Hungary and Poland in relation to judicial independence and access to judicial review. Judicial review is noted as being 'central to the trias politica-based separation of powers theory' which itself protects the quality of democracy.³⁷

Or, as put by Hubkova, 'the very existence of judicial review is considered one of the essential parts of the rule of law and in fact [is its] "intrinsic component"'.³⁸

Petrov warns that populist-led states often undermine constitutional courts early in their term of office, using measures like limiting jurisdiction or restricting access to prevent judicial challenges to their policies.³⁹ In Hungary and Poland, the new populist governments 'managed with relative ease to render the [constitutional] courts toothless by packing them with loyalists and curtailing their independence'.⁴⁰ In Poland, the Constitutional Tribunal was staffed with sympathizers and its decision threshold raised to two-third majority, curtailing the tribunal's ability to oppose government.⁴¹ Following legal reform to the constitutional courts in Hungary, Orbán's government dismissed most presidents of the lower courts and replaced them with sympathisers.⁴² Kantorowicz-

³⁶ Castillo-Ortiz (n 12), 1129.

³⁷ Allison Östlund, 'A Review Review: Mapping Judicial Scrutiny in the Fields of Migration, Trade and the EMU' (2024) 30 European Public Law 133, 133.

³⁸ Pavlina Hubkova, 'Judicial Review of EU Soft Law Acts as a Matter of the Rule of Law [pre-publication]' (2023) 29 European Public Law 182, 183.

³⁹ Jan Petrov, '(De-) judicialization of politics in the era of populism: lessons from Central and Eastern Europe' in *Judicial Activism in an Age of Populism* (Routledge 2023) 43.

⁴⁰ Bugaric (n 30), 47.

⁴¹ *ibid.*

⁴² *ibid.*

Reznichenko, Kantorowicz and Weinshall show that judges may indeed exhibit bias through ‘in-group love’, suggesting that a judiciary dominated by populist appointees could systematically favour the government in legal interpretation.⁴³

3.1.4. *Institutional response*

Within the European judicial network, there are three types of courts that may respond to infringements by national governments: the CJEU, the ECtHR, and the national courts of the member states.⁴⁴ Notably, it is the constitutional (and some supreme) courts that hold the ultimate authority to decide on constitutional matters, including the interaction between these three court systems within their respective legal frameworks.⁴⁵

Despite this, there is no overt primacy of the national courts. Instead, the entire system is designed to encourage all judicial bodies to strike a fair balance between the various interests involved.⁴⁶ In practice, there is an ECHR minimum standard of fundamental rights protection. When contemplating this system, it is worth considering Grasso and Perrone’s contribution wherein they note that certain ‘political regimes [...] contest radically the values on which European constitutionalism is founded’.⁴⁷

As noted by Christopoulou, the EU engagement with this apparent crisis has been to approach the situation firstly through diplomacy and soft law and secondly,

⁴³ Elena Kantorowicz-Reznichenko, Jarosław Kantorowicz and Keren Weinshall, ‘Ideological bias in constitutional judgments: Experimental analysis and potential solutions’ (2022) 19 *Journal of Empirical Legal Studies* 716, 717.

⁴⁴ Christoph Grabenwarter and others, ‘The role of the constitutional courts in the European judicial network’ (2021) 27 *European Public Law* 43.

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ Giorgio Grasso and Roberto Perrone, ‘European political parties and the respect for the values on which the European Union is founded between the European legislation and the national laws’ (2019) 25 *European Public Law* 665, 667.

through legal action involving the CJEU.⁴⁸ Such proceedings can be initiated by the European Commission; however, it requires a connection with the EU legal order (e.g. the market freedoms) for the CJEU to have power to preside over the potential infringement. This also requires the claim to be based on a violation of CFR rights, not national constitutional rights.⁴⁹

Christopoulou warns that whilst the CJEU was able to identify violations with the transparency law example from Hungary, it is limited in its scope to protect civic rights holistically.⁵⁰ The CFR thus plays a minor and ambiguous role, rather than a key role in the defence of the rule of law. Kochenov and Morijn further argue that the CFR contains tools to protect other fundamental rights, like the relationship between the right to a fair trial and freedom of speech. However, the writing of such in explicit wording makes it difficult in practice for the CFR to protect these wider rights if the direct connection to matters of EU law is not overtly obvious.⁵¹ The CFR has thus at best been widely invisible in addressing rule of law problems within the EU, if not playing a negative role.⁵²

Regardless, illiberal developments in individual member states are likely to attract legal and political scrutiny within the EU's architecture.⁵³ The CJEU has been able to widen its scope to examine certain issues such as judicial independence that fall under the right to an effective remedy (required by Article 47 of the CFR).⁵⁴ The CJEU's examination of Poland provides an illustration of this in

⁴⁸ Christopoulou (n 13).

⁴⁹ Monica Claes, 'National Identity and the Protection of Fundamental Rights' (2021) 27 *European Public Law* 517.

⁵⁰ Christopoulou (n 13).

⁵¹ Dimitry Kochenov and John Morijn, 'Strengthening the Charter's Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing' (2021) 27 *European Public Law* 759.

⁵² *ibid.*

⁵³ Erno Várnay and Marton Varju, 'Whither Administrative Justice in Hungary? European Requirements and the Setting Up of a Separate Administrative Judiciary' (2019) 25 *European Public Law* 283.

⁵⁴ *ibid.*, 289.

practice. Poland brought in changes to the appointment of judges, one being a lower retirement age both to new and existing judges of the supreme court along with granting the Polish president power to grant extensions to judges' terms upon his discretion and ability of the Polish government to add more supreme court judges. The CJEU and General Court focused on the overall EU legal system's functionality, observing 'that it cannot be excluded that the Polish reform has the effect of undermining the operation of the supreme court as an independent court [which administers] EU law'.⁵⁵ EU scrutiny on judicial administration and reform in Hungary have also led to the state abandoning plans that would see the administrative law system change such that its 'administration and operation fall under the considerable and direct influence of the minister [of justice]'.⁵⁶

The ECHR builds on individual rights, social pluralism, universalism, and the protection of minorities. Consequently, the ECtHR upholds values that may clash with populist agendas.⁵⁷ For example, governments of Hungary, Poland, Czechia, the United Kingdom, and Italy have undertaken policies that sought to erode the ECtHR's functionality. Such anti-court techniques take various forms, ranging from an alteration of the structural features of the court to changing the judicial personnel and undermining the social legitimacy of the court itself.⁵⁸

In relation to the first two categories, the ECtHR can consider itself well protected by the COE's extensive requirements for procedural changes. Uitz notes that the ECtHR has been able to utilise Article 18 of the ECHR to scope in 'illiberal

⁵⁵ *ibid*, 292.

⁵⁶ *ibid*, 298.

⁵⁷ Petrov, 'The populist challenge to the European Court of Human Rights' (n 14).

⁵⁸ *ibid*.

chicanery' that may undermine the rule of law.⁵⁹ However, the last technique poses a real threat to the ECtHR; there are copious examples of government officials and political candidates who actively engage in 'Strasbourg bashing'.⁶⁰

Liakopoulos offers a detailed exploration of the various interpretations the ECtHR has on standing.⁶¹ He notes that in regard to administrative actions, an individual who is not individually affected by the action but rather affected in a general way along with the rest of the population, or an individual who makes an application on the basis of such an act's potential harm, will likely be unsuccessful in raising that action in the ECtHR. It is worth noting that a potential victim could raise a case on the production of persuasive evidence, although this is not always successful.⁶² Ultimately a victim must have the ability to show their 'personal and individual interest'.⁶³ The application of this approach to date has allowed the ECtHR apply flexibility and decide on admissibility on an individual case by case basis.

3.1.5. Outlook

Bugaric notes that populist governments in countries like Italy and Austria generally support the rule of law or at least have not attacked the independent judiciary or legislative branch of government.⁶⁴ Although left-populist groups in Greece have been alleged to oppose certain judgments and media channels, there is no evidence that they systematically undermine the institutions upholding the rule of law. However, there is a broad consensus among EU institutions, legal

⁵⁹ Renata Uitz, 'The rule of law at risk: what is next?' (2019) 11 Hague Journal on the Rule of Law 473.

⁶⁰ Petrov, 'The populist challenge to the European Court of Human Rights' (n 14).

