

Courts and the Making of Public Policy

Populism, Courts and the Rule of Law: Eastern European Perspectives

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Executive Summary

- The rise of populism in Eastern Europe has had a significant effect on the rule of law, and the reaction of the judiciary to the changing political environment has been particularly revealing. The key question that this policy brief addresses is: to what extent can the judiciary, as bound by constitutional principles and values, be seen as a guardian of liberal democracy against aggressive majorities and authoritarian and illiberal populist leaders?
- The liberal parties, which were the main political actors during the transition period in Eastern Europe, are now facing increasingly strong competition from a variety of populist political players in the guise of nationalists, reformed communists and conservative traditionalists. Populism in Eastern Europe displays a number of important characteristics.
- Firstly, populists in the region present themselves as an alternative not to a specific political party or platform, but as an alternative to the political elite as a whole.
- Secondly, populists are generally against the key idea of liberal democracy: the idea that the political majority is limited in important ways by constitutional constraints.
- Thirdly, populists challenge at least some elements of what they see as the 'liberal consensus' of the transition period: market-oriented reforms; integration in the Euro-Atlantic organizations; rejection of nationalistic language and behaviour; respect for minority rights; freedom of religion, sexual orientation, etc. Populists deplore the 'political correctness' of liberalism, and provide an opportunity for citizens to discuss problems which have been 'bracketed out' by the mainstream parties.
- Courts, thus far, have been unable to put a stop to the rise of populism. There has been no systematic and committed judicial resistance to populism in any of the countries in the region; accommodation of populist pressures, although to varying degrees, has been much more common. In some countries, such as Russia, there is an almost total political subservience of the courts to the populist leader.
- In Ukraine, the Constitutional Court has become a participant in the battle between different populists, and in so doing, judges have foregone their role as impartial arbiters of justice.
- Elsewhere in the region, courts have succumbed to populist pressures in their policymaking on criminal justice issues, national identity questions, welfare policies and so on. Curiously, in some instances, courts have tried to prevent the entry of extremist, illiberal or simply populist actors by themselves adopting paranoid and illiberal strategies; the ultimate effect of such actions is also detrimental to the rule of law and constitutional democracy.
- All in all, there is no evidence on the basis of which courts could be seen as staunch guardians of liberal constitutional values and principles in Eastern Europe: the record is too mixed for such an optimistic conclusion. Courts have proven sensitive and accommodating to rising political tides – both the liberal one in the 1990s and the populist one of the present day.
- When the political infrastructure of a society is emptied of its liberal content, it is probably unwarranted to place hopes in a single institutional mechanism – judicial review and independent judiciary – as the ultimate guardian of constitutional democracy.

Populism, Courts and the Rule of Law: Eastern European Perspectives

The liberal parties, which were the main political actors during the transition period in Eastern Europe, are now facing increasingly strong competition from a variety of populist groups in the guise of nationalists, reformed communists and conservative traditionalists. Over the last two years, elections in at least five countries in the region (all of which are consolidated democracies) have demonstrated that the political parties standing behind the liberal consensus of the transition period (i.e. market economy, protection of human rights, pro-Western orientation in foreign affairs) are no longer in a dominant or even comfortable position.

In Slovakia, Dzurinda's government, which was the author of very successful and far-reaching market reforms, was replaced by a nationalist-socialist coalition. In Poland, a coalition of nationalists and conservatives obtained control over the most important centres of power in the country, trumpeting the need for a new 'fourth republic', which would presumably abandon some of the key liberal commitments of the last 15 years. In Hungary, the socialists and their liberal partners managed to preserve power, but only at the expense of downplaying the real problems of the Hungarian economy, and by avoiding the introduction of painful austerity measures. The most important victim of these processes seems to be the public confidence in liberal democracy. In the Czech Republic, the last electoral cycle produced a political deadlock in which the liberal Civil Democratic Party finds its agenda frustrated by the joint opposition of social democrats and communists. In Bulgaria, elections confirmed the demise of the centre-right parties, which contributed most to the success of the transition. Further, these elections saw the birth of influential nationalist-populist formations.

