Populism, liberal democracy, and the rule of law in Central and Eastern Europe

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Abstract

Populism is on the rise in Central and Eastern Europe (CEE). Persistent attacks on legal institutions of liberal democracy represent the most troubling aspect of the rising populism in CEE. The democracies in CEE are not about to collapse because of the rise of populism, yet the populist challenge to liberal democracy has to be taken seriously. While there has been significant progress in the development of 'electoral democracy' in the region, constitutional liberalism and the rule of law still remain weak. Only strong, independent, and professional legal institutions and respect for the rule of law can bring further consolidation of democracy in the region. © 2008 Published by Elsevier Ltd on behalf of The Regents of the University of California.

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"The first essential step on the road to total domination is to kill the juridical person in man". (Arendt, 1968: 447).

Populism is on the rise in Central and Eastern Europe (CEE). Persistent attacks on the legal institutions of liberal democracy represent the most troubling aspect of the rising populism in CEE. While there has been much discussion of the different political aspects of populism and its likely causes and consequences, there is surprisingly little attention paid to populist disdain for the legal institutions of liberal democracy.

While democracy and liberalism are two strands of liberal democracy that are often in tension, it is also true that in modern liberal democracies liberal ideals and democratic procedures are interwoven and mutually supportive: democracy needs constitutional liberalism to function well (Plattner, 1998). In other words, a strong and independent judiciary, independent media, a politically neutral and professional civil service, and independent anti-corruption commissions are crucial for further development of democracy in the region. And yet, as argued by Tismaneanu (2007: 37), "political reform in all these post-communist societies has not gone far enough in strengthening counter-majoritarian institutions that would diminish the threat of new authoritarian experiments catering to powerful egalitarian-populist sentiments".

The key question is how serious a threat the populist attack on liberal democracy poses for the stability and development of democracy in the region. Democracies in CEE are not about to collapse because of the rise of populism. Nevertheless, the populist challenge to liberal democracy has to be taken seriously. While there has been major progress in the development of 'electoral democracy' in the region, constitutional liberalism and rule of law still remain weak. It is of utmost importance that CEE countries further reform and strengthen their legal institutions. Only strong, independent, and professional legal institutions and respect for the rule of law can bring further consolidation of democracy in the region.

Populism is an ideology or political movement that "considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonte generale* of the people" (Mudde, 2004: 543). Populism seeks to speak in the name of the common people. Its distinctive arguments include an absolute prioritization of plebiscitary democracy and a strong emphasis on anti-elitism. Populism is hostile to elites, but at the same time it is vague and moralistic and as such easily instrumentalized by almost any type of ideology, both left and right. An anti-corruption policy as a 'moral quest' lies at the very forefront of its agenda. No less important are its 'organic' conception of the people ('nation') and its disdain of the formal 'intermediary' institutions of liberal democracy.

As the Freedom House Study, *Nations in Transit, 2007*, indicates, populism and anti-liberal trends have swept Central and Eastern Europe. Governments, political parties, and political movements from Poland, Slovakia, Hungary, Romania, Bulgaria and Slovenia to the Baltic states have declared that they represent the true voice of the common people against the corrupt elites. Populist governments and parties distrust all the traditional institutions of liberal democracy that stand between them and the wishes of the people. Governments attack and publicly challenge any verdict of the constitutional courts they do not like. Their disrespect and contempt is not limited to courts and judges only. They have not hesitated in curtailing the independence of mass media and the professionalism of civil service by replacing the existing civil servants and journalists with unqualified but loyal newcomers. Government distrust of liberal institutions is often accompanied by attacks on the constitutionally-granted rights and freedoms of ethnic minorities, Roma communities, homosexuals and all 'other' groups in society which fall outside the organic, ethno-related and culturally conservative concept of the nation. Hate speech is

becoming the *lingua franca* of the region. The region is characterized by a particularly exclusive and violent form of xenophobic nationalism. All this is happening in the heart of Europe, in member states of the European Union which, in Article 6 of its Treaty, declares that it represents a family of countries founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms.

