



CENTRE FOR ADVANCED STUDY SOFIA

CAS WORKING PAPER SERIES

Issue 4

Sofia 2011

This publication presents part of the research outcome of a project carried out at the Centre for Advanced Study Sofia under the title

Shaken Order: Authority and Social Trust in Post-Communist Societies

(Case Studies in Law)
2007–2009

*Available in electronic form at
www.cas.bg*



CENTRE FOR ADVANCED STUDY SOFIA

7 B, Stefan Karadja St., Sofia 1000, Bulgaria
phone:+359 2 9803704, fax:+359 2 9803662
cas@cas.bg, www.cas.bg

CAS Working Paper Series No. 4/2011

Copyright © 2011 by the CAS contributors/CAS

Copyright remains with the individual authors/CAS. This publication may be distributed to other individuals for non-commercial use, provided that the text and this note remain intact. Thus publication may not be reprinted or redistributed for commercial use without prior written permission from the author and CAS. If you have any questions about permissions, please, write to cas@cas.bg.

Preferred Citation: Smilov, Daniel, *Rule of Law and the Rise of Populism: A Case Study of Post-accession Bulgaria* CAS Working Paper Series No. 4/2011: Sofia 2011. *Shaken Order: Authority and Social Trust in Post-Communist Societies (Case Studies in Law)*, a project of the Centre for Advanced Study Sofia.

DANIEL SMILOV

**RULE OF LAW AND THE RISE OF POPULISM:
A CASE STUDY OF POST-ACCESSION BULGARIA**

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. Over the last several 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, until the autumn of 2008, a coalition of nationalists and conservatives had the control over the most important centres of power in the country, trumpeting the need for a new “fourth republic”, which would presumably part with some of the key liberal commitments of the last fifteen years. Since then, although in retreat, the political forces behind the Kaczynski brothers are still a major political actor in the country. In Hungary, the socialists and their liberal partners still manage to preserve power, but only in the face of extreme loss of popularity, rising xenophobic and anti-Semitic parties, and almost certain defeat in the upcoming parliamentary elections at the hands of an ever-more nationalist centre-right opponents. The poor state of the economy, the populist electoral strategies of both the ruling coalition and the flamboyant opposition, ultimately led to massive street protests and violence – a regular feature of Hungarian politics since 2006. 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 for the success of the transition. Further, these elections saw the birth of influential nationalistic-populist formations. This list of examples could be extended without any difficulty, but this is hardly necessary since the trend is quite clear: the region in the world, where liberal democracy made its most important strides over the last fifteen years, seems now ready to challenge some of its main principles and tenets.¹

This paper examines the effects of the rise of populism on the rule of law, as the focus is on the reaction of the judiciary to the changing political environment. The main question, which the paper poses, is to what extent the judiciary, as bound by constitutional principles and values, could be seen as a guardian of liberal democracy against aggressive majorities and authoritarian and illiberal populist leaders. The paper first discusses the problem of populism and the rule of law more generally, by focusing on the concept and its application to the countries of Eastern Europe (Part One). Then the paper examines the specific Bulgarian political context, and the different manifestations of populism in the country since 2001 (Part Two). Finally, in Part Three, the paper analyses the impact of the rise of populism on the rule of law in Bulgaria.

PART ONE:

POPULISM AND THE RULE OF LAW IN EASTERN EUROPE

WHAT IS POPULISM?

Populism is a phenomenon which is difficult to conceptualise. In a recent article the political scientist Ivan Krastev compares “populist” forms of politics and government, which are markedly different from each other – Chaves’ Venezuela and Putin’s Russia.² Both of them are what Krastev calls “democracy’s doubles”, although they part with liberal democracy in different ways: Putin is more market-oriented and much more co-operative vis-à-vis the US, especially regarding Bush’s global war against terror, than Chaves.

Philippe Schmitter points out another difficulty with the concept: it is often

1 For more detailed case-studies of the rise of populism in Eastern Europe see Grigorij Meseznikov, Olga Gyarfasova, and Daniel Smilov (eds.), *Populist Politics and Liberal Democracy in Central and Eastern Europe*, IVO (IPA) working paper series, Bratislava, 2008. Available at: <http://www.ivo.sk/5353/en/news/ivo-released-working-paper-populist-politics-and-liberal-democracy-in-central-and-eastern-europe>

2 “Democracy’s Doubles”, *Journal of Democracy*, Volume 17, No. 2, April 2006.

abused in political discourse.³ By calling someone a “populist” people are often just expressing their negative evaluation of the actor or her political agenda. Overall, “populism” is most probably a family resemblance concept, so it will be a futile exercise to look for a very strict definition of the phenomenon. Nevertheless, the populisms in Eastern Europe do seem to share some important common characteristics.⁴ First, populists in the region appeal to the people or nation as a whole, as opposed to corrupt and impotent political elites. In other words, 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.

Secondly, populists are (although to a different degree) against 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 – it is centred on the belief that the consent of the majority is the ultimate ground of legitimation in politics. Therefore, this type of populism is particularly opposed to the idea of minority rights. In Ukraine and Russia populism is a by product of plebiscitarian presidents, who claim to represent the nation as a whole, and as such, do not feel particularly bound by legal and constitutional constraints.

Thirdly, and again to a different degree, 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 “challenge” all these “taboos”, 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.

Finally, at least in some countries, the advent of populism was accompanied by a turn to an understanding of politics as a clash of personalities, rather than as a clash of ideas. Issues of personal integrity became central in the political processes primarily through a succession of anticorruption campaigns and activities. The example of Bulgaria well illustrates the original nexus between the rise of populism and the prioritising of corruption as a social problem. The ex-tsar Simeon II – first among a succession of populist politicians in the country – won landslide elections in 2001 on an anti-corruption ticket.

3 A Balance Sheet of the Vices and Virtues of ‘Populisms’, paper delivered at the conference the Challenge of New Populism, organized by the Centre for Liberal Strategies, Sofia, in May 2006.

4 For a discussion of populism in Eastern Europe see Cas Mudde, “In the Name of the Peasantry, the Proletariat, and the People: Populism in Eastern Europe”, in Meny and Surel, *Democracies and the Populist Challenge*, Palgrave, 2002.

SENSES OF CRISIS OF LIBERAL DEMOCRACY

Part of the problem with populism is that there is no general agreement as to the nature, depth and character of the danger that it presents to liberal democracy. Generally, there are two types of reactions to the political developments under discussion. First, 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”, „post-accession” relaxation of political standards, or disappointment with the speed with which market reforms create welfare. On this interpretation, these temporary problems will be gradually overcome with the continuous integration of the region in the EU and the consolidation of democracy. This optimistic interpretation relies on the strength of liberal democratic institutions and the rule of law in Central Europe. In some of its versions, however, it is recognised that the crisis might have some more lasting implications, as the revision of the structures of political representation, and especially the way in which political parties function.⁵

Secondly, there are others who would go as 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. These reactions to the phenomenon are typical of political analysts, journalists and others especially when populism comes in a more radical form: as the case of Ataka, in Bulgaria, or the anti-Semitic outbursts during the mass protests in Hungary. Admittedly, this is a slightly paranoid and 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, calls for taking politics to the streets, and even occasional outbursts of political violence.⁶ 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. In other words, the most popular tool to mobilise public support becomes the attack against liberal policies and principles in different areas of governance: from immigration and welfare to EU integration matters.

5 See, in particular, Philippe C. Schmitter, Alexander H. Trechsel, *The Future of Democracy*, Council of Europe online books, 2004, available at: http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=1832

6 For the link between mass demonstrations, populism and anti-liberal doctrines, such as Carl Schmitt's understanding of representation see Daniel Smilov, "The Power of Assembled People: The Right to Assembly and Political Representation" in Andras Sajó (ed.), *Free to Protest: Constituent Power and Street Demonstration (Issues in Constitutional Law)*, Eleven International Publishing, The Netherlands, 2008.

This paper does not attempt to give an answer to the question which of the above-discussed senses of crisis is closer to reality. Rather, it explores the more lasting impacts of the new populist *Zeitgeist*⁷ on the rule of law and the politics of the judiciary. The main idea is that political populism has often neglected repercussions in the activities of judges and courts – the supposed guardians of the rule of law. Formally, the institutional framework might still be in place, but its *modus operandi* might actually turn it into an instrument of anti-liberal and anti-democratic politics.

COURTS, POPULISM AND THE RULE OF LAW

Courts have different 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 authorised to interpret the law, sometimes even to develop and change it, and, ultimately, to contribute to the elaboration of public policies.⁸ Further, the law has a serious expressive potential, and courts could use this potential quite freely in many situations. They are also entrusted with the supervision of the fairness of political competition, and last, but not least, they are empowered to regulate their own affairs. The above-described rise of populist politics has potential implications for all 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*⁹ has demonstrated that even the courts of established democracies could not 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 could be grouped in several categories.

Firstly, there is a tendency of mainstream parties to restrict competition by populist new comers through legal, constitutional and quasi-constitutional mechanisms. Courts could become instrumental as blocks to such new comers in this context. This is possible because high judges, and especially constitutional judges, are often appointed through partly politicised procedures,

7 Cas Mudde, “The Populist Zeitgeist”, Government and Opposition, Blackwell Publishing, 4/2004.

8 This is a view that has been defended most powerfully by authors such as Joseph Raz *The Authority of Law. Essays on Law and Morality*, Clarendon Press, Oxford, 1979; *The Morality of Freedom*, Clarendon Press, Oxford, 1986; *Ethics in the Public Domain*, Clarendon Press, Oxford, 1994; Aharon Barak, *Judicial Discretion*, Yale UP, New Haven, 1989; *Purposive Interpretation in Law*, Princeton University Press, Princeton and Oxford, 2005. See also Cass Sunstein, David Schkade, Lisa Ellman, and Andres Sawicki, *Are Judges Political? An Empirical Investigation of the Federal Judiciary* (Brookings Institution Press 2006).

9 531 U.S. 98, December 12, 2000.

dominated by the mainstream parties as represented in parliament, the government, or the presidency.

Further, cartelisation of mainstream parties is a process, which is familiar to students of contemporary democracy¹⁰: the main parties stick together in order to obtain state privileges and to deny new competitors entry into the political process. In the circumstances of rising populism, established elites feel increasingly insecure: people are alienated from them (low party membership, lack of large pools of small donors, lack of ideological commitment and loyalty). These conditions intensify the tendencies among established parties to form cartels with the aim to block political competition. Helped by the judiciary, mainstream parties may actually turn the constitution into an instrument for the perpetuation of their staying in power.

This phenomenon is not widespread as yet, but there are examples of such instrumental uses of the courts. In 2001 in Bulgaria, when the former tsar Simeon II announced his desire to take part in elections, there were concerted politico-judicial efforts to prevent him from doing so. At the start, the Constitutional Court ruled that Simeon II could not run for president because of residency requirements.¹¹ Formally this argument was sound, but in previous judgements the same court had really stretched the text of the Constitution in order to retribute to the former tsar the property of the royal family, which showed a pattern of selective fidelity to the positive sources. The next step was for a Sofia court to reject 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 elections as well. Despite these hurdles, Simeon II took part in the elections by joining, as a coalition partner, an already registered small party: the result was a sweeping victory and more that 40% support for the new comer. Thus, the conclusion is that the mainstream parties could try to instrumentalise the courts in terms of political competition, but judicial interventions in this regard are hardly effective. In fact sometimes they might just raise the support for the new comer, who is seen as a victim of a mainstream judicial conspiracy.

Secondly, if the mainstream parties feel threatened both by new-comers 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 as well, 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.).

10 See Richard Katz and Peter Mair, "Changing Models of Party Organisation and Party Democracy", *Party Politics*, 1/1, 1995.

11 Decision 3, 2001 of February 8, 2001.

Examples of this type of politicisation 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 Khodorkovsky¹² – at the time a serious potential competitor and political opponent of the Kremlin. The administrative and police pressure on Gary Kasparov – a leader of the opposition in Russia – is also remarkable¹³: this pressure up to date has not been reigned in by judicial bodies in any way, which just demonstrates the political subservience of the judiciary.

