George Schöpflin

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Contents

In memoriam Ernest Gellner (1925–1995) and Anthony Smith (1939–2016)
friends and colleagues for many years

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Thanks

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Prolegomena

A few preliminary words of explanation. In my work I am guided by the motto of the London School of Economics, *rerum cognoscere causas* – to learn the causes of things – by the Enlightenment imperative that there is no privileged knowledge, that all propositions, truth claims, sacralised areas can be interrogated and that one is under the highest obligation to check one's sources. Indeed, the integrity of sources, the criteria of their selection, their scrupulous examination are central to whatever conclusion one arrives at – in a word, no cherry-picking.

In the eyes of some (many?), this almost certainly marks me out as a dangerous reactionary, a toxic saboteur and the worst kind of legislating intellectual (Bauman,[1] of whom more anon). Then, I am in the unusual position of having a background in political theory, in nationhood and identity theory and theories of power, and, in addition, to having served as a practising politician for 15 years as a member of the European Parliament. This makes what I have written a work of observer participation, with the added feature of reflexivity in the understanding of what I experienced. Note that I do not claim monopoly of understanding, others – colleagues, journalists, think-tankers – will have their own, very different take on these processes. So be it. Thirdly, there is my multicultural background of having grown up in the UK (Scotland, London) and having been simultaneously Hungarian. These provided me with contrasting and conflicting narratives, insights, truth claims and a consequent detachment. Finally, there is age. I've lived through a lot, seen much, forgotten much, but this unquestionably gives me perspectives that set me apart from those of a 25 year old. All in all, be warned, these are the principal elements of my epistemology and delineates the semiotic spheres in which I live, move and have my being.

A few preliminary thoughts about this book, which is best read as two interconnected essays: what it attempts to do is to assess the European Union as a political system, as a polis, and to explain why it has moved from having been a largely consensual undertaking to one that is palpably more

[1] Zygmunt Bauman, *Legislators and Interpreters* (Cambridge: Polity, 1987).

open to attaining its objectives by using sanctions. The second part seeks to dissect Central Europe, its assumptions and cultural capital, and why these are at variance with those of the West. Then, I am possibly vulnerable to a charge of being Hungary-centred (obviously), but I have sought to take on ideas from the other EU-11 formerly communist-ruled polities, albeit with a caveat that I do not read the secondary sources in those languages. But then I am absolutely not alone in this. Finally, I closed the manuscript at the end of 2019, so whatever happened thereafter has not been a part of my thinking.

Part I

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Part I

The European Polis

Europe today is a polis, a political community with its own idiosyncrasies, habits, thought patterns, identity or identities and, as with all identity collectives, a mythic narrative of the past and a vision of its future. The Europe to which I am referring is the European Union (EU), all its institutions, the member states, the elites, the civil society ecosystem that surrounds the EU and feeds it with lobbying and other inputs, the citizens and the interaction between these various bodies. Antoine Vauchez characterises this ecosystem as:

> [The EU] is still heavily dominated by sector-specific professionals and policy officers working in Brussels. Their skills and profiles (legal expertise, mastery of Euro-speak and the language of bureaucratic acronyms, multilingualism, sense of compromise, etc.) have become the expected credentials in most European negotiating tables.[2]

The interaction must be understood relationally, as a multi-actor, multi-level incomplete system, with built-in unpredictability, where decisions by one institution can impact on others without there being any intention to do so and disproportionately. The exercise of power ripples through the system and can do so irregularly.

In formal terms, the institutions of the EU are Council, Commission (COM), the European Parliament (EP), the European Court of Justice (ECJ), the European Central Bank (ECB), the agencies (some with regulatory power) and the myriad semi-formal bodies, like high-level working groups and ad hoc advisory bodies. The EU does have some of the qualities of a state, but far from all, so in that sense it is an ambiguous polis. It is certainly not a state in the Weberian sense of having a monopoly of the legitimate means of coercion, though, as we shall see, it is beginning to construct coercive capacities. But as should be clear, the emphasis in

[2] Antoine Vauchez, *Democratizing Europe* (London: Palgrave Macmillan, 2016), 20.

this analysis is not on the formal structures, but on the interactions and likewise the corporate cultures of the various institutions. Note that it can be taken for granted that all institutions are concerned to secure their own reproduction as a primary objective, they will seek to enlarge their sphere of power and they will expel or confine dissonant elements.[3] The different parts of the European polis are no exception.

The Treaties (TEU, TFEU) add up to something along the lines of a constitution, there is a legislative process and the ECJ is analogous to a Constitutional Court; indeed, its judgements where EU law is affected are hierarchically superior to all other legislation. Let it be added here very firmly that the EU insists on its being a democratic polity, the much cited Article 2 of the TEU is explicit on this, but most contemporary theories of democracy insist on there being a *demos* as a necessary condition of democracy and the European polis manifestly lacks a *demos*. Nor is there much in the way of accountability of power, self-correction mechanisms, self-limitation, checks and balances and even transparency is made imperfect by reason of behind-the-scenes activity (with real-time consequences).

Pivotal to any political system that seeks to ground its legitimacy as firmly and as widely as possible is that it must avoid inconsistency and double standards. There is nothing like inconsistency to undermine one's credibility, especially in a body that was founded to resolve problems of asymmetric power and the equalisation of the weaker actors with the stronger ones. The European polis's record on consistency or inconsistency has been far from perfect.

One illustration of this inconsistency. The Commission launched a so-called Article 7 procedure against Poland on the grounds that its judicial sphere was being distorted by government intervention. Whatever the Polish reality, and it really can be argued in many ways, the fact is that there were similar shortcomings in the legal systems of several of other EU member states. The president of the ECJ could argue that the EU was a single legal space, 'EU law must apply in a uniform manner throughout the Union';[4] nevertheless, there are considerable variations in matters like what role a government may play in the appointment of judges. In Finland, judges are appointed by the head of state on the recommendation of the

[3] Mary Douglas, *How Institutions Think* (Syracuse NY: Syracuse University Press, 1986).

[4] Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue', *Yearbook of European Law* 38 (2019), 3–17, 15.

minister of justice. But when the Poles made reference to these variations, the Commission dismissed it as 'whataboutism'. Rank inconsistency, if ever there was one.

One can add Vauchez's assessment at this point, to the effect that the European polis is a 'Potemkin democracy', in that in both institutional structure and language, the polis merely mimics member state democracy. It uses words like democracy, parties, civil society, public sphere, and so on, but in reality this is merely an appearance. The reality is a 'cognitive dissonance', a 'thick semantic fog' between the democratic language and the technocratic substance.[5] The authentic government of Europe is beyond the realm of its political reality or, to put it differently, power lies elsewhere and is neither particularly accountable nor open to feedback from below.

The deep state problem

To this may be added the 'deep state' problem. The term has acquired considerable popularity primarily because of its use in the US in the conflict around Trump. Its origin is almost certainly from the Turkish *derin devlet*, describing a network, probably the network of bureaucrats, the military, security services and some politicians; business interests can also be involved. It is also called 'parallel state' and 'state within the state'. My reading is that these are simply new ways to describe the phenomenon of administrative autonomy identified by the Italian neo-Machiavellians – Mosca, Pareto and Michels. Nordlinger was also analysing the same phenomenon.[6]

Their premise is that administrative remoteness is structural and self-reproducing, though I would add, there is no inevitability about it. As long as there are competing sites of power and mutually recognised procedures, the autonomy of the bureaucracy can be contained, though it can never be eliminated. Transparency can help and some accountability can be established through administrative courts like the *Conseil d'État* in France and the institution of the Ombudsman. It was the sociologist Stanislav Andreski (in a conversation many years ago) who drew my attention to the insight that where there is no market and allocation is entirely in the

[5] Vauchez, *Democratizing*, 25–26.

[6] Eric A Nordlinger, *On the Autonomy of the Democratic State* (Cambridge, MA: Harvard University Press, 1981).

hands of the state, the result is bureaucratic despotism. He added that this was a great contribution of the neo-Machiavellians, which was all the more remarkable given that they were writing before the Russian Revolution. The actual practice of bureaucratic despotism is succinctly assessed by Gellner.[7]

I'm not arguing that bureaucratic autonomy is a conspiracy, but it can and does give rise to rigidity and a propensity to transfer responsibility to procedures. Above all, all administrations deny that they are in any way exercising power, they are simply performing their due tasks. It is seldom as simple as that. Ideal-typically, power is exercised by the politicians who must, therefore, assume the responsibility, but in real terms, matters are far more complex and it is the knowledgeable bureaucracy that has the knowledge, which then leads directly to the power-knowledge equation that needs no further elaboration.

After this very brief introduction to the topic, a few thoughts about the bureaucracies of the EU – very much in the plural – seems useful. The bottom line is that MEPs, governments and Commissioners come and go, whereas the administration is there for the duration and has much better access to institutional memory and, all too often, to the knowledge itself. Then, predictably the bureaucracies develop their interests and find themselves in competition with other bodies in the system, often with no ready means of conflict resolution. Note that these conflicts are frequently played out in a legal and procedural language that is familiar to them, though not necessarily to the political actors. The outcome is predictable. Ideas, policies, strategies unwelcome to the administration will be resisted, will 'require further elaboration' or 'an impact assessment' or a 'redefinition of the success–failure criteria' or an insistence on action being 'budget-neutral'. The techniques of resistance are endless and difficult to circumvent.

Given that the EU is heavily invested in legal language and articulates its political objectives through the law, it follows that those with the control of the language and knowledge of the law enjoy a primacy when it comes to the autonomy of the bureaucracy vis-à-vis politicians. This places the legal services of the EU institutions in a privileged position. Their advice, which is often the kind of advice that is difficult to reject, then shapes what politics can and cannot do. Politicians are discouraged from offering their own interpretation of knotty points of the rules. A case in point is the way

[7] Ernest Gellner, 'The Captive Hamlet of Europe', in *Culture, Identity and Politics* (Cambridge: Cambridge University Press, 1987), 123–33.

in which the voting of the Sargentini Report was run (see infra). It was Parliament's legal service which gave the advice that abstentions did not count as votes. The reasoning is not available. For a body which prides itself on its transparency, this is strange and so is the fact that the parliamentary left, which usually demands total transparency, has been silent on this issue. Yet it is clear beyond any dispute that the legal service had taken a legal decision with far-reaching political consequences, but had veiled the exercise of power in legality.

Does this add up to an EU deep state, of the kind that has been debated in the US? Probably not, but that does not mean for a moment that the EU's bureaucracies are different and operate the system with Platonic purity. There are blockages and these can add to the remoteness and impenetrability of the system. And certainly there are behind-the-scenes information flows that are kept from the politicians and wider public opinion. But by comparison with member state bureaucracies, those of the EU can be more flexible and sometimes even, more responsive. There may well be a cage of the Weberian kind, but it is not really made of iron, maybe Gellner's rubber cage is the best metaphor.[8]

Europe's asymmetries of power

Then, this polis is incomplete, in as much as its constituent members have powers and legal rights in which the polis has no capacities. In common with Europe as a whole, the most striking quality of both Europe and the polis is that they are structured by asymmetries of power, frequently allowing the stronger to coerce the weaker. Formally all member states enjoy parity of esteem; in reality, this is not so and the large states regularly seek to impose their ideas on the smaller ones. What the polis is and what it should be are all but invariably launched by Paris and Berlin. When the four Visegrád states came forward with thoughts of their own, this was not well received, at all. Still, there is a recognition that in the 20th century, the power of the stronger *über alles* led to disaster, hence (put very simply) the construction of a system that sought to compose these asymmetries by the creation of all-European conflict resolution mechanisms.

[8] Ernest Gellner, 'The Rubber Cage: Disenchantment with Disenchantment', in *Culture, Identity and Politics* (Cambridge: Cambridge University Press, 1987), 152–65.

These had to be voluntary and consensual, because it meant that a sovereign state had to be ready to cede powers to a body that was legally and to some extent politically distinct and superior to it. In the aftermath of World War Two, this was accepted and, indeed, generated a genuine and sincere enthusiasm among the founding fathers (and the occasional founding mothers). This enthusiasm is now very thin, much of the goodwill generated by it has gone and the asymmetries are no longer all that well regulated. But it should be noted here that integration, the polis itself, were and are elite projects. This has had two drawbacks. One cannot run a democratic polis without feedback mechanisms, legitimacy and consent from below, and these are feeble in the practice of the polis. Equally, if the well-being of the polis does depend on the commitment of the elites, then it becomes imperative that these elites remain true to the original inspiration and not try to introduce new agendas. They have. In the mid-2000s, the watch-word of the polis was 'soft power'; by 2019, this was hardly ever heard and it had been replaced by 'rule of law' as the driver, with sanctions for the awkward squad. The polis was well on the way to becoming a punitive polis.

The EU, in the form of its large member states, imposed a technocratic government on Italy and put Greece through the wringer. Then, once the rule of law discourse gained speed, roughly from 2014 onwards, those not conforming to the Commission's definition of good behaviour were threatened with Article 7 procedures and the threat of cuts to structural and cohesion funds if the malefactors refused to mend their ways. This process nicely illustrates the complexity problem. Considerable sums of money are transferred from the net contributors to the net beneficiaries, the poorer states that joined after 2004, and these are mostly deployed in innovation and infrastructure building. That's the headline story, at any rate.

In exchange, the post-2004 states opened their markets to the free movement of capital, with the result that for some, up six per cent of their GDP is exported as capital transfers to the richer states (the EU-14) – some might see this as a subsidy by the poor to the rich, a reverse Robin Hood – and, at the same time, most of the structural funds return to the EU-14 because the work is regularly carried out by Western contractors. The German *Mittelstand* would be decidedly unhappy if these cuts were to happen.

Besides, if these cuts really were implemented, then the affected states, the EU-11, would start thinking about counter-measures, like restrictions on the export of capital. Gradually the behaviour of the constituent parts

of the polis would change from consent to resistance and the building up of countervailing power, as the Visegrád states have been doing.

Two-tier sovereignty

The core of the means of regulation was the revolutionary device of a body with its own sovereignty superior to member state sovereignty, which was delegated to it, a device that would thereby pre-empt hostilities among the member states. But that was as far as it went, at the outset anyway, and this system did not proceed in any linear way – there were serious existential crises (failure of the European Defence Community in 1954, the empty chair 1965–66, the vetoes on UK entry 1963, 1967). In each case, the political will was found to establish a working solution. But as the system grew, from European Common Market to European Community to European Union, it inevitably became more set in its ways, followed its bureaucratic norms and grew less adaptable. Thereby it strengthened its autonomy over those to whom it was accountable and could translate its own preferences into policy making, by its own abstract criteria of 'Europe'.[9]

Note here that this nutshell history of integration further means that the functionalist paradigm, that spillover would necessarily (necessarily, really? shades of historical necessity?) result in ever wider areas of activity falling within the ambit of integration is flawed. No, what the aforementioned crises demonstrated was that political will was the necessary condition of further integration. So this changed the equation, but that in and of itself raised a new question – whose political will are we discussing? All the member states or just the asymmetrically more powerful ones? If the latter, where are the red lines, the boundaries beyond which the polis would become embroiled in conflict? The jury is still out.

At the same time, inter-state asymmetries were paralleled by intra-state asymmetries, the ones that a democratic system was and is supposed to regulate by the continuous redistribution of power, goods, symbols on a more or less consensual basis. I say 'more or less', because governments have to take decisions without consulting their electorates. Sometimes these decisions have consequences that become a source of new and avoidable asymmetries only much later. The opening of the European labour markets

[9] Nordlinger, *On the Autonomy*.

to non-European labour migration in the 1950s and 1960s was one of these. Nowhere was the consent of the electorate sought as to whether they wanted to become multicultural, and thereby the mostly monocultural societies of Europe were transformed. This transformation affected the nature of citizenship. What kind of democratic citizenship is it when the preexisting majority has no voice in determining who fellow citizens should and should not be? Instead, multiculturalism is presented as inherently 'good', ethically, culturally, economically. This is supposedly an apodictic proposition; not everyone agrees.

The point in this connection is that where issues like migration impact on intra-state politics, raise issues of domestic asymmetry, this will most likely be translated into the European polis, especially when stronger states or actors seek to impose their solutions on weaker ones, not least to try thereby to resolve domestic issues, which further serves to illustrate the relationality and interconnectedness of the polis.

At that point, the polis and its conflict resolution mechanisms, the checks and balances included, become entangled, generating further complexity and new sites of power emerge, indeed they come into being as emergent properties – the sum of powers is greater than the bits of powers that have been delegated. There is no actual power grab, to use a phrase much favoured by the media when they don't understand and don't like what they see, there is no actual intent to acquire more power, but it emerges all the same. And no institution will say no to additional power, not until hell freezes over at any rate.

There are many reasons and many foci for the rise of these asymmetries. Some of them are generated by the rise of the European polis itself. Again, we are looking at an inherent belief, that integration, ever more integration, is 'good' without the need for further proof or argument. And anyone who says otherwise is dismissed as irrational, as a fool or a knave. But the inter-state and intra-state structures, as well as the strategies and belief systems of the elites who govern the polis operate in interaction and can give rise not just to complex, non-linear problems, but also to insoluble, so-called 'wicked' problems (these are dealt with in detail later[10]).

[10] Keith Grint, *Leadership, Management and Command* (London: Palgrave Macmillan, 2008).

Pre-globalisation assumptions

And here we immediately encounter a more or less invisible difficulty. The foundations of the European polis were laid down in the post-1945 years, but the thinking behind that foundation has never been openly debated and revised, hence the polis finds itself operating on pre-globalisation assumptions in an age of globalisation.[11] The central issue here is complexity, as defined in the foregoing, the coming into being of a world of power, both inside and outside the polis, in which linear and non-linear processes are constantly cutting across one another, but those running the polis continue to insist on linear solutions, because – in their mind-set – that is the only way in which integration can be made to work.

Centrally, I have the Monnet method in mind here, the proposition that the European polis should be regulated identically as far as possible, regardless of whether these regulations actually work. Sometimes they do, as with food safety or water pollution, but all too often the Monnet method results in over-regulation, an inadequate transposition of central regulation into the member state order, and the centre then launches disciplinary actions (dialogue, infringement procedures, possible adjudication by the ECJ). Alternatively, the implementation of a regulation varies markedly from member state to member state, giving rise to an inconsistency which can either create indignation or provide gaps through which the system can be gamed.

Without offering a long history of European integration and the emergence of the polis, it is important to see the various shifts which the project has undergone and the changes in thinking behind it. The thinking in this connection is intimately tied up with the legitimation of the project. There is a general proposition, popular mostly in the EPP, that Christian Democracy was the original driving force behind the integration. Robert Schuman is regularly cited here, as are Konrad Adenauer and Alcide de Gasperi. They understood Catholicism as forgiveness and reconciliation, with Germany in mind, and as the underpinning of democracy, as all humans are equal in the sight of God. On this basis, it is possible to formulate social protection and redistribution, with the state as the agent. It is hardly worth noting that this concept of democracy is very different indeed from what prevails in Anglo–Saxony, which stresses the autonomy of the individual or from

[11] John Urry, *Global Complexity* (Cambridge: Polity, 2003).

that of Central Europe, where nationhood is seen as the guarantor of liberty and, thereby, democracy (this is utter anathema to the liberal left).

The Christian Democratic approach was paralleled, to some degree contested, by the technocratic thinking of Jean Monnet. What is the problem? Here is a solution, all that is needed is implementation by experts. The solution, if it works, generates its own legitimacy. Technocratism does not exclude redistribution, but tends to subordinate such social issues to problem solution. Similarly, it enhances the autonomy of the technocracy over society.

This has left a deep impression on the integration process and is alive and well in Brussels (the consequent outsourcing of power to non-accountable bodies is dealt with later). The Commission above all operates technocratically and, at the same time, while admitting that its activities are an exercise of political power, is reluctant to enhance its accountability. Indeed, this is one of the central issues in any democratic system, the propensity of technocrats to clothe their exercise of power in legal categories. The dangers of enveloping political power in the language of legality can hardly be exaggerated, it goes directly counter to the principle of separation of spheres, but that is very much a breach/observance issue ('it is a custom / More honour'd in the breach than the observance').[12]

The third founding impulse is federalism, closely associated with Altiero Spinelli and the radical left. Spinelli argued that peace, democracy, social justice were central to Europe and these could only be attained through the construction of a federal Europe. He opposed the incrementalism of Monnet, he was an opponent of state sovereignty and sought to bring Europe under a federalist constitution that would transcend the powers of member state governments. His ideas live on, the federalists remain active and in many ways influence the European polis, above all those on the left. A topos that will surface repeatedly in this analysis is the merger of what currently calls itself liberalism – a considerable distance from Mill or Alexis de Tocqueville – and the goal of a federal, centralised, potentially Jacobin Europe. From another perspective, this merger is neither necessary nor indeed inclusive. A conservative or Christian Democratic Europe is equally conceivable. But the capture of the integration project by the left has come to mean that all critiques of the polis are dismissed as reactionary. Integration is progress and forget about its linearity.

[12] William Shakespeare, *Hamlet*, Act 1 sc. 4. 25.

Arguably, this capture explains one of the more striking features of Europe – striking, that is, by comparison with the past. Europe has become conservative in the bad sense, of having become set in its ways, it has become slow to recognise contemporary realities, it has established definitive truths for itself (like being post-national) and will not change. Indeed, a sizeable section of the elite is living in a tunnel and cannot see that the established truths of 20–30 years ago do not hold. In the federalist–liberal view, Europe is built around a 'universal patriotism',[13] a proposition that is little more than an empty signifier. These elites are captives either of integrate at all cost because more Europe is the universal panacea or of the proposition that Europe is already too integrated and should be dismantled, not wholly, but some of it, because the nation state does better what Europe claims to do.

What is hard to deny is evidence of entropy. The sense of mission that once activated integration is now weak and has been replaced by bureaucratic procedures, technocratic solutions and a default into legalese (Pistor applies this to economics, but it is equally present in the integration process[14]).