⁶¹ Dimitris Liakopoulos, 'Flexibility, Unpredictability and Control of Victim Status According to Art. 34 ECHR in Recent Cases of the ECtHR' (2024) 2(30) 3.

⁶² *ibid*, 11.

⁶³ *ibid*, 11.

⁶⁴ Bugaric (n 30).

scholars and European judges that recent developments in Hungary and Poland present a deterioration of the rule of law.⁶⁵ Gora and De Wilde also raise concerns about ‘corruption in Bulgaria, Romania and Hungary, as well as a weak civic culture across the new [EU] member states’.⁶⁶

In summary, there appears to be a scholar consensus that right-wing populism poses a threat to the rule of law and to European integration. Analysing the number of cases brought before the ECtHR can provide a new angle in this discourse and shed further light on the severity of the threat and the robustness of the institutional response.

3.2. Empirical literature review

Having established the political context and potential challenges to the international legal architecture that right-wing populism may bring, this section turns to an examination of relevant empirical studies. To the best of our knowledge available during this research, there is no empirical study that addresses the research question directly. However, related empirical works offer valuable insights that will inform the subsequent theoretical and empirical analysis.

3.2.1. *Human rights commitment and enforcement*

A few scholars have empirically examined the dynamics of democratic state’s commitment to human rights. Moravcsik studies why governments would voluntarily establish international human rights regimes that constrain their own

⁶⁵ Anna Gora and Pieter De Wilde, ‘The essence of democratic backsliding in the European Union: deliberation and rule of law’ (2022) 29 *Journal of European Public Policy* 342.

⁶⁶ *ibid.*

domestic sovereignty by focusing on the formation of the ECHR.⁶⁷ He finds that the primary supporters of binding human rights commitments were newly established democracies (e.g. Italy, and West Germany), who were interested in stabilising their democratic systems.⁶⁸ Conversely, established democracies like the United Kingdom opposed mandatory individual petition and jurisdiction of the ECtHR, partially due to concerns over their sovereignty⁶⁹. This highlights the potential of populist governments to undermine democratic institutions and rule of law, even in countries that are considered well-established democracies. Populists, who challenge established democratic norms and institutions when in power, could leverage the need for domestic stability to justify their infringement of external human rights commitments.

Similarly, Hathaway empirically investigates why states choose to commit to international human rights treaties, arguing that the decision is driven primarily by the prospect of domestic enforcement and 'collateral consequences' of committing.⁷⁰ Hathaway tests her theories on 160 states over several decades and finds that states with more democratic institutions are less likely to commit to human rights treaties if they have poor human rights records.⁷¹ Importantly, democratic states anticipate with the acceptance of human rights treaties, there is likely costly changes in behaviour to enable effective legal enforcement.⁷² This suggests that even within democratic states, conditions can exist which deter commitment to human rights treaties and hence lead to potential infringements.

⁶⁷ Andrew Moravcsik, 'The origins of human rights regimes: Democratic delegation in postwar Europe' (2000) *International organization* 54(2) 217.

⁶⁸ *ibid*, 220.

⁶⁹ *ibid*, 231.

⁷⁰ Oona A Hathaway, 'Why do countries commit to human rights treaties?' (2007) *Journal of Conflict Resolution* 51(4) 588, 590.

⁷¹ *ibid*, 591.

⁷² *ibid*, 593.

For our context of populist movements in established democracies, Hathaway shows that the very factors that make human rights treaties effective (i.e., domestic legal enforcement) can encourage deviation from such commitments.

3.2.2. *Populism and human rights: implications for ECtHR cases*

Recent empirical cross-country studies on the link between populism and rule of law have shown that populist leaders tend to undermine institutional checks on their authority and erode legal constraints.⁷³

Both Albertazzi and Mueller⁷⁴ and Huber and Schimpf⁷⁵ conducted empirical studies on the relationship between populist governments and democratic quality in European states, with a particular focus on how populist parties impact liberal democratic institutions. Albertazzi and Mueller examine policy proposals put forward by government populists in various European countries, and document instances where these clashed with the principle of the separation of powers. Their findings suggest an ‘inherent incompatibility of populism with liberal democracy’.⁷⁶ Huber and Schimpf confirm a negative association between populist parties and ‘mutual constraints’ in a panel of 30 European states, showing that populist parties indeed undermine the separation of power.⁷⁷ In a non-European context, Houle and Kenny study the relationship of measures of rule of law and populist incumbents in a panel of 19 Latin American states.⁷⁸ Their results show that the election of a populist leader into office reduces measures of

⁷³ Kenny (n 25).

⁷⁴ Daniele Albertazzi and Sean Mueller, ‘Populism and liberal democracy: Populists in government in Austria, Italy, Poland and Switzerland’ (2013) *Government and opposition* 48(3) 343.

⁷⁵ Robert Huber and Christian Schimpf, ‘On the distinct effects of left-wing and right-wing populism on democratic quality’ (2017) *Politics and governance* 5(4) 146.

⁷⁶ Albertazzi and Mueller (n 74), 345.

⁷⁷ Huber and Schimpf (n 75).

⁷⁸ Christian Houle and Paul Kenny, ‘The political and economic consequences of populist rule in Latin America’ (2018) *Government and opposition* 53(2) 256.

rule of law (on a scale of 0 to 1) by 0.06 points each year, compared with a non-populist democracy. However, populism was not found to increase political participation rates, potentially reflecting a tendency of populist leaders to both demobilise their opponents and mobilise their supporters.⁷⁹

A recent experimental study by Gutmann, Kantorowicz, and Voigt also shows that not just populist leaders but also their supporters value the rule of law less.⁸⁰ Focusing on citizens in Germany and Poland, the researchers showed that specifically voters of right-wing populist parties tend to value the rule of law less than others, which is posited as an explanation for why these parties frequently disregard the rule of law.

Examining the potential differences between right- and left-wing ideology in the relationship between populism and liberal democracy, Huber and Schimpf show that that populism itself rather than which form of ideology (left vs. right) drives a negative impact.⁸¹ Right- and left-wing populist parties are hence equally undermining general checks and balances due to the anti-establishment nature of populism itself. However, right-wing populist parties are found significantly more likely to erode minority rights, while left-wing populists are prone to strengthening them.

To quantify the restriction of expression and free press, Kenny uses cross-national data on 91 countries to study the association between populist rule and press freedom.⁸² He finds a significant negative association across various

⁷⁹ Ibid.

⁸⁰ Jerg Gutmann, Jaroslaw Kantorowicz and Stefan Voigt, 'How do citizens define and value the rule of law? A conjoint experiment in Germany and Poland.' (2025) *Journal of European Public Policy* 32(4) 899, 915.

⁸¹ Hubert and Schimpf (n 75).

⁸² Kenny (n 25).

measures, including government censorship, range of media perspectives, and media bias. However, his results do show that populism on the economic right is less likely to restrict freedom of press and expression than populism on the economic left.

Understanding how public opinion shapes government behaviour toward international law is central to studying the association between populism and human rights infringements. Using U.S. survey data, Putnam and Shapiro examine how citizens react to human rights abuses abroad.⁸³ They find that support increases with the severity of abuses and when violations of international law are recognised but declines when punishment conflicts with national interests. Although citizens endorse government actions under certain conditions, they are reluctant to act themselves. In conclusion, the findings suggest that public support for human rights enforcement is conditional, which is relevant here because such conditionality may give populist leaders greater leeway with international legal obligations.⁸⁴

⁸³ Tonya Putnam and Jacob N. Shapiro, 'International law and voter preferences: The case of foreign human rights violations' (2017) *Human Rights Review* 18(3) 243.

⁸⁴ *ibid*, 256.

4. Theoretical and economic analysis

Having established the political context and examined some empirical studies within our field of interest, key economic theories utilised in law and economics research will be set out and applied to our research question to build hypotheses for use in the empirical analysis.

4.1. Public choice theory

Public choice theory offers an analytical framework in which the behaviour of political actors can be studied, including the actions of populist parties and governments. As written by Ekelund and Tollison, 'The public choice approach to politics is based on the idea that political actors are no different from anyone else: They behave in predictable ways and seek to obtain their goals efficiently'.⁸⁵

Importantly, whilst their constraints and the nature of their incentives are different, political actors are 'constrained by costs and rewards'.⁸⁶ Moreover, politicians are assumed to hold various self-interests as rationally self-interested actors and this self-interest can outweigh the interest of those they serve.⁸⁷ Ingham highlights the principal-agent relationship between voters and politicians wherein the voters can constrain the politicians' behaviours with re-election or removal from office.⁸⁸

As rational, self-interest agents, politicians wish to win elections and hence will aim to maximise votes from their constituents.⁸⁹ Ekelund and Tollison argue that politicians will therefore often prioritise legislation in the interest (including

⁸⁵ Robert Ekelund and Robert D. Tollison, *Economics: Private Markets and Public Choice* (6th edition Addison-Wesley 2000) 435.