After the fall of the Berlin Wall and the collapse of communist regimes, many CEE countries successfully managed a 'return to Europe'. Three years ago, in 2004, they became fully-fledged member states of the European Union. For many observers, the 'return to Europe' signaled the ultimate victory of democracy and rule of law over the legacy of totalitarianism in these countries. As Jan Zielonka (2006: 43) argues in his *Europe as Empire*, the new member states may not look exactly like the old ones, but they nonetheless belong to the same broad category of democratic and liberal states and societies.

In contrast to this optimistic view, history is not over and the rising populism in CEE represents the principal challenge to liberal democracy. In one of the first essays describing the rise of populism in CEE, Jacques Rupnik (2006) correctly pointed out that populism is not anti-democratic. On the contrary, while it defends a 'pure', 'direct', 'free' democracy, it is against liberalism, that is, it opposes the rule of law, which it perceives together with other institutions of liberal democracy as often 'preventing' the true voices of the people that express their deepest hopes and fears from being heard directly, in their 'purest' form.

The aim of this article is to analyze how the current challenges posed by rising populism are likely to affect further development of rule of law and constitutional democracy in Central and Eastern Europe.

The constitutional courts of Hungary, Poland, Slovakia, Slovenia and Bulgaria emerged over a relatively short period of time as one of the most influential forms of political institution in the region. Their power to review the constitutionality of statutes challenged the almost absolute supremacy the legislatures previously enjoyed (Schwartz, 2000). It is no surprise then that populist governments soon identified constitutional courts as one of the key 'obstacles' impeding the implementation of their programs.

When the Polish Constitutional Tribunal in May 2007 invalidated several key sections of the lustration law, the Prime Minister, Jaroslaw Kaczynski, unhappy with the ruling, threatened the judges with the possibility of charges if they acted 'improperly' in their ruling. The lustration law (Michnik, 2007) has become a centerpiece of the right-wing Polish government's witch-hunt against the *uklad*: a network of the old Communist nomenclature, new business elites, political liberals, secret police informers, and Russians, who all—according to the brothers Kaczynski—control and govern Polish society against the true interests and moral principles of the Polish people. The lustration law required all journalists, politicians, lawyers, judges, school principals born before 1972 to file an affidavit within two months stating whether they had collaborated with the former Communist secret service. The court declared several of its key provisions unconstitutional, violating various rights and freedoms enshrined in the Polish Constitution. Before the Tribunal reached judgment, the government attempted to discredit two of its judges claiming they were secret service

agents themselves. The Kaczynskis have attacked and publicly challenged any verdict of the Tribunal they have not liked.

In Slovenia almost 20,000 people, one percent of the population, consisting mainly of 'non-Slovenes', were unlawfully 'erased' from the register of permanent residents because they failed to apply or obtain Slovene citizenship when Slovenia in 1991 became a new independent state. As a consequence, they became 'stateless' people and many of them lost their jobs, health insurance, driving licenses, and passports, and some were even deported from the country. They were physically present, but legally they did not exist. The Slovene Constitutional Court ruled on two occasions, in 1999 and 2003, that critical provisions of the Aliens Act, which regulated the legal status of those who did not acquire Slovene citizenship, were unconstitutional (Freedom House, 2007). Despite the two repeated rulings, the current center-right government openly defies the decision of the Court. The Prime Minister, Janez Jansa, president of the strongest party in the ruling coalition, SDS, did not hesitate to attack the legitimacy of the court.

The Hungarian Constitutional Court, the most powerful court in the world during the 1990s, as Kim Lane Scheppele (2003: 227) argued, "fell off the political map altogether". After their nine-year terms ended, none of the old, activist, judges were reappointed. Instead, the new government decided to appoint a whole new court. The jurisprudence of the new court is more formalist and more deferential to the majority in power. The court has decided few cases with political importance so far.

The Slovak Constitutional Court, also one of the success stories of the 1990s, although with a much weaker reputation in the fields of human rights and national minorities, is currently under significant political pressure from Prime Minister Robert Fico's populist coalition. Three vacancies on the Court are expected to be filled with politically loyal candidates. Furthermore, the Court's work was limited throughout 2006 because of its incomplete makeup. Also disappointing was the Court's decision on positive discrimination in 2005, where the Court declared any positive discrimination to be unconstitutional (Dimitrova and Rhinard, 2005). The primary aim of the law was to give special protection to the Roma minority in Slovakia.