It is hardly necessary to add to such examples, since the trend is quite clear: the one region in the world where liberal democracy appeared to make its most important strides over the last 15 years now seems ready to relinquish some of its main principles and tenets. This paper examines the effects of the rise of populism on the rule of law, the main point of focus being the reaction of the judiciary to the changing political environment. The main question posed here is: to what extent can the judiciary, being bound by constitutional principles and values, be seen to be a guardian of liberal democracy against aggressive majorities and authoritarian and illiberal populist leaders?

What is populism?

Populism is a nebulous concept, and the term is often abused in political discourse, since to call someone a populist is to express a negative evaluation of the actor or his/her political agenda. Populism has come to denote someone who is unable to make concessions politically, and who holds a specific opinion in order to win votes. Populists in Eastern Europe appeal to the people or nation as a whole, as opposed to corrupt and impotent political elites. They present themselves as an alternative not to a specific political party or platform, but as an alternative to the existing scheme of representation and the political system as a whole.

To differing degrees, populists oppose the key idea of liberal democracy: that the political majority is limited in important ways by constitutional constraints. The central European family of populism is openly majoritarian, being centred around the belief that the consent of the majority is the ultimate ground of legitimation in politics. Consequently, this type of populism is particularly opposed to the idea of minority rights. In both

Ukraine and Russia, populism is a by-product of plebiscitarian presidents, who claim to represent the nation as a whole and do not feel bound by legal and constitutional constraints.

Populists challenge at least some elements of what they see as the 'liberal consensus' of the transition period: market-oriented reforms, integration in the Euro-Atlantic organizations, rejection of nationalistic language and behaviour, respect for minority rights, freedom of expression in religion, sexual orientation, etc. Populists deplore the political correctness of liberalism, and give an opportunity for the citizens to discuss problems which have been 'bracketed out' by the mainstream parties.

At least in some countries, the advent of populism was accompanied by a shift towards understanding politics as a clash of personalities rather than ideas. Issues of personal integrity became central in political debate, mainly through a succession of anti-corruption campaigns and activities. The example of Bulgaria well illustrates the original nexus between the rise of populism and the prioritizing of corruption as a social problem.

Sense of crisis of liberal democracy

Liberals are alarmed by the recent developments in Eastern Europe, but are unable to agree on the nature, depth and character of the crisis. Firstly, there are those who believe that the described problems are nothing but temporary aberrations from the norm within young and inexperienced liberal democracies. These aberrations are due to transition-fatigue, and disappointment with the speed with which market reforms create welfare. With the continuous integration of the region into the EU and the consolidation of democracy, it is thought that these temporary problems will be gradually overcome. This optimistic interpretation relies on the strength of liberal democratic institutions and the rule of law in central Europe.

Secondly, there are others who would go so far as to compare the current crisis of liberal democracy with its demise in the interwar period, when right- and left-

wing extremists subverted the democratic order by abusing its instruments of representation. Admittedly, this is an alarmist interpretation, but there is prima facie evidence in its support as well. Open authoritarian leanings are most evident in Russia and Ukraine, but even in EU member states from central Europe there are signs of growing intolerance to vulnerable minorities, such as the Roma and homosexuals, resurgence of anti-Semitic feelings, and even occasional outbursts of political violence. It is true that the constitutional framework of liberal democracy is still mostly intact, but within this framework the dominant mode of making politics is becoming illiberal. On this approach, the most popular tool to mobilize public support becomes the attack against liberal policies and principles in different areas of governance, from immigration and welfare to EU integration matters. The danger here is obvious: the loyalty to the basic constitutional framework is growing thin, which in the long term may erode the rule of law, and lead to the gradual subversion of the regime and its replacement with some form of authoritarianism, or with an aggressively majoritarian and intolerant political model.

This briefing will go on to explore the more lasting impacts of the new populist zeitgeist on the rule of law and the politics of the judiciary. It will argue that, while the institutional framework is still in place, its *modus operandi* is in danger of turning into an instrument of anti-liberal and anti-democratic politics.

Courts, populism and the rule of law

Courts have various functions in a modern liberal democracy which could hardly be reduced to a straightforward application of the law as a set of rules. Explicitly or implicitly, courts are authorized and indeed mandated to interpret the law, sometimes even to develop and change it, and, ultimately, to contribute to the elaboration of public policies. In addition to its role in deciding cases, the law has an expressive potential which courts may freely exploit. They are also entrusted with the supervision of the fairness of political competition, and are empowered to regulate their own affairs. The rise of populist politics has implications for each of these areas of judicial activity.