A nutshell history – very much a nutshell, scandalously so – will show that historically Europe has shown an enormous capacity for renewal and innovation, in terms of technology, of institutions and of ideas. The Universal Catholicism of the Middle Ages accepted, indeed sanctioned, political pluralism, in as much as recognised monarchies – awarded a crown by the Papacy – could not be colonised. This explains the rapid, almost overrapid acceptance of Catholic crowns in Poland, Bohemia and Hungary a little before 1000 AD. At the same time, unlike Caesaropapist Byzantium, the separate spheres ruled by Church and State (render unto Caesar, render unto God) meant that circles of autonomous thought were accepted, and thereby innovation could evolve.[15] We can add Deepak Lal's insight[16] that by banning the lateral inheritance of property and establishing itself as the *ultimus haeres*, the Church inadvertently broke up the extended family system, the

[13] Pascal Bruckner, 'Europe's Virtues Will Be Its Undoing', *Quillette*, 14 September 2019.

[14] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019).

[15] James Hannam, *God's Philosophers: How the Medieval World Laid the Foundations of Modern Science* (London: Icon Books, 2009).

[16] Deepak Lal, *Unintended Consequences: The Impact of Factor Endowments, Culture, and Politics on Long-Run Economic Performance* (Cambridge, MA: MIT Press, 1998).

one that remains current in much of non-Europe and remains an obstacle to other loyalties, like citizenship. Despite its bad reputation, the feudal system was innovative, in that it clearly delineated the ownership and boundaries of territory, sustained a stable hierarchy of obligations and a certain system of adjudication. In parallel, the Church developed a complex system of Canon Law to regulate private life where it overlapped with public life and the early trading towns created a system of commercial regulations (for example the *lex mercatoria*), a system of customs and practice, with enforceable contract at its heart. This multiple system of regulation was untidy, created overlaps and conflict, but also allowed innovation to flourish. Crucially, there was no absolute power over the entirety of Europe.

The flaw at the centre of the system, however, was that the secular realm accepted violence and war as the primary means of enhancing power, meaning near constant warfare.[17] Post-mediaeval developments saw several shifts with far-reaching consequences for the regulation of power. The invention of printing had multiple consequences. It meant that literacy was useful beyond the confines of the Church and commerce. It further meant that information spread unevenly, but much faster than before throughout Europe. Third, it resulted in a radically new and permanent information storage system. Benedict Anderson emphasises print capitalism as the outcome,[18] but print etatism was at least as important, if not more so. The state was now able to make and store records of its subjects and thereby, over time, condense its power over the population,[19] as well providing ever growing employment for the newly literate as state employees.

Reformation meant the end of Universal Catholicism and the slow, often painful acceptance of new pluralisms; Westphalia gave this political content. That did not mean, however, that the longing for universalism was abandoned and that universalism encoded a certain belief in the absolute,[20] which came to fruition notably in communism and Nazism. For my own, possibly idiosyncratic reasons, I am making a special mention here of Johannes Kepler, who concluded that if the facts did not sustain the

[17] W H McNeill, *The Pursuit of Power* (Oxford: Blackwell, 1983); Norman Davies, *Vanished Kingdoms: The Rise and Fall of States and Nations* (London: Penguin, 2011).

[18] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006).

[19] Charles Tilly (ed.), *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975).

[20] George Steiner, *Nostalgia for the Absolute* (Toronto: House of Anansi Press, 1974, 1997).

theory, then it is the theory that must be reformulated, not the facts.[21] The implication of this radical shift need not be spelt out.

The French Revolution reinvented the *demos* which necessarily brought the *ethnos* into play and embodied them in the post-Westphalian state – the balance between the two varied in time and place. This meant another political innovation, the modern nation state, which was paralleled by the longing for empire, both within and outwith Europe. Without attributing any historical necessity here, for there was nothing inevitable about the clash of national empires in 1914–1945, what was clear was the devastation and trauma. Another moment of innovation was launched, the integration process as argued throughout this writing.

But this innovativeness appears to have slowed down – this is written in full recognition of the dangers of writing without sufficient perspective in time and space. Nevertheless, it is hard to deny that currently (in 2019) it is proving hard to find solutions to the multiple challenges that Europe has to deal with. There seems to be a pervasive stagnation of thinking, too much of what sees the light of day remains at the surface level or focuses on too narrow a range of symptoms or attributes problems to a flawed aetiology or is too ideologised or the mixture of these. At least a part of this is attributable to the style and content of the output of think tanks. Think tanks seldom do deep structural analysis, rather they focus on the short term. There are exceptions, but they are rare.

These attitudes are symptoms of something which can be called Euro-fatigue, a loss of the innovativeness that made a renewed Europe possible after 1945, the pervasive guilt that Bruckner has identified[22] (Holocaust, colonialism, patriarchy, migration, nationhood, climate change etc.), the rise of ideological thinking and the corresponding loss of capacity for debate – closed epistemologies. Crucially, the capacity that Europe has developed over the centuries for reflexivity, for challenging established truths, for questioning its received epistemologies seems currently to be in a stasis. And while the elected political decision-makers are captives of their ideologies, the technocracy acts, sometimes keeping the political class a very long way from what is really happening.

[21] Arthur Koestler, *The Sleepwalkers: A History of Man's Changing Vision of the Universe* (New York: Macmillan, 1959).

[22] Pascal Bruckner, *The Tyranny of Guilt: An Essay on Western Masochism*, trans. by Steven Rendall (Princeton: Princeton University Press, 2010); Bruckner, *Europe's Virtues*.

Rapid technological change (access to information, new means of communication, climate change), globalisation (the liberation of capital from the state, the power of the bond market over the state) and new sites of power that do not accept the European mode of consensual conflict resolution add up to a challenge that Europe has yet to identify, let alone face.

Furthermore, there are new sociological and demographic cleavage lines within Europe, with political consequences, some generated by the EU's freedom of the labour market. Centrally, the old divide of an aristocracy of birth is largely finished and has been replaced by a self-reproducing meritocratic elite that is every bit as determined to safeguard its privileges and status as the aristocracy was, but is much larger and operates a complex system of barriers against questioning of its status and privileges. There is no sense of *noblesse oblige* in the latter. This new elite has been constructed by education, though increasingly it is becoming hereditary through assortative mating. The political institutions to restore democracy, to reintegrate non-elites have yet to be devised and the outcome is the emergence of peripheries within states.[23] The *demos* at the member state level is all too often dismissed as ochlos – or, to switch languages, Horace's *profanum vulgus*[24] – and the historic linkage between *demos* and *ethnos*, cultural nationhood, is denied. Yet *demos* and *ethnos* cannot be separated fully and the current attempts to do so cannot end well.

The *demos*

The neglected part of the European polis is the *demos*. Most of the evidence suggests that there isn't one. Surveys regularly show considerable support for the EU, even if the level of support varies from one member state to another, but identification as European *demos* is weak to non-existent. The benefits of the EU are routinised and naturalised, there seems to be no strong pull effect from various EU achievements, like the single market, the right of residence anywhere or Schengen or the abolition of roaming charges. These seem to be taken for granted and do not give rise to emotional attachments; their loss, on the other hand, would very likely do so.

[23] Christophe Guilluy, *Fractures françaises* (Paris: Flammarion, 2013); Christophe Guilluy, *No Society: la fin de la classe moyenne occidentale* (Paris: Flammarion, 2018).
[24] Horace, *Odes*, 3.1.1.

The classical model of citizenship meant that those who paid taxes and served in the military had claims on the state. In the case of the EU, neither is true. There is no European army and if there ever is one, it will certainly be governed by the member states. Much the same applies to taxation, the EU has no direct taxing powers, the budget is made up of member state contributions and income from customs dues. This makes it decidedly difficult for citizens to develop an active relationship with the power that has been accumulated in Brussels. As we shall see, the legal dimension of the polis was framed in such a way as to ensure that the political relationship between polis and *demos* should be in the hands of the member state and that citizens should be kept at arms length from the polis. In other words, the *demos* of the European polis, while not entirely a fiction, should not be in a position to make serious dent in the institutions of the polis. In sum, European-level citizenship is thin when compared to member state citizenship. The ecosystem of civil society organisations does not – actually cannot – compensate for this, because they have no legal status, no *locus standi*, in the polis. What they have is influence, but there is no obligation on any of the institutions of the EU to pay attention to them. And when it comes to influence, lobbies are far more effective.

This distant relationship between the citizens and the polis raises a number of hard questions, starting with the legitimacy deficit. What process legitimates the accumulated power in the EU? What role do the citizens play in this? The European Parliamentary elections maybe provide some legitimacy, certainly this is what the EP believes of itself, but these EP elections are overwhelmingly about local issues and not about Europe.

The Treaty itself, the TEU has very little to say about the citizens. The preamble does contain this sentence, [the signatories are] 'RESOLVED to establish a citizenship common to nationals of their countries', and Article 1 adds, '…decisions are taken as openly as possible and as closely as possible to the citizen'. The much cited Article 2, which lists the values of the EU, the ones regularly proclaimed as 'European values' and the two really are not the same, does not mention citizens. Article 3 offers the citizens 'an area of freedom, justice and security', in the context of security. Article 9 makes it clear, and this is vital, that EU citizenship derives from member state citizenship, much to the dismay of pro-EU Brits who would like to retain their EU citizenship. Article 10(3) adds: 'Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.' To which must be added

10 (2): 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.' Then, Article 11 makes provisions for citizen inputs into the EU, including the European Citizens' Initiative.

Now compare this with the text of the abortive Constitutional Treaty. Here is Article 1: 'Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it.' The words 'reflecting the will of the citizens' is the key, because the phrase obviously means that the polis derives its legitimacy from the citizens. Actions may speak louder than words, but omissions can be stentorian.

Under the TEU, the constitutional document of the polis, the linkage between legitimacy and the citizens is absent and it really does not take much of an effort to recognise that the removal from the text of 'the will of the citizens' was done deliberately, not exactly to disempower the citizens, but certainly to place them in a lower status in the hierarchy, thereby enhancing member state citizenship, as is implied by Article 9, the key part of the text being: 'Every national of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.'

If we look closely at the thinking underlying the interconnections of the TEU, then something odd, indeed quite contradictory emerges. We can all agree that member states transfer some of their sovereignty to the EU. But where does that sovereignty come from? Throughout the EU, minus the United Kingdom (sovereignty is vested in the UK parliament, but the Scottish parliament has popular sovereignty), sovereignty is popular sovereignty, that is, it is derived – maybe indirectly – from the people as voters and citizens. But, a truly major but, when it comes to the areas of sovereignty transferred to the EU, the popular element is quietly eliminated and reduced to state sovereignty, meaning that member states freely pass over bits of their sovereignty without further ado. What happens to the popular part of state sovereignty? Seemingly it disappears.

Logically, the member state level popular element should be inherent in the transferred sovereignty and continue to function in the polis. It does

not, in effect it is retained by the member states and does not extend to the EU. That, certainly, is how I read Article 10 of the treaty. Hence, we really should not be surprised that European citizenship is referred to with fair words, but these butter no parsnips when it comes to the distribution of power in the polis. This probably suits the member states in Council and the Commission; Parliament spends so much time obsessing with populism that it does not want serious inputs from real citizens, as opposed to the shadow citizenship that the polis has constructed.

A potentially controversial observation follows. If we can agree that the process by which the Lisbon Treaty, the TEU, was drafted ensured that political participation in the polis should be constrained, then it follows that when groups of voters (citizens) did want changes in the polis, they would be frustrated in this. There are, as we have seen, fine words about an area of freedom, justice and security and running the system as close to the citizens as possible, but the Treaty entirely avoids establishing mechanisms, institutions or procedures for implementing these objectives. So what are citizens to do? Well, as Horace wrote a long, long time ago, *naturam expellas furca, tamen usque recurret* (you may expel nature with a pitchfork, yet she will always return). The return has happened through the mechanism that the polis could not prevent, through member state politics and elections, through the rise of parties dismissed as 'populist'. Yes, they certainly disturb the even tenor of the polis, but they are also acting as the otherwise absent checks and balances in the system, the lack of accountability of power. So be careful, if you set yourself up as a democrat and proclaim democracy as a part of your DNA (see infra), don't be surprised if you are called to account on this score.

All this, taken together, means that EU citizenship is a much weaker relationship than member state citizenship and I rather think that both the member states and the Commission prefer it that way. This evidently means that EU citizens have very few means of activating accountability, of making inputs into workings of the polis and, despite the accumulation of power in the polis, have fewer rights than what would customarily expect in a democratic state. It is fair to call European citizenship a shadow citizenship.

Then, it is generally acknowledged that member state parliaments have significantly better access to legitimacy than the EU, but for pro-integrationists this is regrettable because that strengthens the position of Council in the order of the polis; intergovernmentalism is the obvious opponent of closer integration, as are the mystical watch-words of subsidiarity

and proportionality. Third, there is a fundamental problem of identification as EU citizens. The great majority in Europe identify as citizens of their state first and find it difficult to conceptualise, let alone absorb, the hierarchical, nesting grades of citizenship. During the Irish referenda on the Lisbon Treaty, this state of mind was referred to as the disconnect. Matters were made worse during the negotiations on the Lisbon Treaty by the insistence of several member states, the UK and the Netherlands in the forefront, on stripping out the symbolic and ritualistic elements of the EU, notably the flag, Europe Day and the anthem. These remain in being, but have little resonance outside parliament, even if the flag is widely flown on official buildings throughout the EU. It functions as an empty signifier.

The key event as far as my analysis is concerned was the 2005 referenda in France and the Netherlands. In both cases, the Treaty on a European constitution was clearly rejected, by 54 per cent in France and by 61 per cent by the Dutch. The citizens of two founding members had said no. For me, that was a decisive moment in the history of integration. In two states the national *demos* made it clear that it did not seek more integration, and, just as importantly, that they did not trust or believe the pro-European elites that had urged them to vote yes. Hence further integration could only be undertaken by ignoring the *demos*. But then, was the EU still democratic? Could it simply override the *demos*? Could it actually be democratic without the consent of the *demos*? The elite's answer was yes, of course. I recall the then Portuguese Prime Minister, José Sócrates saying at the end of the 2007 Portuguese presidency that democracy was Europe's DNA. What a wonderful metaphor, I thought when I heard it and was captivated by it briefly, but, then, how was that to be reconciled with the 2005 referenda results? The answer was to pay no attention. So it was no to the *demos* and forget about the feeble resonance of a European constitutional patriotism à la Habermas. The Lisbon Treaty, the TEU, was the technocrats answer to the 2005 failure.

The foregoing provides a kind of context to the fine grain of the relationship between the EU and its (putative) citizens. Article 11 of the TEU brought into being the European Citizens' Initiative (ECI), an instrument (to use EU jargon) by which a million citizens from seven member states could ask the Commission to launch legislation on any area that was legally a part of European law. Disclosure: I was the EP's rapporteur on this file (jargon again) and I took it seriously that the relationship between the EU and the citizens could and should be improved. The ECI was not a perfect instrument, far from it, but it could impel the Commission to act,

if the Commission was prepared to do so. Around 70 such initiatives were launched but to date only the Right to Water made it into legislation and that only partially. To be fair, some of the Initiatives were marginal, badly organised and underfunded and never really got off the ground. But that was only a small part of the problem.

The central difficulty lay and lies in the very eccentric nature of the polis. The right of legislative initiative is a monopoly in the hands of the Commission and nothing short of treaty amendment would change this. Sure, no institution would voluntarily cede some of its acquired power and the Commission was no exception. We tried to persuade the Commission that if an ECI was successful and not ultra vires, then there should be a rebuttable presumption that legislation would follow. Not a chance, this proposal went down like the proverbial lead balloon. In a perverse way, there was logic in this. If the *demos*, the citizens were a negligible element in the polis – *une quantité négligeable*, as the French say – then why let them near the holy of holies, the legislative process? Still, our work was not wasted. The new ECI regulation that we shepherded through trilogues, parliamentary committee discussions and plenary itself is an improvement on its predecessor. The new regulation comes on stream in January 2020 and we'll see how it all works out in practice.

Two footnotes to this issue. The citizens' initiative exists in Latvia and Finland and in these cases, it works reasonably well. The Latvian and Finnish parliaments accept that civic inputs from below have a role to play in a democratic order. The Hungarian system of citizens' consultation generally gets a response of around 10 per cent or more. The two processes do have a role to play in overcoming the remoteness of power and strengthening participation over and above the quadrennial parliamentary elections. Having said this, there are those who dislike the instrument, because they see it as a form of populism. And that takes us back to the vexed question of the nature of the relationship between polis and *demos* in Europe and what precisely is the DNA of the European polis.

The other, more than somewhat theoretical issue, is whether or not the Initiative is a form of direct democracy. In as much as it mobilises citizens with the aim of making a direct input into the EU's legislative process, it looks like direct democracy. But given the absence of compulsion on the legislator and the existence of various filters, adding up to a strong intermediation, a dilution of the input, my preference is to argue that it is *sui generis*, neither direct nor representative.

What exactly is it?

It is safe to say what the polis is not. It is not a state, it is not a monarchy, not a republic, neither a federation nor a confederation, not a commonwealth, nor a protectorate and obviously it is not a colony. It has elements of some of these, notably by reason of the sovereignty that has been transferred to it by the member states, a transfer that is irreversible without treaty change. In this context, Articles 4 and 5 of the Treaty are vital, even if they are nothing like as 'popular' (well, not in the European Quarter anyway) as Articles 2 and 7 (more later on this). These deal with the conferral competences and make it crystal clear, that the EU can act only when an explicit conferral has taken place, otherwise the competence remains with the member states. And Article 4 also provides for 'sincere cooperation', although what this is precisely is left open. What it should mean, I would suggest, is that all the institutions of the polis treat one another as sincere actors and with parity of esteem, otherwise the asymmetries of power can hardly be balanced.

That still leaves open the definition of the polis and here we can discern a line of argument that increasingly the EU is coming to resemble an empire. And it is noteworthy that for some writers, empires were not such a bad thing, really, primarily because they kept down nations and nationalism, with the overriding proviso that 'good' empires were only to be found in Europe. The Russian, Austrian, Ottoman and German empires have been given a little whitewash and their colonial practices, as per these writers, were well intentioned acts of modernisation. Kumar on Austria–Hungary is quite clear on this and achieves his objectives by screening out the repressions that the Hapsburgs committed against those who challenged them – Hungary most evidently.[25] Judson also sees Austria–Hungary as a generally benevolent moderniser, regrettably having to put up with the tiresome awkward squad in Hungary.[26] I hardly need add that this is not a recommendation as far as I am concerned. Stone offers a more balanced account, but then he actually read Hungarian, unlike the aforementioned.[27]

Exactly the same practices are utterly condemned if they were implemented outside Europe. But whatever the case, never ask the subalterns of

[25] Krishan Kumar, *Visions of Empire: How Five Imperial Regimes Shaped the World* (Princeton: Princeton University Press, 2017).

[26] Pieter Judson, *The Habsburg Empire: A New History* (Cambridge, MA: Belknap, 2016).

[27] Norman Stone, *Hungary: A Short History* (London: Profile Books, 2019).

Europe what they thought about being ruled by kindly empires, after all, they were and are nationalists, are they not? So this creeping rehabilitation of empire in Europe can be tied to the polis, which is being redefined as an anti-nationalist project. One might as well disregard Article 4 of the Treaty which explicitly insists on respect for 'the equality of the Member States before the Treaties as well as their national identities'. From this perspective, an imperial or semi-imperial EU is desirable, even ethically desirable, because it is the best way of keeping down the nationalists, who by strange coincidence are found mostly where once the empires ruled. True, these rehabilitators are rather quiet about German imperial rule in western Poland, but then the German imperium was, so runs the implicit narrative, the forerunner of Nazism.

The liberal Polish think tank, the Batory foundation, did issue a report in 2017 with the title *A normative empire in crisis*, indicating that 'a normative empire' was generally a positive idea (dealt with in greater detail below), but the clearest argument that the EU has begun to resemble an empire comes from the veteran German social democrat, Wolfgang Streeck.[28] Streeck defines the polis as a liberal empire, with Germany as benevolent hegemon, albeit as a failing, indeed 'doomed', liberal empire. To this can usefully be added a part of the speech made by the liberal federalist, Guy Verhofstadt, to the British Liberal Party conference in September 2019:

> The world of tomorrow is not a world order based on nation states or countries. It is a world order that is based on empires. China is not a nation, it's a civilisation. India is not a nation. The US is also an empire, more than a nation. And then finally the Russian federation. The world of tomorrow is a world of empires in which we Europeans, and you British, can only defend your interests, your way of life, by doing it together, in a European framework and in the European Union.

It is clear enough that while Verhofstadt does not quite say it out loud, he finds the thought of the EU as empire quite seductive.

There are numerous definitions of empire, but for the purposes of this analysis, I am using an approach from the distribution of political power. Crucially, and unlike in a democracy, ultimate power is not vested in the people (voters, citizens), but in a ruler who floats above all other institu-

[28] Wolfgang Streeck, 'The EU is a Doomed Empire', *Le Monde Diplomatique*, 17 May 2019.

tions, can initiate laws or cancel them or override them without any other institution acting as a brake. Furthermore, the ruler is not accountable and can ignore feedback. On an everyday basis, procedures may be followed, the rule of law may operate, but the imperial centre can always nullify whatever it wants. Of course, breaching a well-established custom has costs, but that can be set aside if the circumstances so dictate.

The legitimacy of this power may well be traditional, like the divine right of the ruler or be ideological or coercive – the threat and memory of coercion is usually sufficient – or be simply customary in the sense that all other possibilities are unthinkable for the great majority. Ideology can be anything, like modernisation, better governance, a civilising mission, communism's radiant future, Japan's greater co-prosperity sphere, and so on. The one supreme contradiction is that an empire cannot be democratic, that the foundation of its power cannot be renewed by popular consent. If we accept this definition of empire, then the European polis is not, at any rate not yet, an imperial polity. It can be called a hybrid system in which ever wider areas are condensed at the centre or a *sui generis* system, though that largely means that it does not fit any of the existing categories of a political realm, but does not take us any closer as to what the polis is, as distinct from what it isn't.