Developments in the Ukraine are also illustrative of the phenomenon. In the prolonged 2007 stand-off between president Yuschenko and prime minister Yanukovich the Constitutional Court of the country had an important role to play: it had to adjudicate on the constitutionality of the presidential decree to dissolve parliament and call pre-term elections.¹⁴ 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.¹⁵ According to the plain text of the Ukrainian Constitution, the decree of the presidents 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 street: ongoing demonstrations in support of the two camps, calls for civil disobedience, etc.

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 privatisation, restitution, the legacy of the communist past, etc. Hidden 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

12 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 they believe that there were grounds for further indictments of the ex-oligarch for money laundering. There was a possibility that he went out of jail on parole in the spring of 2007. In case of further indictments, this possibility would become irrelevant.

13 For instance, Kasparov was arrested for the organisation of an allegedly illegal public demonstration (April 14, 2007). 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.

14 For an account of the stand-off see: <http://www.time.com/time/world/article/0,8599,1607853,00.html>

15 See <http://news.bbc.co.uk/2/hi/europe/6545467.stm>

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, and, 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 organised 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, and that visible results are difficult to detect.¹⁶ 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 results of these pressures have 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 organised 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 organised crime and corruption. The effects of this extension of policy making powers of the independent judicial branch are difficult to assess at the moment, but there is one obvious effect which is to be attributed to populist pressures: the preservation of *incredibly high conviction rates*.¹⁷

In Bulgaria, the percentage of acquitted persons from all completed cases is around 1% (for the period 2002–2005). 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 the prosecutorial and the investigators' offices. The ultimate result is increasing discretion of the prosecutors: literary hundred thousands of cases were just recently finally closed because of statutes of limitations. This fact was again skilfully exploited by the populist press and politicians – it was called 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 that is how 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

16 For an account of the pre-accession negotiations between EU and Bulgaria and Romania on the issue of judicial reform see Daniel Smilov, “EU Enlargement and the Constitutional Principle of Judicial Independence”, in Sadurski, Wojciech; Czarnota, Adam; Krygier, Martin (Eds.) *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*, Springer, 2006.

17 See the report of the Centre for Liberal Strategies, *The Judiciary: Independent and Accountable. Performance Indicators of the Bulgarian Judicial System* at http://www.cls-sofia.org/uploads/files/Projects%20files/1162302106__final_report_english.pdf

middle of the 1990s the liberal financial minister Bokros introduced much needed austerity 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.¹⁸ The judges did this by introducing a wide range of social and economic “acquired” rights of welfare. Although a year later the judges became more accommodating of neo-liberal measures, they set a specific political *bon-ton* – that there are acquired welfare rights from which political parties cannot deviate. This tone contributed to the entrenchment of a policy of ever increasing public spending, the flourishing of populist rhetoric, which ultimately led to the 2006 crisis, when it became clear that most of the “acquired” rights cannot any longer be supported by the state. In the ensuing events, the mainstream parties started accusing each other for the severe financial problems (although public spending and etatist politics had been a common ground between them for most of the transition period). Ultimately, spontaneous protests and even street violence broke out, when it became clear that in the pre-election campaign the ruling Socialist PM Gyurchany had not necessarily been exhaustive as to the scope of austerity measures, which needed to be adopted after the elections of 2005. The issue whether this pre-electoral brevity constituted a political lie was set to be explored in massive public demonstrations, in which football hooligans, conspiracy theorists, anti-Semites and opposition leaders made their views known (not always in this order) in the major Budapest squares. The thus-far stable parliamentary democracy was successfully by-passed and temporarily pushed in the corner by a populist and plebiscitarian political action.

Courts and identity politics:

The law expresses the identity of a given political community as a whole, or at least this is what every populist would argue. Therefore, the rise of populism entails 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 – on the contrary, their origin should be traced in the western part of the continent. After all, the failure of the EU Constitutional Treaty should be attributed to a degree to the wide spread belief that the treaty was expressive of a “European identity”. This imagined identity was not recognised by various national populisms as their “own”, 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 ECtHR in the *Refah Partisi*¹⁹ case, in which the court approved the ban of an

18 For an account and analysis of these events see Andras Sajó, “How the Rule of Law Killed the Welfare Reform”, *East European Constitutional Review*, Spring 1996.

19 *Refah Partisi (The Welfare Party) and others v. Turkey* (application nos. 41340/98, 41342/98,

Islamist popular party in Turkey, was following the same identity-expressing logic. It is not that 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 incompatible with Islamic ideas of legal pluralism, with Islamic law (Sharia), and with the idea of *jihad*. This whole-sale judgement of incompatibility between the ECHR and the key normative underpinnings of the Muslim world is hardly anything different from a bold declaration of a distinct (Western, European, civilised?) identity by the court. This element of the judgement of the court made even many Turkish liberals angry. After all, the Strasbourg judges could have been much more careful in their language, attempting to distinguish between these elements in the Sharia, Islamic pluralism, jihad, etc., whose political pursuit would constitute a real and present danger in a liberal democracy. The whole-sale incompatibility declarations could hardly be explained on grounds different from populist pressures on judges to enter into identity politics.

The repercussions of this and similar judgements on dress codes, veils, crucifixions in schools, etc. could be quite powerful in Eastern Europe. The region in general is very susceptible to overblown and paranoid interpretations of “militant democracy”²⁰ – 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 nurturing secession or autonomy dreams. Greece, for instance, has put significant judicial pressure on members of the Macedonian Slav community, by denying their right to association and assembly.²¹ Across the border in Bulgaria, members of the same Macedonian community are regularly denied the right to form a political party, be that on constitutional²² or on formal procedural grounds (this case is going to be considered in more detail in Part Three). There are further instances of bans of communist parties, for nothing more than their name and declared support for some form of communist ideology. The rise of identity politics, which populism spells, will hardly leave the courts and the judiciary unmoved – many of them will be tempted, and are already tempted, to join in.

41343/98, and 41344/98). The first judgement on the case by the ECtHR was in 2001 while the Grand Chamber ruled in 2003.

20 For a discussion of the concept see Andras Sajo, “What is Militant Democracy? Against What Should We Defend the State? In Andras Sajo (ed.), “Militant Democracy”, Eleven International Publishing, 2004.

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

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

Courts as adjudicators in politics of personal integrity:

As mentioned above, there is a certain natal nexus between populism and personality politics. If political competition becomes more and more a competition of persons rather than ideas, it is reasonable to expect that the integrity of these persons will become more and more the subject of judicial proceedings. Recent events give support for such a thesis. Starting from the sinister cases in Russia and Ukraine where political opponents have been physically threatened and attempts have been made on them to be criminalised: think of the attempt to poison Yushenko before the Orange Revolution²³, Khodorkovsky's trials, Gari Kasparov's present ordeals as the leader of the Russian opposition, and so on. In more benign regimes, the attacks against the personal integrity of the opponent took less sinister forms. In Romania, for example, 2007 – the first year of EU membership for the country – started with an attempt of top politicians to impeach each other. President Basescu was at the receiving end of these attacks. There are ongoing judicial proceedings against a former prime minister of the country – Adrian Nastase – as the accusations are about corruption.

Across the Danube in Bulgaria, there is also a rising tide of corruption allegations and judicial proceedings against senior politicians. The former mayor of Sofia – Sofianski – was the primary target of those.²⁴ Also, the ex-tsar Simeon – after leaving the PM office – was entangled in complex judicial proceedings about the legality of the restitution of his real estate property: the accusation against him was that he had taken back his property in a corrupt and illegitimate manner. There was an interesting irony in this case, however. Simeon came to power on the popular belief that an aristocratic person will put an end to the succession of corrupt Bulgarian politicians: he left the PM office leaving the public with the impression that his property as a whole was acquired in a corrupt and illegitimate way. Bulgarian courts have actually done nothing clarify conclusively the matter – ongoing proceedings, preliminary investigations, etc. serve only to fan public suspicions (Part Three will explore these issues further).

One of the probably most threatening developments took place in Poland. There, the nationalist-populist political forces of the twin Kaczynski brothers originated a so-called second wave of “lustration”. The idea was twenty years after the beginning of the transition to ultimately disclose all agents and collaborators of the communist secret services. More than 700,000 individuals were supposed to go through a screening procedure for their political past.

23 For a brief description of this attempt see: <http://observer.guardian.co.uk/international/story/0,6903,1371999,00.html>

24 Partly to avoid criminal prosecution Sofianski run for and was elected to the Bulgarian parliament. At the time, parliamentarians enjoyed immunity against prosecution: under popular pressure and pressure from the EU, this immunity was removed through a constitutional amendment, however.

The idea behind this operation was nothing less than total purification of the Polish political elite in the pursuit of moral and political integrity: the more cynical interpretation saw this operation as a tool 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 was crucial. First, the Constitutional Court had to assess its compatibility with fundamental rights. Then, the judiciary will had to enforce the rule that public figures failing to disclose information or to comply otherwise with the proceedings will be liable to serious sanctions: fines, dismissals, bans from pursuing a specific profession for a number of years. It was not difficult to predict that the courts would be exposed to huge politicisation in this “integrity-guaranteeing” exercise.²⁵

Rise of judicial corporativism:

The rise of judicial corporativism is most visible in the fresh 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 – there were serious problems of both performance and accountability related to the judiciary. In both countries the judiciary actively resisted the introduction of substantial reforms. In Bulgaria, the Constitutional Court imposed severe limits on the kinds of reforms, which the parliament could introduce, in a series of judgements. In order to get around 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, the introduction of performance indicators and managerial approaches, leading to greater efficiency and accountability. In Romania the situation is quite similar, although under the pressure of an energetic Justice Minister – Monica Macovei – things had started to move faster 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, the judiciary took a partial revenge – the Justice Minister lost its position as a side effect of the impeachment battles between the President and the Prime Minister. With EU pressure receding, the straightforward defence of narrowly construed institutional interests of the judiciary seemed to increase in both countries.

25 Key articles of the 2007 Law law were judged unconstitutional by Poland’s Constitutional Court or Constitutional Tribunal of the Republic of Poland on May 11, 2007, making the role of the Institute of National remembrance (IPN) unclear and putting the whole process into question. For a general overview of late lustrations see Cynthia M. Horne, Late Lustration Programs in Poland and Romania: Better Late than Never?, 2007 at http://www.allacademic.com//meta/p_mla_apa_research_citation/2/1/1/2/8/pages211286/p211286-1.php

A final example highlights the trend: if during the 1990s the most important decisions of the Bulgarian Constitutional Court were on issues such as land restitution, freedom of speech, right to association, privatisation and social-security reform, since 2001 this body's key judgements have mostly been on judicial independence. Self-serving policies are becoming the order of the day.

General impact of populism on the rule of law in Eastern Europe

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

These facts *per se* do not render Ely's proceduralist ideal of reinforcement of political representation through judicial action irrelevant.²⁶ Indeed, in some cases courts have helped to improve democracy by curbing the power of aggressive majorities or by protecting vulnerable minorities. The whole question is about the dynamics of the process, however. Ely relied on the example of the Warren Supreme Court, which responded positively to the rise of the Civil Rights Movement and took on board many of its claims about equality and political participation of disadvantaged groups. This is a demonstration of the responsiveness of courts to rising political movements.

Are courts – as bodies bound by constitutional rights and principles – responsive only to liberal political pressure however? The evidence for such a conclusion is unfortunately lacking. In the US, during the McCarthyism period in the 1950s the Supreme Court did accommodate illiberal attitudes and positions. The already-mentioned *Bush v. Gore* case is also indicative of the tendency of courts to go with rising political forces.

The Eastern European perspective, offered so far, supports such a conclusion. During the 1990s, there was a wave of liberalisation in the region, which was marked by the rise of liberal political forces to power.²⁷ This was the high point of constitutional courts as well, which became instrumental for the entrenchment of the values of liberalism in the ex-communist societies. Success was different in the different countries, but as a whole, constitutional review was established together with the belief that courts could curb the excesses

26 John Hart Ely, *Democracy and Distrust*, Harvard UP, Cambridge Mass. 1980.

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

of aggressive majorities or authoritarian leaders. The beginning of the new century spelled the rise of a new political fashion 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 experience a rising tide of illiberal and populist parties and leaders, which question many of the consensual goals and priorities of the transition period. Poland's flamboyant Kaczynski coalition emitting anti-Semitic, anti-homosexual messages, and trying to criminalise its political opponents under the guise of lustration laws pursuing absolute "moral integrity", was probably the most striking example.