Courts as regulators of political competition

Courts are most exposed to political pressures when they act as supervisors of the fairness of the political process. *Bush v. Gore*,¹ where the US Supreme Court had to decide the outcome of the presidential election, demonstrates that even the courts of established democracies cannot avoid partisan pressures in their decision making. The rise of populism in Eastern Europe amplifies the impact of certain political pressures on the courts, pressures which can be grouped in several categories.

Firstly, there is a tendency of mainstream parties to restrict competition by populist newcomers through legal, constitutional and quasi-constitutional mechanisms. Courts could become instrumental in obstructing newcomers in this context. This is possible because judges of superior courts, and especially constitutional judges, are often appointed through partly politicized procedures, dominated by the mainstream parties as represented in Parliament, the government, or the presidency.

Further, cartelization tends to result, whereby the main parties stick together in order to obtain state privileges and to deny new competitors entry into the political process. With the help of the judiciary, mainstream parties may turn the constitution into an instrument for the perpetuation of their political hegemony.

This phenomenon is not yet widespread, but examples can be found. In 2001 in Bulgaria, when Simeon II announced his desire to take part in elections, a Sofia court refused to register Simeon's party on formal grounds (lack of necessary signatures, procedural irregularities during the constitutive meeting, etc.) and thus to prevent him from taking part in the parliamentary, as well as the presidential elections. Despite these hurdles, Simeon II managed to participate as a candidate by joining a previously registered small party. The result was a sweeping victory and more than 40 per cent support for the newcomer. The case shows plainly that mainstream parties can try to exploit the courts

1. 531 US 98, December 12, 2000.

in issues of political competition, but judicial interventions in this regard are rarely effective. In fact, sometimes they might raise the support for the newcomer, who is seen as a victim of a mainstream judicial conspiracy.

Secondly, if the mainstream parties feel threatened both by newcomers and by the judiciary, or other independent centres of power, they might launch a campaign against these centres of power by trying to change the constitutional rules, granting them independence and autonomy. In this case also, the rule of law may be the ultimate victim, especially if the end result is political domination over areas which might be better left free from partisan influence (public media, judiciary, etc.).

Examples of this type of politicization of the courts are not hard to find. President Putin, as a plebiscitarian populist leader, has managed to ensure political control over the judiciary, which resulted in a series of high-profile cases against recalcitrant oligarchs, like the notorious case against Mikhail Khodorkovsky,² who at the time was a serious potential competitor and political opponent of the Kremlin. The administrative and police pressure on Garry Kasparov, the present leader of the opposition in Russia, is also remarkable,³ yet it has not been reigned in by judicial bodies in any way, which demonstrates the political subservience of the judiciary.

Current developments in the Ukraine are also illustrative of the phenomenon. In the stand-off between President Yuschenko and Prime Minister Yanukovich, the Constitutional Court of the country has an important role to play: it has to adjudicate

2. For a concise description of Khodorkovsky's judicial ordeal see en.wikipedia.org/wiki/Mikhail_Khodorkovsky. It is quite indicative that immediately after Khodorkovsky announced his political ambitions to campaign in the 2008 presidential elections, prosecutors stated that there were grounds for further indictments of the ex-oligarch for money laundering.

3. In April 2007 Kasparov was arrested for the organization of an allegedly illegal public demonstration. At the time of the annual conference of the Russian opposition in the autumn of 2006, Kasparov's office was raided by special police units.

on the constitutionality of the presidential decree to dissolve Parliament and call pre-term elections. Judges of the Constitutional Court, which at the time of writing are still deliberating the case, made official complaints about political pressure exercised on them, including open threats. According to the plain text of the Ukrainian Constitution, the decree of the president seems unconstitutional, but it remains to be seen what the reaction of the judges to the issue will be after the impact of the discussed competing pressures is taken into account. This case is interesting, because political pressure here is accompanied by pressure from the populace in the form of ongoing demonstrations in support of the two camps and calls for civil disobedience.