⁸⁶ *ibid*, 436.

⁸⁷ *ibid*, 452.

⁸⁸ Sean Ingham, 'Social Choice and popular control' (2016) *Journal of Theoretical Politics* 28(2), 332.

⁸⁹ Ekelund and Tollison (n 85), 438.

economic interest) of their constituents.⁹⁰ Contrastingly, Munger believes that politicians rarely try to maximise votes but rather acts in ways that ‘benefit friends, contributors, or ideological soul mates’.⁹¹ Kenny further notes that political leaders may be also be motivated by ‘the survival of their party as organisations beyond their own personal political lives’.⁹²

Applying public choice conjectures to the research question, we will look at different self-interests that a populist leader or governing party may be pursuing and evaluate whether these self-interests will impact the likelihood of an ECtHR case. We will also consider if additional factors emerge when the political actor is right-wing populist in nature.

Firstly, we will analyse the impact of winning elections and the ideological aspirations of populists together as we assume right-populist candidates would have achieved electoral successful on ‘right-wing and nationalist’ platform.⁹³ We also note that the populist candidate ‘values the will of the people over constitutional rules’.⁹⁴ It is therefore possible that a populist government who feels electoral empowerment to engage in populist constitutionalism (thereby rejecting constitutional restrictions of power)⁹⁵ would clash with the source of constitutional restrictions.

Populist often platform a position that presents them as group who protect the citizens from the political elite,⁹⁶ or from the imposition of rules by an international

⁹⁰ *ibid*, 439.

⁹¹ Michael C. Munger, ‘Self-Interest and Public Interest: The Motivations of Political Actors’ (2011) *Critical Review* 23(2), 351.

⁹² Kenny (n 25).

⁹³ Prieto (n 8).

⁹⁴ *ibid*.

⁹⁵ Szente and Gárdos-Oros (n 33).

⁹⁶ Kenny (n 25).

elite.⁹⁷ Given the legal architecture of the EU and CoE was set up in part to deepen European integration⁹⁸ and in doing so has been placing constraints on sovereignty of its members⁹⁹, it is also reasonable to expect that a government who follows populist policies promoting sovereignty¹⁰⁰, would by nature seek to erode EU/CoE obligations they deem excessive and therefore incite legal challenges.

In relation to achieving re-election and avoiding removal during term, right-wing populists' actions may differ from the typical political actor who primarily aim to satisfy the interests of voters¹⁰¹, allies and benefactors¹⁰². We explored previously how right-wing populist governments tend to pursue anti-democratic actions¹⁰³, weaken the separation of powers¹⁰⁴ and access to judicial review.¹⁰⁵ During right-wing populist rule in certain European states, we have observed the banning of NGO/CSOs who are important for public debate¹⁰⁶ and the government monopolisation of media channels.¹⁰⁷ Kenny believes that these actions relate to political survival not of their affiliated party but rather their own individualistic political survival.¹⁰⁸ He therefore poses that this self-interest leads to a weakening of the 'autonomy of institutions that balance governmental authority' such as free media.¹⁰⁹

⁹⁷ Jan Petrov, 'When Should International Courts Intervene? How Populism, Democratic Decay and Crisis of Liberal Internationalism Complicate Things' (2021) *European Journal of International Law* 32(5) 1509.

⁹⁸ Nash (n 10).

⁹⁹ Jan-Werner Mueller, "'The People Must be Extracted from Within the People": Reflections on Populism' (2014) 21 *Constellations* 483.

¹⁰⁰ Blokker (n 31).

¹⁰¹ Ekelund and Tollison (n 85), 439.

¹⁰² Munger (n 93), 351.

¹⁰³ Landau (n 32).

¹⁰⁴ Zysset (n 15).

¹⁰⁵ Hubkova (n 38).

¹⁰⁶ Kenny (n 25).

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*, 262.

Finally, Kenny notes the type of governance that can be classified as ideologically right-wing have inherent ideological disposition to restrict certain freedoms.¹¹⁰ Therefore we posit that any governance that has an ideological preference to restrict freedoms would likely also incite cases that aim to protect individual citizens' from having such freedoms restricted.

4.2. Contract theory

Contract theory explores the ex-ante decision to enter into a contract and can be applied to international treaties and the design of international institutions, such as the ECtHR.¹¹¹ We will continue to utilise the term 'contract' to describe such international mechanisms. Decision makers like government officials or political leaders participate in such contracts if the 'expected costs of constraining (regulatory) sovereignty do not exceed the expected net benefits from cooperation'.¹¹²

As highlighted by Van Aaken, uncertainty about future conditions makes international law especially prone to imperfect contracts.¹¹³ Such contracts can be difficult to enforce or have difficulties in sanctioning non-compliant actors. To maintain the contract's effectiveness, the contract obligations' rigidity is traded off for flexibility to better withstand such changes. Van Aaken also observes that flexibility brings problems such as 'shading', wherein ambiguous text or obligations invite parties to interpret them with a 'self-serving bias'.¹¹⁴

¹¹⁰ *ibid.*

¹¹¹ Anne van Aaken, 'Behavioural international law and economics' (2014) 55 *Harvard International Law Journal* 421, 456.

¹¹² *ibid.*, 457.

¹¹³ *ibid.*, 459.

¹¹⁴ *ibid.*, 461.

The CoE and EU were shaped after World War II both to promote deeper European integration¹¹⁵ and to impose supranational constraints on individual member states.¹¹⁶ In the above-mentioned trade-off between regulatory sovereignty and cooperation benefits¹¹⁷, ceding national sovereignty was seen as a benefit to cooperation. Contrastingly, in later decades, populist European leaders like Orbán place a higher weighting on national sovereignty, hence effectively recalibrating the trade-off.¹¹⁸

As described above many complex international contracts required flexibility to respond to changing circumstances and therefore, we would expect that the CoE and EU is exposed to the risk of ‘shading’.¹¹⁹ Indeed, as illustrated in Section 2, populist governments have used interpretive techniques to recontextualise such legal sources¹²⁰ and challenge CJEU/ ECtHR rules.¹²¹

In speculating whether such techniques result in more cases before the ECtHR, Daly’s claim that ‘public law has been ‘weaponised’ to dismantle democratic systems’ provides an important context.¹²² It is unclear, however, if a skilful and careful application of the interpretative techniques would address the risk of a challenge in Strasbourg and hence limit the number of cases.

4.3. Median voter theory and institutional design

Ekelund and Tollison explain that there is a tendency towards political outcomes that lie ideologically close to the midpoint of voters’ (or contributors) ideological

¹¹⁵ Nash (n 10).

¹¹⁶ Mueller (n 100).

¹¹⁷ Van Aaken, ‘Behavioural international law and economics’ (n 111), 457.

¹¹⁸ Halmai (n 20).

¹¹⁹ Van Aaken, ‘Behavioural international law and economics’ (n 111), 461.

¹²⁰ Szente and Gárdos-Orosz (n 33).

¹²¹ Castillo-Ortiz (n 12).

¹²² Tom G Daly, ‘Democratic decay: Conceptualising an emerging research field’ (2019) 11 Hague Journal on the Rule of Law 9.

preference.¹²³ With this in mind, we will consider the current set up and rule base that informs the ECHR as a political outcome related to the founding states preference. As such the median voter theory can inform our understanding of the design of the ECHR in its current form. That midpoint is derived from the 'normal distribution of voters holding different ideological positions is split down the middle'.¹²⁴ In Holcombe's contribution it is noted that median voter outcomes occur in both representative and majority democratic systems.¹²⁵ This midpoint is said to have 'controlling force'.¹²⁶ It is expected that this theory can be applied to 'virtually any type of collective decision process'.¹²⁷

Koremenos, Lipson and Snidal consider the impact of installing an international institution from the perspective of various schools of thought.¹²⁸ From a constructionist point of view, the design of international institutions can cause a spread of global norms related to the goals of the institution itself.¹²⁹ Realists however would believe such norms stem from precision construction of the institution by the contracting states and their goals.¹³⁰ Finnemore and Sikkink comment that when institutions are created around a norm, it enters an internalisation stage which the norm itself is not typically subject to much further debate.¹³¹

¹²³ Ekelund and Tollison (n 85), 439.