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 a different degree, 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 – the sense of judges being impartial arbiters has been ultimately lost. Elsewhere in the region courts have succumbed to populist pressures in their policy making 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 – 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. It could be argued 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.

PART TWO:**POPULISM IN BULGARIA – THE POLITICAL CONTEXT**

This part of the paper examines the rise of populism in Bulgaria and focuses on these characteristics of the phenomenon, which have the biggest potential to affect the rule of law.

In order to better grasp the nature of the Bulgarian developments relating to the rise of populism, it is necessary to start with a contrast: a brief description of the preceding period of *non-populist* politics in the country. During the first decade after the fall of the communist regime in 1989, the Bulgarian political process was dominated by two ideological party camps. On the left there were the ex-communists (BSP – Bulgarian Socialist Party); right of the centre were the democrats – the Union of the Democratic Forces (UDF), who were the driving force behind most of the liberalisation processes initiated during this period. Thus, for more than ten years there was a *resemblance* of a generally established party system in Bulgaria structured along the left-right cleavage typical of some of the mature democracies.

The BSP made extensive use of ideas such as the social state, greater intervention of the government in the economy, minimal privatisation, and stronger ties with former foreign partners and Russia in particular. The UDF, on its part, stood for more radical pro-market economic reforms, including privatisation and restitution of agricultural lands and urban property nationalised by the communist regime, full integration and membership into the Euro-Atlantic structures – EU, NATO, etc.

Further, the two blocks had a different assessment of the communist past: the UDF was rejecting it as a period of oppressive totalitarianism, while the BSP was much more nuanced, attempting to stress the positive achievements of its predecessors in government. In short, the two main parties espoused different visions of the past and the future of Bulgaria, defended different programmes before the electorate, and demonstrated rather sharp divergences in terms of concrete policies. During most of the 1990s, Bulgarian society was passionately divided along the ideological lines drawn and promoted by the party system. The role of personalities in politics was secondary: party supported candidates as a rule won against popular leaders.²⁸

The first populist wave

In 2001 all this dramatically changed, and the appearance of stability and consolidation of the Bulgarian party system evaporated. The return of the former

28 The most striking example of this was the win in the 1996 presidential primaries of the virtually unknown candidate of the UDF Petar Stoyanov against the former dissident and first democratically elected president of the country Zhelyu Zhelev.

tsar Simeon II from long years of exile was an event, which was greeted by welcoming demonstrations in Sofia and the other major cities of the country. The gathering of large masses of people sparked reminiscences of the first years of the transition, when the ex-communists were forced out of government by popular pressure. In the same revolutionary vein, in 1997 the Socialist government of Zhan Videnov resigned under the continuous pressure from street protests. Not surprisingly, in 2000–2001 the then-ruling government of Ivan Kostov (UDF) reacted rather nervously to the popular return of Simeon II to the country, and mobilised all of its resources with the intention of preventing him from participation in the political process. First, the Constitutional Court – in which the UDF had a clear dominance – banned Simeon II from participation in the presidential election because of residence requirements.²⁹ Secondly, and more controversially, a Sofia court denied registration to the National Movement Simeon II – the organisation with which the ex-tsar was planning to take part in the parliamentary elections. The denial was grounded in procedural considerations – the lack of support shown by signatures, etc: all of these were rather curious in the case of a political organisation which was just about to win half of the seats in the Bulgarian parliament. All these efforts came to no avail, since Simeon II and NMSII managed to run in the elections even without being registered as a separate party: they used the registrations of two small and insignificant parties for that purpose.

The results of the June 2001 parliamentary elections were shocking: the NMSII won more than forty per cent of the vote and exactly half of the seats in the Bulgarian National Assembly. The result would have been an absolute majority in the parliament had it not been for several small parties which used Simeon II's name on their ballot without his authorisation – some three per cent of the vote were lost on such parties through voter confusion. All established “traditional” parties – the right-wing UDF, together with the left-wing Socialists – won less votes than Simeon II's NMSII. The party system seemed to be the first victim of Simeon II's arrival, which showed that it was not well established, the parties were not truly programmatic, and the political culture of the population was susceptible to fits of opportunism and populism.³⁰

29 The 1991 Constitution requires that candidates for presidential office spend the five years in the country before the elections. This provision was introduced in 1991 specifically against Simeon II – ironically, it came to be applied ten years later than the original plan. In this case the Constitutional Court faithfully stuck to the plain text of the basic law, although on other occasions the CC has proven that it could interpret rather creatively constitutional provisions. For instance, several years before that the CC had returned all of the real estate property of Simeon II and his family, which amounted to millions of euro.

30 The electoral programme of NMSII looked like the manifesto of any fairy-tale hero: it sometimes defied the laws of nature, and, more often, the laws of economics. The beginning was innocent: the NMSII made it clear that it would follow the major policies of the former government (Kostov's passwords), but would bring about more radical economic reforms, and would eradicate corrup-

Using the concept of „populism” as defined for the purposes of this paper, it is justified to classify the coming of the former tsar to power as an instance of populism for the following reasons:

- Simeon II appealed to the people as a whole, without stressing the cleavages, differences and distinctions within this whole, and without assuming that there could be conflicting interest within the people, not all of which could be satisfied in the same time;
- Simeon II’s campaign portrayed the then-existing political elite as largely politically corrupt. Against this background, he presented his candidacy as the triumph of personal integrity in politics;
- Simeon was campaigning against the existing parties. For a long time after his arrival he refused to register the NMSII as a political party,³¹ still nurturing the idea that he was the tsar of all Bulgarians, not a simple party leader. Simeon II, himself, was not a member of parliament – his name was in the title of the party list but not among the party candidates;
- Simeon II’s movement was agnostic and indifferent towards political ideology. His main message was that the ideologies of the established political parties were already *passe*.
- The major source of mobilisation of the people behind Simeon II was personal – his personal charisma and historical legacy. Programme and party structure were non-existent as sources of mobilising electoral support. As to the party structure, it was already made clear that there was not sufficient time for institutionalising the movement in the country: the party list of NMSII was created in a haphazard way, little different from the lottery in its reliance on chance and formal equal opportunity for the second tier of the Bulgarian political elite, which has been left out from the patronage practices of the two major parties – the UDF and BSP. In terms of programme, Simeon II was arguing that this was an issue for the experts to decide – not an essentially political problem. For this purpose he invited young, educated Bulgarians from abroad (without any

tion, which is perceived as a major problem in Bulgaria. The heroic part started with the promise that the tsar would get things ‘substantially better’ in the country within 800 days. One of the ways of doing so would be by simultaneously reducing the budget deficit to zero, and significantly cutting the taxes. This could have been possible if the country was to slash its welfare provisions – healthcare and education, in particular. But this was not what His Majesty’s Economic Experts had in mind – they were planning an immediate improvement of the situation of the ‘ordinary people’ in Bulgaria, most of whom are heavily dependent on these anyway under-funded public services. Nor were the experts envisaging a default on the huge foreign debt payments of the country or abandoning of the tough budget restraints of the currency board: in their opinion, all their goals, contradictory as they appeared, were to be achieved simultaneously. The eradication of corrupt practices was addressed by a more ‘coherent’ strategy – it would be impossible, it was argued, for a (former) tsar and all his men to dirty their hands in inappropriate activities.

31 Before the June 2001 elections Simeon indeed tried to do so, as stated above, in order to be able to compete for parliament. After he managed to send people to parliament, he refused to register a party.

previous political experience) to become ministers in his cabinet, and to design the policies in different governmental sectors;

- In terms of political presentation and communication Simeon II stressed much more appearances than content. In terms of content he was minimalist and elusive: he spoke slowly and uttered well worn-out clichés. In terms of presentation, however, he was quite skilful in stressing the mass support and affection that he enjoyed, his non-confrontational, polite and kind political style, which was rather refreshing against the background of the rather unrefined Bulgarian political class.
- Finally, and probably most importantly, Simeon II was campaigning not on a specific coherent programme, as it was already pointed out, but on people's expectations for what should be done. In short, he created the impression that after years of austerity measures finally there was coming the time of prosperity for everyone. The ex-tsar summed up these expectations in his promise to improve dramatically the situation in the country for 800 days.

The first wave of populism in Bulgaria, represented by the NMSII, demonstrated the electoral potential of the populist approach: for a very short period of time it managed to assemble and mobilise the people behind a charismatic leader. It must be stressed, however, that once in office the NMSII went through a complex evolution which transformed it from a populist movement into a "traditional" political party.³²

The second populist wave

Days before the 2005 presidential election the pollsters in Bulgaria were in for a big shock: out of the blue, a new political actor appeared claiming 8–9 percent of the voters' support. Since this was so surprising, the rumour was that leading polling agencies delayed the announcement of their prognoses, because they feared the accuracy of the results. The new actor was a party organised around a TV journalist radically criticising the political establishment as corrupt and dangerous from the point of view of the national interests. The party was called "Ataka", and the journalist Volen Siderov. His career trajectory had taken him to a regional cable network – TV SKAT, having a devoted following of nationalistic, anti-establishment bend. Siderov's biography is instructive for the student of populism. In the beginning of the transition,

32 After coming to power the NMSII cut back on many of the fantastical promises its leader made or suggested in the pre-election period. Ultimately, the NMSII led a government whose politics was continuous with the previous government: financial discipline and strong commitment for integration in NATO and the EU. The overall result of this was positive for the country. From the point of view of the NMSII, however, the revision of the pre-electoral promises led to a quite dramatic fall in public confidence in the movement and its leader: only two months after the June 2001 election the fall of support started to be noticed.

Siderov was the editor-in-chief of the UDF newspaper *Democracy*. After that he became a journalist in one of the most influential dailies *Monitor*, a newspaper on the borderline between the serious press and the tabloids.

Ataka ultimately entered the Bulgarian parliament in 2005, surprisingly becoming the biggest opposition group in it (albeit for a short period of time, since the group soon after disintegrated): the other bigger parties – the BSP, the NMSII, and the Movement for Rights and Freedoms – formed a grand ruling coalition. The entering of Ataka in the Bulgarian parliament could be treated as an instance of populist politics and mobilisation for the following reasons:

- Ataka's ascent was a small-size replica of the ascent of the NMSII to power: much of the analysis of the pre-electoral strategy of the NMSII is applicable to Ataka as well. The only difference was the nationalistic discourse and the language coming close to hate speech used by the new actor;
- Ataka was appealing to the Bulgarian people as a whole, denying the relevance of differences and cleavages embedded in the party system, and denying even the rights of ethnic minorities to political representation. Ataka was the first party in Bulgaria since the relative consolidation of Bulgarian democracy to challenge the legitimacy of the MRF (ethnic Turkish minority party in its essence). It was also the first party to use a thinly veiled racist language against the Roma minority in Bulgaria;
- The role of the personality of the leader of Ataka was undeniable. The lack of a party structure and organisation was compensated for by personal charisma of a specific sort;
- The role of the media, and the TV SKAT in particular, explains much of the success of Ataka. This was the main tool of mobilisation of electoral support of the organisation. SKAT is in fact a TV station which provides a forum for populist discourse. It has mainly publicist and analytical programmes, giving voice to the second, third and the lower tiers of the political and intellectual elite. Not surprisingly, the station is “anti-elitist” (meaning against the empowered political elites), defends public morality, national interests, national integrity etc. All this is presented with a degree of popular culture, conspiracy theories, and tiny bits of high culture;³³
- Ataka is not a programmatic party by any means. Its political agenda is a compilation of “expressive issues”, most of which are not translatable into concrete policy. For instance, the party stands for the revision of the results of the whole transition period, since all the transformations, it alleges, were done in an unjust way. It is not clear how such a revision

33 It is very important that the network does not invest in the quality of the picture or the quality of the content of its programmes. This is probably an intentional aesthetic choice, which gives to the whole show a very “natural” air, bringing it close to reality TV and even the documentary genre. The overall effect is that it is as if “the people” express themselves in the programmes of this TV

could be achieved, however, short of a revolution leading to re-nationalisation of privatised assets. The party has never committed itself to such a concrete policy, however. The same is true of its position on the Roma: it is clear that the party views the Roma as the source of numerous problems, but it is not apparent what the party thinks about the solutions to these problems. Finally, the party relates immediately to symbolical issues, such as the closure of the nuclear reactors at the Kozlodui power plant, the destiny of the Bulgarian nurses in Libya, the alleged national irresponsibility of scholars re-examining certain national myths, as the myths around the April 1876 uprising in Bulgaria, etc;

The culmination of Ataka's political career thus far has been the presidential elections in 2006 when Volen Siderov was one of the two candidates reaching the second decisive leg of the contest. There, Siderov lost to the Socialist incumbent candidate Georgi Parvanov by a very large margin – approximately 80 to 20 per cent.³⁴

The third populist wave

In 2007 there was another electoral shock for the political establishment in Bulgaria. At the May EU parliamentary elections a new political party – GERB – led by the popular mayor of Sofia Boiko Borissov won most of the votes. In the local elections in the autumn of 2007, GERB came out as the first political force in the country: 80,000 people more voted for the party-lists of GERB compared to the voters for the candidates of the Socialists. In circumstances of low turnout, this was a meaningful difference, although admittedly small in absolute terms.