Courts as the makers of public policy

In the circumstances of rising populism, there are suitable conditions for the courts to become fora for the making of some types of public policy. Mainstream liberal parties have willingly passed an increasing number of difficult political decisions to the judiciary in sensitive areas such as privatization, restitution, the legacy of the communist past, etc. Hiding behind the authority of international or constitutional rules, domestic elites are often willing to avoid taking responsibility for sensitive and unpopular decisions. Further, the judiciary itself has been active in taking the opportunity to block unpopular policies of governments on the basis of legal rules and principles. It is reasonable to expect that the reduction of the scope of democratic politics leads to the expansion of the scope of the decision-making activities of other bodies, especially judicial bodies. This process could have a lasting impact on the rule of law.

Populist pressures are most apparent in the area of criminal policy and the fight against organized crime and corruption. Romania and Bulgaria are cases in point: in these two countries, the European Commission and others have repeatedly stated that policies in these areas are wanting. This criticism has been accompanied by significant public pressure for decisive action, which is fuelled by populist politicians, eager to portray the whole mainstream

establishment as criminal and corrupt. Apart from the rising rating of these populists, the combined result of these pressures has been the transfer of significant powers to judicial and prosecutorial bodies. In Romania, a special, well-funded prosecutorial unit targeting high-profile corruption has been set up. In Bulgaria, insistent calls for special organized crime courts have been made, and the prosecutor general (who is part of an independent judiciary in the country) has been repeatedly asked to elaborate policies and strategies in relation to organized crime and corruption. The effect of this extension of policymaking powers of the independent judicial branch are difficult to assess at the moment, but one obvious effect is the preservation of incredibly high conviction rates.

In Bulgaria, the percentage of acquitted persons from all completed cases is around one per cent (for the period 2002–2005).⁴ Paradoxically, the judicial reluctance to acquit has led to significant protraction of court cases, because judges either render guilty verdicts, or send cases back for additional investigation. Accordingly, there is a backlog of cases at the pre-trial level in both the prosecutorial and the investigators' offices. The ultimate result is increasing discretion of the prosecutors: literally hundreds of thousands of cases were only recently finally closed because of statutes of limitations. This fact was again skilfully exploited by the populist press and politicians who labelled it a 'grand amnesty' which just confirmed the 'rotten character of the whole state'. This type of rhetoric increases populist pressures on the courts to render guilty verdicts, and hence the vicious circle of the populist rule of law is completed.

A very interesting example of courts directly responding to populist pressures is presented by a decision of the Hungarian Constitutional Court. In the middle of the 1990s the liberal financial minister Bokros introduced much needed austerity

4. For a more detailed account of the performance of the Bulgarian judiciary see the monitoring report of the Sofia-based Centre for Liberal Strategies:

<http://www.clssofia.org/uploaded/1162302106_final_report_english.pdf>

measures in order to ensure the financial stability of the country. The Court invalidated key elements of the package of legislation, and in practice rendered it meaningless by introducing a wide range of social and economic 'acquired' rights of welfare.⁵ Although a year later the judges became more accommodating of neoliberal measures, they set a specific political *bon ton* – that there are acquired welfare rights from which political parties cannot deviate.

Courts and identity politics

According to the ideology of populist politics, the law serves to express the identity of a given political community as a whole. Therefore, the rise of populism has brought to bear an increasing pressure on the courts to make sure that the law expresses the identity of the people, the nation or even the dominant religious denomination. These pressures are not an invention of Eastern Europe; rather, their origin can be traced to the western part of the continent. After all, the failure of the EU Constitutional Treaty should be attributed to a degree to the widespread belief that the treaty was expressive of a 'European identity'. This imagined identity was not recognized by various national populisms as representative of their national identity, which probably was the key reason for its failure. Be that as it may, there are other examples of European mainstream constitutional policies framed under populist pressures. The decision of the European Court of Human Rights (ECHR) in the *Refah Partisi* case, in which the court approved the ban of an Islamist popular party in Turkey, was following the same identity expressing logic.⁶ It is not important for present purposes whether the Court was right or wrong in its decision about the legality of the ban. More important is the reasoning of the judges, according to which the ECHR was held in principle to be incompatible with Islamic ideas of legal pluralism, with Islamic law (Sharia), and with the idea of jihad. This wholesale

judgement of incompatibility between the ECHR and the key normative underpinnings of the Muslim world can be construed as a bold declaration of a distinct (Western, European) identity by the Court. This element of the judgement of the Court inflamed many Turkish liberals, who argued that the Strasbourg judges could have been much more careful in their language by citing only those elements such as jihad, whose political pursuit would constitute a real and present danger in a liberal democracy. The wholesale incompatibility declarations can only be explained on the grounds that populist pressures were encouraging judges to enter into identity politics.