Needless to say, the role of courts in democratic society is always problematic. Aggressive judicial activism inevitably raises the issue of counter-majoritarianism and democratic accountability of independent institutions like courts. Tushnet's (2005) recent proposal to limit judicial review has reopened a theoretically important debate in contemporary political theory. Tushnet's work (Tushnet, 1999), dissecting the role of the seemingly too powerful American judiciary, is always an important reminder to those who uncritically endorse the power of 'the least dangerous branch'.

Nevertheless, the very different political context in Central and Eastern Europe requires a different approach to the role of courts in society. As Sadurski (2001) has argued, what is needed is a fact-sensitive theory of judicial review. And the facts are very instructive here. The region has a weak or sometimes non-existent tradition of protection of human rights, particularly the rights of minorities. Almost the entire

region has a strong history of ethnic nationalism aimed at suppression rather than accommodation of ethnic minorities, Roma, homosexuals, and Jews. As Ivan Berend (2007) argues, nationalism in CEE has a particularly violent and exclusive nature compared to nationalism in the West. The region has been devastated by many horrors, wars, and other forms of violence: it has an exceptionally cruel and bloody history. Central and Eastern Europe needs liberal democracy to tame such horrible and violent excesses. Majoritarian rule therefore needs limitations which are, in liberal democracy, imposed by independent political institutions and constitutionally codified rights and freedoms. This is not to glorify the role of such institutions, but only to stress their importance in the political reality of Central and Eastern Europe.

The populist disdain and contempt for liberal institutions is not limited to constitutional courts and judges. Equally troubling is their attitude toward a professional civil service, independent mass media, and independent anti-corruption commissions.

The politicization of civil service in Poland, Hungary, Slovenia, and Slovakia has reached a critical point, leading Adam Michnik (2007) to declare the Polish civil service corrupt. The Polish, Hungarian and Slovene government amended their civil service laws to allow more political appointments in the civil service. In Poland, the entire civil service is now under the direct control of the prime minister's office, special civil service examinations are being abolished so that politically loyal but unqualified newcomers can replace existing civil servants (Davies, 2007; Seleny, 2007). The Polish government replaced hundreds of board members of state enterprises with their friends and cronies. In Slovenia, politicization reaches downwards toward non-managerial ranks in the civil service. The joke has it that even a chauffer at the ministry needs party approval. Hungary amended its civil service law to allow appointment of 350 political civil servants, a corps of experts under the control of the prime minister who owe their loyalty to him (Meyer-Sahling, 2006). Examples of this spiraling process of continuous politicization can also be found in Slovakia and Czech Republic.

The independence of the mass media, particularly of public radio and television, has been curtailed by changes in media legislation, changes in personnel, and pressure to control the content of what was broadcast and published. The governments in Poland and Slovenia amended media laws so as to allow more direct political control of media regulatory bodies. The new law in Poland made possible a massive purge of journalists whose careers began during the Communist period (Michnik, 2007). Top management in public radio and TV was replaced by the journalists loyal to right-wing governments in both countries. The governments went even further and directly interfered by censoring particular news which criticized or ridiculed the president or prime minister in both countries. Robert Fico, Prime Minister of Slovakia, made a direct call to Slovak Television instructing their journalists how to report a foreign visit he was making. Severe political pressure on Slovak Television led to several top editors resigning. A vigorous campaign against journalists who are, according to Fico, "undermining trust in the government", has culminated in the drafting of a new media law. Its two basic 'innovations' are more direct

political control of the media regulator, and a new right of refutation that gives the government the right to respond to all allegedly non-objective articles. If enacted, the new law could easily turn the principle of editorial independence into an empty phrase. It is particularly instructive that the Party of European Socialists which, in an unprecedented decision, suspended Fico's party (Smer-SD) membership in the alliance of socialist parties in European Parliament for forming a coalition with a far right party (Slota's Slovak National Party), announced in their decision on whether Smer-SD should remain suspended, that Fico's attitude toward the media may influence the PES decision on the subject (The Slovak Spectator, 2007). Party suspension remains postponed indefinitely.