In the 2009 electoral cycle GERB won both the European Parliament elections and the national parliamentary elections. Especially important was the win for the National Assembly, where GERB got 116 out of the 240 seats, which enabled it to form a minority government. The Socialist Party – one of the main parties of the Bulgarian transiting – managed to obtain only 40 seats, while the remnants of the former UDF (called the Blue coalition)

34 The situation was similar to the situation in France at the previous presidential elections when Le Pen lost to Chirac by a very large difference. It is important to stress that in order to receive this result, Ataka had to move slightly to the centre of the political spectrum, by scaling down its claims and adopting a much milder and acceptable for the general public political discourse. After the presidential election, however, the party moved back to more radical positions, influenced by its European counterparts from the alliance of right-wing extremist parties in the European parliament. At the 2007 elections for the European parliament the party did relatively well by winning 3 out of the 18 Bulgarian seats. Its support has been stabilised at a close to ten per cent of the voters, which gives it a good starting position in future elections in Bulgaria. In the autumn 2007 local elections, the party again did relatively well, by managing to form sizable groups of representatives in the local councils of a number of Bulgarian cities. In many cities its group was the third largest after the groups of GERB and the BSP. In 2008, Ataka left the Bulgarian parliament in preparation for the 2009 parliamentary elections.

GERB's main resource was and still seems to be the personal charisma and appeal of its leader. The party was registered and set up only in 2006, reflecting the political ambitions of its leader to convert his general popularity into representation at the national level. Borissov, very much like Siderov, was member of the second tier of the political elite. His career started inconspicuously: during much of the 1990s he was a businessman of a specific, highly symbolic for Bulgaria type – the boss of a private security firm. These organisations were typical for the fledging private enforcement business, which was dangerously close both to the state security structures (police, secret services, etc.) and the criminal underworld. In such a context, Borissov could hardly avoid, even if he tried, contacts with people connected in the popular imagination with the “organised crime” and the “political mafia”. Therefore, his political CV, as composed by the public consciousness, starts with allegations for illegitimate, suspicious, and improper connections. His visual image also feeds such public perceptions as far as Borissov has espoused (consciously or not) the aesthetics of the good and reformed criminal: no hair, no glasses, always slightly unshaven beard, short and expressive speech in the idiom of the street, leather jackets, athletic looks, etc.

The first fact, which brought Borissov to the attention of the public, however, was that he was the bodyguard of the former communist leader Todor Zhivkov, while the latter was tried for crimes committed during his long stay at the helm of the totalitarian regime. Borissov's career took off as late as the end of the 1990s, when he became the official bodyguard of Simeon II. This royal appointment elevated Borissov to the heights of politics, although this did not happen immediately. First, he became the head of the police under the government of the NMSII. In 2005 he ran as a candidate for parliament of the NMSII, and won a seat in parliament. He declined to leave the police for the parliament, however, and stayed on under the coalition government of the BSP, NMSII, and MRF. This did not last for long since in 2006 Borissov decided to run for the mayor of Sofia – elections which he won without a great difficulty. Borissov's public ratings have been extremely high since 2002–2003, but it was only in 2005–2006 when he converted these ratings into political support. Borisov's party GERB (abbreviation from Citizens for European Development of Bulgaria but also meaning “heraldic sign”, “coat of arms” in Bulgarian) became an electoral force only in 2007, although it is still outside of the National Assembly. The reasons for categorising Borissov as a leader using populist strategies are the following:

- Borissov speaks directly to the Bulgarian people. Much of his success could be attributed to his ability to speak to the ordinary people, to look like many of them, and to articulate what they commonly think about complex governmental matters;

- Electoral success and mobilisation are to be attributed largely to personality factors, not programmatic issues. Borissov consciously attempts to present his party as a right-of-the-centre-party, but in terms of programme and policy, Borissov has been always elusive, using “symbolic issues” very much in Siderov’s manner. It is not surprising, therefore, that Ataka and Gerb are not seen as direct enemies, and that they have come to certain common positions on symbolic issues, such as the Kozloduy nuclear power plant, for instance;
- Borissov is to a large extent a product not of party life and party politics, but of media presentation. He has an extremely fine sense for PR matters and manages always to be in the focus of media attention. His use of street jargon in a relatively delicate manner and with a fine sense of humour makes him one of the media favourites;

Much of the analysis of Simeon II and Siderov could be applied to Borissov as well. He is much less aristocratic and more down-to-earth than Simeon, while being less nationalistic and fanatical than Siderov. From this perspective, Borissov presents a new stage of the fine-tuning of Bulgarian populist sentiments: it is spicier than the ex-tsar, but does not scare the people as much as Siderov does. These simple reasons probably account for the electoral success of the new popular hero. Nevertheless, he should be treated as part of the same phenomenon, the features of which could be summed up as follows:

- Disintegration of the traditional, ideological, programmatic parties;
- Loss of the mobilisation force of ideological and programmatic coherence, and party loyalty in elections;
- Rising value of personal charisma, expressivist and aesthetic techniques of popular mobilisation;
- Appeal to the people as a whole, and treating their acclamation and support as the ultimate legitimation in politics, trumping issues such as individual and minority rights, international conditionalities, etc;
- Heavy reliance on the public media, as a substitute of party structure in political mobilisation.

These are the major contours of the “populist condition” in Bulgaria.

Populism as a reaction to quasi constitutionalism

Populism in Bulgaria, as in the rest of Eastern Europe, could be understood as a reaction to a process of excessive constraining of the space for the development of alternative visions of democratic politics. As a result of this con-

straining, the platforms of the major political parties came dangerously close to each other, which opened space for more radical or simply extravagant newcomers to the political stage (NMSII, Ataka, GERB).

Constitutionalism did have a role to play in this process of constraining of democratic politics. “Constitutionalism” normally means the commitment of political actors to the observation of constraining principles in the form of rights and separation of powers. In Eastern Europe, the EU pre-accession process has helped strengthen the constraining of the powers of political majorities mainly through the explicit reinforcement of the “transition consensus” by the EU conditionality. If we consider the political Copenhagen criteria together with the requirement for “functioning market economy” “capable of withstanding competitive pressures”, we are going to see that these “conditions” in fact overlap with (what could be called) the “transition consensus” commitments. No serious political actor could deviate from these commitments, which gave them a quasi-constitutional status.

This process could be interpreted as “deep constitutionalisation” of politics or „quasi-constituonalisation”, since it reached much deeper into the political process, than normal constitutions actually do. The more concrete expressions of this “deep constitutionalisation” were the following:

- *Economic quasi-constitutional constraints:*

Economic policy was largely a discretionary area for the government until 1996 in Bulgaria. During these first transitional years, the Bulgarian Socialist Party was willing to engage in economic experimentation: it delayed the privatisation process, loosened financial discipline for the financing of loss-making state owned enterprises, etc. As a result, the financial situation in the country drastically deteriorated at the end of 1996, and the banking system virtually collapsed. In order to tackle hyperinflation, and to restore the trust in the banking system, the Bulgarian government established the so-called “Currency Board”, which fixed the rate of the Bulgarian Lev to the rate of the Euro (the Deutsche Mark originally). This was the first significant constraint on political discretion in the area of the economy, which deprived the government from the right to alter the exchange rate of the Bulgarian currency. The second major constraint was the conclusion of various agreements with the IMF and the World Bank, which provided for loans in return for fast reforms in the area of privatisation and the improvement of the functioning of the administrative apparatus. All of these limited significantly the room for the designing of radically different economic policies. Gradually, the two main parties – the UDF, and more significantly the Socialists – recognised these constraints as fully legitimate. This recognition, however, brought their economic programmes vary close together, and made them virtually indistinguishable after 1997. The beginning of the pre-accession negotiations for membership simply reinforced and further legitimated the already existing

economic constraints. An additional consideration eventually also emerged – the potential membership in the Euro zone, which would also require tight financial discipline in line with neo-liberal policies.

- *Political quasi-constitutional constraints:*

The accession of Bulgaria to EU and NATO imposed a virtual “political supervisory board” on the Bulgarian government. It had to report regularly to the EU Commission on progress in agreed upon reforms, as well as to coordinate its foreign policy with EU and NATO partners. The room for independent initiatives was decidedly decreasing, although of course it could not be fully eliminated. For instance, although the Bulgarian population was as a whole against the intervention of NATO against Milosevic’s regime, the Kostov UDF government gave permission to NATO for the use of Bulgarian air space for attacks against Yugoslavia: the only act of defiance was the refusal to accept Albanian refugees in Bulgaria.

In the area of substantive reforms of the administration and the judiciary, the influence of the EU Commission was very strong: a fact which has been well studied and documented. The overall result of the monitoring and the conditionalities was by and large positive from the point of view of the modernisation of the country. But it needs to be said that political priorities were set up together by the Bulgarian government and the Commission. Due to this joint decision-making, some issues were raised as political priorities much higher in the public agenda that they would have been in other circumstances. Thus, the reform of the judiciary gained the status of a paramount concern in the period 2002–2007. The same was with the fight against corruption and organised crime. In the same vein, areas in which the EU was not that interested – such as the reform of the public education system and healthcare – were systematically neglected by successive governments. The appropriation of public funds is a reliable indicator: while the budget of the judiciary was rising significantly from year to year (as the salaries of the judiciary), the budget for the education system remained relatively stable (as the salaries of teachers and university professors). This situation was the reason for a major strike in the school system in the autumn of 2007, which was the biggest strike seen in Bulgaria after the changes in 1989.

- *Judicial constitutional and quasi-constitutional constraints:*

The Bulgarian Constitutional Court (CC) and the Bulgarian judiciary have asserted themselves strongly during the transition period. During the 1990s, the Bulgarian Constitutional Court managed to “bracket out” from political competition at least four main areas: restitution of agricultural land, restitution of urban property, judicial independence, and independence of the public electronic media. In all these four areas there was significant political disagreement. In the first two, the disagreement was between the left and the

right: the BSP and the UDF. The Socialists opposed the restitution of property nationalised by the communist regime, and instead, introduced a scheme of compensation for the assets with state bonds. The UDF, with the decisive help of the CC in this regard, prevailed: the principle of full restitution for nationalised assets was promoted to the rank of a constitutional principle.

Regarding the independence of the judiciary and the media, the political dividing line ran not so much between left and right, but between government and the opposition: throughout the 1990s, Bulgarian governments had tried to assert their influence in these areas. Here again the CC was quite instrumental in curbing these attempts.

Overall, the impact of the CC in this period could be assessed as positive, but again a side effect of this influence was the diminishing of the room for substantive political competition after the constitutionalisation of particular questions.

Since the beginning of the new century, the CC has focused predominantly on the issue of judicial independence, interpreting this principle to prevent the possibility of any major reform of the judicial system. This has brought the Court as a whole in conflict with the political establishment: most of the parties at the present moment would adopt more radical reforms than the CC would be willing to permit. In any event, however, the constitutionalisation of a very strict conception of non-interference with the judicial system has further decreased the possibilities for radically different ideas of judicial reform – a policy area which became central in the period 2001–2009.

International courts, and especially the ECtHR, have had a similar impact on the Bulgarian political process, although much more limited. One issue which comes to mind is the legitimacy of ethnic minority parties. The pressure of the Council of Europe and its bodies was key for the legitimisation of the Movement of Rights and Freedoms, which is generally an ethnic minority party. Without the existence of such foreign standards, this legitimation would have been more difficult (all this does not mean that the ECHR standards of political freedom are fully applied in Bulgaria).