¹²⁴ *ibid*, 439.

¹²⁵ Randall G. Holcombe, 'The median voter model in public choice theory' (1989) *Public Choice* 61(2) 115, 116.

¹²⁶ Ekelund and Tollison (n 85), 452.

¹²⁷ *ibid*, 439.

¹²⁸ Barbara Koremenos, Charles Lipson, and Duncan Snidal, 'The rational design of international institutions' (2001) *International organization* 55(4) 761

¹²⁹ *ibid*, 762.

¹³⁰ *ibid*, 762.

¹³¹ Martha Finnemore and Kathryn Sikkink, 'International norm dynamics and political change' (1998) *International organization* 52(4) 887, 895.

Ekelund and Tollison also note that political decision makers who are at the midpoint will 'place barriers to entry in the way of non-centre parties'.¹³² Koremenos, Lipson and Snidal also consider the need for centralised cooperation measures to keep an institution resilient¹³³, also noting that centralisation clashes with national sovereignty¹³⁴. They also warn that centralisation can lead to contracting parties using reciprocal strategies with select other members to pursue their own outcomes¹³⁵.

As mentioned above we can apply the median voter theory to any collective decision making.¹³⁶ Applying this theory to the collective decision-making processes that set up the ECHR, we will replace the idea of a voter with the idea of a contributor or contracting state.

In this context, the atrocities witnessed in Europe in the twentieth century prompted the entrenchment of norms grounded in liberal values that protect human rights and democracy.¹³⁷ Applying Finnemore and Sikkink's idea of internalisation of norms¹³⁸, we can see this occurring in the subsequent development of the ECHR and ECtHR. It could be argued that, due to the low number of member states in the CoE at this founding stage, the spread of ideological preferences skewed rather than normally distributed. The impact of recent wartime events intensified this skew, producing a consensus which, although representing a midpoint among members' positions, was situated at a distinctly liberal point on the spectrum.

¹³² Ekelund and Tollison (n 85), 439.

¹³³ Koremenos, Lipson and Snidal (n 129), 766.

¹³⁴ Ibid, 790.

¹³⁵ Ibid, 788.

¹³⁶ Ekelund and Tollison (n 85), 439.

¹³⁷ Christopoulou (n 13).

¹³⁸ Finnemore and Sikkink (n 131), 895.

As mentioned above, ‘barriers to entry’ are often established once a political outcome (such as the establishment of the ECHR) has been consolidated.¹³⁹ This is evident in the EU’s requirement that prospective members accept certain human rights treaties, a condition that can itself prompt states to accede to the treaties.¹⁴⁰ It is reasonable to expect that these normative safeguards, when challenged by right-wing populist actors, would give rise to litigation before the courts in Luxembourg or Strasbourg.

As right-wing populists’ ideological preferences is considered ‘antithetical’ to the moral, constitutional values established by such legal orders¹⁴¹, and by definition actively ‘challenges the traditional structures and even values of constitutional democracies’¹⁴² we would arrive to a similar conclusion to our earlier application of public choice theory; that its ideologically driven political outcomes would by nature of their challenge to the existing legal norms, invite legal challenges.

We also do observe the collusive behaviour described by Koremenos, Lipson, and Snidal,¹⁴³ wherein Hungary and Poland have been observed to (and have resultingly been subjected to legal challenge) collude to protect each other from penalties relating to their respective alleged rule of law backsliding.¹⁴⁴

¹³⁹ Ekelund and Tollison (n 85), 439.

¹⁴⁰ Hathaway (n 70), 596.

¹⁴¹ Doyle (n 96).

¹⁴² Szente and Gárdos-Orosz (n 33).

¹⁴³ Koremenos, Lipsos, and Snidal (n 129), 788.

¹⁴⁴ World Justice Project, ‘European Union’s Top Court Rules Against Hungary and Poland in Rule of Law Showdown’ World Justice Project (16 February 2022) <<https://worldjusticeproject.org/news/european-union%E2%80%99s-top-court-rules-against-hungary-and-poland-rule-law-showdown>> accessed 21 June 2025.

4.4. Behavioural economics and compliance theories

Van Aaken explains that due to the difficulty of contracting at an international law level, 'implicit agreements and social norms [become] even more necessary'.¹⁴⁵

Van Aaken also explains how behavioural approaches should be incorporated into the understanding of such international contracts.¹⁴⁶

Koh explores how various schools of theorists assess compliance.¹⁴⁷ He explains that 'rationalists' will serve their own national interest and will utilise 'negotiated legal norms' to serve such ambition.¹⁴⁸ Koh also introduces 'constructivists' who explain that identity in terms of both national identity and which international groups a state wishes to belong to, is important in explaining the adopting and adherence to legal rules.¹⁴⁹

Koh also discusses the managerial approach brought forward by Chayes and Chayes, which focuses on the role of reputation in prompting compliance with international law.¹⁵⁰ Van Aaken describes reputational constraints as a key determinant of state behaviour¹⁵¹, with Friedman suggesting that they may constitute the most important enforcement mechanism.¹⁵² Phrased optimistically, the less a state cooperates with international law, the greater the damage to its reputation, hence reducing the likelihood that other states will seek to contract with them in the future.¹⁵³ However, it remains difficult to determine whether

¹⁴⁵ Van Aaken, 'Behavioural international law and economics' (n 111), 459.

¹⁴⁶ *ibid.*, 462.

¹⁴⁷ Harold H Koh, 'Why do nations obey international law?' (1996) 106 Yale Law Journal 2599

¹⁴⁸ *ibid.*, 2625.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ Van Aaken, 'Behavioural international law and economics' (n 111), 475.

¹⁵² David Friedman, *Law's order: What economics has to do with law and why it matters* (Princeton University Press 2001), 145.

¹⁵³ Van Aaken, 'Behavioural international law and economics' (n 111), 476.

reputation damage affects a particular state's government or the state as a whole.¹⁵⁴

In relation to above outlined contractual flexibility, it is suggested by Van Aaken that compliance mechanisms are effective in the field of human rights.¹⁵⁵ She observes that the prospect of being brought before an international court can damage a state's external reputation and create a risk of sanctioning. Moreover, she notes that internationally enshrined laws can lead both political actors and voters to oppose policies that would conflict with international law.¹⁵⁶

Koh does however warn that due to 'reasons of economics or realpolitik', abuses of human rights are often not called out by their fellow treaty signatories.¹⁵⁷ Van Aaken further emphasises that the reputational impact of such abuses depends on how a state's 'allies and adversaries' attribute the cause of the state's actions.¹⁵⁸

A good reputation is seen as valuable to a state not only for the economic concessions they can achieve with it but also for national sentiment.¹⁵⁹ Van Aaken notes too that punishments can impact reputation but if a punishment is seen as unfair, the willingness to continue to cooperate with the institution within the punished state could diminish.¹⁶⁰ Further to this, sanctions can be seen as stigmatising and such institutions can be vilified by governments of the punished state.¹⁶¹ It is theorised that this is why EU internal sanctions are rather rare when

¹⁵⁴ *ibid*, 476.

¹⁵⁵ *ibid*, 476.

¹⁵⁶ *ibid*, 477.

¹⁵⁷ Koh (n 147), 46.

¹⁵⁸ Van Aaken, 'Behavioural international law and economics' (n 111), 478.

¹⁵⁹ Anne van Aaken and Betül Simsek, 'Rewarding in international law' (2021) *American Journal of International Law* 115(2) 195, 213.

¹⁶⁰ *ibid*, 225.