The Slovene and Slovak governments mounted a systematic campaign to abolish the independent Commission for Prevention of Corruption in Slovenia, and the special court and Office of the Special Attorney, set up to fight corruption in Slovakia, just as they had became effective tools in combating corruption in both countries. Paradoxically, while the rhetoric of both governments elevates the fight against corruption to the top of their agenda, their campaign against independent commissions show their discomfort with politically independent institutions.

Xenophobic nationalism in Central and Eastern Europe has, like a dangerous virus, spread throughout the region. Its primary attributes are its tribal nature, which links the nation with ethno-culture and kinship. Whereas in the West the state created the nation, in CEE the nation had to create the state. The nation had to emerge as a separate entity from other nations, which contributes to its exclusiveness. As a consequence, the rights and freedoms of national minorities, Roma, homosexuals and Jews, are often under attack.

Jan Slota and his Slovak Nationalist Party, a partner in the ruling Slovak coalition, is probably the most extreme example of this development. Slota, an ultra-nationalist and right-wing politician, leads the campaign of racist hate speech directed against Hungarian and Roma minorities in Slovakia. In his outbursts of hatred and xenophobia, he proposed sending a leader of the Hungarian minority to Mars ''without a return ticket.'' He does not hide his sympathies for Father Tiso, a controversial leader in the clerico-fascist Slovak government during the Second World War, who helped to send more than 70,000 Jews to the Nazi concentration camps (Shepherd, 2006).

In Slovenia, the aforementioned 'erased' non-Slovenian citizens represent the most troubling example of the violation of rights of minorities. The Slovene government also 'reinvented' the doctrine of separate but equal. Roma children were separated from other pupils and put in a separate class. According to the education minister, this strategy should enhance their learning abilities. In another case, after a violent riot, organized by their neighbors, a Roma family was moved by the police from their house to another town. The minister of the Interior, confident of his success, promised the exultant neighbors that the Roma family would never return. After the Slovene Human Rights Ombudsman raised the issue with the Council of Europe's Human Rights Commissioner, the government accused the Ombudsman of ''denigrating the country's name'' and asking him to resign (Wood, 2006).

In Hungary, Victor Orban, the leader of the opposition FIDESZ party, unhappy with electoral defeat, is engaged in an extra-parliamentary political struggle against the ruling coalition of socialists (MSZP) and left-liberal alliance of free democrats (SZDSZ). While there is no excuse for Prime Minister Gyurcsany's politics of lies, this hardly justifies the FIDESZ flirtation with the Hungarian far right parties and movements which heavily borrow from neo-fascist and anti-Semitic ideology. The Hungarian Guard, a paramilitary group wearing uniforms resembling Nazi stormtroopers, was recently established in Budapest (Spiegel, 2007).

Lech Kaczynski, at that time still a mayor of Warsaw, banned an 'equality parade' for gays and lesbians, invoking his politics of restoring the 'moral order'. Again in Poland, Ewa Sowinska, a spokesperson for children's rights, was about to investigate whether the BBC show *Teletubbies* promotes a homosexual lifestyle. After being widely ridiculed even from her own political camp, she announced that "a leading sexologist" maintained that Tinky Winky has no negative effects on a child's psychology (BBC News, 2007). Vodin Siderov, leader of a far right movement AT-TAKA and a presidential candidate in Bulgaria, told the public that he hates Turks, Gypsies and Jews (Rupnik, 2006). Gigi Becali, leader of the Romanian New Generation Party, announced that if he wins the presidential elections in 2009 he will force homosexuals into special ghettos (Evenimentul Zilei, 2007). Anti-Roma hate speech is also present in the Czech Republic, which seemed so far to be largely immune to the populist virus (Eurozine, 2007).