In terms of quasi-constitutional judicial constraints on political majorities one could point out the increasing assertiveness and the autonomy of the ordinary Bulgarian judiciary. The Supreme Administrative Court (SAC) is a case in point. This body attempted to play a significant role in some of the big privatisation projects of the Simeon II government in the period 2001–2005. In coalition with some political actor, the SAC helped to block the privatisation of the tobacco monopoly company Bulgartabac. SAC also threatens to stall one of the major reforms in the education system, by invalidating (again) the introduction of A-level exams. All these instances demonstrate that political majorities face increasing competition from independent judicial bodies in

the policy making process: constraints on the will of the majorities are increasing. The EU insistence on issues such as strengthening of judicial capacity, judicial independence, etc. have actually amplified these trends.

- *NGOs as quasi-constitutional constraints*

NGOs have not been a significant constraining factor on the Bulgarian political process, at least in comparison with the other above mentioned and listed factors. Still, however, there have been examples where NGOs have been successful in the imposition of specific goals and priorities on political actors. The most prominent example of this was the anti-corruption programmes designed by the Coalition 2000 organisation and the Centre for the Study of Democracy. With the help of significant foreign aid from USAID Coalition 2000 managed to raise public awareness of corruption and make anti-corruption one of the top priorities of government. While the results of these efforts are subject to intense debate, it is beyond doubt that the problem itself, as well as the strategies to tackling it (measurements of corruption, design of action plans, creation of anti-corruption commissions and other bodies), were virtually imposed on political actors by NGOs and foreign donors. The EU granted further legitimacy to the NGO-initiated anticorruption campaigns and compelled successive governments to take them seriously.

All these considerations suggest that the EU accession process has helped the entrenchment of a “deep constitutionalism” which imposes quite comprehensive and pervading constraints on the political process. Paradoxically, however, this entrenchment has had dubious result on the development of a “classical” conception of constitutionalism in Bulgaria, which consists in increased respect for the Constitution and its protective mechanisms, such as the Constitutional Court. In other words, while quasi-constitutional constraints have flourished in the pre-accession period, the “real” constitutional constraints did not fair that well.

This dynamic provides us with a key for understanding the impact of populism on the rule of law in Bulgaria. We have to expect two types of pressures. On the one hand, there is the pressure on courts and the judiciary to stick with an expansive notion of „quasi-constitutionalism” typical of the transition period. This pressure would come from the „traditional” political forces, the parties of the „liberal consensus”. On the other hand, one could expect pressure on the courts from the new populist players, who would strive not only to unravel the „liberal consensus” of the transition period, which acquired a quasi-constitutional status, but also the constraints of „constitutionalism proper”, such as constitutional rights and separation of powers. It is this dynamic that we set out to explore in the next part of the paper.

PART THREE:
POPULISM AND THE BULGARIAN JUDICIARY

In this part of the paper I offer an analysis of a series of case studies, which illustrate different types of impact of populism on the rule of law in Bulgaria, following the analytical framework proposed in the first part of the paper.

COURTS AS REGULATORS OF POLITICAL COMPETITION

- *Courts used to block populist new comers (NDSV case in 2001; Simeon II for president)*

The return of the former tsar Simeon II from long years of exile was an event, which was greeted by welcoming demonstrations in Sofia and the other major cities of the country. The gathering of large masses of people sparked reminiscences of the first years of the transition, when the ex-communists were forced out of government by popular pressure. In the same revolutionary vein, in 1997 the Socialist government of Zhan Videnov resigned under the continuous pressure from street protests. Not surprisingly, in 2000–2001 the then-ruling government of Ivan Kostov (UDF) reacted rather nervously to the popular return of Simeon II to the country, and mobilised all of its resources with the intention of preventing him from participation in the political process. First, the Constitutional Court – in which the UDF had a clear dominance – banned Simeon II from participation in the presidential election because of residence requirements.³⁵ Secondly, and more controversially, a Sofia court denied registration to the National Movement Simeon II – the organisation with which the ex-tsar was planning to take part in the parliamentary elections. The denial was grounded in procedural considerations – the lack of support shown by signatures, etc: all of these were rather curious in the case of a political organisation which was just about to win half of the seats in the Bulgarian parliament. All these efforts came to no avail, since Simeon II and NDSV managed to run in the elections even without being registered as a separate party: they used the registrations of two small and insignificant parties for that purpose.

The results of the June 2001 parliamentary elections were shocking: NDSV won more than forty per cent of the vote and exactly half of the seats in the Bulgarian National Assembly. The result would have been an absolute majority in the parliament had it not been for several small parties which used Simeon II's name on their ballot without his authorisation – some three per

³⁵ The 1991 Constitution requires that candidates for presidential office spend the five years in the country before the elections. This provision was introduced in 1991 specifically against Simeon II – ironically, it came to be applied ten years later than the original plan. In this case the Constitutional Court faithfully stuck to the plain text of the basic law, although on other occasions the CC has proven that it could interpret rather creatively constitutional provisions. For instance, several years before that the CC had returned all of the real estate property of Simeon II and his family, which amounted to millions of euro.

cent of the vote were lost on such parties through voter confusion. All established “traditional” parties – the right-wing UDF, together with the left-wing Socialists – won together less votes than Simeon II’s NDSV.

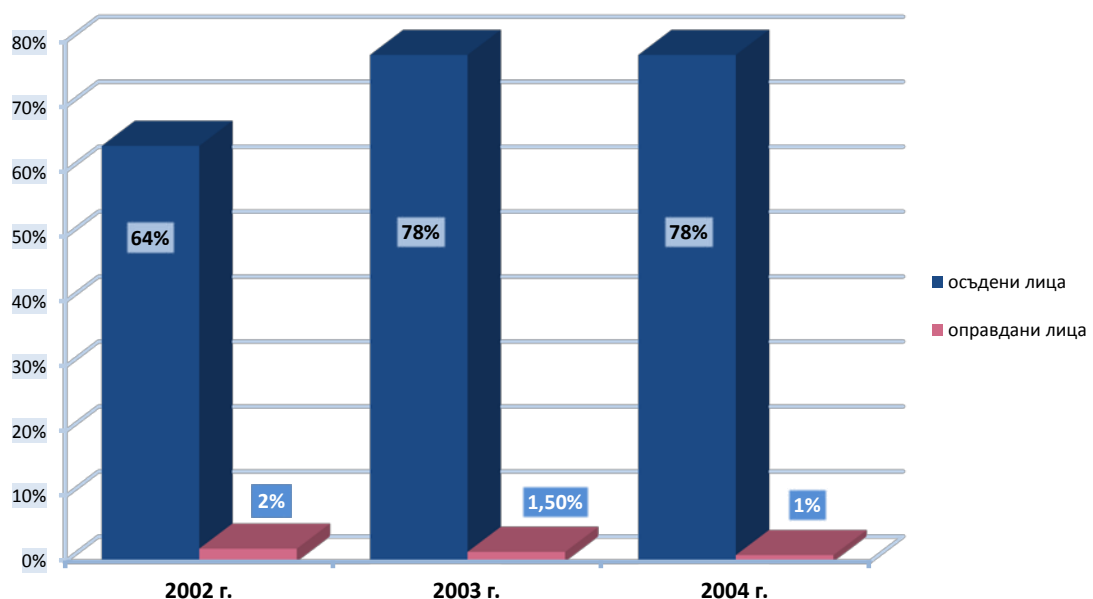
- *Courts mobilised against the political opponent: the Blue Coalition case 2009*

The fluid state of the Bulgarian party system, which was almost fallen apart due to the impact of the rising populists intensified political competition dramatically. Established parties – even the once stable and powerful BSP – began to feel threatened and saw their resources for political mobilisation weakened. Therefore, established parties with access to and influence over the high magistracy tried to capitalise on these relationships in order to block inconvenient political opponents. Thus, the ruling coalition of BSP and DPS (MRF) attempted to block through the courts the registration of the successor to the UDF as a political party (in the Sofia city court). The reasons for the denial of registration were very formalistic and ultimately the registration was granted. However, this happened only after the European Parliamentary Elections, and only after it was clear that the UDF will take part in the elections together with DSB in the Blue coalition, regardless of the state of its registration. The case clearly illustrates the instrumentalisation of the courts for the purposes of political competition.

*COURTS AS REGULATORS OF PUBLIC POLICY:
CRIMINAL POLICY AND THE NATIONAL SECURITY STATE AGENCY (DANS)*

- *Criminal policy area: the fear of acquittals*

Table 1. *Percentage of Convicted and Acquitted Persons from All Indicted Persons/ convicted blue, indicted red)*



According to original research carried by the Centre for Liberal Strategies³⁶, Sofia in 2006, in terms of duration of trial and pre-trial procedures as an indicator for the efficiency of the judicial system, Bulgaria does not differ dramatically from the practices in the EU member countries. (Civil cases – 350 days on average; criminal cases pursued by the state – 835 days, the pre-trial phase included.) It should be stressed, nevertheless, that these practices are rather diverse, and that our judicial system is not a high scorer in either one of the categories – we are rather in the middle, and possibly more towards the end regarding criminal cases. What our study shows is that there is a considerable “in-between- institutions” time, which the cases spend between two courts, or between the court and the prosecutorial office. There is a serious potential for optimization in this regard.

Further, with respect to criminal cases, it is the duration of the pre-trial phase which draws the attention. The accumulated duration here is 541, which is the overall time in the investigation and the prosecutorial offices (i.e. including the time, during which cases are sent back for further investigation). This demonstrates that the pre-trial phase accounts for most of the duration of a common criminal case (835 days altogether). One should not immediately jump from here to the conclusion that the pre-trial phase is inefficient, because other explanations are also possible. To begin with, the duration of the pre-judicial phase should be read together with the information about the “super efficiency” of the prosecutorial office, demonstrated by the ratio between convictions and acquittals: around 80% convictions as against only around 1% acquittals of all indicted persons. When these two facts are combined, we get a difficult-to-interpret picture. It is quite possible, that in the Bulgarian criminal judicial system as a whole there is a “fear” of acquittals. This increases considerably the relative weight of the pre-trial phase: either it has collected sufficient evidence for conviction, or the case is referred back to it for further investigation. The tendency to refer cases back increases the duration of the pre-trial phase.

- *DANS: anticorruption fighter or discourse controlling instrument*

Generally, the traditional liberal democratic political parties in Eastern Europe are in a precarious situation: their resources for political mobilisation are running out. Political actors – be they in government or in the opposition – need to make use of the anticorruption discourse as a means of mobilising electoral support. The problem for governmental parties is that “corruption” is generally an opposition topic. Traditionally governments have been on the receiving end, denying corruption allegations and attempting to dismiss all accusations unless proven in court. However, governments, sticking only to such a narrow and legalistic conception of corruption, – crimes proven in court

36 http://www.cls-sofia.org/uploads/files/Projects%20files/1162302147__final_report_bg.pdf

– could hardly use the corruption discourse for mobilisation purposes. On the contrary, such governments risk to see virtually everybody talking against them – the media, the NGOs, the businesses, eventually the prosecutors and the police, if they enjoy a degree of autonomy. Governments, therefore, need to re-examine their discourse on corruption very carefully, if they do not want to be left in isolation. In order to break up their discourse isolation, however, governments must take at least some of the following steps:

First they must publicly admit and recognize the problem of corruption. In this way they throw a discourse bridge to potential partners in other groups, who are not directly interested in political changes like the opposition, and build partnerships with them around specific anticorruption measures

With regard to civil society, in exchange for the public recognition of corruption, governments could require cooperation with NGOs in a number of spheres, such as measuring corruption, legislative drafting of programmes, action plans, and other normative acts, consultation with experts, etc.

In the case of media, the situation is more complex. In contrast to NGOs, media are not that interested in long-term institutional and legislative measures. They frame public discourse mostly through scandal and personalization of politics. Therefore, personnel changes are indispensable in order to bridge the gap between media and governmental discourse on corruption. For this purpose, governments must involve elements of the prosecutors and the police, with the goal of starting investigations of public persons, possibly including members of the governing parties as well (only in exceptional cases, of course). It is important to stress that for the purposes of collaboration with the media, governments need to focus only on the start of investigations, since media interest is highest at this point, and goes down dramatically at the more complex judicial stages, whose intricate procedures are often impenetrable for the public in general

Even the opposition could be co-opted in terms of anticorruption discourse by a skilful government. The key element here is the depoliticisation of the issue through the elaboration of a comprehensive anticorruption plan, which requires profound long-term institutional changes in all areas of governance. Ultimately, governing parties will be successful if they obtain the consent of the opposition for these programmes and plans. It is normally not impossible, since these contain predominantly common-sense measures aiming at the general improvement of governance. And they reduce the chance of anti-corruption measures being selectively applied to leaders of the opposition. In certain cases, members of the opposition could become also members of watchdog bodies, supervising the implementation of legislative and institutional reforms.