¹⁶¹ *ibid*, 230.

compared to the economic rewards that follow the deepening of integration.¹⁶² As noted by van Aaken, there is a spectrum of how much an actor will care about its reputation which sets the actor's risk preferences.¹⁶³ These preferences will influence the actor's decision making in how they encounter events that can alter their reputation.¹⁶⁴

Teson, when discussing Franck, mentions that how political actors perceive the legitimacy of international rules and institutions can be more important than the 'coercive control' of the latter.¹⁶⁵ What actors perceive as unfair will determine the decision of whether to comply. Van Aaken notes that 'consequential reasoning' such as the balancing of costs with benefits is not the only driving force in this field of law as 'actors can be guided by moral, religious, or ideological ideals'.¹⁶⁶

Koh notes that enforcement is not necessarily a good proxy for whether international law is obeyed with.¹⁶⁷ Finnemore and Sikkink note that shocks such as war or economic difficulties can break norm patterns and cause a search for new ideas if a connection can be made between the hardship and the existing norm base.¹⁶⁸ They also warn that when searching for a new norm, focusing on how things 'should be' creates extremely principled norms which can lead to extreme nationalism or xenophobia¹⁶⁹.

Hathaway's analysis of compliance shifts the focus on domestic enforcement and 'collateral consequences of the decision' to not comply.¹⁷⁰ Hathaway also notes

¹⁶² *ibid*, 234.

¹⁶³ Van Aaken, 'Behavioural international law and economics' (n 112), 477.

¹⁶⁴ *ibid*, 477.

¹⁶⁵ Frank R. Teson, 'The Power of Legitimacy Among Nations by Thomas M Franck' (1992) *McGill Law Review* 37(2) 666.

¹⁶⁶ Van Aaken, 'Behavioural international law and economics' (n 111), 471.

¹⁶⁷ Koh (n 147).

¹⁶⁸ Finnemore and Sikkink (n 131), 909.

¹⁶⁹ *ibid*, 916.

¹⁷⁰ Hathaway (n 70), 592.

that the number of advocacy groups in a country can impact compliance and acceptance of such commitments¹⁷¹. Finnemore and Sikkink also consider the idea of 'domestic legitimacy' and approval from a state's own citizens as a factor that pulls states toward institutional compliance.¹⁷² They highlight liberalism as being a self-esteem boosting part of many states' identities.¹⁷³

Van Aaken also acknowledges that complaint mechanisms in human rights law are the strongest means of compliance.¹⁷⁴ However, that the costs of potentially losing the case may dissuade potential victims from taking one in the first place. She mentions that the ECtHR takes some measures to relieve this pressure by granting recovered costs to successful claimants and by considering those with less financial means.¹⁷⁵ Van Aaken and Simsek also note that without coordination, it is not reliable to rely on a volunteer to provide a public good in the form of taking a case.¹⁷⁶

Applying a rationalist approach to compliance and behaviour, given that right-wing populist regimes follow a nationalist agenda¹⁷⁷, there appears to be an obvious potential to clash with the obligation to 'cooperate in good faith' with the CJEU and ECtHR, given this cooperation not only relates to compliance but also a 'serious effort to reach a fair balance between the different aspects articulated by others'.¹⁷⁸

¹⁷¹ *ibid*, 596.

¹⁷² Finnemore and Sikkink (n 131), 903.

¹⁷³ *ibid*, 904.

¹⁷⁴ Anne van Aaken, Anne, 'Making International Human Rights Protection' (2006) 23 *International Conflict Resolution* 29, 30.

¹⁷⁵ *ibid*, 42.

¹⁷⁶ Van Aaken and Simsek (n 159), 222.

¹⁷⁷ *Populist Governments and International Law: A Reply to Heike Krieger*

¹⁷⁸ Christian Grabenwarter and others, 'The role of the constitutional courts in the European judicial network' (2021) 27 *European Public Law* 43.

There are, however, behavioural factors that could constrain incompliance such as the constructivists' idea of belonging extending to international groups¹⁷⁹, the general aversion by actors and voters to a violation of a law that is considered an international law¹⁸⁰, and the self-esteem inducing effect of liberalism.¹⁸¹

However, when public resentment grows against policies perceived as imposed by an international elite, often reflected in the election of right-wing populists, domestic pressure to comply with international obligations can weaken.¹⁸² Economic hardship can intensify this resentment, particularly when citizens associate it with the state's commitments under international institutions.¹⁸³ As van Aaken noted, the behavioural effect of sanctions following incompliance can become stigmatising rather than compliance inducing, if the punishment or process is seen as unfair.¹⁸⁴ Additionally, if anti-court techniques employed by a right-wing populist government are successful in undermining the ECtHR or CJEU's local social legitimacy¹⁸⁵, this could also reduce the risk of domestic disapproval and reputational damage if an action is deemed to be uncompliant with EU or ECHR obligations. This may increase a risk appetite¹⁸⁶ for right-wing populist leaders to pursue actions that could be subject to ECtHR challenge.

However, as noted by van Aaken, the more uncooperative a state is with international law, the worse its reputation can grow and it may potentially damage its ability to make future beneficial international contracts.¹⁸⁷ Given that the EU

¹⁷⁹ Koh (n 147).

¹⁸⁰ Van Aaken, 'Behavioural international law and economics' (n 111), 478.

¹⁸¹ Finnemore and Sikkink (n 131), 904.

¹⁸² Petrov, 'The populist challenge to the European Court of Human Rights' (n 14).

¹⁸³ Finnemore and Sikkink (n 131), 895, 909.

¹⁸⁴ Van Aaken and Simsek (n 159), 222, 230.

¹⁸⁵ Petrov, 'The populist challenge to the European Court of Human Rights' (n 14).

¹⁸⁶ Van Aaken, 'Behavioural international law and economics' (n 111), 477.

¹⁸⁷ *ibid*, 476.

requires membership of the CoE and recognition of the ECHR¹⁸⁸, there is a substantial cost to non-compliance in the form of exiting from the CoE framework which as noted by van Aaken is likely why such exits are so rare.¹⁸⁹ This may curtail any aspirations to outright exit any such institutions, however we propose, due to the reasons stated in the paragraph above, it may not discourage non-compliance in other forms.

While we have established that domestic sentiment could encourage right-wing populist governments to deviate from international law compliancy, it does not necessarily mean the public would support policies that challenge the rule of law itself. As noted by Gutmann and Voigt, most western citizens desire their legal systems to be underpinned by the rule of law.¹⁹⁰ However, as noted above, the decision of an individual to take a case against a state for an infringed right is also worth analysing¹⁹¹.

Although the ECtHR has reduced somewhat the financial burden of taking a case to Strasbourg¹⁹², the case must also exhaust domestic procedures first, which cannot only cost the applicant in the short-medium term (assuming they win the ECtHR case) but also like any case, would bring time costs and exertion upon the applicant.

We will consider if there are other situations that could incur costs on a potential applicant. As mentioned by Koh, fellow states will not always desire to take a

¹⁸⁸ Hathaway (n 70), 596.

¹⁸⁹ Van Aaken, 'Behavioural international law and economics' (n 111), 477.

¹⁹⁰ Jerg Gutmann and Stefan Voigt, 'The rule of law: Measurement and deep roots' (2018) 54 *European Journal of Political Economy*, 68.

¹⁹¹ Van Aaken, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of *Ius Standi* Provisions' (n 174), 30.

¹⁹² Van Aaken, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of *Ius Standi* Provisions' (n 174), 42.

case due to economic or political consequences.¹⁹³ Additionally, restrictions emplaced by right-wing populist governments on the activities of NGO/CSOs can help such governments shirk accountability¹⁹⁴, could also restrict such group's ability to take cases to Strasbourg. Restriction of assembly and expression in other forms could also be argued to impose costs on an applicant. Van Aaken also draws attention to less behavioural but still important effect of standing provisions.¹⁹⁵

4.5. Summary of theoretical analysis and hypotheses

Based on the above application of economic theories, public choice theories, median voter theory and institutional design theories provide strong theoretical arguments as to why right-wing populists in power pursue actions that could lead to challenges in the ECtHR. On the other hand, contract theory and behavioural and compliance theories paint a more nuanced image, depending on the design of certain policies, domestic opinion, and incumbent governments' weighting of reputational damage, infringements could be somewhat more constrained.

To test these theoretical arguments, we will turn towards an empirical analysis of the number of ECtHR cases in a cross-country panel. Our main arguments can be summarised in two sets of hypotheses, which will be tested in the next section.

Hypothesis 1.1 (H1.1):

The number of ECtHR cases rise in years with governments that can be categorised as right-wing populist are in power.

¹⁹³ Koh (n 147), 46.

¹⁹⁴ Christopoulou (n 13).

¹⁹⁵ Van Aaken, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of *Ius Standi* Provisions' (n 174), 35.