While certain examples of attacks on liberal institutions do not result in actual curtailment of basic rights and freedoms, many cases do. Furthermore, there is an intimate link between the strong liberal institutions and protection of those rights: when liberal legal institutions are constantly attacked and disrespected, that seriously undermines their capacity to protect human rights. As we have seen in the case of constitutional courts and anti-corruption commissions, the attacks and the politicization of appointment procedures have seriously weakened the independence and vigor of those institutions.

Only three years after their triumphant 'return to Europe' in 2004, CEE countries are confronted with the rise of populism and anti-liberal politics. The legal institutions of liberal democracy in CEE differ from their West European counterparts.[1] Under the facade of seemingly harmonized legal rules, transposed from various EU directives and regulations, several cracks have appeared that expose the fragility and uncertainty of development of legal institutions of liberal democracy in CEE. This discrepancy between the form and the substance of liberal democracy in this part of the world should not come as a surprise. Ivan Berend (1998), a leading historian of the region, has argued that CEE is home to a continuing pattern of "forms without substance", pointing to a series of unsuccessful attempts to emulate Western European democratic institutions, often resulting in legal forms devoid of real

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[1] Another important element of liberal constitutionalism, separation of church and state, is formally recognized in most of CEE constitutions. However, the implementation of these constitutional principles leads to different national practices which are often in conflict with more established traditions of state and church separation in West Europe (Kuhelj, 2007).

substance. All those who expected that a decade of 'EU accession' for CEE legal regimes would lead to an irreversible break with the totalitarian past were simply naïve. They forgot that institutions of liberal democracy cannot be created overnight. It is not only that developing liberal democracy requires more time, it also depends on continuous support and endorsement of the people. In his *Dark Continent*, Mark Mazower (1998) shows that the liberal democracy was not universally accepted as the normal and natural form of government in 20th century Europe, and that fascism and Nazism were not simply aberrant deviations in otherwise steady growth of democracy in Europe but deeply rooted and accepted ideologies able to compete with liberalism and socialism for political dominance in European political landscape at the time.

It is often argued that the rise of populism is not something peculiar to CEE. According to this argument, it is equally present in Western Europe and elsewhere around the world, which is to suggest that CEE is not that different from West Europe (Seleny, 2007). The weakness of this argument is that it overlooks the fragility of newly established liberal institutions in CEE. The old member states can cope more successfully with different attacks on liberal institutions because their courts, media, human rights, and ombudsman have a longer and more developed tradition of independence and professionalism. On the other hand, if such institutions are weak and underdeveloped, as in CEE, then there is always a potential danger of drift to populism and 'illiberal democracy'. One should not forget that a market economy and its political and legal institutions had to be built from scratch in CEE. Because such institutions and mechanisms had never worked in the area, Central and East European countries faced a formidable task. Since we are dealing with the biggest enlargement of the EU ever, this aspect becomes even more pertinent. Many have expressed skepticism about the administrative capacity of the new member states to actually implement the EU *acquis*, and have stated that there are huge differences in the ability of the older and the newer member states implement it. While the formal effects of transposing European norms and standards in CEE have been more immediate, they have led to a 'shallower' institutionalization of European principles and ideas.

The reformers in CEE were under a strong pressure to quickly adopt adequate institutions in order to satisfy various conditionality requirements. The desire of reformers to create institutions that 'look' European has had an important legitimizing effect during the accession negotiations. The rhetoric of a 'return to Europe' was an important political and ideological device used by the CEE elites during the enlargement process. Whether the return to Europe helped to create robust and well-working institutions, much needed for the CEE's nascent democracies, or whether instead it led to 'Potemkin harmonization' resulting in formal structures designed to please the EU, but with little impact on actual domestic outcomes, is one of the key issues at the moment. Several observers have raised skeptical voices when it comes to the quality and sustainability of liberal institutions established during the accession period. Whether the rule of law and the principles of liberal democracy in CEE are comparable to those in Western Europe is an open question. To what extent

citizens of those countries have internalized the principles of liberalism is yet to be seen.