What can be said with certainty is that the EU is a law-based system in which ultimate power lies in treaty amendment, but treaty change is rare and difficult to attain, so in the interim between treaties, supreme power lies in the ECJ, but on an everyday basis, it can be located in the interplay between the various institutions of the polis, with Council being *primus inter pares*. Within Council what exists is the highly complex interplay of the putative European interest, member state interests, the impact of lobbies, large and small states, and groups of states (Hansa, Visegrád, Mediterranean). The inference to be drawn is that Streeck is not quite accurate. Germany is pre-eminent, but there are situations when it cannot enforce its will, given resistance from a sufficient number of other states. So, at the end of the day, the polis is not quite an empire, even if sometimes it behaves in a manner that resembles one.

Certainly, there are those on the liberal left who seem to think that the idea of Europe as a liberal empire is really rather attractive – attractive from the point of view of the ruler, that is. Converting the polis into a liberal empire, and the contours of this are still vague, would clearly mean dispensing with many of the essential elements of democracy. These evidently

include accountability, transparency and feedback. After all, to whom was, let's say, King Leopold II of the Belgians and master of the Congo, accountable? To whom was Franz Josef answerable when he declared war in 1914 (no one, of course)? Much the same applies to transparency. Contemporaries had very little insight into how imperial decisions were taken. Sometimes it was the emperor, sometimes the small coterie of advisors who took these decisions. It really is hard to see how this works at the European level. And if we translate 'European Empire' into German, as '*Europäisches Reich*', the resonance makes one decidedly uneasy.

But maybe the most attractive element of Europe-as-empire is that this transformation would turn citizens into subjects, in other words one would no longer be troubled by those tiresome voters disagreeing with the liberal vision and preferring the populists. How this shift is to be reconciled with the West Europeans' post-colonial guilt is not at all clear. And I can be morally certain that those who were ruled by the Soviet empire – the 'evil empire' let it be recalled – would hardly be over the moon as (subalterns once again) members of a West European run empire.

Does the EU, the polis, have a civilising mission? It does not have one explicitly, but the aim of an 'ever closer union', the establishment of single standards over very large areas of activity, from water pollution to chemicals, say, can be read as a mission. One can extend this proposition by looking at the cultural downslope from West to East, that those to the east of the Elbe have to be transformed to meet the expectations of the former. The possibility that the east might have values and cultural capital from which the West might benefit does not enter into the equation.

Finally there follows an attempt at trying to define the polis, but this time by looking at the way in which decisions are taken and legislation emerges. In any analysis, it is vital that one has a clear understanding of the roles played by the law and by politics. What the EU does is argued in legal categories that can be challenged only in legal terms. But the legal form is generally the end of a process. It does happen that a political decision, framed in legal language, is then challenged on legal and procedural grounds – that, after all, is what the ECJ is for. But despite the prevailing legalese, something which adds massively to the remoteness of EU power, there usually is a prior political process. This is when deals are done, lobbying takes place, NGOs and think tanks make their inputs and when parliament scrutinises legislative proposals. When all goes well, a law is born.

The case of migration, migrants and the EU response offers an illustration. Note that migrants and refugees are not at all the same thing. States accept the obligation to provide asylum for refugees, but immigration is a member state issue, the state decides whether or not it wants immigrants. This further means that the issue is determined in Council; statements by the Commission and resolutions by parliament are noise, nothing more. The summit meeting in April 2015 resolved that the crisis of arrivals in Europe needed urgent action – the fight against human trafficking, saving those trying to cross the Mediterranean, contact with countries from which the migrants and refugees were coming and a distribution of the burden. To this end, the summit entrusted the Commission to design a plan, which it did, introducing quotas for each member state. But this is where the complexity came to play a role. The basic interests of the member states were too divergent. Some were ready to accept migrants, others were not. At the May 2015 summit, the participants had the sense that they retained the right of veto over the quota, that the quota was not obligatory.

On the ground, the pressure to redistribute was intensifying, hence the Commission used an emergency procedure [TFEU Article 78(3)] to accelerate the acceptance of the quotas. But this allowed Council to take decision by qualified majority vote, so that the opponents of the quota could be overridden, which they were. From the perspective of the states that wanted the quotas, this was generally a positive development; in the opponents' view, it was a betrayal, because they believed that the April summit had assured them of a veto.

And this nicely illustrates the troubles of complexity. In technical legal terms, the Commission was within its rights, but politically the opponents rightly felt that they had been cheated, that the Commission had evaded their promised veto. Predictably, this poisoned that already awkward relationship between the Juncker Commission and the affected states, most obviously Hungary. The legal and the political were in direct contradiction, the decision-making system of the polis failed, not least by reason of its own complexity.

So where the difficulties lie, generally, is both with complexity and with the complexity of the system (these are not the same). The former is about the multiple sites and levels of power within and outwith the polis, like the US and China, while the latter is about the confusing internal institutional and procedural processes, which as we have seen are hard to follow. Herein lies a danger. Complexity in the first sense is dangerous for

confused systems, because it becomes extremely difficult, if not impossible, to know where the next challenge will come from.

This further means that it is next to impossible to prepare for them. These crises do not have to be earth-shattering ones, black swans to use Taleb's metaphor, but they can well be black cygnets.[29] Too many of them can shake the polis apart and add to the confusion. Technocrats will then follow the existing procedures with which they are comfortable, some politicians will go into denial about what is happening, even while those trying to introduce innovative solutions pointing towards greater flexibility – antifragility to use Taleb's language again – are frozen out as troublemakers or visionaries.

More asymmetry

All human systems are subject to entropy, change and asymmetry and these are inherent in all relations of power (as we know from Foucault). Political systems are constructed – the creation of cosmos out chaos – to establish a degree of stability and predictability in human societies. This will never be perfect, change will destabilise human communities – the internal combustion engine is one example – and the problem then is how to re-establish the stability that any one particular society will want. Note that different sections of society may want different intensities and these then become that much more difficult to integrate. Furthermore, all asymmetries are relational, one actor will be asymmetrically stronger or weaker than the other with which it will be involved in the power relationship. Indeed, if the asymmetry is not rebalanced, if an actor concludes that it is perpetually the loser, polarisation will ensue and the asymmetrical relationship will become a part of the affected actor's identity. There is, indeed, a further asymmetry at the heart of this, that the stronger actor will mostly be unaware of or will disregard the arguments of the weaker. At that point, the asymmetry will result in systemic disequilibrium.

Societies that have lived through major caesuras can be affected by cultural traumas (dealt with below) and are then that much more difficult to restabilise. Trust is much weakened, trust in other members of the

[29] I am enlarging Taleb's Black Swan concept, somewhat arbitrarily. A fully fledged unpredicted and unpredictable crisis can be a black swan. Smaller crises can be black cygnets and minor shocks are ugly black ducklings. And some can be grey.

community will decline, likewise who the others in the community are, trust in the future and in the past are all open to questioning, often with extreme differences coming to the fore. Furthermore, institutional authority is likely to be weak, informal and personalised procedures will dominate and many will see processes as the result of prior concertation, excluding elements of chance.

There are several methods for dealing with asymmetry in questions of political power – they can be suppressed or coopted or in extreme cases eliminated physically. Ethnic cleansing is one example of this, assimilation is another. Another method is a period of terror, followed by easing up and satisfaction of consumer demand, though that method has its dangers in the revolution of rising expectations, notably when a generational shift is involved. Post-Khrushchev communism exemplifies this. The objective of these methods is to make stability the central target.

The problem here is change – technology, economic development, cultural shifts, exogenous factors all come to mind as agents of change, which basically means that the suppression of dynamic factors creates rigidities that then generate new, potentially more serious challenges to stability. Hence the widespread assumption that the ideal system is one that allows for sufficient flexibility to absorb change.

Feedback between rulers and ruled is a necessary condition of a system of this kind, even if the mechanisms of feedback are not in any way straightforward, above all because these raise issues of power and potentially constrain the elites in their freedom to act. Representative democracy is generally accepted as the default solution and it can indeed work as long as the rulers practise self-limitation, respond to demands for accountability and are open with non-elites. Note that in every system there will be a hierarchy of status and access to power, so the task is to ensure openness, like upward social mobility, to minimise Michels's iron law of oligarchy and allow a degree of agency accorded to the non-elites.[30] This is a fairly ideal–typical account, let it be freely admitted.

Much of the literature on asymmetry focuses on the unevenness of economics and information, but asymmetry has vital political dimensions. Some actors will have accumulated more power than others. There may be geopolitical factors at work, history and tradition, economic success,

[30] Robert Michels, *Political Parties. A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, trans. by Eden and Cedar Paul (New Brunswick NJ: Transaction, 1999).

innovativeness or the contrary, a climate of failure, at any rate self-attributed failure.[31] Perhaps the most important condition of political stability is a recognition that asymmetries will always arise and to make provision for their equilibration. In practice, this means continuous identification of potential and actual differences of power and openness to conflict resolution. One aspect of this problem is that when conflict arises, there is a tendency for the parties involved to default into binary opposition.[32] That, however, conceals the multi-polar, multi-actor dynamic of much of contemporary politics, coupled with a very deep level, ground-base epistemological assumption that processes are linear and are subject to a single 'correct' solution. Right-or-wrong thinking is very deeply encoded in the European tradition and is hard to overcome.

A term that has very recently acquired popularity, certainly in the US, is asymmetric polarisation, that one side of the binary divide has become so extreme that it can no longer be included in the political spectrum. One way of looking at this, although there is evidently an attribution involved, is to suggest that a political actor has overreacted to putative actions of its counterpart and has responded with excessive force or language of force, looking to accumulate power against a perceived, but exaggerated threat. One thought-provoking suggestion is that Nazism in Germany was a response of this kind to a leftwing putsch that never happened, even while the language of extremism (Rosa Luxembourg, Karl Liebknecht) was real enough.

In the US case, one can identify the everlasting culture wars as the trigger. Thus, currently, this extremism is attributed to the Republicans, but the concept is useful enough and can be applied to the European political scene, mutatis mutandis. Clearly, there is no agreed measure of extremism, it is a subjective metric, a metaphor at best, so it should be applied cautiously. Nonetheless it can be observed in the language and approach of several actors in the polis. The dismissal of those termed 'populist' or 'right-extremist' allows one party to the dispute over the nature of the polis to dismiss and ignore the points of view of the other. The outcome is political exclusion that sustains and reproduces the asymmetry, with

[31] Wolfgang Schivelbusch, *The Culture of Defeat: On National Trauma, Mourning, and Recovery*, trans. by Jefferson Chase (London: Granta, 2003).

[32] Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985).

all the attendant dangers of erosion or fragmentation of the polis. The explicit innovation of 2019 that reinforced this was the *cordon sanitaire* or quarantine. It meant that the liberal mainstream announced that certain political movements and parties – those not to its taste – were to be excluded from the political game. That these parties were represented in the European and member states parliaments through a democratic vote did not trouble the mainstream in the least, even if this meant an arbitrary, qualitative redefinition of democratic legitimacy.

The relationship between the EU and Central Europe, a core argument in this book, can be characterised in these terms, though I would be most reluctant to suggest that the asymmetry is beyond repair, as US usage is saying. The term 'checks and balances' seems to be fading away, there is not much discussion of institutional asymmetries and a new discourse has emerged with the Trump-era.

In the EU, there are multiple asymmetries, as we have seen, and this is both ironic and regrettable, seeing that the integration process was called into being – it was very much a constructed process – precisely to ensure that the asymmetries that had destroyed Europe (1914–1945) could be settled and settled for good. As argued, there is nothing inherently untoward or reprehensible as such in this, as long as the conflict resolution mechanisms are in place and working. That, of course, demands the political will to make them work. Currently, they work fitfully. The explanation that I find as cogent is that the asymmetries are identified and evaluated as pro or contra the ideal of a federal Europe, which then results in growing polarisation. That in turn generates frustration and those who enjoy the greater power in the polis are moving away from soft power and the consensual settlement of disputes towards sanctioning those whom they regard as the impediment. What we are seeing in consequence is the rise of the punitive polis.

If we apply the asymmetry model to the EU, the problems of balance, the weakness of balance become clearer. A considerable amount of power has accumulated in the polis, but it is shot through with asymmetry. The power in question is not moderated by checks and balances, accountability is weak and the constraints on the exercise of the power tend to be swept to one side by the commitment to the higher goal. The member states do act as the primary constraint and parliament does have oversight with respect to the Commission, but as the parliamentary majority broadly agrees with the integrationist agenda, there is a joint purposiveness between two of the major institutions of the polis. Furthermore, they are backed up by the

Court and the NGO-think tank ecosystem. What is absent here, an absence that the institutions of the polis repeatedly demand from the member states, is the support of the citizens.

Asymmetry applies manifestly to the main institutions of the EU itself – the Commission, the European Parliament, the Luxembourg Court and Council. In an ideal world, there should be a dynamic equilibrium here, but reality lies elsewhere. A closer examination of the polis will show a significant disequilibrium in this area, with evident consequences for the kind of integration that the EU pursues.

The argument on the role of the ECJ will be laid out later, so suffice it to say that the ECJ is very close to being the site of de facto sovereign power, in as much as treaty change is the sole superior instance and treaty change is extremely difficult to achieve. Over the years, the ECJ has been guided by a strongly integrationist, potentially federalist vision, albeit entirely without accountability to the citizens with whom sovereignty lies, notionally at any rate. Furthermore, the ECJ makes no secret of its project to claim that its decisions transcend the rights and constitutional identities of the member states. The clash – the Lotmanian explosion – that these two competing visions of the polis can, conceivably will, produce has yet to happen (as of 2019). It is clear enough all the same that member state constitutional courts will defend their prerogatives.

At the same time, the relationship between the ECJ and the Commission is close. The great majority of the cases, infringement procedures against member states, appealed by the Commission to Luxembourg are decided in the Commission's favour – around four-fifths, it is thought. In effect, this means that the Commission and the ECJ exercise a duopoly in the polis and they do so without much in the way of checks and balances, despite repeatedly insisting on the need for these in a democratic order. Parliament's majority is basically committed to the integrationist agenda, whether at the level of MEPs or Parliament's deep state, hence it functions as an additional, auxiliary support system for the ECJ–Commission duo, above all in its public communication, like plenary debates. The *cordon sanitaire* ensures that dissenting voices in Parliament, and these do exist, are muffled. The NGO-think tank ecosystem reinforces integrationism.

This leaves Council, which represents the member states at both the strategic–political level and at what might be called the everyday level. Member state governments by definition have a significantly closer relationship to the citizens – whether in their own state or as Europeans – and in balanc-

ing the state–national interest and the European interest in its current, integrationist form. The outcome is often tense, not least because in certain areas, like taxation or the multiannual financial framework each and every member state has a veto (the unanimity requirement). Otherwise, decisions are taken by a qualified majority vote, meaning that a blocking minority can come together. It should be added that both these are relatively unusual. All the same, hardline integrationists have the veto in their cross-hairs. At a private meeting in Brussels in late 2019 (hence the Chatham House rules), a senior parliamentarian expressly demanded that the veto power should be abolished and when I suggested that the veto was an integral part of the checks and balances of the EU's constitutional order, this was dismissed as an irritating irrelevance. The Jacobin mindset was palpable.

One of the clearest statements of the limits to federalist integration ever put forward by a member state was the announcement of the 54 conditions of the Royal Netherlands Government in 2011. There is every reason to believe that these conditions continued to be seen as valid thereafter and, as the original declaration has tended to be lost in the mists of time, I thought it worth recalling in detail.

> European where necessary, national where possible.
>
> The Netherlands is convinced that the time of an 'ever closer union' in every possible policy area is behind us. This was the government's message in a letter on the outcome of the 'subsidiarity review', presented to parliament by foreign minister Frans Timmermans today. According to the government, this is an issue which strikes a chord with many people across Europe. With this initiative, the Netherlands aims to initiate a process in the EU, based on the principle: 'European where necessary, national where possible'.
> In its letter, the government identifies a number of areas which it believes can better be left to member states. The list was compiled with input from all government ministries and from stakeholder organisations. […]
> The government emphasises that it is not aiming at a treaty change. The Netherlands fully accepts the existing distribution of competences. It is the division of tasks that it is aiming to discuss: is everything that the European Union currently does really necessary?

This position was confirmed by Mark Rutte, the Dutch Prime Minister, in his address to the European Parliament in June 2018, when he said: 'So

let me be very clear: the debate about the future of the EU should not be about more or less Europe. It should be about where the EU can add value. I believe that the future of Europe should essentially be about the original promise of Europe. The promise of sovereign member states working together to help each other achieve greater prosperity, security and stability.' (See also Caroline de Gruyter on Dutch attitudes to Europe – these are far from enthusiastic about further integration.[33])

This discussion of the position of the Netherlands government is about as clear a statement of intergovernmentalism as one can hope to find. What is noteworthy about it is that Rutte's party sits with the liberal group in the European Parliament, who are among the most dedicated federalists and that this exposition of the Dutch position did not generate the same outrage when the equivalent sentiments are voiced by Central Europeans. It is true that Rutte keeps his other liberal credentials clean, in his support for free trade and rule of law.

There is little doubt that the move towards intergovernmentalism in the polis has intensified since the 2005 referenda. The member states, partly under the pressure of domestic public opinion are much less inclined to accede to the federalist pressure from the Commission and Parliament, so in that respect the asymmetry has been diminished or rebalanced.

As already noted more than once, the missing element is the *demos*. Indeed, while there is regular insistence on the importance of the citizens, in real terms the structures of the polis largely exclude them – largely, not wholly. As argued above, European citizenship is largely a fiction and, at the very least, it is not to be compared to the reciprocal relationship between rulers and ruled in contemporary democracies. Indeed, while the federalist left regularly excoriates some of the post-2004 member states for their alleged shortcomings in civic rights and rule of law – the so-called 'democratic backsliding' – it wholly fails to notice the weakness of the EU's citizenship concept. Indeed, by tying this citizenship to member state citizenship, the polis deprives itself from direct civic input. The putative citizens of Europe have next to no direct access to the EU.

There are two exceptions. The European Parliament can be petitioned and there is the European Citizens' Initiative (dealt with above). Neither of these procedures can compel the polis to do anything, they are at best advisory, but mostly informational. Besides, the status of citizens is further

[33] Caroline de Gruyter, 'The Dutch Are Trapped in Europe', *Carnegie Europe*, 25 April 2013.

undermined by the NGO-lobby-think tank ecosystem, to which the institutions of the polis do listen (as well as finance partially). The problem is that the ecosystem, while treated as the surrogate for the missing European civil society, that is a source of rebalancing the asymmetries, in the real world it is nothing of the kind. The ecosystem simply reproduces and reinforces the centralising, federalist thought-world that has captured so much of the polis and underlies the asymmetries discussed in the foregoing.

Law, politics and juristocracy

The central proposition to help decode the nature of the European polis is that the EU is simultaneously a legal and a political formation. It is, of course, possible to look at legality and the politics separately, which is what most commentators do, but at crisis points, this becomes misleading, because it is only through the analysis of the interaction between the two that the functioning of the EU makes sense. As always in such interactions, there will be ambiguity, because it is hard to determine which has priority, the law or politics. I have argued that any major change requires political will, but at the everyday level, the legal form used by the technocracy dominates. Note that domination is not absolute, political inputs can change matters, but then the politics has to be recast into legal language and can only be challenged – by the citizens, for instance – through legal action (Pistor is relevant on the importance of legal language[34]). For many, this is deeply frustrating. And, furthermore, this reciprocal relationship raises the issue of juristocracy.

If we accept this intimate, interactive relationship between law and politics, two things follow. First, the values on which the rule of law is based are European values (rule of law is mentioned explicitly in Article 2) and, second that these values of legality should apply to the practice of politics, the exercise of political power. The values in this context are straightforward enough. They include the integrity of sources and evidence-based argument, the presumption of innocence and high standards of proof, *audi et alteram partem* (hearing the other side), no retroactivity of judgement, no double standards. Further, there is a very difficult problem in law about how far an actor is responsible for the secondary and unintended consequences of

[34] Pistor, *Code of Capital*.

action – the problem of remoteness. The test in law turns on foreseeability, but this doesn't really work in politics. What does happen, however, is that one actor may hold another responsible for her actions, which the second party denies or ignores. The result is likely to be resentment. Yet again asymmetry ensues.

Ideally the administration of law should be quite separate from politics; in reality, as has been argued, these are difficult to keep fully apart. But if the European polis places mounting emphasis on the rule of law as central to its concept of the political, these legal principles should be as central in politics too. We know they are not. Double standards and inconsistencies can and do have a destructive effect on political legitimacy.

In sum, there are three aspects to this relationship between legality and political power – the legalisation of politics and vice-versa, the coincidence of legality and legitimacy and juristocracy which further involves the doctrine of constitutional identity. None is easy to resolve. A close examination of these issues, both at the level of the polis and the member states demonstrates the gaps, ambiguities and asymmetries that affect the democratic order. The starting point is, of course, the proposition that in a democratic order supreme power lies with the *demos* in the form of popular sovereignty, as embodied by a democratically elected legislature. But this power cannot be absolute for fear of the tyranny of the majority, hence this absolute power cannot in fact be absolute, but must be tempered by checks and balances. The nature of these checks and balances is less than unequivocal and much argument – a good deal of it party politically and ideologically motivated – focuses on where the limits should lie. Basically, even if the starting point is the *demos*, the system should erect multiple impediments to popular sovereignty, not least because 'the people' cannot be trusted to be democratic enough.

The attribution of populism to the *demos* – some, most or all of the *demos* – can be found here and behind it lies the ancient fear of ochlocracy. However, the question can also be raised as to whether too many impediments can be created, whether the fear of mass democracy has gone so far, set up so many intermediate institutions between voters and power that the outcome is variant of elite rule, a kind of new aristocracy or oligarchy. Added to this tension is the role of referenda in democracies. Do they represent popular sovereignty, what can a referendum decide, can a referendum be construed as the expression of the will of the people that can override constitutional adjudication? Who, then, is the sovereign?