Finally, the government must tread very carefully in its anticorruption discourse in relation to the business sector. The best strategy to ensure its sup-

port is to lead a policy of downsizing of the state and lowering the taxes. These are the key anticorruption measures which the business community looks for. Normally, a political crisis and instability are not in the interest of the economic players.

Although governments must admit the existence of corruption (even if not judicially proven), in order to become players in the discourse battles, they have to do this cautiously. It is impossible for key government politicians to speak regularly about widespread corruption, to measure it, and to organise public awareness campaigns, as this will associate the politicians with corruption in the eyes of the public. Therefore, there is a political need for a semi-autonomous, semi-independent public body to take upon itself the anticorruption discourse on behalf of the ruling parties. Based on the previous discussion, one could conclude that it is rational for such a body to have the following structure and powers:

First, its composition should build bridges with civil society and the opposition. Members of civil society could either participate in the nominations of commissioners, or even sit on the commission. At a minimum, most of the meetings of this body should be open to the public and encourage media coverage and participation of NGOs. As to the opposition, a delicate balance should be sought between its participation and its support for long-term programmatic documents in the fight against corruption.

The powers of these bodies need to be concentrated mainly in the area of institutional reform, legislative drafting, and coordination among other government agencies. Investigative powers are not needed, and indeed, they could antagonize important groups as the police and the prosecutors. It could be the case, however, that the commissions are entitled to initiate proceedings, which then are transferred to the prosecutors and the police for continuation.

In relation to the media, the commission/agency should be able to supply them with media-friendly material. The best is the news of started proceedings and possible indictments. In the absence of such data, the second-best option is statistical data on the spread of corruption in society.

Finally, in relation to business, one could expect that the commission remains discrete and appreciative of the two major factors of business support: downsizing of the state and lowering of the taxes.

Very much in harmony of the rationale presented above, Bulgaria set up in 2008 a special agency with some limited investigative powers to target high level corruption and involvement in organised crime DANS (National Security State Agency). No one has systematically studied the impact of anticorruption bodies on the democratic process in Eastern European countries. In the name of objectivity, at the most we can say is that the introduction of anticorruption bodies has sometimes helped to break up conservative, inefficient and

authoritarian structures of the state machinery, and to introduce a greater degree of separation of powers in law enforcement – an area where the communist legacy of hierarchy and centralism is still felt. Thus, in the Bulgarian case, the introduction of DANS in 2008 helped break up the special services of the largely unreformed Ministry of Interior and diminished dramatically the powers of its head by strengthening the powers of the Prime Minister. Yet, this initial positive result was quickly overshadowed by a string of subsequent scandals in which DANS got entangled, including an attempt to use surveillance instruments against a large section of the Bulgarian media. In January 2009, a senior representative of the European Commission summed up the situation in a revealing way: „...the introduction of DANS was a positive step...Now we expect it to start work.”³⁷

COURTS AND IDENTITY POLITICS

- *The Constitutionality of political parties: The Bulgarian Constitutional Court decisions on OMO Ilinden and militant democracy doctrines*

Remarkably, immediately after the adoption of the 1991 Constitution, the Bulgarian Constitutional Court delivered a very liberal in spirit judgement, relaxing considerably the bans on ethnic and religious parties entrenched in Art. 11, 4 of the basic law.

Decision 4, 1992:

The constitutionality of the Movement for Rights and Freedoms

In this case, the constitutionality of the Movement of Rights and Freedoms (MRF or DPS, as it is known in Bulgarian), a predominantly Turkish-by-membership party, was challenged before the Constitutional Court right after the first elections carried out under the new 1991 Constitution. The CC dealt with the question whether the MRF was falling under the prohibition of establishment of political organisations on ethnic and religious grounds (Art. 11,4 and Art. 44,2), and whether its activity was directed against the sovereignty, national security of the country, as well as the unity of the nation. The challenge was sponsored by parliamentary representatives of the Bulgarian Socialist Party (the former communists), who were trying to capitalise on the nationalistic feelings among large parts of the Bulgarian population; the socialists had been the major advocates for the inclusion of the ban in the 1991 Constitution.

In the central part of the argument, the judges admitted for consideration the

37 “Interview with the Vice President of the EU Commission Jacques Barrot”, Capital Weekly, issue 3, 23 January 2009, www.capital.bg.

challenges based on the general constitutional principle of Art. 11,2 – the prohibition against establishing parties on an ethnic and religious basis. In their reading of this constitutional provision, the judges interpreted the various prohibitions contained in it as a single “militant democracy clause”³⁸ aiming to protect the constitutional order of the country. They argued that the ban was directed generally against parties which threaten the constitutional order: from their wording, it was not clear what *separate* role the “ethnic, racial and religious” element of the ban played, if it had any such role at all:

The placing together in Art. 11,4, of the prohibition of establishing political parties on ethnic, racial, and religious grounds and the “prohibition” of establishing political parties which aim to come to power through violent means, gives grounds for the conclusion that the former prohibition also has a protective function and aims to defend the state and state power from any extreme consequences, which might result from the development of a process of ethnic, racial, or\and religious confrontation... Being erected on the idea of the unity of the Bulgarian nation, the Constitution... simultaneously recognises the existence of religious, linguistic, and ethnic differences... [T]he [Constitution] does not aim to establish a prohibition directed against a certain category or categories of persons distinguished by their ethnic, racial, or religious characteristics, but to disallow the establishment and functioning of political parties in a rigid frame defined by ethnic, racial, or religious characteristics, as well as parties inaccessible to persons lacking these characteristics.³⁹

The judges further stressed the *open* and *voluntary* character of the MRF, demonstrated by its internal regulations, the membership of its governing bodies and parliamentary caucus, as well as by the presence (although by no means significant) of representatives of different ethnic groups among its rank-and-file members (the membership of the party was predominantly ethnic Turkish). Also, the Court examined the electoral platform of the Movement, and ruled that although it had set for itself the goal to amend the Constitution, and although it had used the term “minority” (not mentioned by the Constitution), the organisation had not violated the basic principles of the Constitution. The CC ultimately held that the party *did not threaten the constitutional order* and dismissed all challenges against it.

The political soundness of the decision of the CC is beyond question: the judges prevented the escalation of ethnic tension in Bulgaria, in a time when the new constitutional order was far from established. Also, the judges diluted an express constitutional ban, which was embarrassing and damaging

38 ‘Militant democracy clause’ in German constitutional law is a doctrine, which allows for the limiting of constitutional rights, if their exercise threatens the free democratic order. (For instance, Art. 21(2) of the Basic Law, declaring the unconstitutionality of political parties ‘seeking to impair or abolish the free democratic order or endanger the existence of the Federal Republic of Germany...’) Kommers (1997: 217–218).

39 Jurisprudence 1991–1996, p. 52.

for the international reputation of the country. Not only was the result of the decision politically sound, but the constitutional reasoning involved was also correct, although not based on coherence considerations.

First, the judges avoided defining and elaborating conceptions of general concepts such as “minority rights” and their relationship with the principle of the “unity of the nation”, “national sovereignty”, and “democracy”. Their decision refused to elaborate all abstract and general constitutional concepts implicated in the case, such as “minority”, and “national sovereignty”. Furthermore, the judges did not answer fully the question what it is to have a party established on an “ethnic basis”.

The case was ultimately resolved on the basis of a simple test of unconstitutionality: whether the MRF threatened the existing constitutional order. On this issue, the judges created a doctrine of local coherence, grounded on a limited number of principles. They held that, as long as the party programme and activities were not directed at the subversion of the constitutional order, at its violent change, and as long as the party was not exclusive and closed to members of other ethnic groups, it was not a danger for the constitutional order. Global interpretations were avoided, the drawing of all implications of the decision for global interpretations as well.

Eight years after this decision, the Bulgarian CC delivered another decision on the constitutionality of political parties, which parted with the logic and the rationale of the first decision in important ways. The slightly nationalist overtones emerging in the jurisprudence of the CC on this issue are telling: they anticipated the gradual rehabilitation of mild nationalism in political discourse and in political life. This rehabilitation was used and further enhanced by the rising populists. It is not a surprise, therefore, that the rehabilitation of mild nationalism in constitutional jurisprudence took place exactly at the turn of the century – the time which marked the end of the transitional party system and the advent of the new populist age.

Decision 1, 2000:

The constitutionality of OMO Ilinden – PIRIN

Eight years after the MRF decision, the judges faced a challenge against the constitutionality of a tiny Macedonian party. The challenge took place after the 1999 local elections, in which the party – OMO Ilinden-PIRIN – collected around 2000 votes and managed to win only one mayoral place in a small village. Understanding the issue of the Macedonian national identity may require a long and complex discussion: yet, it is probably not too controversial to say that the modern Macedonian nation appeared only in the 20th century on the basis of the Slavic population living between Bulgaria, Serbia, Greece, and Albania. As the local elections in 1999 showed, a small part of the popu-

lation in southern Bulgaria was willing to identify as Macedonians both politically and nationally.

The challengers in this case argued that the establishment and operation of OMO Ilinden violated Art. 11,4 and Art. 44, 2 of the Constitution, as well as the constitutional principles of the Preamble declaring the duty to protect the Bulgarian statehood and national unity. It was alleged that the party had a “separatist character”, and that its goals ran against the unity of the Bulgarian nation. One argument invoked by the petitioners was that the party was the successor of an independent Macedonian association OMO Ilinden (formed in 1990), whose goal was the “founding of a Macedonian state through the secession of the Pirin region from Bulgaria”.

First, the judges considered the issue whether the registration of the party violated Art. 11,4 of the Constitution. They held that:

There is no separate Macedonian ethnos in the Republic of Bulgaria. Because of that, the Court does not find evidence that the registration of this organisation violates Article 11,4 of the Constitution and the prohibition to establish parties on ethnic ground.⁴⁰

It seems that at this point the Court had reached the right conclusion for the wrong reason. The logic of this argument advanced an interpretation of Art. 11,4, which is far less justifiable than the interpretation of this provision from the 1992 MRF decision. According to the new reading, Art. 11,4 prohibited for *minority ethnic groups* to establish political parties: however, since there was no Macedonian ethnic group in the country (in the view of the judges), the Court did not find a violation of Art. 11,4 in the OMO case.

In contrast, the old interpretation did not enter into the issue of what an ethnic minority party was, or the issue of whether there was a particular minority in the country. Rather, it simply permitted the registration of parties, as long as they were inclusive and did not threaten the constitutional order.⁴¹

40 Decision 1, 2000.

41 In the following paragraph, however, the judges resorted to a further argument, echoing the rationale of the previous doctrine:

On the other hand, it could be asserted that a party is based on ethnic ground, when its founding documents do not allow for membership of representatives of other ethnic groups. As evident from art. 8 of the founding document of OMO Ilinden – PIRIN, all Bulgarian citizens can be its members.

The argument reinforced the requirement of “party openness” and “inclusiveness” from the 1992 decision but this time, it seemed, the Court considered openness not as a decisive, but, at best, supporting consideration. The central point that the judges made was that in Bulgaria there was no Macedonian minority and therefore there could not be a party on ‘ethnic Macedonian ground’. From their reasoning, it was unclear whether, had there been a Macedonian minority in Bulgaria, it would have been sufficient for OMO to be open to other minorities in order to be recognised as constitutional. If openness is sufficient, the lack of a Macedonian minority argument would be irrelevant anyway – the judges’ first argument would be redundant.