While I agree with Seleny (2007) that democracy in these countries depends on strong and independent media, judiciary and other liberal institutions, I am concerned that the recent populist backlash against the very same institutions comes at a moment when CEE countries would need further reforms aimed at strengthening those institutions. With no or weak political consensus, it is very difficult to initiate such reforms As the case of constitutional courts shows, even the most developed liberal institution in the region is not secure. The appointment of new judges turned the Hungarian court from one of the strongest courts in the world into a relatively weak institution. The Slovenian and Slovak courts face a similar danger. Furthermore, when it comes to protection of rights and freedoms, many of these courts have yet to establish their reputation as the ultimate safeguards of constitutional rights. There are simply too many cases of violations of basic rights and freedoms, particularly of the weakest minorities, that do not receive judicial protection.

In the absence of a genuine political consensus on how to proceed with civil service reform, the political parties in the region are locked in a spiral of continuous politicization of the civil service, where each newly-elected government suspends or radically modifies the administrative reforms of its predecessor. In such a climate of heightened political distrust among the key political actors, it is nearly impossible to agree and even more difficult to implement any serious administrative reform. Administrative reforms in developed democracies are usually piecemeal and take several decades to develop. They require the strong support of all major political forces. Why then should one expect the CEE countries to design or even implement administrative reforms in just a few years?

Similarly, it is difficult to expect a vigorous anti-corruption campaign when specialized anti-corruption commissions are established only to placate the EU, not to fight the corruption.[2]

After the Law and Justice coalition of the Kaczynskis recently lost the elections in Poland, some were quick to announce that their loss could "mark the beginning of the end of populism in central Europe" (Tupy, 2007). While it is true that the liberal Civil Platform of Donald Tusk promises a shift in general political orientation toward what he calls "consensus government", much less certain is how the Tusk government is going to contribute to any reversal of the populist attack on liberal democracy. In one of the first post-election reactions, Wagsty and Cienski (2007) argued that "Civic Platform would be acting no differently from previous incoming Polish governments, which all removed hundreds of political appointees after taking power". We should also not forget that Tusk strongly supported the Lustration Law of the outgoing government. While deregulation and reducing the size of the state,

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[2] In an interview, Loskutovs, a chief of the anti-corruption bureau in Latvia, admits that "Latvia's goal was not to fight corruption—it was to get into the EU and NATO. Creating an anti-corruption authority, he added, was part of the checklist" (International Herald Tribune, 2007). Slovenia and Slovakia are also about to abolish their special anti-corruption authorities.

one of the Tusk's principal policy directions, can help reduce corruption in certain instances, it is naïve to believe that more deregulation could solve the problem of corruption. In the absence of appropriate regulatory institutions, deregulation may often increase, not decrease, opportunities for corruption.

While the recent Polish elections on the one hand demonstrate that democracy in this country is not in danger, on the other hand they also remind us that the problem of liberal democracy in the region cannot be solved only by replacing one government with another. The reasons for the lack of respect for liberal democracy go much deeper. The rise of populism has only brought to the surface more forceful tendencies shared by the majority of political parties in the region. In other words, even though the populist attack on the rule of law differs in its intensity from the politics of previous governments, it would be wrong to attribute anti-liberal instincts only to the populist governments and movements. The same instincts have been shared, in different forms, by other political parties as well.

What CEE countries need is to find a common language and political culture hospitable to the presence of strong institutions of liberal democracy. Reforming liberal institutions is not possible amidst the climate of political distrust and polarization in those countries. Additionally, civil society has to be strengthened and more involved in the process of further reforms of liberal institutions. During the enlargement, due to the speed and conditionality of the reforms, there was little time for the involvement of various groups and forms of civil society. Now that they are full members of the EU, the new member states should have more time for their own domestically-driven reforms. Many liberal institutions created during the enlargement need additional reforms. It is time now for real democratic deliberation and experimentation, which could usher in much needed institutional reforms in the region. Only a climate of strong political consensus and the broader involvement of civil society can help bring about much needed further reforms of liberal democracies in the region.

As Anna Seleny (2007) argues, the CEE democracies are not about to collapse. However, when courts' decisions are not respected, when some of the basic human rights are not protected, and when many institutions of liberal democracy lack the required political independence and professionalism, then liberal democracy is under threat. Whether we call it threat or collapse is only of semantic importance. What matters for liberal democracy is that constitutional liberalism enjoys the same prestige and importance as 'electoral democracy'. Only when both elements of liberal democracy work together can we speak about mature and consolidated liberal democracies.