Juristocracy is a relatively new issue and was certainly not a part of the legal upbringing that I received in the early 1960s. I recall some reference to Roscoe Pound and whether judge-made law should keep pace with social change or whether there were objective, immanent standards of the law. What has changed the nature of democratic systems throughout Europe, however, has been the adoption of Constitutional Courts (called tribunals in some countries) in the majority of member states, even while it is absent in the Netherlands and Finland, in Estonia a chamber of the supreme court performs constitutional adjudication. The process began after 1945 with Germany and Italy setting up such Courts, very much at US urging or insistence. Indeed, there is evidence that the post-war US advisors saw such courts as a necessary condition of democracy, based on the US Supreme Court as the model. So no Constitutional Court, no democracy. Of course this overlooked the fact that the first such Court was set up in Austria in 1919 at the urging of the jurist Hans Kelsen, who became its president.[35]

The essence of such a court is that it has monopoly review powers over the legislature and can strike down legislation that it concludes is contrary to the constitutional order. It should also be clear that the Constitutional Court is separate from the rest of the judicial system. What this means is that once such a tribunal has been set up, the political system becomes mixed. Political decisions are given legal form by the legislature, but Constitutional Courts can launch legal initiatives that have political consequences. Furthermore, the mixed system provides opportunities for the opposition to challenge the political steps of the government by appealing them to the Constitutional Court, thereby adding to the legalisation of politics.

The question of supreme power, at any rate in the abstract, is open – is it in the legislature or in the Constitutional Court with its power of review? The answer, of which Kelsen was aware, is that supreme power now lies in the process of constitutional amendment.[36] Whoever can amend the constitution can also enlarge or diminish the powers of the Constitutional Court.

This sounds somewhat absurd on the face of it, but it follows logically from the innovation. If one establishes an institution that floats, as it were,

[35] Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015).

[36] Hans Kelsen, *The Essence and Value of Democracy*, ed. by Nadia Urbinati and Carlo Invernizzi Accetti (Plymouth: Rowman, 2013).

above all other bodies,[37] then the quality of popular sovereignty has to be reassessed. What motivated Kelsen was his scepticism about the legislature's commitment to self-limitation, and this was not as such unreasonable. But the innovation also meant that there could or would be the potential for conflict between the legislature and the Constitutional Court. This has, in fact, been the case in a number of states, not least Germany where the *Bundesverfassungsgericht* operates as a major constraint on the *Bundestag* and, hence, the government.[38] This basically means that it is not enough to win elections. If you are a new government and want to launch a radically new programme, you will have to tread carefully. That is, unless, you are elected with a constitutional majority, but this is very rare.

In Europe after 1945 whenever a democratic system was introduced, a Constitutional Court was a necessary part of it. This applied to Spain, Portugal and Greece, to Malta and Cyprus (but in the latter the Constitutional Court was merged with the Supreme Court; the situation is analogous in Ireland and Estonia). Note that Scandinavia was exempt, ditto the Netherlands, so that where recognised democracies existed, a constitutional court was not deemed necessary. After 1989, the former communist states went in the same direction, setting up Constitutional Courts usually with no antecedent traditions (in Poland it was established in 1986[39]). These courts thus acquired extensive powers and it was generally assumed that these were inherently democratic, requiring no limitations. There is an irony hidden in here somewhere. Kelsen distrusted the self-limitation of politicians, but both in his own time and in retrospect, the Kelsenians have no doubts about the self-limiting capacity of judges. The protagonists of liberal democracy being the sole legitimate version of democracy take the introduction and workings of the Constitutional Court as the primary guarantor of the rule of law. They deny, in effect, the contingent nature of the innovation and the unintended consequences of juristocracy.

For, the direct and indirect – unintended – outcome has been the rise of juristocracy.[40] Judges are not in any direct way subject to the doctrine of

[37] Tamás Sulyok, interview, *Ars Boni*, 5 February 2018.

[38] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).

[39] Lech Garlicki, 'Constitutional Court and Politics: the Polish Crisis' in *Judicial Power: How Constitutional Courts Affect Political Transformations* ed. by Christine Landfried (Cambridge: Cambridge University Press, 2019), 141–62.

[40] Béla Pokol, *A jurisztokratikus állam* (Budapest: Dialóg Campus, 2017).

democracy encoded in popular sovereignty and exercise very considerable power over the self-same democratic order. The only formal limitation, as argued, is constitutional change. This might not have mattered so much if Constitutional Court judges had exercised their powers with self-limitation and intervened in politics only where major issues of constitutionality were involved. The record is nothing like as straightforward as that, particularly in the early years of a democracy. Indeed, and this is the heart of juristocracy, Constitutional Courts have enlarged the scope of their jurisdictions and involved themselves in issues that in a previous era would have been dealt with by politicians. It must be added that the politicians themselves have connived at this. They have outsourced power to the judiciary, essentially because this is then easier to explain to the electorate, as if to say, 'sorry, there's nothing we can do here, the judges say this is the law'.

A closer examination of these constitutional courts shows something else, basically qualitative differences between how these courts operate. The central question is a theoretical one – where does ultimate power lie, with the sovereign people as represented in parliament or with what is actually happening, a continuous constitutional review which at times goes counter to the will of parliament. This may be seen as the core of the problem identified by Kelsen, the aforementioned Austrian jurist.

Indeed, there is a growing literature on juristocracy, rule by judges.[41] Much of this literature is critical, in as much as judges are seen as involving themselves in political decision-making, an area that is supposedly the sovereign competence of parliaments and governments. The explanation is centred on a very longstanding disagreement in jurisprudence. What is the proper role of the judge, to interpret the text as strictly, 'objectively', as possible or to assess the text in a way that reflects the intentions of the legislator and the expectations of society? There is, for what it is worth, no easy answer. The question in a democracy is whether the role of the law is to set limits to political power or whether political power is the articulation of popular sovereignty that transcends judicial power.

Many, if not all, these questions have played a major role in the evolution of the democratic rules of the game in Hungary. Hungary has been the target of extensive criticism in the Western media to the effect that the rule

[41] A pedantic point here. 'Juristocracy' is a mixture of Latin and Greek; properly, the word should be 'kritocracy' or 'kritarchy', 'krites' being the Greek for judge, but 'juristocracy' has taken off.

of law has been overwritten by the centre-right government. This misses the main point, which is overwhelmingly about where ultimate power should lie, with the legislature or the Constitutional Court.

In the 1990s, the Constitutional Court in Hungary arrogated a great deal of power to itself, which it was able to do not least because it was dealing with inexperienced governments, because it was indirectly encouraged to do so from the West, because the constitution was based on the 1949 communist constitution and had gaps and, possibly, because the President of the Court, László Sólyom, had very clear ideas of his own as to how the Constitutional Court should impact on the country.[42] In summary form, he decided that regardless of the actual text of the version of the constitution agreed (in a hurry) in 1989, he would take decisions by what he called the 'invisible constitution'. One of the decisions in Sólyom's time that had far-reaching consequences was to block any attempt at lustration, by striking down a law that would have initiated this. Even more striking, indeed striking at the heart of Parliament's core power, was the Constitutional Court's decision to annul sections of the 1995 budget. By any standard, this was an extraordinary extension of judicial power and led eventually to a reassertion of the power of the legislature. But that had to wait until after 2010, when *Fidesz* won the elections with a constitutional majority. The current situation is somewhat obscure. On the one hand, a government with a two-thirds majority is constrained only by the norms of self-limitation; on the other, (as noted) the current President of the Court, Tamás Sulyok (2018), has asserted that the Constitutional Court 'floats' above all the other spheres of power (legislature, government, legal system).

If that has been the dynamics of constitutionalism in Hungary, a back-and-forth movement of power between the court and parliament, matters have been different elsewhere. Thus in Germany, the constitutional court has regularly arrogated power to itself and clashed with the *Bundestag*. Thus the court has the power to rule a law 'not compatible' with the constitution and to require the legislature revise it. Equally, the court can issue 'binding interpretations', meaning that only one interpretation of a text can have legal validity (this practice also exists in France and Italy). There is no equivalent in Hungary. In Germany and France, there is abstract review referral, requesting the court (the *Conseil Constitutionel*) to undertake prior review

[42] Kálmán Pócza, 'Az alkotmánybíróság' in *A magyar politikai rendszer – negyedszázad után*, ed. by András Körösényi (Budapest: Osiris, 2015), 159–81.

of legislation, a procedure regularly used by the opposition. This procedure inevitably gives the Constitutional Court certain political powers. Again, in Hungary prior (abstract) review does exist, but only in a few exceptional circumstances. Another feature of this judicialisation is 'autolimitation', restraint by the legislator for fear of annulment by the Constitutional Court. This can be a serious constraint on fulfilling an electoral promise or mandate. Overall, any threat to take an issue to the Constitutional Court in Germany will function as a limitation on the powers of the legislature.

There is one final issue to be looked at in this comparison of constitutional courts, their relationship to supreme courts. There is ample evidence that in several countries, supreme courts see the constitutional court as a major competitor and will ignore or contest decisions of the constitutional court. At this point, there is stalemate, until and unless the legislature intervenes. There is evidence of such turf wars from Slovenia, Spain, the Czech Republic and Serbia.[43] In Hungary, my starting point for these comparisons, the evidence points in both directions. Sulyok has reassured me (in conversation in August 2017) that the Constitutional Court and Supreme Court (the *Kúria*) can settle their differences, including by informal means. On the other hand, other constitutional court judges see it differently and take the view that the precise relationship with the *Kúria* has still to be settled. What is clear is that the Constitutional Court has evident supremacy when it comes to interpretations of the constitution, but whether it can compel the *Kúria* to follow its judgements remains open. Presumably, the constitutional legislator has the ultimate power to do.

The establishing of Constitutional Courts meant that a very particular model of democracy was introduced as the sole, immanent version, one that may have been tried and tested in Germany and Italy, former fascist-ruled states, but no one knew how this would work in former communist states. There is a lot to suggest that few understood the nature, quality, content or meanings of communist cultural capital. The introduction of Constitutional Courts into this political–cultural context proved in some cases to be very radical, which in a sense went contrary to Western expectations of the former communist states, that of transformation without upheaval.

[43] Pavel Holländer, 'The Role of the Constitutional Court for the Application of the Constitution in Case Decisions of Ordinary Courts', *Archiv für Rechts- und Sozialphilosophie* 86, no 4 (2000), 537–52; Pokol, *A jurisztokratikus állam*.

One further aspect of the European polis requires attention here, the role of legality and the courts in a political order. One of the lessons I learned while visiting Canada (as a member of a parliamentary delegation) was that legality on its own is not enough, there must also be legitimacy. This is a lesson that the European polis stolidly ignores, not surprisingly as it has little time for the *demos*. The ultimate authority of the European polis is the Treaty which raises two pivotal questions. One is Treaty amendment, which means amending Kelsen's *Grundnorm*, the basis of the system, and the other is the interpretation of the Treaty. Amending the Treaty is slow and difficult because it means ratification in all the member states. Whatever happens in the polis, it needs a legal base and that base is the Treaty, it is the ultimate authority in all EU matters. But the Treaty and its interpretation mean looking at those responsible for so doing.

Hence one of the novel features of contemporary politics, not just in the EU, is the role of the judiciary in determining political issues. It is noteworthy that this shift took place without any debate, any input from the *demos*, any democratic assent. This is a controversial area, because increasingly political problems are decided by the courts and arguably there is a legitimacy gap here. Judges are not elected, and I would not want them to be elected as that would thoroughly politicise the legal system, but the judiciary should recognise that its power should be exercised with due regard to self-limitation. Juristocracy raises two further points, one of them widely discussed, the other less so. How judges, especially constitutional court judges, are chosen is a political act, but only partly so. Judges are human beings and, hence, have political views, but that does not necessarily make them the handmaidens of party political power.

There is a widespread proposition that the Hungarian Constitutional Court has been packed by *Fidesz* cronies. This story is repeatedly spread by the opposition, but it does not stand up to closer scrutiny. First, constitutional court judges are appointed by parliament by a two-thirds majority, meaning that the *Fidesz* government, as indeed its predecessors, had to craft balanced deals for the election to succeed and did so even when it did have the necessary majority. Second, and this proposition is simply ignored, those appointed are legal professionals and that professionalism regularly overrides politicisation. Thirdly, constitutional courts in the polis do operate within a European network and, therefore, cannot afford to lose the esteem of their peers. And if one looks at the practice of other EU states, then the question of 'cronies' is never raised. In Finland, judges are appointed by the

president on the recommendation of the minister of justice. No comment. When Laurent Fabius was appointed to the French *Conseil Constitutionel* (in 2016), no one called him an Hollande crony. *Et pourquoi non?* Was Scalia a Reagan crony?

One of the after-effects of the European Parliament's voting to pass the Sargentini Report was that the EU Council was obliged to deal with an Article 7 procedure against Hungary, a task that would fall to the member state in charge of the presidency. Austria and Romania had other priorities, but Finland did decide to put Hungary on the Council's agenda. This is the background to comments made by the Hungarian Prime Minister, Viktor Orbán, in July 2019. He pointed out that Finland's arrangements regarding constitutionality were visibly weaker than in Hungary. In the former, there is no Constitutional Court at all, rather a parliamentary committee – elected politicians – deals with such matters. Judges are appointed by the head of state on the advice of the minister of justice. Is it equitable for a member state to question the procedures concerning legality in another member state when its own procedures fall short of the other's? To an outsider, this has the distinct quality of a double standard.

The other, much less visible area affecting juristocracy is the role of the apparatus, the administrative staff of the judges. Their influence in preparing judgements is enormous and wholly invisible. They generally have a deep knowledge of the case law at hand and are – according to those affected – ready to impose their ideas on the judges, making the latter not much more than mouthpieces for their staff. There have certainly been complaints in this area, notably from an anonymous judge of the European Court of Human Rights in Strasbourg. This makes oversight of judicial power even more difficult to practise than might appear at first sight.

Axiomatically, the *demos* has next to no input into what the legal system decides, hence judicial power – juristocracy – has become something like a 'wicked' problem, one for which there is no satisfactory solution. How far should judicial power stretch and can it be made accountable? Is it possible to avoid the legalisation of politics and, worse, the politicisation of the law? In the world of the EU, the European polis, the answer is increasingly no. This raises real dangers, as both political power and the independence of the law are discredited.

There are no easy answers and in the case of the European polis, the ECJ, the Luxembourg Court, customarily takes decisions by pro-integrationist criteria. That in turn raises the question of the limits of European versus

member state constitutionality and the growing emphasis by member state constitutional courts on the country's constitutional identity. Are the two on collision course? Can legality and legitimacy be reconciled in the European polis? We don't know, but this issue will certainly play a role in the functioning of the polis, for good or ill.

Juristocracy has a further dimension that is only seldom formulated in these terms, if at all. Membership of the EU is voluntary and one of the founding principles of integration was respect for the interests of all member states. Increasingly, but especially in the 2014–2019 parliament, there were growing demands from the left for the polis to acquire punitive instruments. The rule of law Framework of 2014 was one of these (see infra). Parliament's report on democracy, rule of law and fundamental rights was another. The process can be said to have culminated with the previously mentioned Sargentini Report (2018), which entirely dispensed with the European values of debate and hearing the other side, *audi et alteram partem*. It was directly and incontrovertibly punitive. But can a European polis function at all if conflict resolution is replaced by punishment, the voluntary principle is disregarded and the view of the governed is dismissed as populism, when legality and legitimacy are pointing in the opposite direction? Obviously my answer is no, because a polis of this kind would be moving or actually is moving towards a liberal authoritarianism.

The rise of the punitive polis

My starting point is a simple one. The EU has changed and it is then vital to understand what and why. Whereas until quite recently, certainly during my early years in Parliament, 2004–2009 say, the emphasis was on consensus and soft power. The EU, indeed, Europeanness, being a good European, were defined by the successes of applying soft power and consensus. This applied to intra-EU relations, as well as to extra European ones. The international climate was undoubtedly favourable, Russia, China, Venezuela were mere clouds on the horizon and democracy seemed to be the universal aspiration. All was well in the world, or so it appeared. True, there were one or two beauty flaws, like the Iraq war on the basis of which the US had successfully split the EU (new Europe, old Europe, coalitions of the willing – how these phrases fade) and internally there were the 2005 French and Dutch referenda. But still, all seemed to be proceeding 'in the right

direction'. At that time, history – that should probably be History – did not have sides, but the EU certainly believed in its own rightfulness and, above all, that its unique method of conflict resolution worked.

Then things changed. The centre did not fall apart, but a series of shock events did hit the EU. The 2004 enlargement can certainly be counted as one of these. It was seen at the time as triumph and the expectation was that the new member states would soon come to resemble the old ones, through a process of assimilation. But when the encounter actually happened, matters were more complicated. The new members rather resented being treated as 'apprentice Europeans' and as being somehow lower in the informal hierarchy of members. It was as if parity of esteem was suspended, possibly *sine die*. Above all, the accession of the new members meant the reception of hitherto unknown volumes of information at variance with the assumptions of the normal (and tacitly normative).

The second such shock was the result of the 2005 referenda on the Constitutional Treaty in France and the Netherlands. The content of the message, decidedly unwelcome to mainstream thinking, was that significant sections of the putative *demos* did not want more integration or indeed the enlargement. And the third such disturbing event was the 2008 crisis. Its primary information challenged one of the basic principles of integration, of the single market, that markets know best, as well as foregrounding other issues that affected the polity, inequality first and foremost. The EU economies have yet fully to recover from the shock.[44] This crisis rippled through the system and generated different, conflicting responses, conflicts of a kind that consensus building could not solve, because they were explosions of asymmetric power – different member states were differently affected and sought different solutions.

This cumulative triple set of explosions (Lotman's usage)[45] can be taken as central in the aetiology of the shift from consensual to punitive polis. In a field as large and dynamically complex as the polis, it is far from easy to identify all the necessary and sufficient conditions to explain all aspects of the shift. Nevertheless, a Lotmanian explanation is definitely helpful,

[44] Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (New York: Viking, 2018).

[45] Jurij Lotman, *Robbanás és kultúra*, trans. by Teri Szűcs (Budapest: Pannonica, 2001); Yuri M Lotman, *Culture and Explosion* (Berlin, New York: Mouton de Gruyter, 2009); Yuri M Lotman, *The Unpredictable Workings of Culture* (Tallinn: Tallinn University Press, 2013).

cogent too in my view. It should be added that the actors involved were certainly unaware of Lotman, of systems theory and the importance of unpredictability of culture. All the same, whatever the conscious motivations and the self-legitimations that emerged over time, an approach from dynamic interaction offers the most cogent explanation.

The self-legitimation element deserves an extra look, for it is often overlooked in analyses of power. Elites, once in power, are capable of sustaining their power for considerable periods of time with only a limited amount of wider support. But if they remain cut off from the population and the wider global context for too long, a relatively small shock can cause a rapid collapse in the edifice of power. That was more or less what happened in Czechoslovakia in November–December 1989. The point, in the context of the European polis, turns on the disconnect, the distance between the elites and the citizens, who as argued, are shadow citizens.

Furthermore, if there is any leakage of the legitimacy of the elites, this can, and often has evolved into a dynamic process primarily because of the remoteness, the erosion of self-correcting mechanisms. If we take this power political weakness into account, it becomes clearer why the triple shock demanded a response. This response, however, represented a turning away from the innovative tradition of Europe and brought coercive elements into the polis – pressure, threats, and, as detailed, reliance on the discourse of the rule of law (as interpreted politically by the Commission). I want to avoid using spatial metaphors here, but if I were to do so, I would suggest that giving up on the consensual exercise of power, the great post-1945 innovation, in favour of coercion and the threat of it was a step backwards. Enough of apophasis, all the same.

Rather, the shift towards the discourse and practice of punishment – and some of my parliamentary colleagues were wholly open on this – could be seen as a rational response to the triple shock and to the fear of fragmentation, especially if the new political forces – the ones to be derided as 'populists' – were to make serious inroads in the support for the pro-integrationist mainstream. And by 2014, this was a reality. The shift was rational, because by moving away from consensuality, the integrationists could upgrade their cohesiveness, and thereby the stability of their system, by declaring certain political forces to be hostile. Hostility was defined as a deviation from Article 2 TEU or, to be precise, from selected elements of Article 2. There was and is endless repetition of the rule of law, but human dignity – the first on the list – was and is firmly ignored.

In many ways the shift towards the punitive was a missed opportunity. If the commitment to consensual politics had been maintained, then this would have allowed the system to introduce self-corrections and could have used the 'populists' as the missing checks and balances. Self-limitation, as we have seen, is seldom sufficient to act as a limitation on power. So while there was innovation as a response to the triple shock, it may have had short term benefits, but constructing an internal enemy created long term question marks. This reversion to Carl Schmitt was not, I think, conscious and it did not emerge in any overt fashion. Rather, it was the instinctive response of the pro-integrationist elites of the early 2010s based, presumably, on previous political experience in their home countries. It found articulation in the self-proclaimed 'political' Commission of Juncker and Timmermans. The latter especially tended to see very clear dividing lines between friend and foe – as a classical left–right polarity with himself at the leftward end – and acted accordingly, notably in activating the rule of law Framework against Poland (discussed elsewhere).

So the key proposition in this analysis focuses on system stability and the factors that dislocate that stability. In essence every collectivity and system of power operates with the primary aim of self-reproduction and the stabilisation of its power. Often enough, stabilisation has meant the enlargement of power perceived as the means of stabilisation. It follows, that while a large institution like the EU can cope with minor disturbances without qualitative change – indeed, in the past that was one of its key objectives – a major disturbance like the triple shock would have far-reaching and, for that matter, unpredictable consequences.