Despite the dubious merit of the reasoning up to this point, the first three parts of the decision seemed to be more or less consistent with, or at least not directly contradicting the doctrine of constitutionality of parties elaborated in the MRF judgement. The error in the fourth part of the decision, however, was far from insignificant. There, the judges developed another doctrine of unconstitutionality of parties based not on Art. 11, but on Art. 44,2 which contained a prohibition of parties whose activity was “directed against the *sovereignty, the territorial integrity of the country, and the unity of the nation*”. The CC held that OMO violated this provision in its part concerning the integrity of the country. The evidence revealing the violation, in the view of the judges, included the following:

- a. A gathering of OMO supporters in 1991 and the adoption of a declaration calling, among other things, for the granting of political autonomy to Pirin Macedonia, the withdrawal of the Bulgarian “occupational” armed forces, and the disbanding of Bulgarian political parties.
- b. The publication of two maps indicating the inclusion of Bulgarian lands in the territory of the Republic of Macedonia in 1993 and 1995.
- c. Seven 1998 and 1999 interviews, memoranda and press-conference statements of the leaders of OMO, in which they, among other things, “treat[ed] the Pirin region as part of Macedonia... and agre[ed] that the region should be cut off from Bulgaria, although they claim[ed] that the time for this ha[d] not come yet...”
- d. Two campaign statements of the leaders of the party (during the 1999 local elections) in which they threatened to raise the issue of secession in case their requirements were not fulfilled by the government.
- e. Finally, the Court accepted as evidence a 1999 letter on behalf of the party from a member of its governing body to the Open Society Institute, Budapest. In the letter, there were claims for political autonomy of the Pirin region and a statement that the rights of the Macedonians ranked higher than Bulgarian national sovereignty. (After the admission of the letter as evidence, OMO denounced it as an expression of its official policy.)

Not only did the Court hold that this evidence was sufficient to demonstrate that the activity of OMO Ilinden violated Art. 44, 2 of the Constitution in the part aimed to protect the *territorial integrity* of Bulgaria; the judges further argued that every separate piece of evidence constituted sufficient grounds for the establishment of such a violation. The Court expressed the view that no “*effective* impact on the protected... [territorial integrity] is necessary” for a declaration of the unconstitutionality of a certain political activity under Art. 44,2. In other words, declarations, interviews, letters and statements – all of them forms of *speech* – could be interpreted as unconstitutional activity sufficient for the prohibition of a political party.

The restrictions on statements, containing calls inflaming hostility, is based on the enshrined in the Constitution values of toleration, mutual respect, as well as the prohibition to propound hatred on racial, national, ethnic or religious ground. These restrictions do not deny protection to the variety of contradictory beliefs, reflecting the competition of ideas and opposing view points.⁴²

The [hatred restrictions]... definitely target statements, which affect the interests of the social groups, formed on the basis of different characteristics – racial, ethnic, religious, political, national, social, sexual, etc. The exclusion of such statements from the range of protected speech is consistent with the proclaimed in the Preamble to the Constitution universal value of tolerance, with the requirement of religious tolerance (Art. 37,1), and with the prohibition to create organisations, whose activity is directed toward the inflaming of racial, national, ethnic, or religious hatred (Art. 44,2).⁴³

The political effects of the decision were purely negative. It contributed to the cooling of the relationship between Macedonia and Bulgaria. Also, the decision of the CC will most probably prove to be an embarrassment for Bulgaria, because the country ultimately lost several cases brought by OMO in the ECtHR.

Still, despite the pressure from the Council of Europe, Bulgarian courts deny systematically (on formal and procedural grounds) to register OMO. OMO has become one of the sticking points not only in Bulgarian relationships with Macedonia, but also vis-a-vis the Council of Europe. Most importantly for our purposes, the case indicates the rehabilitation of mild nationalism with its anti-minority bias in the jurisprudence of Bulgarian courts. This has become possible because of the change of the political climate: with parties such as Ataka around, with politicians such as Bozhidar Dimitrov, there is tacit but persistent public pressure on courts to accommodate nationalist feelings.

COURTS AND INTEGRITY POLITICS

- *Foundation 'Democracy' case: illicit party donation*

With the advent of populism, much of Bulgarian politics is about the integrity of politicians. There is an avalanche of court cases against politicians, although to date there are not serious convictions. The example of former mayor of Sofia Sofiyanski is instructive in this regard: he was the most high profile case (former prime-minister in an interim government). Below I present a case, which is quite typical of all such cases in Bulgaria. The elements of these cases are the following:

42 Decision 7, 1996, Jurisprudence 1991–1996, p.140.

43 Ibid. (145).

- High media exposure;
- Senior politicians involved;
- Attempt to denigrate political opponents;
- Long and protracted proceedings;
- Lack of convictions and sentences.

The case study is yet another example for the instrumentalisation of courts for political purposes. With the advent of populism the importance of such cases increases, as well as their instance.

In October 2003, the notorious Russian businessman Michael Chorny announced in the media that he had been blackmailed by the former PM Ivan Kostov, and that one of his companies had funded the Union of Democratic Forces' party foundation *Democracy* with the amount of 200,000 USD. Chorny was expelled from Bulgaria over suspicions of organized crime involvement during the UDF government (1997–2001) headed by Ivan Kostov. The management of the Democracy Foundation announced they received the money from a company based in Cyprus that had no connection with Michael Chorny.

Several investigative services began proceedings against the Democracy Foundation suspecting money laundering. One month later investigation was completed finding no criminal activity, but the Prosecutor's office requested an extension of proceeding. These proceedings did not lead to a definite conclusion for more than a year. In November 2004, the Sofia City Court found the former executive director of Democracy Foundation Grozdan Karadzov guilty of libelling Michael Chorny as a criminal, and sentenced him to pay a fine to the amount of 1,000 EUR. In March 2005 a court in Nicosia, Cyprus, ruled that the company that had transferred the money to the Democracy Foundation was not in possession of Michael Chorny. The scandal around the foundation continued lingering on for some time and gradually died out.

In 2000, upon Bulgaria's accession to NATO, Michael Chorny, together with a number of other Russian businessmen residing in Bulgaria, was expelled from the country by the UDF government of Ivan Kostov. The argument that the government used was that they presented a threat to national security: the evidence, the government argued, constituted classified information, which cannot be publicized. The 2000 order for the expulsion of Chorny was signed by the head of the National Security Service (NSS) General Atanas Atanasov. In 2004, this order was quashed by a Sofia court on procedural grounds. However, this did not lead to the rehabilitation of Chorny and the restoration of his right to enter the country – on the contrary, the new chief of the NSS Ivan Chobanov reissued the order, rectifying some of the procedural flaws mentioned by the court, but again relying on classified information and national security considerations. In the meantime, Chorny started civil proceedings for libel against some of the members of the UDF Government and the executive director of Democracy Grozdan Karadzhov. In 2004 the court fined Karadzhov

for libel against Chorny, and in 2006 the Court fined the former finance minister Muravey Radev to the amount of 30,000 leva for the same reason. Both of them accused Chorny of being part of international criminal networks and of meddling illegally in Bulgarian politics. As we shall see below, the courts found these accusations unfounded and libellous.

A further twist to the story adds a report produced in 2000 by the then head of the NSS General Atanasov, which accused senior members of the UDF government, and especially the Minister of Interior Bogomil Bonev, of illegitimate connections with Michael Chorny. More specifically, Bonev was accused of illegitimate lobbying for the financial interests of Michael Chorny and for providing him with “political roof” (protection) from investigation. This report became the reason for the dismissal of Bonev as minister. However, the report was never made officially public. In the 2001 presidential race, UDF candidate Petar Stoyanov showed the front page of the report to the public during a presidential TV debate with Bonev who was also running for the presidency. The exact content of the report was never published, however. (Since we got access to this report, below we summarise some of its main features relevant to this project). Bogomil Bonev started judicial proceedings against general Atanasov, accusing the latter of abuse of powers in the production of the report. A first instance court found general Atanasov guilty of abuse of powers, but an appellate court judgement acquitted him.

All these intricate details of the story are mentioned here in order to illustrate a very specific feature of Bulgarian public discourse on organised crime and corruption. On the one hand, it seems that it is public knowledge that businessmen, such as Chorny, are part of the organised crime and the underworld in general. After all, most of the media (apart from his own newspaper *Standart*) treat Chorny either openly as a criminal, or at least as a person whose wealth is of illegitimate origin. Further, there are official documents – such as the order of the NSS expelling Chorny from the country, which are motivated by the threat he presents to Bulgarian national security. People read this as an acknowledgement of the connection between Chorny and the mafia. On the other hand, however, no independent Bulgarian judicial body has ever established that Chorny is guilty of crime of any sort, not to speak of organised crime. On the contrary, Bulgarian courts have pronounced such allegations libellous. This state of affairs creates a degree of public confusion: people know who the criminals are, but they do not know exactly why they are criminals and what the character of their crimes is. This situation is fertile ground for the creation of myths as to the nature and scale of the spread of crime and corruption in the country.

Most importantly for the purposes of our study, this state of affairs leads to a situation in which different people put radically different content in their conceptions of organised crime and corruption. Most of the time, as the ensu-

ing analysis will demonstrate, there are strategic reasons which lead different actors to stick to a specific conception of crime and corruption.

Such an environment is the breeding ground of populism: it is an environment prone to the rise of anti-corruption heroes. My argument is that the courts have been involved in the creation of such an environment.

COURTS AND THE CORPORATE INTERESTS OF THE JUDICIARY

- *Blocking constitutional reforms through rule of law: the abuse of the concept of judicial independence*

Courts and magistrates in general feel threatened by the rise of populism, because many populist players advocate increased *public* and *political* responsibility for the judiciary. As a reaction to this pressure, it is not uncommon for a professional group to consolidate around its corporate interests. The Bulgarian judiciary was no exception: it attempted systematically to block attempts for more transparency and accountability. Consider the following case study.

At the end of 2002, the Bulgarian Constitutional Court took a key decision with which it invalidated a major governmental plan to reform the judicial system.⁴⁴ The judges argued that many provisions in the amendments to the Law on the Judicial System, sponsored by the cabinet of PM Simeon Sax-Coburg-Gotha,⁴⁵ violated the principle of judicial independence in the Bulgarian Constitution.

The Bulgarian CC has a history (although not a fully consistent one as shown above) of defending judicial independence against interference by the political branches of power – the legislature and the executive. Especially prominent in this regard was the resistance of the Court to the plans of the 1994–1996 Videnov⁴⁶ government to introduce substantial judicial reforms, which were in many respects similar to the reforms planned by Simeon II's government.

In 1994–1995 the stance of the Constitutional Court was widely approved by commentators of Bulgarian politics, and by representatives of the EU and the Council of Europe: in fact, the Videnov government was much criticised by European analysts and politicians for its controversial reforms. In order to understand better the dynamics of the stance of the Court on judicial reform, it is necessary to introduce a new player, which has not been mentioned thus far – the EU, which insisted on judicial reform as a prerequisite for Bulgarian accession.

Judicial reform in Bulgaria has proven one of the most difficult issues of transition politics. Generally, the Bulgarian judicial system is seen as slow,

44 Decision 13, 2002

45 Leader of the ruling party – Movement Simeon II.

46 Bulgarian Socialist Party

cumbersome, and inefficient. These criticisms were present in the European Commission's Regular Reports which assessed Bulgaria's progress in the implementation of the Copenhagen criteria.

The jurisprudence of the CC since 2001, however, has not accommodated the demands of the Bulgarian government and the EU Commission for radical reforms; most prominently there have been no structural reforms concerning the place of the prosecutorial office and the investigators in the judicial system. The Court has stuck to a rigid position, according to which such reforms are to be carried out by a special legislature – a Grand National Assembly. Such a legislature is extremely difficult to convene, and in practice, a requirement for its convening makes radical reform of the judiciary in Bulgaria impossible.

Apart from decisions devoted to the judiciary, the Court has taken very few other decisions both in terms of numbers and in terms of social significance in the period after 2001. This fact I interpret as an indication of the growing influence of the corporate interests of the judiciary in the workings of the Constitutional Court.

There is evidence for the thesis that political identities do play a role in the formation of judicial policies. One can see a correlation between the political-identity groups that are dominant on the Court at a given time and the choice of judicial policies at the same time.⁴⁷ Thus, the CC dominated by right-wing judges was anti-majoritarian when there were socialist governments in power and deferentialist when Kostov's UDF government came to office. Since 2001 the Court has been increasingly dominated by the "juristocracy"; accordingly there has been reorientation towards judicial policies protective of the corporate interests of the judiciary. These are trends that are clearly discernable, although they of course do not exhaust the entire activity of the BCC.