The repercussions of this and similar judgements on dress codes, veils, crucifixes in schools, and so on could be quite powerful in Eastern Europe. The region in general is very susceptible to overblown and paranoid interpretations of 'militant democracy' – the doctrine according to which democracy and the constitutional order should be guarded by 'preventive' strikes against their opponents. In particular, these opponents are often seen among representatives of ethnic minorities as nurturing hopes of secession or autonomy. Greece, for instance, has put significant judicial pressure on members of the Macedonian Slav community by denying their right to association and assembly.⁷ Across the border in Bulgaria, members of the same Macedonian community are regularly denied the right to form a political party, be that on constitutional or on formal procedural grounds.⁸ These and other cases show that populism will, and, in some cases, is already influencing the courts and judiciary in the region to enter into identity politics.

Courts as adjudicators in politics of personal integrity

As mentioned previously, if this nexus between populism and personality politics means that political competition increasingly becomes a competition of persons rather than ideas, it is reasonable to expect that the integrity of these persons will

5. For an account and analysis of these events see Sajo, A. (1996) 'How the Rule of Law Killed the Welfare Reform', *East European Constitutional Review*, Spring 1996.

6. *Refah Partisi (The Welfare Party) and others v. Turkey* (application nos. 41340/98, 41342/98, 41343/98, and 41344/98). The first judgement on the case by the ECHR was in 2001, while the Grand Chamber ruled in 2003.

7. *Sideropoulos and Others v. Greece* (1998) 57/1997/841/1047.

8. Constitutional court decision 1/2000, February 29, 2000.

increasingly become the subject of judicial proceedings. Recent events give support for such a thesis, with examples ranging from the attempt to poison Yuschenko before the Orange Revolution,⁹ to Khodorkhovsky's trials and Garry Kasparov's present ordeals as the leader of the Russian opposition. In more benign regimes, the attacks against the personal integrity of the opponent took less sinister forms. In Romania, for example, attempts have been made to impeach President Basescu, whilst there are ongoing judicial proceedings against a former prime minister of the country, Adrian Nastase, on charges of corruption.

Perhaps the most threatening of developments is the current situation in Poland. There, the nationalist-populist political forces of the twin Kaczinski brothers have originated a second wave of so-called 'lustration', whereby 20 years after the beginning of the transition all agents and collaborators of the communist secret services will be disclosed. Under this proposal, more than 700,000 individuals will undergo a screening procedure to assess their political past. Ostensibly, this operation is intended as a total purification of the Polish political elite in the pursuit of moral and political integrity. A more cynical, but probably more accurate interpretation is that the operation is, in fact, a means for the conservative-populist forces to deal a death blow to the more liberal-minded political formations in Poland. The role of the courts in this procedure is crucial. Firstly, the Constitutional Court has to assess its compatibility with fundamental rights. Secondly, the judiciary will have to enforce the rule that public figures failing to disclose information or to comply otherwise with the proceedings will be liable to serious sanctions such as fines, dismissals or bans from pursuing a specific profession for a number of years. It is not difficult to predict that the courts will be exposed to huge politicization in this 'integrity guaranteeing' exercise.

Ultimately, if this plan goes ahead, courts might become instruments for political prosecutions. It remains to be seen to what extent they will be able to resist this trend.