We can accept, I would suggest, that every system of power, human collectivity, institution of moral regulation, will seek to establish and maintain stability. This is threatened by new information (Lotman's explosion or Simmel's stranger)[46] and impels the collectivity and its elites to restabilise things. If, as I think happened in the polis, the dominant elites concluded that the new political forces (the 'populists') were so divergent as to be unintegrable and dangerous, then demarcation was a logical answer. That move was further underpinned by legalism and to some extent by a moral differentiation, such as is usually found in a positive–negative polarity. The pro-integration elites saw themselves as representing the 'good' and

[46] Lotman, *Explosion*; Georg Simmel, 'The Stranger' in *The Sociology of Georg Simmel*, ed. and trans. by Kurt H Wolff (New York: The Free Press, 1950), 402–8.

their opponents as being 'on the wrong side of history' with a sliding scale pointing downwards. The moral fervour should not be missed. That, of course, made the politics of compromise and consensual exercise of power more or less impossible. The road towards building Mary Douglas's 'wall of virtue'[47] was being paved with the very best of intentions.

All three explosions in Lotman's sense represented new information that disturbed the old and could not be easily processed. Cosmos and political stability were threatened with chaos in the eyes of the integrationists, so something had to be done. As noted, the stabiliser employed was the construction of an opponent-enemy, one whose values were deemed intolerable. It was, therefore, very much a cultural offensive, to be precise a political one relying on cultural norms. Note that even while the rule of law weapon was wielded regularly, evidence to the contrary was ignored. The Commission's own Justice Scoreboard consistently showed that Italy was among the poorest performers, but the targets were located elsewhere. I can still recall Guy Verhofstadt, then the highly vocal leader of the liberal group, insisting that fulfilling legal criteria was not sufficient if 'the spirit' of the law was being set aside. And who defines 'the spirit'? Need I ask?

One final thought worth adding to this analysis of why the polis shifted from soft power to punitivity.[48] In the pre-globalisation past, politics mostly turned on material issues, incomes, working conditions and the like. The defining feature of politics of this kind is that it is mostly – not wholly – linear, certainly the non-linear elements, like the demands from labour for recognition of their status, could be resolved through the classical means of negotiation. In the 1980s, this changed and cultural issues came to the fore. Material demands (in the West) were mostly satisfied – certainly primary poverty was a thing of the past for the overwhelming majority – hence the working class was no longer a useful ally of the left (I recognise that this description is a simplification, but see infra).

The outcome was the culture wars, a topic on which much has been written. The one element that must be added to the mix is that cultural issues are non-linear, hence much less predictable, hence much less satisfactory as the foundation stone for a stabilisation strategy. This then explains why the elites of the polis sought to intensify the punitivity. The construction of

[47] Mary Douglas, *Natural Symbols: Explorations in Cosmology* (London: Routledge, 1970/1996); Geoff Mulgan, 'Mary Douglas Remembered', *Prospect* 135 (June 2007).

[48] This word, while rare, does actually exist.

an opponent-enemy condensed the home front, as it were, constrained the EU elites, who were far from being homogeneous, to clarify their positions as friend or foe and, crucially, never to deviate. This put the EPP in an extraordinarily difficult position, because it meant that moderation in the cause of integration was no longer tolerable and it placed an impossible question mark over the relationship between the EPP – the European Peoples Party – and the people, the *populus*, who were inherently suspect as populists as far as the integrationists were (and are) concerned.

Thus the construction of the polarity had the twofold function of cementing the unity of the integrationist camp in the polis and, at the same time, securing the stability and viability of the system. The relational element thereby launched and sustained the system.[49] This system resembled the older version in some respects, but was new in several ways, as argued in the foregoing. Crucially, this interaction between friend and foe should be understood operating as a single system, where the ruler constructs its opposition and the opposition constructs its ruler in an ongoing negative interdependence. This also means that the transformed polis definitely needs its opponents, it has no real choice but to return to the attacks on those whom it considers morally reprehensible (Poland, Hungary), always assuming that it is committed to its self-reproduction. And it should be clear that it takes two to tango. The opponent, who can readily be redefined as hostile and beyond the moral pale, then equally comes to define itself as the counter-centre of virtue. It doesn't really matter who starts this process. Once in motion, it operates as an unstable, but viable equilibrium system; and system is the operative word. The shift in the identity of the European polis towards the punitive was in place and both internal and external entities were located at the negative end of the polarity. By the same token, nothing that 'the foe' offers or does will ever be enough. The result is an equilibrium, albeit an unstable one that could be shaken by some major new development. The 2015 migration crisis was just this and it intensified the tension in the polarity.

This led to a further development that was crucial. Given that cultural norms are fluid, methods have to be found to stabilise them and the most effective way is to nominate an opposite polarity, placing yourself at the positive end, of course. The polarisation that ensues then becomes a self-sus-

[49] François Dépelteau and Christopher Powell (eds), *Applying Relational Sociology: Relations, Networks, and Society* (London: Macmillan, 2013).

taining system, kept going by the repeated identification of some violation of the norms by the opposite polarity.

But while the existing asymmetries were always there as structural elements of Europe and of the polis, the crisis had various unintended consequences, some of which then added further crisis or crisis-like developments. Many of these were new or perceived as developments that many (in their linear way) had believed Europe had left behind – nationhood being the most obvious one. Indeed, the distinction between 'the national interest' and 'nationalism' is all but entirely subjective.

Thus it is safe to say that the 2008 crisis set off a slow-burning fear of unravelling, of incoherence in the polis. Notably, it became clear that while the single market had indeed integrated a great deal, member state economies remained separate to a considerable degree and weathered the crisis or not in different ways. Latvia, which imposed an internal deflation of about 25 per cent, was at one end of the spectrum, Greece and Italy, where indebtedness was very high, could be placed at the other. But what is noteworthy about the effects of the crisis is that it slowly triggered an anti-liberal upsurge or revolt or insurgency at the popular level. These forces could combine with older anti-integrationists and, coming together, were seen as a serious threat to the way in which the nature of the polis was understood – rely on the Monnet method and gradual integration, 'ever closer union', would follow.

This thinking dispensed with the political will discussed earlier, but that issue was made visible precisely by the upsurge. There was an emerging – maybe even emergent – political will that was opposed to 'ever closer union'. Both were relevant, the political and the will. The response on the part of the integrationists was to double down, to insist on ever more integration. The new anti-integrationists were fairly quickly dubbed populists, as we have seen. There was a time when the populist was a positive figure,[50] but in today's (integrationist) context, the populist is the polar opposite of both liberal and democrat, which is odd, really, because that way of thinking requires a new version of democracy from which the *populus* has been edited out. What ensued, and this was palpable by around 2010, was that intensified integration, federalism, had merged with liberalism, a current that was itself changing, condensing under the impact of the

[50] Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (New York: Norton, 1993).

culture wars. This is not the place to examine these wars, a successor to Marxism v. Capitalism (to put it crudely), but the culture wars were and are characterised by one really major difference from their predecessor.

The Cold War, socialism, communism, Marxism (in all its numerous variants), the market, capitalism were all at heart linear and, therefore, broadly predictable. Rational choice theory, based on a reductive understanding of human motivation, could basically be seen as linear in the sense that utility maximisers would invariably behave in the same way. Likewise, markets would invariably return to equilibrium state. Culture, on the other hand, is non-linear and not predictable.

Indeed, anthropologists have spent decades deconstructing the nation and concluding that the most that one can say is that there are certain shared cultural practices. This approach fits nicely with the traditional view of the universalist left, equally with that of the Marxists, that nations were an instance of false consciousness that history would deal with it (this was, supposedly, a law-governed process). Euro-federalists have declared themselves post-national and saw nationhood as atavistic (at best).

Reality lies elsewhere and national, as well as other a-national, trans-national, proto-national, supra-national cultural processes continue to guide the way in which societies structure their lives. This is also true for the federalists. The problem with culture, however, is precisely in its fluidity. If one wants to construct a system of power on cultural foundations, one must deal with the fluidity by establishing a credible plausibility structure[51] and condensing power around it. Without this, stability becomes very difficult to sustain and power elites discover that their power is leaky. Hence the determination to lay down cultural norms that are unchallengeable. In theory, this can work, but in the real world cultural norms are constantly open to new practices, technological change, fashion, and, of course, challenges to power from counter-elites.[52]

With the 2008 crisis, the material bases of integration, on which much of the success of the polis was predicated, began to erode and were to a growing degree being replaced by cultural normativity, one that was given shape by the use of legal language and processes. As argued in this analysis,

[51] Peter L Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (New York: Doubleday, 1967).

[52] Lotman, *The Unpredictable Workings*; also relevant: Victor Turner, *The Ritual Process: Structure and Anti-Structure* (Ithaca: Aldine, 1969).

however, the fluidity and non-linearity of culture proved to be a much less firm foundation for integration that the promise of eternal prosperity, hence the quest to stabilise the gradually transforming system of norms. The centrality of the rule of law as the ordering principle of integration underlay the metamorphosis of the polis.

The fate of Hungary illustrates this process quite well. The 2008 crisis hit the profligate leftwing government hard and it discovered that the EU, not least Germany, would not help,[53] so off it went to the IMF, which imposed the usual conditions of austerity varied with more austerity (years later the IMF retracted). Then in 2010, the leftwing lost the elections very badly and the centre-right *Fidesz* gained a two-thirds majority. The last thing that this new government (I don't need to make a disclosure here, do I?) was going to do was to bring in more austerity and asked Brussels for an easing of the three per cent deficit limit. No, was the answer, whereupon Hungary engaged in what it called "unorthodox" economic policies – taxing the banks, insurance companies, telecoms and other foreign investors. There was shock, horror all around.[54] It made matters worse that the unorthodoxy worked and Hungary entered a seven-year growth cycle. In the Eurogroup, austerity resulted in slow to minimum growth, with Italy and Greece being the hardest hit. Those crises have still to play out.

A secondary problem, which became a primary problem in 2016, was the EU's relationship with the United Kingdom. Without digging into the contortions of Brexit, suffice it to say that the crisis of a member state, a large one at that, opting to leave the EU added up to a loss of prestige and a serious concern that others would follow. It was only when the contortions became visible that Eurosceptics changed their position and opted to remain and try to change the EU from within. That, in turn, caused alarms and excursions among the federalists and liberals, fearful that their beloved EU would be transformed from within by the populists.

The Arab Spring, and if ever there was a misnomer that was it, filled the air with hopeful noises, but these hopes were badly dashed by what actually happened, the war against Libya, the non-transformation of Egypt, the civil war in Syria and Yemen. Turkey was transformed from a democracy-lite and aspiring EU member state to an autocracy-lite close neighbour.

[53] Tooze, *Crashed*.

[54] Wiedermann Helga, *Sakk és Póker: Krónika a magyar gazdasági szabadságharc győztes csatáiról* (Budapest: Kairosz, 2014).

The Middle East, the Near East, Western Asia was a thoroughly unstable neighbourhood, close to home and the EU's soft power was proving useless.

That showed up even more strongly with the 2015 migration crisis. Here a distinction has to be made between refugees and migrants. Refugees are fleeing for their life and under the Geneva Convention, they are offered asylum. Migrants are classified as economic migrants and states have no obligations towards them. The media confuse these two categories constantly and do so consciously and deliberately in order to promote their liberal agendas. A further turn of the screw is that criticism of migrants and of those who do not accept them is classified as Islamophobic racism. Without going into the detail of the 2015 migration crisis for the EU, it resulted in dissension and bad blood, as sketched in the foregoing.

Russia's semi-colonial war with Georgia in 2008 was swallowed by the EU, which does have certain long term aspirations towards the Eastern Partnership countries, Georgia among them. But the 2013–2014 crisis in Ukraine was another matter. Russia did flout the Helsinki Final Act of 1985 by absorbing Crimea, not to mention other agreements, notably the Budapest Memorandum (1994) under the terms of which Ukraine transferred its Soviet-era nuclear armoury in exchange for a Russian guarantee of its territorial integrity. This again produced a cygnet-level crisis for the EU. What could it achieve against a determined Russia by soft power, specially as the EU, minus five its members, accepted the state independence of Kosovo, which Moscow then regarded as a precedent? The problem for the EU was that it had long regarded Russia as a decent, honest state, a strategic partner that just needed time to match the role that the EU had invented for it. I recall several discussions with Commission officials who simply ignored the evidence that Russia was not a Jeffersonian democracy. This all changed with Ukraine, of course, but that too was lived as a setback. Added to that was the section of the business community that was doing very nicely out of trading with Russia, thank you, and the *Putinversteher*, in Germany and elsewhere who really did not, repeat not, like the sanctions at all.

The economic power of China was an ongoing challenge for which the EU had no ideas at all, basically arguing from the belief that economic growth was good and that it would produce peace. Evidence to the contrary, that newly created and inexplicable wealth often produces corruption, that it allows states to spend their money on things like armaments rather than, say, infrastructure and education, that the rise of sovereign wealth funds acquire the capacity to influence EU economies and, above all, that it makes

it possible for the non-EU to generate soft and hard power that it can use in its relations with EU states, that evidence was mostly ignored. Certainly, it was never looked at in the round.

The final chapter in this tale of woe was the election of Trump of course.

Each one of these developments could have been absorbed had they happened singly, but cumulatively they affected the EU and affected it badly. Much of what the EU stood for, the reasoned solution of conflict, was shattered and that eroded the EU's self-confidence, as well as producing overload in its international relations. That in turn came to affect the internal dimension of the EU's mission and identity. The outcome was a not very conscious decision – if it was conscious, I did not live it that way – that the time had arrived to establish an internally more coherent, ideally more cohesive EU. And that meant more centrally determined discipline, more centralisation, more order, more moral legislation. Member states that were seen as in some way deviant, and the definition of deviant was absolutely in the hands of the Commission and Parliament, would be targeted by a new insistence on the rule of law. The reference was Article 2 of the Treaty. This reads:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

So why single out rule of law? Why not human dignity or minority rights? Why indeed. But it was here that the turning point in the emergence of the punitive polis can be identified.

The punitive polis at work

By 2019, it was hard to deny that something had changed in how those in the EU – all three major institutions – were coming to see divergence. In a nutshell, whereas from foundation days the emphasis was on finding consensual solutions to conflict, the famous soft power on which the EU prided itself, increasingly the emphasis shifted to constraint and, in the eyes of some, coercion. The shift was not absolute, of course. Numerous

consensual processes remained, indeed, the EU could not have functioned otherwise. Nonetheless, member states deemed deviant came to be subjected to political pressures in legal form. The relevant procedures were in the Treaty – dialogue, infringement procedures for minor, technical problems, for example when a member state had failed to implement some aspect of EU legislation, and the Article 7 procedure, described as the 'nuclear option', which carried through to completion would deprive the member state in the cross-hairs of its voting rights in Council.

The political factor is the relevant one in this context, several political factors to be precise, a kind of accumulation. A starting point was the formulation of the Copenhagen criteria, pronounced at the Copenhagen Summit in 1993, which laid down the terms on which states could join the EU. The date is relevant. Accession criteria were clearly defined with the former communist states in mind, all of which were keen to join Western institutions, and these were guided by a fear that communism would return. In fact, communist successor parties did win elections, but these parties had accepted the criteria, on paper at any rate, and the EU accepted their bona fides.

Maybe there was an assumption encoded in this that states that had undergone a democratic transformation would behave in much the same way as the older EU members, that they would not game the system. If this assessment is accurate, and I have not found evidence to support it, it would account for subsequent irritation that these new member states were not really, fully like the EU-15, that they did things differently or just that they were somehow alien. The *longue durée* downslope of cultural condescension from west to east identified by Larry Wolff was also relevant in this context.[55] Central Europe was European, but not quite as thoroughly and self-evidently European as, say, Belgium or the Netherlands. It may well be that the way in which the former authoritarian states of southern Europe moved to democracy with relative ease – the emphasis is on relative – influenced attitudes towards the former communists. This assessment failed to recognise the differences between moving to democracy from authoritarianism and from totalising systems.

The sense of cultural superiority was underpinned by the long years of the Cold War, during which time the West saw itself as 'the good Europe' as

[55] Larry Wolff, *Inventing Eastern Europe: The Map of Civilization on the Mind of the Enlightenment* (Stanford: Stanford University Press, 1994).

against the Soviet Europe, 'the evil empire'. There was definitely an element of moral judgement in this, why otherwise use the word 'evil'? And that necessarily illuminated something else, Bauman's moral legislation.[56] The secular intellectuals who replaced the clerisy in the 18th and 19th centuries, were certainly not bowing out in the 21st. After all, without wanting to be too cynical here, if one is a moral legislator, one has to have a negative other to set up as the symbolic incarnation of evil. By the 21st century, this other simply could not be found outside Europe – that would be racism and go counter to the colonialism-as-guilt narrative.[57] So Central Europe was the ideal target area where one's pre-assumptions, pre-judgements and plain old prejudices could be lived out. The great convenience of this moral assessment was that it could not be in any way affected by an evidence-based counter-argument, it had a core of positive values embodied in the symbolic Europe of Article 2 and created a specific narrative by which Central Europe could be made the centre of sin. Once the narrative of breaches of the rule of law became established, sin could metamorphose into crime. The circle was complete.

Cultural superiority mixed together with moral certainty make for a very powerful cocktail and is almost impossible to resist. It legitimates a very large spectrum of political moves without further need for argument. The mixture does have one danger, all the same. It operates as a single logic that subordinates alternatives to itself, screens out non-conforming data and generally promotes a reductionism, which readily defaults into a kind of dynamic simplification.[58]

There is a wider context to the foregoing. During the Cold War, the definition of what it meant to be a European was straightforward. The West – Europe, the US, maybe Japan – were democratic and constituted the Free World (yes, with capitals; it's a phrase that really has fallen into desuetude). The Soviet Union, communism, was the polar opposite. The communist states of Central and South-Eastern Europe were initially 'captive nations", but were imperceptibly metamorphosed into satellites. This meant that as far as the West was concerned, Yalta stood, the Soviet Union's very hard *droit de regard* over 'Eastern' Europe was accepted, with

[56] Zygmunt, *Legislators*.
[57] Bruckner, *The Tyranny of Guilt*.
[58] Ernesto Laclau, *On Populist Reason* (London: Verso, 2005).

regret in some quarters, with relief in others that finally this troublesome region – where the two world wars had broken out – were under stable control.

Although this acceptance of Soviet power was based primarily on military, geostrategic and political considerations, it acquired a cultural and moral content as the decades passed. We can disregard the rather short-lived argument over convergence, to the effect that industrial societies were moving in the same direction, whether they were communist or capitalist. This always was wishful linear thinking, given the communist system's manifest inability to innovate technologically and to deal with the complexity produced by its one-off modernisation strategy. By the 1980s, Soviet-type systems had moved into a non-change state, the *stagna*[59] of the Brezhnev and post-Brezhnev years, so cogently depicted by Kundera.[60]

This state of affairs proved to be rather comfortable for the West, because it offered a stable criterion of self-definition, placing the West at the positive end of the polarity. At the time, the overwhelming majority believed that communism was there for ever and the small minority, who argued that these systems had entered a phase of decomposition did not know what they were talking about (disclosure: I was a member of the minority, but I was in good company, for so was Leszek Kołakowski).

From this perspective, the collapse of communism was a classic Lotmanian explosion, even if the effects of the explosion were slow to enter Western consciousness. Rather, the 1990s seemed entirely not to need any rethinking. Fukuyama had confidently told the world that the West had won and that the West's, the US's, model of democracy was the sole conceivable political system that would live on. We can, with an effort of will, remember the years of US dominance that the French ruefully called *hyperpuissance* (the French Wikipédia entry 2010 has a useful summary).

All the same, despite the decade of 'fatal conceit', to adapt Hayek's term somewhat illicitly, seeing that he applied it to socialism, gradually the explosion began to impact. The central issue was that if liberal democracy and capitalism, now firmly yoked, had no contender, how could the West embark on any kind of the self-reflection that post-modern thinking presumed? Any collectivity, even one as lightly bounded as the West, defines

[59] The term is used in Estonian and Russian.

[60] Milan Kundera, *The Unbearable Lightness of Being* (New York: Harper & Row, 1987).

itself by what it is not, as well as by what it thinks it is.[61] But what was the other when Western norms and normativity were presumed – very much presumed – to be universal? In effect, the question was waved away and reflection on the nature, qualities, character of Westerness was absent or ignored. In retrospect, some of this non-reflection could certainly be classified as agnotological, as more or less consciously ignoring a key issue. (To be fair, there were some on the non-liberal left who did ask these questions, Mouffe obviously.[62] I had a conversation along these lines in 2012 with the late Benjamin Barber).

By extension, this inwardness applied equally to the EU and to the integration process. The question that could, indeed should have been asked is why integrate? What was its purpose, should it change now that the communist other had disappeared? This self-interrogation did not take place and in some respects the rationality of the old way was confirmed by the 1995 enlargement and the relative ease with which Austria, Sweden and Finland acceded to the EU (as it had by then become).

This comfortable state of affairs was compounded by the otherwise logical step of Third Way thinking. Now that there was no ideological or political danger from the radical left, it arguably made sense to combine the 'best' of both left and right traditions and to base democracy on this amalgam as the sole legitimate form of politics and to enter what was defined as 'politics as management'. This concept then became the foundation of the liberalism that claimed a monopoly over democracy in later years with the results that exist currently.

The problem with this development was threefold. It had no contender, it lacked a theory of what the state could and should do and it launched a process of depoliticisation as it outsourced political issues to non-accountable bodies, like the judiciary (see the section on juristocracy), as well as to the market. Matters worsened as this new liberalism (John Gray called it hyper-liberalism[63]) began to shift into something that resembled a Bakhtinian monology,[64] repelling challenges by condensing a specific metalanguage, like giving History 'sides', and simply ignoring questioning (I have had

[61] Fredrik Barth, *Ethnic Groups and Boundaries: The Social Origin of Culture Difference* (Boston: Little Brown, 1969).

[62] Chantal Mouffe, *On the Political* (London: Routledge, 2005).