CONCLUSIONS

Liberals are alarmed by the recent rise of populism in many countries of Eastern Europe. But part of the problem is that they do not agree on their interpretation, and especially on the nature, depth and character of the crisis. Without being alarmist, however, I would argue that the current crisis is not just a temporary aberration, but is an expression of a lasting trend, which will lead to a serious transformation of liberal democracy. The intensifying problems of the structure of representation should be specifically stressed. Since the platforms of the mainstream liberal parties grow increasingly similar, people

47 See my previous research for CAS.

do not see that elections are likely to make any difference. Citizens do have the vote, but in fact they do not have important alternatives to choose from: key issues, such as the constitutional framework, monetary policy (run by independent banks), international relations (determined by participation in organizations such as NATO, EU and WTO), are off-limits for routine democratic politics. This lowers the payoff for voting for liberal parties – they do not promise to change the essential elements of the status quo. The populists capitalize on this fact by offering to “reopen” for political competition all these “liberal taboos”.

If this analysis is correct, it appears that liberals have surrendered active political participation to their populist rivals. Liberal mobilization of voters becomes only possible as a form of veto against some excessive and dangerous candidates or issues. But are voters always going to veto the excesses of populists, if they become firmly entrenched in the political establishment, and if their discourse starts to dominate routine democratic politics?

On the basis of the case study presented above I am drawing the following conclusions about the rise of populism in Central Europe and its impact on the rules of law and the judiciary:

- **Populism is not “radicalism” or “extremism”:** It is not useful to conceptualise Central European populism as “political radicalism” or “extremism”. Extremism was the typical challenge to liberal democracy in the post war period. Communists and neo-Nazis attacked the democratic polities in Western Europe with radical proposals for systemic change, which was to be carried out partly through violent means. Such calls for radical changes cannot be observed in the region today. Contemporary populists do not offer a political alternative to democracy. The problem is rather that the ideal of democracy they espouse is unattractive and dangerous.
- **“Soft” and “hard” populism:** Although populism is not extremism, there are more and less radical versions of the phenomenon. “Soft populism” is a challenge to the existing system of representation and mainly to the existing party system. It is a signal of a crisis of representation: it thrives on popular perceptions that the established parties are corrupt, that they form cartels and are alienated from the people, that they are too ideological, etc. “Hard populism” is characterized by more severe threats to the constitutional framework: it challenges not only the existing structure of representation but also some of the fundamental principles of liberal democracy, such as the protection of individual and minority rights, etc. Soft-populist parties in our case studies are: Simeon II’s NMSII (НДСБ) and Borissov’s GERB (ГЕРБ) in Bulgaria, Orban’s FIDESZ in Hungary, Fico’s Smer-SD in Slovakia. Hard populists are more difficult to come by, but they are by no means missing from the region. The most contentious and notorious example here is PiS, Self-Defence and League of Pol-

ish Families, in Poland, and the phenomenon of the Kaczynski brothers more generally: their stance against minorities, their attempts to criminalize their opponents, and the disrespect for entrenched constitutional principles and foreign engagements in our view justify their depiction as “hard populists”. In the same categories are parties such as Siderov’s Ataka in Bulgaria, Meciar’s HZDS and SNS in Slovakia, and other smaller parties throughout the region.

- **The dividing line between the “soft” and “hard” versions of populism is fluid** and ever changing. Since populist parties generally lack both internal party structures and discipline, and ideological coherence they are prone to changes in their overall profile. Their radicalism might increase or decrease not only during elections, but also while in office. For instance, regarding foreign policy issues and minority rights Smer-SD could be described as moving towards more “hard” versions of populism. Similarly, it can be argued that PiS in Poland evolved into “hard” populism throughout its term in the government. Siderov’s Ataka, in contrast, was scaling down its radical rhetoric in the presidential campaign of 2006, in an apparent attempt to attract more moderate voters.
- **The platforms, which mobilize voters, are increasingly “identity-based”.** In circumstances where the liberal parties are increasingly losing their appeal and profile (except from cases of last-itch mobilization against hard populists), nationalism and identity politics become more and more attractive to the public. These platforms increasingly win votes. Even in countries, such as Hungary, where populism has no separate exponents but has infiltrated at least one of the major parties, nationalism and even xenophobia and anti-Semitism have become vote-winning strategies. One of the effects of the rise of populist actors in Central Europe has been that they have forced virtually all of the parties to adopt one form or another of “responsible” nationalism. It is important that this is not a revival of the pre-WWII nationalism in the region. This type of nationalism seems to be induced by some of the features of the present-day political processes in Central Europe. Also, it copies quite liberally from the “identity” politics of Western European parties.

Responses to populism

There is a variety of strategies that could be employed as a response to the rise of populism. Some of them have already been tested in Central Europe. Others are familiar from the fight against other threats to liberal democracy, such as extremism. A third category includes some experimental ideas, which have not been tested yet, but which have gained some prominence among

expert and academic communities. Below I provide a map of the possible responses, and an account of their advantages and disadvantages.

- **Treating populism as extremism and radicalism:** As said above, liberal democracy does have means to address extremist, anti-systemic parties. The most restrictive measures which could be employed are legal restrictions, such as bans on unconstitutional parties. There are two such legalistic approaches. The first is *militant democracy*, which was pioneered in Germany. Karl Lowenstein in the 1930's advocated the idea that democracy should not be neutral (as the Weimar Republic was neutral to different types of political parties and their ideology), but should defend militantly its own principles. The important point of the militant democracy doctrine is that it is a *preventive* doctrine: it asks the state to act (sometimes long) before actually a crime has been committed or some danger has become imminent. The second approach could be called the "American" approach of "clear and present danger" by reference to the standard used by the US Supreme Court. This doctrine requires *imminence* of the danger: the state does not act before the actual threat occurs, but waits until the danger is imminent, and the threat is almost unavoidable. However, even in the case of "hard populism" it seems better to avoid as much as possible the employment of legal restrictions: indeed, no populist party has been efficiently stopped from entering politics by legal means, although attempts have been made. Therefore, the first strategy of choice should be incorporation and integration of the populists in democratic politics. Of course, this incorporation could be accompanied by avoiding coalitions or other collaborative activities with them. If the political measures are not sufficient to alleviate the dangers of "hard" populism, then the more restrictive legal measures could, theoretically, be employed. Yet, if it is necessary to impose legal measures against populists, it should be said that the "clear and present danger" approach provides less opportunities for abuse than the "militant democracy" doctrine. In our assessment, in none of the four countries that we studied treating populists as extremists would be appropriated. It is true that some of Siderov's remarks verge on racism and xenophobia, but this does not seem to be a sufficient ground for a ban on Ataka, or some other severe legal restrictions on their activities. Such an approach could be actually very counter-productive, raising the popularity of the potential targets. The same could be true if EU partners (member states governments, EU bodies, etc.) exercise pressure on Central European countries to treat populists as extremists: the result again could be counterproductive.
- **Increased constitutionalisation of politics:** An intuitively appealing idea for liberals seems to be the increased constitutionalisation of politics. This could be achieved through the strengthening and increased role in the decision making processes of bodies such as constitutional courts,

central banks, currency boards, intergovernmental bodies, the judiciary, independent public administration, etc. In the EU context, a faster transition to “multi level governance” or “polycentric governance”, which disperses responsibility among a variety of bodies, could be very appealing. The idea behind such proposals is that even if populists manage to get to the government (as they increasingly do) they will not be able to distort the policy making process, since an increasing number of decisions will be taken by independent bodies. Recently, the former Bulgarian foreign minister Solomon Pasi publicly defended a similar idea in a much more radical form. He argued that computer simulators and programmes should be used to screen out “incompetent” politicians and “inefficient” policy proposals. He actively argued for much more rigorous constitutional constraints on the democratic process, going beyond human rights and basic principles into the realm of economic efficiency, value choices and the setting of social priorities. We believe that such strategies are not only potentially counterproductive (they will make populists more popular), but are also dangerous with their potential to further undermine trust in democracy. This is a strategy which is basically saying that democracy is valuable as long as the voice of the people does not really matter. Anti-majoritarianism of this sort could hardly be a viable response to the rise of populism.

- **Political isolation:** The list of generally inefficient strategies continues with attempts to isolate politically the populists. This strategy is a spin-off of the reduction of populism to extremism. The assumption here is that populism is a generally marginal phenomenon, against which all of the “mainstream” parties stand united. First, this strategy has been proven unworkable in the context of Central Europe. In the Polish case, before coming to power PiS was not that much different from and confrontational toward its main opponents from the Civic Platform: the initial idea before the previous parliamentary elections was that these parties would rule together. Further, isolation is practically impossible (and not advisable) in the case of “soft-populism”. Even in the case of “hard” populism, it is very difficult to isolate the populists, as demonstrated by the recent local elections in Bulgaria, after which Ataka entered the local government in various important cities. Especially difficult to avoid are coalitions between soft- and hard populists (GERB-Ataka; PiS and Leper’s party; Smer-SD and Meciar, etc.) Secondly, the isolation strategy underestimates to what extent populism has already undermined and infiltrated the political spectrum – in Bulgaria, for example, it is not quite clear who are the “non-populists”. In general, when populism has taken centre-stage, isolation cannot work. Finally, threats of isolation could be effective not so much in the *elimination* of populist parties, but in the drawing of a line which should not be passed by them: for instance,

if they become openly anti-Semitic or xenophobic, if they threaten to permanently damage certain foundational constitutional values, a strict strategy of non-cooperation and isolation should be adopted. One should not hope that with such a strategy ‘hard’ populism will be eliminated, but it might thereby be reasonably contained.

- **Civil mobilization:** The recent Polish parliamentary elections could be interpreted as a success story for the strategy of civic mobilization against populism. One should not be overly optimistic, however. The most that these elections show is that liberal parties could mobilize their voters when “hard” populists threaten to take over the country. The same was the message of the 2006 parliamentary elections in Bulgaria, when the Ataka’s candidate suffered a resounding defeat. The experience of Central Europe also shows that civic mobilization is not easy against soft populists. As pointed out above, nothing prevents a soft populist party from “hardening” after winning the elections. Further, it is discomfoting to learn that liberal voters could be mobilized only in desperate attempts to prevent hard populists from coming to power. If so, this would mean that routine politics is no longer attractive and meaningful for the liberal voter: she or he are only interested in vetoing certain options, but are not interested in participating more actively in the political process. Ordinary politics becomes a realm of the populists.
- **Revival of programmatic parties and stable party systems:** This strategy accepts that populism has already done significant damage to the representative structures of liberal democracy and especially the party system. It assumes that a revival of the pre-populist status quo (real or imagined) is still possible. This status quo is seen mainly in terms of the “western European” party systems and especially the German one. Thus, the main goal of the strategy is to recreate something like the German party system in East European context. Two, types of measures are usually invoked by such strategies: institutional hurdles to new players and increased advantages for the established parties:
 - i) Hurdles for new players: majoritarian electoral system, tighter requirements for registration of a political party and party lists in elections;
 - ii) Advantages for established parties: increased state funding for the parliamentary parties, introduction of state funded party foundations and institutes, party programmes of political education, more benefits in terms of recreation and education for party members, institutionalized relationships between parties and trade unions and employers’ organizations, etc. We are generally sceptical of the usefulness of such measures, which try to “rebuild” a streamlined party system with institutional means. Even in established democracies,

such as Germany, where such institutional measures are employed, it is hardly possible to avoid newcomers (the Green Party, the new Left Party, etc.) Loyalty to parties and programmes is being eroded not only in Central Europe and it is probably wishful thinking to believe that these processes could be limited through formal institutional measures. The Hungarian case study suggests the limits of such a strategy. Hungarian mainstream parties are institutionally well-protected from challenges from newcomers and also enjoy significant institutional privileges. The rise of populism has not indeed produced a new populist party. But the result is not less threatening: populism has infiltrated at least one of the major parties, and it seems that there is a certain tendency of “hardening” of its outlook. One could only speculate what could happen if this party wins elections: Hungary might turn into another Poland from the heights of the Kaczynski period.

Generally, the present paper suggests that the political response to populism is preferable to the judicial response to it. In fact, the rise of populism has entangled judges and other magistrates in very complex relationships with the political bodies of power. In these relationships, the rule of law has often been the victim.