Hypothesis 1.2 (H1.2):

The number of ECtHR cases do not rise in years with governments that can be categorised as left-wing populist are in power.

Hypothesis 2.1 (H2.1):

The effect of a right-wing populist government on the number of ECtHR cases grows with the populist influence within that government.

Hypothesis 2.2 (H2.2):

There is no effect of a left-wing populist government on the number of ECtHR, even at high levels of populist influence within that government.

5. Empirical analysis

5.1. Sample and data description

This study constructs an unbalanced panel dataset to empirically investigate the number of constitutional and administrative law cases brought before the ECtHR per year and government cabinet. Drawing on data from the ECtHR's HUDOC database¹⁹⁶, the analysis examines how often states face legal challenges under provisions of the ECHR relevant to the research question, with a focus on cases that reflect potential disruptions to the rule of law and the prevailing legal order.

The time horizon of the study spans from 2006 to 2022 but varies across countries. In particular, the sample includes all national government cabinets in power at the time of enforcement of the CFR (entering force concurrently with the Treaty of Lisbon) on 1 December 2009, as well as all subsequent cabinets. As such, the panel is unbalanced, with the first year of observation differing by country based on the of the cabinet that was in power on 1 December 2009.

To align with the study's focus on constitutional and administrative cases that challenge core elements of the rule of law, the dataset is restricted to cases invoking Article 6 (right to a fair trial), Article 7 (no punishment without law), Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 18 (limitation on use of restrictions on rights), and Article 3 of Protocol No. 1 (right to free elections) of the ECHR.¹⁹⁷ In relation to Article 6 and Article 7, the dataset is further restricted to exclude cases which are related to criminal law or raised in relation to reasonable time obligations. This approach follows Gutmann

¹⁹⁶ European Court of Human Rights, *HUDOC*< <https://hudoc.echr.coe.int>> accessed 27 July 2025.

¹⁹⁷ European Convention on Human Rights (as amended), 4 November 1950.

and Voigt and ensures a clear focus on human rights related to the rule of law only.¹⁹⁸

All relevant judgments and decisions were retrieved from HUDOC on 27 July 2025, filtered for English-language documents and limited to the EU28 states as defined during the study period. This was to ensure broad comparability across the states as each would have been subscribed during the study period to the CFR and ECHR. However, it is important to note that Croatia who joined the EU in 2013 and the UK who exited the EU in 2020 were still considered broadly comparable and therefore remain in the dataset for the entirety of the study period. Cases which were published before the election date of the ‘earliest’ cabinet in the sample (namely, UK general elections of 5 May 2005) were excluded from the initial download. This process yielded an initial dataset of 1,555 cases subject to further screening.

A key challenge in matching ECtHR constitutional and administrative law cases with the relevant government cabinet is the correct identification of the timing of a given case. HUDOC provides data on the year of application of a case as well as the date of the publication of the corresponding decision. In the first stage of screening, any case with an *application* year earlier than the first election considered for that country was removed. This resulted in a significantly smaller sample of 368 cases. However, as both the application to the ECtHR and the judgement may take place years after the alleged violation in order for domestic proceedings to conclude, the corresponding alleged violation date was retrieved manually by accessing the case documents on HUDOC for each case within the

¹⁹⁸ Gutmann and Voigt, (n 191).

from the sample of 368 cases. The alleged violation was also manually verified as relating to the chosen articles at this stage. Subsequently, another 189 cases were dropped since their date of alleged violation fell outside of the considered time horizon.

The final dataset aggregates the case-level observations into a panel of case counts per cabinet per year which forms the basis for the empirical analysis. The panel consists of 625 cabinet-year observations covering a total number of 179 ECtHR cases in sample period from 2006 to 2022. The states with the highest sample number of cases were brought against them are Poland (20), followed by France (17) and Croatia (16). Austria, Ireland, Latvia, Luxemburg, and Sweden each faced only one or had no relevant case in this sample period. Interim cabinets, some of which were technocratic in nature, with an overall duration of 90 days or less are excluded from the sample, as their political influence and potential to contribute to the initiation of an ECtHR case are very limited.

5.1.1. *Dependent variable*

The dependent variable *cases* reflects the number of ECtHR constitutional and administrative law cases for a given government cabinet per each year. Table 1 shows the summary statistics for *cases*, as well as for the considered explanatory variables in the model. Note that *cases* is a count variable and hence takes on nonnegative integer values. A histogram of the number of cases per observation can be found in the Appendix A.1. Only 20.1% of the sample of cabinet-year observations (126 of 625 cabinet-year observations), have been subject to at least one ECtHR case.

Table 1. Summary statistics of the final sample

Variable	Mean	Median	Std. Dev.	Min	Max	Observations
<i>cases</i>	0.286	0	0.662	0	4	625
<i>left_pop</i>	0.049	0	0.158	0	1	625
<i>right_pop</i>	0.271	0	0.377	0	1	625

5.1.2. Independent variables

The explanatory variables identifying the political orientation of government cabinets are derived from the second version of the Varieties of Party Identity and Organization (V-Party) Dataset, published by the University of Gothenburg's V-Dem Institute.¹⁹⁹ This dataset provides party-level ideological scores for each election, allowing for the identification of cabinet orientation based on the composition of the respective governing parties. Following the approach of Gutmann and Rode, we use two separate variables to identify left- and right-wing populism in governing parties.²⁰⁰

To ensure accurate identification of cabinet orientation, descriptive data on each cabinet's composition is required. The party composition of European governing coalitions is retrieved from the Parliaments and Governments Database (ParlGov) authored by Döring and Manow.²⁰¹ This dataset provides descriptive information on election dates, cabinet term dates, cabinet leaders, cabinet composition and party seat numbers within parliament, allowing for the identification of cabinet start dates, parties within each governing coalition and the proportion of seats each respective governing party held within each coalition.

¹⁹⁹ Staffan I Lindberg and others, *Varieties of Party Identity and Organization (V-Party) Dataset V2 (Varieties of Democracy Project 2022)* <<https://doi.org/10.23696/vpartydsv2>> accessed 21 June 2025.

²⁰⁰ Jerg Gutmann and Martin Rode, 'Are populists constitutionalists? An empirical assessment of populist constitutional compliance' (forthcoming).

²⁰¹ Holger Döring and Philip Manow, *Parliaments and Governments Database (ParlGov): Information on Parties, Elections and Cabinets in Established Democracies (2024)* <<https://parlgov.org>> <<https://dataverse.harvard.edu/dataverse/parlgov> <https://github.com/hdigital/parlgov-snippets>> accessed 21 June 2025.

The dataset also included party-level ideological scores; however, these were static. Hence, this dataset was carefully merged with the V-Party dataset to include the V-Party's party-level ideological scores at each election date, allowing for the identification of cabinet orientation based on the composition of governing parties.

Left-wing populism is defined through a focus on economic redistribution, identifying parties' stance on increased government involvement in the economy.²⁰² This is captured by V-Party's indicator *v2pariglef*, placing parties' economic right-left orientation on a 7-point scale, where 0 corresponds to 'Far-left ideology' and 7 corresponds to 'Far-right ideology'. On the other hand, right-wing populism is defined by a nationalist perspective on immigration.²⁰³ This is captured by V-Party's indicator *v2paimmig* on a 5-point scale, ranging from 0 ('party strongly opposes all or almost all forms of immigration into the country') to 4 ('party strongly supports all or almost all forms of immigration into the country').

For each cabinet within the selected time frame, the relevant scores for all coalition parties are retrieved. Where scores for a party are missing for a specific election, these are replaced by the party's mean score across all observed elections in the sample period. Parties are categorised as left-wing if they obtain an economic left-right score of 1.5 or less. Similarly, parties are categorised as right-wing if they obtain an anti-immigration score of 1.5 or less. The robustness of results to changes in these cut-off values is examined in Appendix A.2.

²⁰² Gutmann and Rode (n 207).

²⁰³ *ibid.*

In a second step, the share of left- and right-wing populism in each cabinet is determined using each governing party's share of seats within the governing coalition, i.e., their proportion of seats with respect to the total seats held by coalition parties *only*, excluding opposition parties. The resulting variables *leftpop* and *rightpop* reflect the share of a coalition that can be considered left- or right-wing populist, and hence range between 0 and 1. Summary statistics can be found in Table 1. In the final sample of 625 observations, 5 cabinets are classified as completely (100%) left-wing populist and 64 as completely right-wing populist. The Pearson correlation coefficient between *leftpop* and *rightpop* is -0.182 and significant at 1% level ($p < 0.01$), confirming a negative albeit weak relationship.