[63] John Gray, 'The Problem of Hyper-Liberalism', *Times Literary Supplement*, 27 March 2018.

[64] Mikhail Bakhtin, *The Dialogic Imagination: Four Essays*, ed. by Michael Holquist (Austin, Texas: University of Texas Press, 1981).

endless personal experience of this). The tenets of hyper-liberalism were and are unfalsifiable, its adherents reject refutation and the entire construct has morphed into a monological article of faith.

It follows, therefore, that the three Lotmanian explosions explored in the foregoing struck an intellectually tired and, equally, a self-satisfied mainstream. It was and is (at the time of writing) unable to cope. Worse, liberalism (maybe that should be called 'real existing liberalism') came to face a challenge from the left, from the rise of the Green alternative, which necessarily questioned the market centredness that exercised a hegemony over economic thinking and ignored its consequences like the rising inequality and the emergence of disadvantaged peripheries.[65] The whys and wherefores of the impact of Central Europe are dissected in the second part of this writing, but they are very much a crucial part of the story.

With some justification one could end this section by murmuring 'a stitch in time saves nine'. In sum, the failure to rethink what the West stood for without a contender, how globalisation and non-linear processes were transforming causation and why the depoliticisation of the Third Way generated the so-called 'populist' challenge drove the crisis of the EU and acted as the midwife to the punitive polis discussed in this part of the book.

The weaponising of the rule of law

In political terms, if transformation could be completed with the speed shown in the south, why not in the east as well? All the same, the Copenhagen criteria could be defined as a kind of insurance policy if things went wrong. As ever, it would be Brussels that defined what going wrong entailed. And somewhere in this package was another tacit assumption, that the criteria would apply only or primarily to the former communists, not to the EU-15, whatever the case. So while there might have been serious problems with Greece at various times, there was never any question of an Article 7 procedure.

From the Brussels perspective, the big bang enlargement of 2004 was at the time seen as a major triumph. But the first seeds of dissent from the triumph could be observed in the rejection of the Constitutional Treaty a year later. I recall taking part in a debate in Paris a few weeks before

[65] Guilluy, *Fractures françaises*; Guilluy, *No Society*.

vote and trying to answer a question along the lines of 'what have we in common with the Czechs?', not to mention the symbolic figure of the Polish plumber who would come and take away French jobs. At the popular level, the enlargement was not universally popular. There was never a question of submitting the enlargement to a Europe-wide referendum, yet if European citizenship was to have any content, should existing citizens not have been consulted as to whom they wished to see as fellow citizens? And, yes, I recognise that a no to enlargement would have meant that Hungary would not have acceded to the EU (and I would not have spent a decade and a half as an MEP).

At the same time, the newly acceded states did occasionally cause raised eyebrows in Brussels. The first PiS government in Poland (2005–2007) did irritate people because of its rhetoric and its reluctance to accept the Charter of Fundamental Rights. Quite some consternation was caused when the Czech parliament voted down the government in the midst of the Czech presidency in 2009 – this was not the done thing at all. The Slovenian–Croatian frontier dispute – still unsettled at this time (2019) – was also a source of irritation, as if to say, in well behaved Europe, people just don't raise such issues. Still, these were minor crises – in the ugly black duckling category – and were far less damaging than the Italian and Greek crises of 2011 and 2015 respectively.

A rather more slowly burning crisis were the developments in Hungary. The leftwing governments of 2002–2010 amassed enormous debts, were in continuous excessive deficit procedure, had major holes in the budget that exceeded the EU's three per cent limit, but the Commission tended to look the other way. Matters changed when *Fidesz* won a two-thirds majority in 2010 and discovered the sise of its predecessor's indebtedness. To its dismay, when the government asked the Commission for an easing of the three per cent limit, the answer was a firm negative, whereupon the *Fidesz* government rejected austerity and filled the gap by extraordinary taxes on financial institutions.

This went directly contrary to the Commission's philosophy that the market is always right and, it is fairly safe to say, relations never really recovered. There was a mutual loss of trust. In effect, whatever initiative was launched by the Hungarian government was viewed in Brussels with suspicion. An example of this was the media law of late 2010. The Western media trumpeted this measure as the introduction of censorship and the Commission was ready to examine it as closely as possible. I still remember

the commissioner for audio-visual matters, Neelie Kroes, having to admit that her directorate had been through the law with a fine toothcomb, but found only a few minor problems. This was not the message that plenary had wanted to hear, let alone the Western media. In effect, from then on, it was open season on Hungary. I had a ring-side seat and it was not altogether comfortable.

For fairness's sake, I should add that the enacting of the media law in December 2010 was, so to say, tactically inept. The Hungarian presidency of the Council began on 1 January 2011 and, sure enough, there were many who declaimed that in the light of the Media Law, Hungary should not be permitted to take up the presidency (there was no legal base for this demand). The chorus was started by the Luxembourg Foreign Minister, Jean Asselborn, and many others joined, shouting censorship. In reality, the Media Law was put together on the basis of general EU member state practice and, in the years that followed, no one was ever able to prove even a single case of censorship, but that did not trouble the critics of Hungary in the slightest. It was open season. And during open season, there is no need for evidence. These practices, the absence of evidence, the presumption of dubious practices, giving whatever the Hungarian government did the worst possible reading and setting aside the *audi et alteram partem* principle were definitely against the much-trumpeted European values – the basis of the charges – but that contradiction was ignored.

The tension between Hungary and the EU, Parliament especially, intensified in the years that followed. I lost count of the number of hearings and plenary debates held on Hungary in Parliament, they were well into double figures, but it was and is hard to say what they achieved, other than as a performance of leftwing outrage at the thought that a centre-right party could be elected with a two-thirds majority. Indeed, these hearings had a strongly ritualistic quality. The left returned to the theme of Hungary as the source of pollution repeatedly, denounced the pollution using much the same language – again ritualistically – and then went on to organise the next ritual. There was next to no variation, that too being a quality of a ritual. The Western media performed and still performs a parallel ritual. The fact that these rituals had next to no effect, in as much as the source of the pollution remained, implied that the ritual was and is much more about performing and strengthening the identity of the left at a time when it was facing a growing popular challenge. The Hungarian government's

use of 'war of freedom' rhetoric meant that the system of cultural polarities was alive and well.

It is hard actually to prove my next proposition, but all the same, it wasn't just Hungary. The other new member states tended to be viewed through a similar lens, in a kind of Western guilt by association or, equally, through the optic of cultural disdain. It certainly added to the mixture that the Visegrád Four, the V4, began to understand that acting together functioned as an influence multiplier, which made them less and less popular in EU circles. By 2015 or so, they were known as 'the dirty four'. Their crime? They argued in favour of the national interest. Seemingly this was permissible for France or Germany, but not for the Central Europeans.

The construction of the punitive polis was a process and it is possible to identify several of the steps that contributed to its creation. Beginning presumably with Copenhagen, the draft Constitutional Treaty duly incorporated the concepts that eventually became Article 2 of the TEU. Matters scould have rested there had the Commission, aided and abetted by some of the member states, not decided that member state consensus was not enough and that Article 2 should be given teeth that bite. The existing procedures of dialogue, infringement procedures and then the threat of Article 7, it was concluded, were insufficient if a member state opted to ignore the warnings. The consensual approach was not enough. This does happen. There are constantly cases when member state interest (the national interest) is at odds with the EU interest. By way of illustration, is it really the case that moving the European Parliament once a month for a few days from Brussels to Strasbourg is in the European interest? France insists that it is so, because holding plenaries in France is in the national interest, as well as being safeguarded in the TEU. There is no agreed procedure for sorting this out. Still something changed in and after 2009, with the start of the second Barroso Commission.

The first indisputable step came from the foreign ministers of four member states – Denmark, Finland, Netherlands, Germany – urging the setting up of a new rule of law mechanism, 'a new and more effective mechanism to safeguard fundamental values in member states'. Council, to which this was submitted, duly took note (on 22 April 2013) and 'had a comprehensive discussion on the subject'. Council's minutes add laconically: 'The Commissioner in charge of justice, fundamental rights and citizenship, Vice President Viviane Reding, gave an overview of the existing mechanisms for the protection of fundamental rights and the rule of law.' A side note

here: I find it somewhat contradictory that the Netherlands government which had issued its clear statement that there were 54 areas where further integration was undesirable should, on the other hand, have joined in a move that self-evidently implied exactly that, further integration, by arguing for a rule of mechanism run by Brussels.

What triggered this initiative by the four northern states is not entirely clear, likewise why these states and no others? 'Comprehensive discussion' can be read as no consensus having been reached, quite possibly because several member states saw this initiative as an intermeddling in their internal affairs (and going against the letter or the spirit of Article 4). Nor is the next step clear, although it could probably be established with adequate access to the files, namely how Council's 'comprehensive discussion' ended up as a new initiative, the Rule of Law Framework, which the Commission published on 11 March 2014. The date is important, because by that time the European Parliament was into election mode with elections due in June, hence there was no parliamentary scrutiny of this instrument. The media were likewise more concerned with speculating about the next parliament than what appeared to be a rather dull, technical document, such as the Commission published regularly. Presumably, journalists were not briefed specifically about the Framework, to the effect that the Commission was about to go a-hunting for rule of law deviants, defining deviancy by their own criteria.

The beauty of rule of law as the lever was that no one would stand up and say, no, 'we oppose the rule of law'. There are a number of general propositions in the world that, given the current climate of opinion at the time, everyone will accept, pro forma anyway. In the Soviet era, it was 'peace', you can't be against peace, can you, the Soviet interlocutors would say, and then, if you agreed, proceed to impose their definition of peace on you. In the 1990s, the word was 'democracy', there really was no one in the world who would stand up and say, 'I'm a tyrannical dictator and proud of it', though figures like Robert Mugabe could certainly have done so. The EU's equivalent became the Rule of Law and the instrument with which to bring member states to mend their ways was the Framework.

The justification for this move can be found in the Commission communication to the Council of March 2014. The relevant sentence reads:

> However, recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental

> values which the rule of law aims to protect, can become a matter of serious concern. During these events, there has been a clear request from the public at large for the EU, and notably for the Commission, to take action.

This is quite subtle. No evidence is marshalled to sustain the claim of 'the public at large', though I imagine that the media and some NGOs would have done some lobbying, even if the words 'clear request from the public at large' imply something much more extensive than this. We can be certain that there were no large crowds outside the Berlaymont demanding action. Nor is there any evidence of 'recent events'. What 'recent events'? Where? By whom? Nothing.

A further sentence indicates that the Framework is intended to be preemptive: 'The framework seeks to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met.' So, supposedly the Framework is about something that has yet to happen, though once again, it is the Commission that decides what these 'future threats' are and on the criteria for action. A journalist at this point would obviously use the phrase 'power grab', except that most journalists are leftwing and believe that the Commission is on the side of the angels.

The Commission had invented an instrument in order to extend its power, power which it did not have under the Treaties, hence the critique (from Hungary) that this was 'treaty change by stealth'.[66] This is almost admitted *expressis verbis* in the aforementioned Commission communication: 'There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law.' This sentence does not require any translation, it means that the Commission will act beyond the scope of EU legality and, as before, it has arrogated to itself the right to decide what these 'situations of concern' might be. Legality was visibly moving away from legitimacy. Being the guardian of the treaties, the role of the Commission, implies close attention to the text of the Treaties and not to seek to widen their remit. But, it should be added, this point is deeply contested along federalist-intergovernmentalist and left-right cleavage lines.

[66] The Hungarian phrase is 'lopakodó szerződésmódosítás'. 'Stealth', with its roots in stealing, conveys 'lopakodó' exactly.

The Framework itself was designed to bring a member state into line by three stages. These were dialogue, objective and thorough assessment, and the principle of equal treatment of member states. If systemic breach is established, then swift and concrete action would follow. What is noteworthy about this is how one-sided the instrument is. None of the stages offers anything resembling an impact assessment, let alone a red team process (described by Gladwell and Zenko)[67] or, for that matter, any possibility of appeal. There is no guarantee that dialogue really would involve the party where systemic breach has been diagnosed, seeing that once the Commission had concluded that such a breach existed, it would already be proceeding from a presumption of wrongdoing, otherwise it would not start the process at all. The affected state would be on the back foot from the outset. Possibly to sweeten the pill, external experts could be called in, in order to 'help to provide for a comparative analysis about existing rules and practices in other Member States in order to ensure equal treatment of the Member States', but there is nothing to indicate whether the targeted member state could choose its external experts and whether the Commission was in any way committed to listen to them. With the best will in the world, it all seems rather one-sided.

There is more to come. Even while the Commission insists on its being the guardian of the treaties and the centrality of the rule of law, and claims in the communication that the Framework was 'based on Commission competences as provided for by existing Treaties'. This was not true. The Commission failed to admit that the Framework had no legal base. If the Framework was going to work, it would do so because the affected member state would accept it voluntarily. In truth, the Framework was a gigantic bluff. An opinion from Council's legal service made this amply clear (27 May 2014), issued very shortly after the Commission's communication. The proposition from Council is in point 24:

> There is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to

[67] Malcolm Gladwell, *Blink: The Power of Thinking without Thinking* (New York: Little Brown, 2005); Micah Zenko, *Red Team: How to Succeed by Thinking Like the Enemy* (New York: Basic Books for Council on Foreign Relations, 2015).

> act along such lines, it would run the risk of being found to have abased[68] its powers by deciding without a legal basis.

It really couldn't be clearer. One does not need a fully fledged legal education to see the point. The Framework is not a legal procedure, but a political one dressed in the vestments of law. And again it does not need much knowledge of the law that mixing legality with a political objective discredits both. But, no, the Commission had created an instrument and it would use it. Quite apart from anything else, this raises two questions. The Commission was acting in the name of the rule of law, but was it acting within the terms of the law when it sought to establish an instrument without a legal base? Second, Article 4(3) of the TEU enjoins the EU and the member states to act on 'the principle of sincere cooperation', but does creating the Framework without a legal base meet the criteria of sincerity? Still, once launched, it could be deployed. So it came to pass. The member state in the cross-hairs was not Hungary, much to the distaste of the parliamentary left (if anyone has doubts about this distaste, they should look at the speeches of various MEPs from ALDE and S&D during the debates on Hungary). No, it was Poland.

This demands a bit of background and here I want to begin with a disclaimer. I do not read Polish and the evidence in English (and my other languages) is not fully adequate to offer a definitive conclusion, overwhelmingly because most of the material assumes the guilt of the accused party, the centre-right Polish government that was elected in October 2015. This has impelled me to find a detached perspective and to treat the claims of the left with the same questioning with which they treat the statements of the right. Given that the left's position is ubiquitous – the website *Verfassungsblog* is a good place to start – I'm inclined to listen attentively to the centre-right's case.

This was set out by the Prime Minister of Poland, Mateusz Morawiecki, in an article in December 2017. His starting position should be quite acceptable to those who spend their time worrying about the rule of law in Poland:

> No democratic nation can long accept having any branch of government independent of checks, balances, and public accountability. That is the judiciary's status in today's Poland. And this very peculiar flaw of governance, its origins, and its consequences have been rarely discussed or understood in Europe and America.

[68] 'Abased'. This is very likely to be a misspelling for 'abused'.

The article goes on to analyse the pathologies of the Polish judiciary inherited from the communist period and undisturbed thereafter. Despite the end of communism, as part of the 1989 Round Table Agreement there was no purge of communist appointed judges and they were able to place likeminded persons in office when their term ended. This could all be explained by the soft transition in Poland, which stressed continuity not a caesura, unlike Czechoslovakia or Estonia. The outcome, argues Morawiecki, is a corruption of the administration of the law, including bribes that governments prior to his tolerated. The PiS government elected in 2015 was determined to change this and immediately ran into a barrage of criticism from the displaced left, buttressed by their allies in Brussels. The Commission, led here by Vice-President Timmermans (yet again) led the counter-attack and activated the Framework – yes, the one with no legal base – against Poland on 13 January 2016.

The Polish government returned to the topic in much greater detail in its *White Paper on the Reform of the Polish Judiciary* in March 2018. In summary form, the Paper argued that the level of trust in the Polish judiciary was low, lower than in other EU jurisdictions, that its independence was likewise not trusted, that only 35 per cent of the judges believed that promotions were based on merit. Despite (or because of) the high number of judges per head of the population, the administration of justice was not very efficient. Proceedings were slow and becoming slower, Poland was 26th out of 31 of the European Economic Area states.

Then there was the problem of the past. Many judges still in office had handed out sentences during the communist period, which were clearly political. Can judges who were socialised into a thoroughly politicised legal system be expected to uphold the rule of law, which as the EU never ceases to proclaim, must be independent of politics? The White Paper also assessed the accountability of judges, some of whom – it noted – had behaved in ways incompatible with judicial independence (Points 27–32).

It should be added that the White Paper was heavily contested in Poland and elsewhere. Those in the Polish judiciary who were affected, basically rejected the content of the White Paper as having been based on selective evidence.

There is a profoundly difficult problem in all this that the West never confronted. A democracy clearly needs an autonomous administration of justice, but what should happen after a revolution or far-reaching system change? How many of the personnel of the previous system should remain

in office? Huntington commended the process overseen by Karamanlis after the collapse of the colonels' regime in 1974.[69] In essence, the Greek reckoning with human rights violations was fast and circumscribed, it was over by 1976, and it affected senior office holders and torturers. This satisfied public opinion and constituted a clear caesura. But it should be added that the colonels' regime lasted only seven years as opposed to the communists' forty-five and the system was far less deeply embedded. Besides, the soft transition in Poland had involved a political bargain that there be no overt accounting for the past, for it was – to simplify – on that basis that the communists ceded power. It may also be that Kelsen's assumption that the professionalism of the judiciary would operate as a background culture of self-limitation was too optimistic. At best this culture was incomplete in the case of Poland, as it was bound to be without some oversight. Membership of the Council of Europe proved not to be a sufficient condition.

In a way this easygoing approach to the legacy of authoritarian and totalising systems on the part of the democratic West was idiosyncratic. The repeated emphasis on judicial independence could have been the basis of a closer oversight of the extent of the carry over in former community states and, indeed, it should have been in the interest of the West to ensure that it would be held at a minimum. In retrospect, this can be assessed as an omission and it was not really addressed during the pre-accession process when the former communist states applied for EU membership.

All this was odd, given the precedents. Should judges from Nazi Germany have been allowed to continue to sit? At the time, West Germany accepted the carry over, but was heavily criticised for this thereafter. The West, and that includes opinion formers like NGOs and think tanks, never concerned themselves with the carry over from left totalitarianism. In the Polish case, the soft transition from communism to democracy made coming to terms with human rights violations under communism politically difficult if not problematic. And, as noted, the West ignored this, presumably in the name of stability and continuity.

To return to the EU and Poland, the strategy of the post 2015 PiS government to transform the judiciary raised two issues. The EU did not accept the basis of the Polish argument that a reform was needed and it saw the attempt to launch this transformation as an overtly political gambit by

[69] Samuel P Huntington, *The Third Wave: Democratization in the late Twentieth Century* (Norman & London: University of Oklahoma Press, 1991).

a right-wing national(ist), conservative and above all dubiously pro-integration government. Hence the Polish government's position was eo ipso rejected by the Commission, likewise on political grounds. This resulted in the launching of the Framework in January 2016.

The story of the actual operation of the Framework need not detain us, as it received ample coverage. The operation was rapid, the procedure completed all its stages by the autumn of 2017 and the Commission made various recommendations to the Polish government, basically intervening directly in the administration of the law in a member state. The demands were far-reaching, as summarised in a *Verfassungsblog* article (very hostile to the Polish government), the Polish government must take steps:

> To ensure the judges, its President and its Vice-President of the Polish Constitutional Tribunal are lawfully elected and appointed so as to restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution;
> To publish and/or fully implement a number of rulings of the Constitutional Tribunal before its 'capture' by the Polish ruling party in December 2016 in obvious breach of the Polish Constitution;
> To ensure that the following laws are withdrawn or amended so as to ensure their compatibility with the Polish Constitutional and with basic European standards on judicial independence: the law on the Supreme Court; the law on the National Council for the Judiciary; the law on Ordinary Courts Organisation and on the National School of Judiciary;
> To refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole;
> To ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties.

By any criterion these demands were humiliating and betrayed an attitude of seeing Poland, and presumably not just Poland, as being in a state of subalternity. The EU's civilising mission, always denied, was very visible indeed, though not to the authors of the article,[70] of course.

[70] Laurent Pech and Patrzyk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)', *Verfassungsblog*.

The Polish government made various adjustments, but no more than that, there would be no return to the status quo ante and a reinstatement of the communist-legacy judges. It was a complete stand-off, neither side could make concessions that would satisfy the other – that would have required a major climb-down – so the Commission took the next step in the gradation of the punitive polis. It launched an Article 7 procedure on 20 December 2017. By late 2019, however, nothing much had been achieved, judging by the complaints from the left (Jyrki Katainen, Commission Vice-President was quoted saying more or less that by Reuters).

Even while Poland was being targeted by the Commission, the European Parliament was doing something similar to Hungary (disclosure: obviously, I was involved here, against the activities of the left). It should be added, that the Commission had its own agendas and was not exactly delighted when Parliament took matters into its own hands (from private conversations with Vice-President Timmermans).

In sum, the Commission's approach was to rely on dialogue and infringement procedures, with appeals to the ECJ. The Commission's problem was that Hungary would apply the law and follow the procedures, but not necessarily implementing them as the Commission would have liked, albeit within the limits of legality. As we know, or should, there are always grey areas in the interpretation of the law. Still, the responses of the Hungarian government, while not ideal from the Commission's perspectives and purposes, were legally sufficient. Indeed, there was a sense that Parliament's determination to push ahead with its punitive measures against Hungary was something of a distraction. Parliament could pass a thousand-and-one resolutions critical of Hungary, but these could be and were ignored. Hence, presumably, the decision in the LIBE committee to prepare a report intended to initiate an Article 7 procedure against Hungary.