A vital further factor is the existence of the EU which, according to many authors, makes the danger of rising populism less dramatic. However, there is no EU *acquis* or formal rules on this issue, apart from Article 6 of the EU Treaty, regulating liberal institutions in the member states. Despite the absence of the *acquis* regulating courts, the rights of minorities, and the civil service, the EU created certain criteria which were used to measure the adequacy of institutional reforms in the CEE countries during the accession period.

The first crucial step in this direction was the Copenhagen Summit in June 1993 leading to the so-called Copenhagen criteria which included the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for, and protection of, minorities (Vachudova, 2005: 96). When CEE states became full members, they could no longer be subject to the Copenhagen criteria. The EU therefore lost an important mechanism for monitoring and controlling the development of democracy and liberal institutions in CEE. That the Copenhagen criteria would not be available after 2004 was clear to the Commission in Brussels. However, only three years after the enlargement there were few who anticipated such a dramatic reversal of events leading to the rise of populism, attacks on liberal institutions and violation of rights of ethnic minorities. If it turns out that CEE are not able to respond adequately to the rise of populism, then the key question is whether the EU has any other adequate mechanisms at its disposal to influence or prevent such developments.

Due to the current political identity crises caused by the rejection of the EU Constitution, it is highly unlikely that the EU would resort to an extra-legal strategy as used against Austria in 2000, when the racist Freedom Party joined the Austrian government. Even less likely is the EU's resort to Article 7 of the EU Treaty which allows a Member State's rights to be suspended if it is found to be responsible for serious and persistent breaches of the rights declared in Article 6. Both the EU and the Council of Europe offer additional judicial protection for violation of fundamental rights and freedoms. The European Court of Human Rights recently ruled in D.H. and others vs. the Czech Republic (ECHR, 2007) that segregating Roma students into special schools is a form of unlawful discrimination that violates fundamental human rights. The decision represents a major step forward in Europe's fight against racial discrimination. The Court's ruling could mean that the integrated education of Roma children will be enforced throughout the European Union.

Liberalism and democracy coexist in contemporary liberal democracies. That there is a tension—some would call it contradiction—between the two has always been a matter of debate among modern political thinkers. Carl Schmitt (1994), a leading German legal thinker of his time, argued that their incompatibility leads to the inescapable contradiction between liberal individualism and democratic homogeneity resulting in the crisis of parliamentary democracy. The only true democracy for Schmitt was direct, plebiscitary democracy based on the homogeneity of the nation. The nation is a collective political entity competing in the field of the political with its political opponent, the enemy. The only real safeguard of such democracy was a leader, a Fuhrer. There was no place for liberal institutions in Schmitt's concept of democracy. Later, Schmitt became the crown jurist of the Third Reich.

Hans Kelsen (1930–1931), a leading Austrian jurist, criticized Schmitt and argued that only independent constitutional court could protect democracy from its vices. Austria followed Kelsen's advice and established the first Constitutional Court in Europe. Kelsen was one of its founding justices. However, after the Anschluss in 1938, the Court was shut down and Kelsen, himself of a Jewish origin, had to emigrate. Schmitt's concept triumphed in the Europe of that time. After the Second World War, Europe seemed to follow Kelsen: a majority of European states

established constitutional courts, primarily as a reaction against the collapse of democracies before and during the Second World War. Echoing this new development, Norberto Bobbio (1990) in his *Liberalism and Democracy* argues that democracy and liberalism are friends and that liberalism represents a necessary condition for the proper development of democracy.

The rise of populism in CEE is reminiscent of dramatic events in Europe's most horrible century. Even if it is true that CEE democracies are not about to collapse and even if we add that there is also the existence of the EU which makes the danger of rising populism less dramatic, there are still reasons to be worried about the populist attack on liberal democracy.

We can only hope that Europeans have truly learned the lessons of their violent and bloody history and that we are far from seeing history repeating itself. Yet given the precarious nature of democracy in twentieth century Europe, it certainly calls for a healthy dose of providence.

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