5.2. Empirical approach

Given the non-negative, discrete nature of the dependent variable, a Poisson regression model is to estimate the influence of left- and right-wing populist cabinets on the number of ECtHR cases. To control for unobserved time-specific factors that could influence the outcome across all respective countries and cabinets, year fixed effects are included in the model. The regression equation reads as follows:

$$cases_{ci} = \alpha + \beta_1 leftpop_c + \beta_2 rightpop_c + \delta_i + \gamma_c + \varepsilon_{ci} \quad (1)$$

where $cases_{ci}$ denotes the number of ECtHR cases against cabinet c in year i , $leftpop_c$ and $rightpop_c$ denotes the left- and right-wing shares of governing cabinet c , and δ_i and γ_c denotes the year and country fixed effects.

The effects of populist parties who form a minority coalition partner may be washed out when they govern with a much larger centrist coalition partner. To explore potential ‘thresholds’ of left- or right-wing influence needed to impact the number of ECtHR cases, a competing model formulation is tested using indicator variables for *leftpop* and *rightpop* :

$$cases_{ci} = \alpha + \beta_1 I_{\{leftpop_c < q\}} + \beta_2 I_{\{rightpop_c < q\}} + \delta_i + \gamma_c + \varepsilon_{ci} \quad (2)$$

Here, q defines the cut-off values which considers a governing cabinet significantly influenced by left- or right-wing populist parties in its composition.

5.3. Results

The results from estimating Equation (1) are presented in Table 2 below. Model 1.1 presents a model specification using year fixed effects only, while Model 1.2 additionally adds country-level fixed effects to account for unobserved country-specific factors. In both models, the estimated coefficients for right-wing populist influence are negative, with the coefficients ranging between -0.28 and -0.17, but these effects are not significant at conventional significance levels. By contrast, left-wing populist influence shows a positive effect in both models which increases in both magnitude and significance when introducing country-level fixed effects. However, the coefficient in Model 1.2 ($\beta = 0.909$, $SE = 0.549$) only reaches a significance level of 10% and the large inconsistency across the specifications casts doubt on the overall validity of the estimate.

In Models 1.3 and 1.4, standard errors are clustered at the *cabinet* level. This approach follows Abadie in clustering standard errors when the treatment status

is constant within a cluster.²⁰⁴ As right- or left-wing populist influence is constant within all observations of one cabinet, standard errors are hence clustered at the cabinet-level to consider heteroskedasticity.

Table 2. Estimation results for a Poisson regression of the number of ECtHR cases on left- and right-wing populist influence

	Model 1.1	Model 1.2	Model 1.3	Model 1.4
Variable				
Left-wing	0.132 (0.482)	0.909* (0.549)	0.132 (0.775)	0.909 (0.580)
Right-wing	-0.284 (0.238)	-0.174 (0.269)	-0.284 (0.387)	-0.174 (0.220)
Sample	N=625	N=625	N=625	N=625
Fixed effects	year	country-year	year	country-year
Clustered SE	-	-	cabinet	cabinet
Log-likelihood	-382.4	-323.0	-382.4	-323.0
Pseudo-R2	0.145	0.278	-	-

Note. Standard errors are presented in parentheses. ***p<0.001, **p<0.05, *p<0.1

Table 3. Estimation results of a Poisson regression of the number of ECtHR cases on binary left- and right-wing populist influence

	Model 2.1 (q=0.2)	Model 2.2 (q=0.4)	Model 2.3 (q=0.6)	Model 2.4 (q=0.8)
Variable				
I Left-wing > q	-0.174 (0.570)	0.445 (0.571)	0.899 (0.546)	1.332*** (0.458)
I Right-wing > q	-0.061 (0.179)	-0.214 (0.188)	-0.184 (0.194)	-0.141 (0.237)
Sample	N=625	N=625	N=625	N=625
Fixed effects	country-year	country-year	country-year	country-year
Clustered SE	cabinet	cabinet	cabinet	cabinet
Log-likelihood	-324.4	-323.6	-322.5	-321.5
Frequency				
Left-wing	60	30	16	10
Right-wing	236	191	162	103

Note. Standard errors are presented in parentheses. ***p<0.01, **p<0.05, *p<0.1

²⁰⁴ Alberto Albadie and others, 'When should you adjust standard errors for clustering?' (2023) 138.1 The Quarterly Journal of Economics.

The introduction of cabinet-clustered standard errors in Models 1.3 and 1.4 do not affect the magnitude of coefficients but reduce statistical significance in comparison to Models 1.1 and 1.2. In Model 1.4, which represents the preferred specification, neither left-wing nor right-wing populist influence show a significant effect. Hence, this suggests that there is no robust evidence of an association between left- and right-wing populist influence and the number of ECtHR cases.

Table 3 presents the results from estimating Equation (2), which uses binary indicators for whether left- or right-wing populist influence within a governing cabinet exceeds a given proportion of the governing cabinet's seats (p). The cut-off thresholds vary from 0.2 to 0.8 across Models 2.1–2.4, allowing to assess the relationship between populist influence and ECtHR case counts in greater detail. All specifications include country and year fixed effects. Additionally, standard errors are clustered at the cabinet level to account for the fact that left- and right-wing populism is constant within the respective governing cabinets and hence not independently assigned across observations.

With respect to left-wing populism, coefficients are small and statistically insignificant at lower thresholds ($q = 0.2$ and $q = 0.4$), indicating no robust association when left-wing populists make up a more modest share of cabinet seats. The estimated effect does, however, grow somewhat in magnitude and becomes positive at higher thresholds, reaching statistical significance at the 1% level when $q = 0.8$ ($\beta = 1.332$, $SE = 0.458$). This suggests that governing cabinets dominated by left-wing populists are associated with higher numbers of ECtHR cases, while smaller shares of influence do not appear to have a detectable effect. However, the frequency counts at the bottom of Table 3 shows that the

significant effect with a threshold of $q = 0.8$ is driven by only 10 observations, which raises concerns about the validity of this effect.

In relation to right-wing populism, the coefficients are consistently negative across all the thresholds, although the magnitudes are small with none reaching statistical significance. This implies that there is no statistically significant evidence that right-wing populist cabinet dominance, at any of the tested cut-off levels, is associated with changes in ECtHR case numbers.

Overall, the results do not offer any support of the research hypotheses H1.1 and H2.1, which posit a positive association between right-wing governments and ECtHR cases. Across all models, no such positive association was found, if anything, the consistently negative (but insignificant) effects provide indicative evidence of a negative association. Similarly, the research hypotheses H1.2 and H2.2 regarding the absence of an effect of left-wing governments on ECtHR cases are generally supported by the results of the model; however, the consistently positive and spuriously significant effects provide an indication of a positive association.

It is important to note that the relatively large standard errors across the model specifications may lead to inconclusive results, perhaps due to the limited data quality. Several impactful choices were necessary to construct the dataset, such as selecting ECHR articles for inclusion which could cause measurement error. These choices can inflate statistical noise, making it difficult to detect meaningful effects.

6. Interpretation and argumentation

Overall, our empirical results do not support the research hypotheses regarding a positive association between right-wing populist governments and ECtHR cases. The patterns observed were negative but insignificant effects for right-wing populists and inconsistent effects for left-wing populists, suggesting that any relationship between populist governments and ECtHR jurisprudence is likely to be weaker and less systematic than initially theorised. In the following, we will explore potential moderating factors in the association between populism and ECtHR case numbers.

First, the chosen sample period is unable to cover recent rises of populism in Europe due to an expected time lag in litigation processes. More recent alleged infringements may take years to finish their (potentially very lengthy) domestic proceedings before being heard in Strasbourg. In fact, no cases within the final sample had an alleged infringement date of later than 2022. A re-examination of the data in a few years would be particularly interesting to see how many more cases might later be attributable to current and recent right-wing populist governing cabinets in states such the United Kingdom and Hungary. Similarly, it could also be interesting to see how case numbers evolved in states who returned to more centrist governance in recent years, like Poland. Additionally, it could also be worth considering the inclusion of CJEU cases relating to rule of law issues such as judicial independence for a more complete examination of right-wing populist driven jurisprudence.