This was the Sargentini Report, the partial text of which, together with the Hungarian government's rebuttal, is in the appendix. For the sake of completeness, Sargentini had a predecessor, the Tavares Report of 2013. This report listed a range of alleged deviations by the Hungarian government, but as an own-initiative resolution, it was political, not legal, hence could be ignored. Sargentini was something else. It did have legal consequences. Here it is important to clarify the relevant procedures, central to which is that Article 7 complaints are heard by Council and only by Council and whether anything happens will depend on whether the member state in charge of the presidency will table it or not. The Austrian presidency,

followed by the Romanian, did not seek to put the issue on Council's agenda, but the Finnish presidency (second half of 2019) has done so, and the outcome remains open at the time of writing.

Sargentini was passed by Parliament on 12 September 2018. Even in the voting, there was a contested element. There were 693 MEPs present, 448 voted in favour, 197 voted against and 48 abstained. For the vote to be valid, it had to be passed by a double majority – half the MEPs (376 out of 751) and two-thirds majority of the votes cast. The first hurdle was clearly passed, but the second is contested. Is an abstention a 'vote cast' within the meaning of Parliament's Rules of Procedure [Rule 89 (3)]? If so, then the 448 votes in favour were not enough, the bar is 462. However, if abstentions do not count as a 'vote cast', then the number of votes needed is reduced to 645 and two-thirds of that is 430, meaning that the report would pass the two hurdles. Common sense would suggest that an abstention is a vote, but that was not what the president ruled, so the report passed. Hungary, quite understandably, is appealing this to the ECJ. It is hard to avoid the conclusion that Parliament's voting of the Sargentini Report added up to a legislative declaration of guilt in which legally sound evidence played no role.

The party political quality of Sargentini was pointed up by something that didn't happen – action against Romania or Malta. There was more than enough evidence, certainly more reliable evidence, that in these two countries there were serious rule of law problems, more so certainly than in Poland or Hungary, *prima facie* at any rate. Yet Parliament refused to act. It refused because in these two member states the governments in power styled themselves leftwing, hence the left in Parliament did what it could to block scrutiny. Party politics or legality? *Res ipsa loquitur*.

Some analysis of how a proposition can become an indisputable fact will be useful here.[71] Much play has been made over the years of evidence-based argument, something that should be a central European value. If we take rule of law seriously, then the integrity of evidence should be central. Reality is different and, if we accept an argument from social construction theory, all data are the outcome of selection, so that the selection criteria are a necessary part of knowledge transmission. These criteria are generally implicit, they are derived from naturalised assumptions. Once naturalised, they are seen

[71] Ludwig Fleck, *The Genesis and Development of a Scientific Fact* (Chicago: University of Chicago Press, 1979).

as beyond questioning and all too often they are moralised. These then become impossible to rebut, because 'everyone' knows that they are 'the truth'. And this is further solidified if the assumption is a collective one, because members of the collectivity reinforce the assumption by relying on the same semiotic code.

One of the side-effects of a process of this kind is that the collectivity is now in a position to exercise power collectively, in the belief that it is acting for the common good – this belief is an essential part of self-legitimation – and because every collectivity has alterities – asymmetries of power will ensue, asymmetries that the collectivity will not recognise or override. Self-limitation is extremely difficult to practise where a collective identity group is involved. And that was what emerged on the left in the European Parliament.

The outcome is groupthink and the decisions that follow play a role in sustaining group identity, in establishing and intensifying a positive–negative polarity. In the case of the Sargentini Report, two such assumptions were deeply encoded with the result that its content was entirely predictable. One of these was (and still is) that the European Union is ideologically neutral, hence those questioning it are necessarily flawed. This, then, is a sacralised value. Those who question a sacralised value are at the negative end of the polarity, by definition. Second, over the years – as we have seen – pervasive knowledge transmission placed the *Fidesz* government in this unquestionably negative category. Those who prepared the report reflected this mindset. No argument, data, statistics could challenge this, it was an established truth. Minds had been made up. The document of refutation prepared by the Hungarian government was an empty signifier or a *quantité négligeable* as far the majority was concerned. And, to shift meanings a little, this was a source of concern, because ignoring the refutation necessarily means the absence of dialogue and implicitly that one's interlocutor is no such thing, but is a non-being.

Looking back on it, the emergence and triumph (for some it was a defeat) of the Sargentini Report was a classic case of a collective movement that had acquired its own dynamic and could not be countered. Evidence had no impact, as it could not once groupthink had found the critical mass and the critical speed. For the left, Hungary as the source of pollution was a naturalised fact, apodictic, about which there could be no further discussion.

More interestingly, the same dynamic captured the majority of the EPP. There were several explanations. For some, especially the Scandinavians, the unrelenting negative reporting in their media made them sensitive to questions from their constituents, along the lines of, why are you in the same party family as the fascist, authoritarian *Fidesz*? At the same time, they were challenged by right-radical parties at home and these they identified with *Fidesz*. Why *Fidesz*? Because it is always convenient to construct an external scapegoat that you can define and redefine without reference to the scapegoat itself. Scapegoats do not have voice, nor can they practise exit or loyalty.

For others, like the Polish members of the EPP (the *Platforma*), attacking Hungary was instrumental, a blow (supposedly) against their own centre-right government. Besides, the *Platforma* always contained some members who were, in reality, liberals and losing the election in 2015 pushed them towards the left. Apart from that, they disliked the close relationship between the Polish and Hungarian governments. Some of the Romanian MEPs took up a parallel position, except that in this case, they were looking to weaken their own socialist government. Being critical of *Fidesz* and Orbán, then, became a performance of their own loyalty to their version of an integrated Europe. The Maltese followed suit. The CDU had in any case shifted towards the centre under Merkel and were captured by the crowd dynamic. The Benelux members saw Hungary, correctly, as an anti-federalist impediment.

To go back to the Polish case, and some of this applies to Hungary as well, what we can see is the clash of two political logics. That of the Polish government was to complete the decommunisation of the judiciary and that of the Commission was, that once appointed by due process, judges should be irremovable, regardless of their past. In effect, Poland could conceivably have done the cleansing before EU membership, but not afterwards.

But what does this say about the EU as a defender of democracy and the rule of law? Can those who actively served a non-democratic, totalitarian or at any rate totalising system be accepted as servants of a democratic order? Should they undergo a cleansing process, if there is one? Germany was regularly excoriated in the 1950s for allowing many who had performed legal duties in the Nazi system to continue unaffected in the *Bundesrepublik*, but why did this not apply to the enforcers of communism? In truth, the EU and the West never really confronted the problem of what to do with the problem of communist residues. Indeed, it was ready to treat these with

kid gloves as long as the procedures were followed, washing its hands of the problem, but also denying the right of an elected government to complete its programme of decommunisation.

Added to that, the leftwing ecosystem was loud in its support of the Commission's position, hence other voices could not be heard. Furthermore, former communists wholeheartedly supported European integration as the most effective way of protecting themselves politically, but the Western left refused to see this as a problem. The Western left's entire attitude towards the residues of communism was that they didn't really matter, that the problem should just go away. Anyway, the entire question of decommunisation two decades after the collapse of communism was all a bit far-fetched as far as the left was concerned. After all, the centre-right implementing the reforms was composed of nationalists and populists, so their opponents must be the people that the left should support.

The cultural and political convergence of the Western left and an integrated Europe thereby established a gap for onetime communists, who seized on this opportunity to cleanse themselves of their dubious pasts. It was, in this sense, somewhat ironic that the EU functioned as a kind of laundry for those who wished to purify themselves of their authoritarian antecedents and to be able to do this at minimum cost, acquiring a kind of get-out-of-jail-free card.

After the 2019 elections, the new institution of the *cordon sanitaire* made its way into the European Parliament. Its role and function were to exclude those MEPs from parliamentary office whom the pro-integrationist majority regarded as anti-European and, therefore, not fit to hold offices like the vice-presidency of parliament, chairs of committees or deputy chairs of committees. There is a certain logic in this. If one begins from the assumption that there is only a legitimate concept of an integrated Europe, the one that has been extensively sketched in this writing, then it is clear enough that other approaches – like a more intergovernmentalist one, say – will be seen and treated as anathema. So the logic is clear enough. The problems begin with the assumptions on which this logic is based.

The dominant integrationist position is effectively monistic. There is and can be only one way of being European, it insists. This proposition runs counter to much of the European tradition and, if it persists, will run into trouble as well for the obvious structural reasons, that Europe is too diverse to be reduced to a single model. Even while the protagonists of this position are sincerely committed to it, accept no alternatives, propagate it

passionately, they thereby ignore many of their own cherished principles. These latter are to do with democracy and citizenship. After all, those who now find themselves beyond the pale have also been legally and legitimately elected. Thus those citizens who voted for the excluded MEPs have somehow lost something of their civic status, their votes are somehow less worthy. Politically it makes sense maybe to exclude if the object of the exercise is to discourage citizens from doing it again, even if it is just as likely to generate resistance. And the expression *cordon sanitaire* is a metaphor that speaks volumes, to the effect that those beyond it are a pathology that must be quarantined lest the healthy body be (further) infected. Metaphors of nature and the body are remarkably powerful and conceal all sorts of motivations and power games.[72]

Exclusion by the *cordon* is, at the same time a form of virtue signalling by the left, and to some extent by the EPP as well, with the implicit message that the Eurosceptic right is unfit to be in the European Parliament at all, is there on sufferance, but should be powerless. Being banned by the majority from holding office does help to bring this about. Office holders in Parliament have access to far more information than common or garden MEPs – we are, in fact, discussing a rather hierarchical institution here.

I do not want to push the parallels of monism too far. The European polis is neither totalitarian nor totalising. There are no gulags, no KGB, no democratic centralism. All the same, monism is a dangerous direction to take because it points towards intolerance and exclusion and, as has been one of the pivots of this argument, it goes counter to integration as a mode of conflict resolution. Monism suppresses conflict by exclusion, only in this case (no violence), but the exclusion of MEPs goes beyond the obvious, it excludes their political ideas and, quite apart from anything else, is hard to reconcile with several articles of the Treaties, not to mention Parliament's rules of procedure.

The exclusion incidentally also goes against Parliament's own informal rules. Party groups are allocated office and budgets according their success, under the d'Hondt system. The *cordon sanitaire* dumps this and to that effect is in breach of the rules. Furthermore, the exclusion also means that the groups affected have no particular interest in the smooth running

[72] George Lakoff and Mark Johnson, *Metaphors We Live By* (London: University of Chicago Press, 2003).

of parliament, given that their own concept of Europe has been de facto declared a disease. Hence obstruction, the polarisation of rhetoric, conflict can all be expected. And, while prediction is hardly a sensible activity, the excluded will have every interest in trying to block the budget. This turn of the screw in the punitive polis does not augur well.

What underlies the punitive polis can evidently be understood as an aspect of Bauman's moral legislation.[73] The European integration process has allowed the left to seize the agenda and to condense moral and legislative power by reference to a rather narrow interpretation of European values – reduced to the rule of law and not much else. Human dignity, with which Article 2 begins and is there in Article 1 of the Charter of Fundamental Rights – this is primary law of the EU – has no role to play. Those who can control moral legislation, then, have a considerable political advantage, as well as a sizeable constituency in society. This accumulation of moral power-setting further allows the integrationist left to exclude those sections of society who disagree with them. They are labelled populists and their moral agendas are excluded.

Vauchez offers another explanation for the shift.[74] In sum, the measures taken after the 2008 crisis to save the Euro effectively marginalised parliament's power over economic governance. What this meant was that the polis had been endowed with a certain political-institutional system, which mimetically resembled the structures of a state, but this was completely marginalised by the economic governance that was constructed to cope with the crisis and from which the EP and the citizens were excluded. Hence the 'Potemkin democracy' mentioned above. My added thought is that instituting the punitive dimension of the polis and the enlargement of space of EU power to that end constituted a response to the loss of power in the economy. In this sense, becoming a punitive entity rather than a consensual one can be seen as a compensatory move, one that introduced a qualitative change in European politics.

All this, it can be safely said, is a long way from the ideas of the founding fathers. Europe as the punitive polis is, in truth, impossible to reconcile with the Europe of democracy and conflict resolution.

[73] Bauman, *Legislators*.
[74] Vauchez, *Democratizing*, 18.

Some inconclusive closing thoughts

They are inconclusive for two reasons. One is that my direct experience of Brussels and the EU ended with the end of my mandate at 0900 on 2 July 2019 (precision for pedants). Second is that the EU is a dynamic polis and there have certainly been developments that I have only watched at a distance. Besides, there's no such thing as a conclusion when it comes to questions of power.

During my years in the European Parliament, I understood something that political theory only touches on tangentially, namely the intersection or, better, the interconnection between politics and law. While there are some who pay attention to this, it is often hard to make sense of the one without the other. The two processes are involved in reciprocal potentiation and at the same time offer an escape hatch, a kind of legitimating strategy that allows politicians to claim TINA and the judiciary to insist that their actions are simon-pure legal and do not need any legitimation beyond the constitution. Any deeper look, piercing the veil, will show that the relationship between the two fields is complex and impure.

Kelsen, who has come to play an important role in my thinking, may well have argued for a *Pure Theory of the Law*, the *Reine Rechstlehre*, but reality lies elsewhere, certainly in the functioning of modern democracies. The postulate that there is a purely legal normativity from which all other norms are derived in a hierarchical order sounds plausible, but is not an accurate reflection of the EU or any member state either, for that matter. At the very least, legality has a sociological, cultural and political context.

The EU is not in any way exempt. By definition, no parliament, no legislating politician can be outside the field of law, even if the impulse behind a particular item of legislation is political. The political impulse is translated into legal language – a qualitative shift from one semiotic field to another – and thereby acquires what all hope will be beyond political questioning by becoming legal. This happens in the EU and equally so in national legislatures. In this area, the media are woefully inadequate. They do not understand or take the trouble to understand the legal field and language. Media comment on the 2010 Hungarian media law illustrated this nicely, the journalists were all over the place and reported not the law, but what opposition politicians told them about the law.

On the other hand, the same applies in reverse to the law. Those involved in the administration of the law cannot transcend the political, cultural and

sociological context of which they are a part. The very interaction between the law and politics affects both. The quiet transfer by politicians of awkward political decisions to the judiciary has increased the power of the latter, made them more prominent and, by politicising the law, made legal decisions less legitimate. The leftwing complaint about 'unelected judges' always brought to my mind that the election of judges would produce a far worse outcome. (Nota bene, the 'unelected judges' of the ECJ appear to be exempt from this leftwing critique, though it is heard on the right.) But this transfer of power is something that the judiciary should resist, because if their activities become overtly political, these will become the target of public pressure and that, in turn, will erode their claim to the political neutrality without which they cannot exercise their arbitration function. That function must be neutral and must be seen to be neutral, otherwise the law itself becomes discredited and will be lived as arbitrary.

What I've described here is ideal-typical, of course, but the transformation is real enough, even if that does not guarantee the exemption, because an ever wider range of political actors have recognised the growing significance of the law and of the language of the law. In the EU, the distance kept by the ECJ from the other institutions of the polis has so far avoided this danger, but only just. The case of the appointment and dismissal of Polish judges in 2018–2019 brought the Luxembourg Court to the threshold of politicisation, above all, because the organisation of the judiciary is a member state competence. The Polish authorities stepped back from brink, but some analogous issue will certainly come to the fore at some future stage.

One likely area where this will happen is the doctrine of constitutional identity. The European Union formally endorses diversity (Article 4(2) will bear this reading), but the Jacobin spirit of recent years says otherwise. And that in turn had begun a quiet counter-movement. Member states are beginning to define their constitutional identities according to their own historical traditions, by the experience of constitutionalism and perhaps by their sense of the power that these constitutional courts have amassed over the years. Rosenfeld points to the ethnos being the basis of the German constitutional identity, contrasting it with the demotic nature of France, but this is no more than the starting point.[75] Both states have made adjustments

[75] Michel Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham NC: Duke University Press, 1994).

to demographic and sociological shifts, for example. It is clear enough that the idea of the ethnos, a people with shared linguistic, cultural and historical traditions, has played a pivotal role in the formulation of most European constitutional orders. The likely consequence is that the constitutional order of the European polis, which rejects ethnos in principle and keeps the *demos* at arms' length will sooner or later have to engage with the constitutional order of one or other member state. A collision cannot be excluded. At that point, the question of legality and legitimacy will play a key role. This collision, if or when it happens, will be a turning point in the definition of what the European polis actually is.

One possible trigger, and what follows is speculative as to the outcomes, is the project to establish a universal rule of law mechanism, as announced by the 2019 Commission on 17 July. The key passage reads:

> **To prevent rule of law problems from emerging,** the Commission has decided to set up a **Rule of Law Review Cycle, including an annual Rule of Law Report** covering all EU Member States. This additional system will assist early detection of emerging rule of law problems wherever they appear. The Commission will deepen its monitoring of rule of law developments and invite all Member States to engage in a mutual exchange of information and dialogue, including through a network of national contact persons. There should be a dedicated follow-up on the annual report with the Parliament and the Council. The Commission will also further develop the EU Justice Scoreboard and strengthen the dialogue with other EU institutions, Member States, European political parties and stakeholders (original emphasis).

That the rule of law cycle will cover all member states notionally deals with the problem of double standards. The presence of political parties, on the other hand, raises issues of politicisation of the rule of law. And 'stakeholders' is immensely vague. If it does not go beyond the Brussels ecosystem of NGOs and think tanks, the preexisting problems will be reproduced. Then, there is the absence of independent experts, of any mention of the criteria for choosing the national contact person and, beyond that, the member state constitutional courts.

Furthermore, if this mechanism is to operate even-handedly, in conformity with the Lenaerts principle – 'EU law must apply in a uniform manner throughout the Union' – then the mechanism will have to be applied rigorously to each and every member state. Currently the Commission does

not have the monitoring capacity to do this (information from Timmermans in conversation), so if this exercise is to be effective, it will require a sizeable team of assessors for each member state and that has major budgetary implications.

Some of the member states will not like this at all, having become used to the thought that rule of law problems are only to be found in faraway Poland and Hungary. Would the way in which the French authorities treated the *gilets jaunes* have fallen within the purview of this mechanism? I think we can be morally certain that if something analogous had happened in Budapest, the howls of outrage would have resounded all over Europe. It's a little odd, come to think of it, that when the police did attack a demonstration in Budapest in 2006 and did so with a good deal of brutality, Europe was silent. Ah, but a self-styled leftwing government was in power. Of course.

Then, what is to be the status of the annual report? Is this to be a political document or a legal one? If the latter, can it be appealed to the ECJ? If a particular member state receives a 'bad' report, can it challenge it by reference to the practice of another state or will that be 'whataboutism'? That could set off a cycle of states informing on one another, which is hardly conducive to 'sincere cooperation'. We shall see. But we can be reasonably certain that attempts to launch an institutional homogenisation, a *Gleichschaltung*, will meet stiff resistance. Europe is not ready for that.

A few further reflections follow.

First and maybe most importantly, Europe is remarkably diverse, in cultures, languages, traditions, aspirations; paralleling this, since Classical Greece, dreams of creating a universal harmony have accompanied this diversity. Babel is termed a curse. The 20th century has seen the outcome and the reconstruction of Europe was launched with the objective of accepting the diversity within limits that would provide the space within which the inevitable conflicts could be resolved. The European integration process, if I read it aright, was never intended to establish harmony, but make conflict resolution possible. Yet, and yet, the old nostalgia for the absolute[76] never quite goes away. The obsession with what comes close to a single overriding rule of law regime could certainly be converted into something more monolithic. I am not saying it will, but that danger is there. Indeed, the role played by rule of law as discourse and as institutional realty is acquiring

[76] Steiner, *Nostalgia*.

a haunting similarity to what Laclau termed single logic thinking[77] – he, of course, applied it to populism, but if the shoe fits…

If harmony, as defined by a morally legislating elite, is the overriding, even transcendental objective, then what to do with whatever creates disharmony? The European answer is purification, a radical cleansing, whether of sin (in Christian terms[78]) or of political opponents. The latter arises when a political actor or movement is guided, indeed driven, by a transcendental objective. This may be the Kingdom of Heaven, but as far as the European polis is concerned, it is anything that is regarded as a hindrance to the sacralised goal of the liberal imperialists. This means that the radical supporters of integration *à outrance* are moved by faith and we know all too well – there are many precedents in Europe's history – that a faith collectivity, surrounded by a wall of virtue, is left unmoved by counter-argument. The trouble is that this kind of monism is just as much a part of the European tradition as the rationality in the name of which the left pursues power. It is difficult to envisage an equitable outcome, other than the collapse of the faith, which means that purification will continue.

As should be clear from the foregoing, Europe is not some kind of cosmic jigsaw puzzle that can be put together by the EU and thereby achieve the single correct answer. Integration is an ongoing process, with no eschatology, it's not a religious cult, there is no divine inspiration or Providence and the *acquis communautaire* is not holy writ. This means that for the integration process to be effective, it must be open to challenges, to reinterpretation, to discarding what no longer works and, maybe most importantly, function along democratic lines, which means that the EU must be involved in a continuous redistribution of power, as between its own institutions, the member states and, horribile dictu, even the citizens. The objective of the integration process should be the least bad outcome.

A theory question raised by this analysis of the integration process is that of sovereignty, of the sovereign as understood by Carl Schmitt, the person or institution that transcends all others to make the exception. Let me add the customary disclaimer here, Schmitt was the Nazi crown jurist (or is so described), but he raised difficult questions about the distribution and exercise of power. In Schmittian terms, the sovereign is not bound to follow the established rules and procedures, but can act setting these to one

[77] Laclau, *On Populist*.
[78] Tom Holland, *Dominion: The Making of the Western Mind* (London: Little Brown, 2019).

side if the need arises. I'll assume that the sovereign is not gender-linked, so I'll refer to it as it. Second, it establishes the friend–enemy distinction to secure legitimacy.