Rise of judicial corporativism

The rise of judicial corporativism is most visible in the new EU member states of Romania and Bulgaria. The last pre-accession monitoring reports of the EU Commission stressed that the judicial systems of these two countries were least prepared for membership as they displayed serious problems of both performance and accountability. In both countries the judiciary actively resisted the introduction of substantial reforms. In Bulgaria, in a series of judgements the Constitutional Court imposed severe limits on the kinds of reforms that the Parliament could introduce. In order to circumvent these judgements, Parliament attempted to introduce constitutional amendments, the most important of which were also struck down by the court. Hidden behind the veil of judicial independence, the Bulgarian judiciary has actively defied calls for greater transparency and the introduction of performance indicators and managerial approaches which would lead to greater efficiency and accountability. In Romania the situation is quite similar, although under the pressure of the energetic Justice Minister, Monica Macovei, things had started to move in the right direction. Despite corporate judicial resistance, with the support of the EU, Macovei had managed to introduce important reforms in the governing bodies of the judiciary. However, immediately after accession in April 2007, Macovei was dismissed by the prime minister. With EU pressure receding, the straightforward defence of narrowly construed institutional interests of the judiciary is bound to increase in these two countries. Self-serving policies are becoming the order of the day.

9. For a brief description of this attempt see:

<<http://observer.guardian.co.uk/international/story/0,6903,1371999,00.html>>.

Conclusion

The examples discussed above demonstrate that courts and the judiciary are by no means immune from the pressures of populism. The judiciary may be seen as the guardian of constitutional order against aggressive illiberal majorities, but the truth is that often the guardians are also implicated in the political clashes between majorities and minorities, or are rendered ineffective by them. Frequently, instead of being relatively impartial arbiters, courts become active participants in the political process, or isolated, self-interested bystanders.

This is not to say that Ely's proceduralist ideal of reinforcement of political representation through judicial action is irrelevant.¹⁰ Indeed, in some cases courts have helped to improve democracy by curbing the power of aggressive majorities or by protecting vulnerable minorities.

One must question whether courts, as bodies bound by constitutional rights and principles, are responsive only to liberal political pressure however. The Eastern European perspective offered in this briefing would suggest not. During the 1990s, there was a wave of liberalization in the region, which was marked by the rise of liberal political forces to power.¹¹

Constitutional courts became instrumental to the entrenchment of the values of liberalism in ex-communist societies. Success varied across the different countries, but as a whole, constitutional review was established together with the belief that courts could curb the excesses of aggressive majorities or authoritarian leaders. The beginning of the new century spelled the rise of a new political trend in Eastern Europe. Putin's plebiscitarian presidency extinguished not only liberalism but democratic competition in Russia as well. Ukraine's never consolidated democracy has slipped

into instability in which populist leaders are pursuing altogether indeterminate goals. Even the new EU member states of central Europe are experiencing a rising tide of illiberal and populist parties and leaders, who are subverting many of the consensual goals and priorities of the transition period.

Courts, thus far, have been unable to put a stop to these developments. Although reactions to the rise of populism have not been unified, there has been no systematic and committed judicial resistance to populism in any of the countries in the region; accommodation of populist pressures, although to varying degrees, has been much more common. In some of the countries, such as Russia, we have an almost total political subservience of the courts to the populist leader. In Ukraine, the Constitutional Court has become a player in the battle between different populists, and the ideal of judges serving as impartial arbiters has been severely eroded. Elsewhere in the region, courts have succumbed to populist pressures in their policymaking on criminal justice issues, national identity questions, welfare policies and so on. Curiously, in some instances courts have tried to prevent the entry of extremist, illiberal or simply populist actors by themselves adopting paranoid and illiberal strategies, thereby undermining both the rule of law and constitutional democracy.

In summation, there is no evidence to suggest that courts are acting as staunch guardians of liberal constitutional values and principles in Eastern Europe; the record is too mixed for such an optimistic conclusion. Instead, courts have proven sensitive and accommodating to rising political tides, be it the liberal one in the 1990s or the populist one of the present day. When the political infrastructure of a society is emptied of its liberal content, it is probably unwarranted to place hopes in a single institutional mechanism – judicial review and independent judiciary – as the ultimate guardian of constitutional democracy. It is open to debate whether courts have presented a 'counter-majoritarian difficulty' in Eastern Europe, but thus far at least, they have not presented a serious and committed counter-populist difficulty.

10. Ely, J. H. (1980) *Democracy and Distrust*. Cambridge Massachusetts: Harvard University Press.

11. For an account of the role of courts during the transition period see Smilov, D. (2004) 'The Character and Legitimacy of Constitutional Review: Eastern European Perspectives', *ICON (Journal of International Constitutional Law)*, No. 1.

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Courts and the Making of Public Policy

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