Second, there are factors raised across the literature that offer some explanation as to why ECtHR case numbers may not rise in practice. These factors mostly

revolve around the successes of right-wing populists at achieving their goals and potential structural inadequacies of the ECHR and ECtHR.

In relation to interpretation and legal reform, several scholars have noted that while populist constitutionalism can lead to more authoritarian governance, states like Poland and Hungary have been able to install such regimes using constitutional tools.²⁰⁵ The CoE possibly left enough room for ‘shading’²⁰⁶ in the construction of the ECHR that makes litigating these changes difficult. These structural inadequacies may indeed stem from pushback from established democracies on restraining their national sovereignty²⁰⁷ or worries about their own human rights record²⁰⁸ during the process of setting up human rights institutions such as the ECtHR. The polarising effect of sanctions²⁰⁹ also may not have the intended effect reputational effects within the violating state, especially if it contributes to the popular support of the infringing populist government. Anti-court techniques undermining the ECtHR’s social legitimacy would also contribute to this.²¹⁰

Moreover, supporters of right-wing populist parties have been shown to value their supported party’s policies over the rule of law and hence may not be motivated to take a case.²¹¹ Other citizens or organisations who do not support their government and who might be more expected to take a case may also be constrained by costs imposed by the right-wing populist government. Restrictions to judicial independence, freedom of expression, and media freedoms or ability

²⁰⁵ Bugaric (n 30).

²⁰⁶ Van Aaken, ‘Behavioural international law and economics’ (n 111), 461.

²⁰⁷ Moravcsik (n 67).

²⁰⁸ Hathaway (n 70).

²⁰⁹ Van Aaken, ‘Behavioural international law and economics’ (n 111), 461.

²¹⁰ Petrov (n 52).

²¹¹ Gutmann, Kantorowicz, and Voigt (n 80).

of NGOs/CSOs to operate within the state may also create a socio-political environment where it is structurally difficult to challenge the incumbent government. This implies that while the number of infringements may indeed rise in periods of populist governments, the number of ECtHR cases may not rise at the same rate. This is consistent with Houle and Kenny's suggestion that populists are effective at demobilising their opposition.²¹²

Next, though our results did not find a robust effect of left-wing populism on ECtHR case numbers, earlier findings in the literature may offer explanations for the obtained indicative evidence of a positive effect. Notably, Kenny showed that even though all populist governments are prone to restricting media freedom, this effect is exacerbated for left-wing populists.²¹³ Huber and Schimpf also show left- and right-wing populists are equally likely to erode certain (though not all) dimensions of democratic quality.²¹⁴ Hence, it is possible that right- and left-wing populist governments increase the number of ECtHR cases in different dimensions. A detailed analysis of the types of cases raised by right- and left-wing populist governments would shed further light on this hypothesis but is not warranted by the small total case number in this study.

Lastly, a potential explanation as to why ECtHR cases may not rise under populist incumbents is the capacity of the CJEU to constrain the erosion of rule of law, for example with judicial independence in Hungary and Poland.²¹⁵ This again strengthens the argument to consider CJEU and ECtHR together in future research projects.

²¹² Houle and Kenny (n 78).

²¹³ Kenny (n 25).

²¹⁴ Huber and Schimpf (n 75).

²¹⁵ Várnay and Varju (n 53).

Overall, there are reasons why constitutional and administrative ECtHR cases could arise challenging an action of a right-wing populist government however factors that impact the ability to challenge infringements may result in lower case numbers than expected. Further research would be required to assess this impact and clarify the answers to the research question further.

7. Conclusion

This study's goal was to contribute to the developing empirical research on the effects of populist rule in Europe, particularly the different effects of right- and left-wing populist rule. The research question asked whether the number of ECtHR constitutional and administrative law cases rise in periods with right-wing populist governments in power. We first developed a theoretical framework to identify if populist governments tangibly challenge the rule of law and European legal order. Applying both economic theories and law and economics theories, we analysed whether, and in what circumstances, these challenges would manifest in administrative and constitutional actions that could rise to the ECtHR. Using a cross-country panel data set covering 28 European states between 2006 and 2022, we empirically tested our main hypothesis that the number of ECtHR cases rises for states in years with higher populist influence in the governing coalition. We consider the construction of a cabinet-level data set of political right-left orientation a key contribution of this paper.

In contrast to earlier studies focusing on specific dimensions of rule of law infringements, we find no effects of either right- or left-wing populist governments' rule on the number of ECtHR cases. However, both limited data quality introducing substantial statistical noise and moderating effects in the link between infringement and subsequent litigation may be at the root of these results. Further research is needed to explore these moderating effects. For example, CJEU jurisprudence may be included to ascertain the effect populists in their various forms might have on the rule of law in Europe. Alternate proxies to the volume of case jurisprudence should be considered when assessing the impact such populist governments have on the rule of law in Europe.

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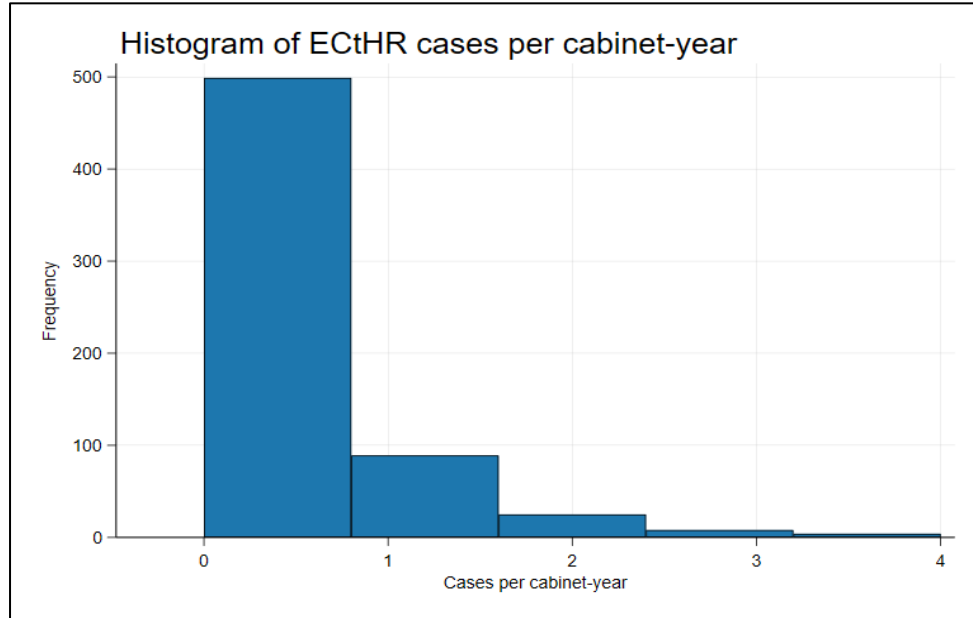
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Appendix

A. Supplementary Data

1. *Frequency histogram of the number of ECtHR cases per cabinet-year observation*



2. *Robustness checks for the cut-off value of left-wing and right-wing parties*

In the definition of right- and left-wing influence, parties are classified as left-wing based on V-Party's 7-point variable *v2pariglef* (score 0-6) and as right-wing based on the 5-point variable *v2paimmig* (score 0-4). To test the robustness of our results to various cut-off values, we consider different values α and β as cut-off points for the respective two variables in defining populist orientation. In the standard model (first column), $\alpha=\beta=1.5$.

Table A.1 Estimation results using different cut-off values for definition of party orientation

	Model 1.4 $\alpha=1.5$ $\beta=1.5$	Model 1.4 $\alpha=1$ $\beta=1$	Model 1.4 $\alpha=1.5$ $\beta=1$	Model 1.4 $\alpha=2$ $\beta=1.5$
Left-wing	0.909 (0.580)	-1.734 (2.376)	0.857 (0.592)	-0.283 (0.332)
Right-wing	-0.174 (0.220)	-0.796 (0.486)	-0.696 (0.485)	-0.291 (0.247)
Sample	N=625	N=625	N=625	N=625
Fixed effects	country-year	country-year	year	country-year
Clustered SE	cabinet	-	cabinet	cabinet
Log-likelihood	-323.0	-322.9	-322.3	-232.8

Note. Standard errors are presented in parentheses. *** $p<0.001$, ** $p<0.05$, * $p<0.1$.