This process also constructs identity boundaries, something of which the devotees of defining Hungary and Poland as anti-European sources of pollution do not seem to be conscious. It is decidedly ironical that the identity of Europe is being defined – consciously or otherwise – by identifying indubitably European states as the negative other by which we amass our own virtue. Let me add here that the negative other is a standard feature of identity construction. Still, using the former communist states as the negative identifier has a logic. These states just do not conform to how the current avatars of integration wish to sustain it, but offer an alternative, which, therefore, points up their own contingency and, thereby, opens up the federalist normativity to debate, discussion and reformulation.

Then, if we follow Schmitt, politics is about conflict, but this immediately raises the question of which conflict and who should decide what is a conflict and what is not. The answer, staying with Schmitt, is the political sovereign, but in the context of the EU this sovereign is singularly difficult to locate, it's a kind of will o' the wisp. At best, we can locate it in the European Council, which determines the strategic directions of the European polis, but the European Council is a committee and it goes against the Schmittian grain to accept it as sovereign. Bits of the sovereign argue back, disagree, offer up counter-arguments.

In sum, the European polis is marked by the same contradictions that are inherent in Europe's diversity. This diversity can be analysed as a wicked problem, but whilst it cannot be solved, it can be managed in the multiple ways argued in the foregoing. The fatal inheritance of harmony, on the other hand, functions as a counter-movement. The task for Europe, from the perspective of 2019, is to establish the necessary equilibrium and not to lose sight of it. We know what happens if that should eventuate.

Appendices

The Sargentini Report and the Hungarian government's response to the Article 7 procedure before Council (16 September 2019).

These two documents should be seen as a classic case of Popper's conjecture and refutation. The Sargentini Report laid out a case for launching an Article 7 procedure, basically listing a very large number of instances of "democratic backsliding". The Hungarian refutation takes the assertions seriously and demonstrates that the evidence on which they are based is fatally flawed. That should end the matter, but – as I've already suggested – ending things where power is concerned is difficult in the extreme, above all where one party to a conflict has to face a loss of power. Note that the two documents are long, and would have overloaded this text, hence I have extracted the passages dealing with rule of law issues and the judiciary.

Appendix 1

European Parliament
2014-2019

Plenary sitting

A8-0250/2018

4.7.2018

REPORT

on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded

(2017/2131(INL))

[…]

A. whereas the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as set out in Article 2 of the Treaty on European Union (TEU) and as reflected

in the Charter of Fundamental Rights of the European Union and embedded in international human rights treaties, and whereas those values, which are common to the Member States and to which all Member States have freely subscribed, constitute the foundation of the rights enjoyed by those living in the Union;

B. whereas any clear risk of a serious breach by a Member State of the values enshrined in Article 2 TEU does not concern solely the individual Member State where the risk materialises but has an impact on the other Member States, on mutual trust between them and on the very nature of the Union and its citizens' fundamental rights under Union law;

C. whereas, as indicated in the 2003 Commission Communication on Article 7 of the Treaty on European Union, the scope of Article 7 TEU is not confined to the obligations under the Treaties, as in Article 258 TFEU, and whereas the Union can assess the existence of a clear risk of a serious breach of the common values in areas falling under Member States' competences;

D. whereas Article 7(1) TEU constitutes a preventive phase endowing the Union with the capacity to intervene in the event of a clear risk of a serious breach of the common values; whereas such preventive action provides for a dialogue with the Member State concerned and is intended to avoid possible sanctions;

E. whereas, while the Hungarian authorities have consistently been ready to discuss the legality of any specific measure, the situation has not been addressed and many concerns remain, having a negative impact on the image of the Union, as well as its effectiveness and credibility in the defence of fundamental rights, human rights and democracy globally, and revealing the need to address them by a concerted action of the Union;

1. States that the concerns of Parliament relate to the following issues:

(1) the functioning of the constitutional and electoral system;

(2) the independence of the judiciary and of other institutions and the rights of judges;

(3) corruption and conflicts of interest;

(4) privacy and data protection;

(5) freedom of expression;

(6) academic freedom;

(7) freedom of religion;

(8) freedom of association;

(9) the right to equal treatment;

(10) the rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities;

(11) the fundamental rights of migrants, asylum seekers and refugees;

(12) economic and social rights.

2. Believes that the facts and trends mentioned in the Annex to this resolution taken together represent a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach thereof;
3. Notes the outcome of the parliamentary elections in Hungary, which took place on 8 April 2018; highlights the fact that any Hungarian government is responsible for the elimination of the risk of a serious breach of the values of Article 2 TEU, even if this risk is a lasting consequence of the policy decisions suggested or approved by previous governments;
4 Submits, therefore, in accordance with Article 7(1) TEU, this reasoned proposal to the Council, inviting the Council to determine whether there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU and to address appropriate recommendations to Hungary in this regard;
5. Instructs its President to forward this resolution and the reasoned proposal for a Council decision annexed hereto to the Commission and the Council and to the governments and parliaments of the Member States.

ANNEX TO THE MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

Proposal for a

Council decision

determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 7(1) thereof,

Having regard to the reasoned proposal from the European Parliament,

Having regard to the consent of the European Parliament,

[…]

(3) In its reasoned proposal, the European Parliament presented its concerns related to the situation in Hungary. In particular, the main concerns related to the functioning of the constitutional and electoral system, the independence of the judiciary and of other institutions, the rights of judges, corruption and conflicts of interest, privacy and data protection, freedom of expression, academic freedom, freedom of religion, freedom of association, the right to equal treatment, the rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities, the fundamental rights of migrants, asylum seekers and refugees, and economic and social rights.

[…]

Functioning of the constitutional and electoral system

(7) The Venice Commission expressed its concerns regarding the constitution-making process in Hungary on several occasions, both as regards the Fundamental Law and amendments thereto. It welcomed the fact that the Fundamental Law establishes a constitutional order based on democracy, the rule of law and the protection of fundamental rights as underlying principles and acknowledged the efforts to establish a constitutional order in line with common European democratic values and standards and to regulate fundamental rights and freedoms in compliance with binding international instruments. The criticism focused on the lack of transparency of the process, the inadequate involvement of civil society, the absence of sincere consultation, the endangerment of the separation of powers and the weakening of the national system of checks and balances.

(8) The competences of the Hungarian Constitutional Court were limited as a result of the constitutional reform, including with regard to budgetary matters, the abolition of the actio popularis, the possibility for the Court to refer to its case law prior to 1 January 2012 and the limitation on the Court's ability to review the constitutionality of any changes to the Fundamental Law apart from those of a procedural nature only. The Venice Commission expressed serious concerns about those limitations and about the procedure for the appointment of judges, and made recommendations to the Hungarian authorities to ensure the necessary checks and balances in its Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted on 19 June 2012 and in its Opinion on the Fourth Amendment to the Fundamental Law of Hungary adopted on 17 June 2013. In its opinions, the Venice Commission also identified a number of positive elements of the reforms, such as the provisions on budgetary guarantees, ruling out the re-election of judges and the attribution of the right to initiate proceedings for *ex post* review to the Commissioner for Fundamental Rights.

(9) In the concluding observations of 5 April 2018, the UN Human Rights Committee expressed concerns that the current constitutional complaint procedure affords more limited access to the Constitutional Court, does not provide for a time limit for the exercise of constitutional review and does not have a suspensive effect on challenged legislation. It also mentioned that the provisions of the new Constitutional Court Act weaken the security of tenure of judges and increase the influence of the government over the composition and operation of the Constitutional Court by changing

the judicial appointments procedure, the number of judges in the Court and their retirement age. The Committee was also concerned about the limitation of the Constitutional Court's competence and powers to review legislation impinging on budgetary matters.

[…]

Independence of the judiciary and of other institutions and the rights of judges

(12) As a result of the extensive changes to the legal framework enacted in 2011, the president of the newly created National Judicial Office (NJO) was entrusted with extensive powers. The Venice Commission criticised those extensive powers in its Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted on 19 March 2012 and in its Opinion on the Cardinal Acts on the Judiciary, adopted on 15 October 2012. Similar concerns have been raised by the UN Special Rapporteur on the independence of judges and lawyers on 29 February 2012 and on 3 July 2013, as well as by the Group of States against Corruption (GRECO) in its report adopted on 27 March 2015. All those actors emphasised the need to enhance the role of the collective body, the National Judicial Council (NJC), as an oversight instance, because the president of the NJO, who is elected by the Hungarian Parliament, cannot be considered an organ of judicial self-government. Following international recommendations, the status of the president of the NJO was changed and the president's powers restricted in order to ensure a better balance between the president and the NJC.

(13) Since 2012, Hungary has taken positive steps to transfer certain functions from the president of the NJO to the NJC in order to create a better balance between these two organs. However, further progress is still required. GRECO, in its report adopted on 27 March 2015, called for minimising the potential risks of discretionary decisions by the president of the NJO. The president of the NJO is, inter alia, able to transfer and assign judges, and has a role in judicial discipline. The president of the NJO also makes a recommendation to the President of Hungary to appoint and remove heads of courts, including presidents and vice-presidents of the Courts of Appeal. GRECO welcomed the recently adopted Code of Ethics

for Judges, but considered that it could be made more explicit and accompanied by in-service training. GRECO also acknowledged the amendments that were made to the rules on judicial recruitment and selection procedures between 2012 and 2014 in Hungary, through which the NJC received a stronger supervisory function in the selection process. On 2 May 2018, the NJC held a session where it unanimously adopted decisions concerning the practice of the president of the NJO with regard to declaring calls for applications to judicial positions and senior positions unsuccessful. The decisions found the president's practice unlawful.

(14) On 29 May 2018, the Hungarian Government presented a draft Seventh Amendment to the Fundamental Law (T/332), which was adopted on 20 June 2018. It introduced a new system of administrative courts.

(15) Following the judgment of the Court of Justice of the European Union (the "Court of Justice") of 6 November 2012 in Case C-286/12, *Commission v. Hungary*[79], which held that by adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries when they reach the age of 62, Hungary failed to fulfil its obligations under Union law, the Hungarian Parliament adopted Act XX of 2013 which provided that the judicial retirement age is to be gradually reduced to 65 years of age over a ten year period and set out the criteria for reinstatement or compensation. According to the Act, there was a possibility for retired judges to return to their former posts at the same court under the same conditions as prior to the regulations on retirement, or if they were unwilling to return, they received a 12-month lump sum compensation for their lost remuneration and could file for further compensation before the court, but reinstatement to leading administrative positions was not guaranteed. Nevertheless, the Commission acknowledged the measures of Hungary to make its retirement law compatible with Union law. In its report of October 2015, the International Bar Association's Human Rights Institute stated that a majority of the removed judges did not return to their original positions, partly because their previous positions had already been occupied. It also mentioned that the independence and impartiality of the Hungarian judiciary cannot be guaranteed and the rule of law remains weakened.

[79] Judgment of the Court of Justice of 6 November 2012, Commission v. Hungary, C-286/12, ECLI:EU:C:2012:687.

(16) In its judgment of 16 July 2015, *Gazsó v. Hungary*, the European Court of Human Rights (ECtHR) held that there had been a violation of the right to a fair trial and the right to an effective remedy. The ECtHR came to the conclusion that the violations originated in a practice which consisted in Hungary's recurrent failure to ensure that proceedings determining civil rights and obligations are completed within a reasonable time and to take measures enabling applicants to claim redress for excessively long civil proceedings at a domestic level. The execution of that judgment is still pending. A new Code of Civil Procedure, adopted in 2016, provides for the acceleration of civil proceedings by introducing a double-phase procedure. Hungary has informed the Committee of Ministers of the Council of Europe that the new law creating an effective remedy for prolonged procedures will be adopted by October 2018.

(17) In its judgment of 23 June 2016, *Baka v. Hungary*, the ECtHR held that there had been a violation of the right of access to a court and the freedom of expression of András Baka, who had been elected as President of the Supreme Court for a six-year term in June 2009, but ceased to have this position in accordance with the transitional provisions in the Fundamental Law, providing that the Curia would be the legal successor to the Supreme Court. The execution of that judgment is still pending. On 10 March 2017, the Committee of Ministers of the Council of Europe solicited to take measures to prevent further premature removals of judges on similar grounds, safeguarding any abuse in this regard. The Hungarian Government noted that those measures are not related to the implementation of the judgment.

[…]

Appendix 2

The Hungarian Government offered two responses. The first was to the European Parliament on publication of the text of the Sargentini Report and then published a somewhat longer text when Council placed the Sargentini Report on its agenda. These extracts are taken from the second of these documents.

Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12 September 2018

I. Introduction and preliminary observations

The European Parliament adopted its Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union (TEU), the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (hereafter referred to as reasoned proposal or Resolution, respectively).

The procedure now continues in the Council of the European Union with a hearing conducted according to the modalities adopted by the Council on 18 July 2019. Member States will assess whether there is a clear risk of a serious breach by Hungary of the values of the Union, as stipulated in Article 2 TEU.

This information note is **an updated version of the text submitted to Member States at the General Affairs Council meeting on 12 November 2018,** and it provides a **comprehensive and detailed overview of all** issues raised by the European Parliament's reasoned proposal. It is intended to serve as the basis of discussions at the hearing of Hungary according to Article 7(1) TEU in the Council scheduled for 16 September 2019.

At the hearing, Hungary is prepared to provide any clarification or additional information requested by Member States that falls under the scope of the procedure.

***

The Hungarian Government considers that the method of calculating the votes on the Resolution constitutes a manifest breach of essential procedural rules, therefore **the Resolution is null and void**. Accordingly, the Hungarian Government has brought an action before the Court of Justice of the European Union seeking for the annulment of the Resolution (Case C-650/18, pending). Thus, the validity of the Resolution is to be decided

by the Court of Justice of the European Union. In its action Hungary pleads, *inter alia*, that the European Parliament has breached Article 354(4) TFEU, as well as Article 178(3) of its own Rules of Procedure by excluding abstentions when calculating the votes cast. If abstentions had been counted as votes cast, the Resolution would not have been adopted.

Notwithstanding the legal reservations, the Hungarian Government, in the spirit of **sincere cooperation,** constructively participates in the procedure pursuant to Article 7(1) TEU in order to **facilitate its timely closure.**

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It is common ground that the Union is founded on the values enshrined in Article 2 TEU that are common to the Member States, and Hungary is strongly committed to these values. Human dignity, democracy, rule of law, equality, respect for human and minority rights are all values that are also enshrined in the **Fundamental Law of Hungary.** Hungary maintains a complex and effective system of **domestic institutional guarantees** to safeguard these values.

The Hungarian Government recalls that Article 4(2) TEU provides that **the Union shall respect the national identities of the Member States, inherent in their** constitutional **structures**. A general review of constitutional rules is not among the powers conferred on the Union by Member States.

Hungary participates in a number of **international control and monitoring mechanisms** to verify compliance with international obligations, including those related to the respect of the values enshrined in Article 2 TEU. In recent years Hungary has been subject to an unprecedented international scrutiny in a series of international procedures that need not be repeated on this occasion.

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The Hungarian Government is of the view that the Resolution of the European Parliament is politically motivated, biased, and factually incorrect in many aspects, therefore its conclusions are unjustified. In addition, it addresses **a number of issues that manifestly fall outside the**

legitimate scope of the procedure under Article 7(1) because they are either not related to the respect of values enshrined in Article 2 TEU, or they have been subject of other procedures under the Treaties that are closed or pending.

The Hungarian Government maintains that **none of the statements included in the reasoned proposal, individually or in their entirety, substantiate that there would be a clear risk of a serious breach by Hungary of the values on which our Union is founded.**

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The values enshrined in Article 2 TEU, as well as, solidarity, cohesion and trust between Member States are the foundations of the Union. The most important benchmark against which the current procedure should be measured is whether it strengthens the above foundations and the unity of the European Union. Only an evidence-based and fair process that respects the equality of Member States and does not follow a hidden political agenda may contribute to these objectives.

[…]

Functioning of the constitutional and electoral system

The functioning of the Hungarian constitutional system does not raise issues which would be in conflict with the fundamental values of the European Union. The Hungarian constitutional system operates under the Fundamental Law of Hungary, taking into consideration all necessary EU and international principles. Modifying certain details, reforming previous rules or adjusting them does not automatically make these new regulations contradictory to the values of the European Union. This is true even when it comes to modifying specific rulings of the Constitutional Court of Hungary. The concerns listed in the reasoned proposal stem from the fact of modification which does not affect Hungary's compliance with the fundamental values of the European Union. Several constitutional elements are also questioned by the reasoned proposal, which do not even exist in many Member States, or albeit they exist, in any case, to a lesser extent or

with weaker competences or guarantees. In addition, the reasoned proposal does not convey the European Parliament's own findings, it merely refers to the research of other international fora. The allegation of the endangerment of the separation of powers and the weakening of the national system of checks and balances are not explained at all in the reasoned proposal of the European Parliament. These statements are politically biased. The constitutional tradition of each Member State should be respected. In this regard there are no commonly agreed European rules to follow. It is submitted that such general accusations undermine the trust between the Member States and its citizens and are highly detrimental to the integrity of the whole European Union.

Constitution-making process in Hungary

(7) The Venice Commission expressed its concern regarding the constitution-making process in Hungary on several occasions, both as regards the Fundamental Law and amendments thereto. It welcomed the fact that the Fundamental Law establishes a constitutional order based on democracy, the rule of law and the protection of fundamental rights as underlying principles and acknowledged the efforts to establish a constitutional order in line with common European democratic values and standards and to regulate fundamental rights and freedoms in compliance with binding international instruments. The criticism focused on the lack of transparency of the process, the inadequate involvement of civil society, the absence of sincere consultation, the endangerment of the separation of powers and the weakening of the national system of checks and balances.

It was generally welcomed by the Venice Commission that former communist countries adopt a new and modern Constitution to create a new framework for society, guaranteeing democracy, fundamental freedoms and the rule of law. From the 10 post-communist EU Member States, Hungary was the last one to accept a new constitution since the fall of communism. In its Opinion on the new Constitution of Hungary, the Venice Commission welcomed under point 142 that the Fundamental Law established a constitutional order based on democracy, the rule of law and the protection of fundamental rights as underlying principles. More generally, while it represents a major step for the current ruling coalition and for Hungary, the adoption of the new Constitution in April 2011

seemed to be only the beginning of a longer process of the establishment of a comprehensive and coherent new constitutional order. The Venice Commission welcomed the efforts to establish a constitutional order in line with the common European democratic values and standards, and to regulate fundamental rights and freedoms in compliance with binding international instruments, including the European Convention on Human Rights and the EU Charter of Fundamental Rights.

The political debate around the drafting of the new constitution was launched in June 2010 by the establishment of an ad hoc parliamentary committee for this purpose, composed of 45 members, representing all parliamentary parties. Following professional and political debate in the Parliament, the Fundamental Law was voted by more than 2/3 of the members of the Hungarian Parliament on 18 April 2011. The parliamentary debate on the draft constitution was preceded by the establishment of a national consultative body, set up in January 2011, followed by large scale public survey on the draft based on a questionnaire of 12 questions, and several public debates were organised on the values and aims of the Fundamental Law, with the involvement of universities, churches and the civil society. Almost a million citizens expressed their opinion on the draft constitution.

Competences of the Hungarian Constitutional Court

(8) The competences of the Hungarian Constitutional Court were limited as a result of the constitutional reform, including with regard to budgetary matters, the abolition of the actio popularis, the possibility for the Court to refer to its case law prior to 1 January 2012 and the limitation on the Court's ability to review the constitutionality of any changes to the Fundamental Law apart from those of a procedural nature only. The Venice Commission expressed serious concerns about those limitations and about the procedure for the appointment of judges, and made recommendations to the Hungarian authorities to ensure the necessary checks and balances in its Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted on 19 June 2012 and in its Opinion on the Fourth Amendment to the Fundamental Law of Hungary adopted on 17 June 2013. In its opinions, the Venice Commission also identified a number of positive elements of the reforms, such as the provisions on budgetary guarantees, ruling out the

re-election of judges and the attribution of the right to initiate proceedings for ex post review to the Commissioner for Fundamental Rights.

(9) In the concluding observations of 5 April 2018, the UN Human Rights Committee expressed concerns that the current constitutional complaint procedure affords more limited access to the Constitutional Court, does not provide for a time limit for the exercise of constitutional review and does not have a suspensive effect on challenged legislation. It also mentioned that the provisions of the new Constitutional Court Act weaken the security of tenure of judges and increase the influence of the government over the composition and operation of the Constitutional Court by changing the judicial appointments procedure, the number of judges in the Court and their retirement age. The Committee was also concerned about the limitation of the Constitutional Court's competence and powers to review legislation impinging on budgetary matters.

In a European comparison, the Hungarian Constitutional Court has a remarkable set of powers. Despite several professional legal arguments to the contrary, the Fundamental Law refrained from decentralisation – e.g. by transferring the protection of fundamental rights to ordinary courts – and maintained the remarkably strong competences of the Constitutional Court. Contrary to the negative perception echoed in the reasoned proposal, the Constitutional Court even received new competences under the Fundamental Law. The Court's competences include ex-ante or ex-post constitutional review of any act. The ex-ante constitutional review may be initiated by the initiator of the Act, the Government, the Speaker of the National Assembly or the President of the Republic. The ex-post constitutional review may be based on the initiative of the Government, one quarter of the Members of the National Assembly, the President of the Kúria (the Supreme Court of Hungary, hereinafter referred to as: Kúria), the Prosecutor General or the Commissioner for Fundamental Rights.

Furthermore, the Constitutional Court has the right to review the conformity with the Fundamental Law of any law applicable in a particular case at the initiative of a judge. On the basis of a constitutional complaint the Constitutional Court may review the conformity with the Fundamental Law of any law applied in a particular case. Even more, the Constitutional Court may exercise ex-post review of conformity with the constitution of any judicial decisions and also ex-post review of conformity with international

law over any approved legislation. The Fundamental Law adds also that besides the powers declared in the Fundamental Law, cardinal acts may confer further functions and powers on the Constitutional Court.

Altogether the current competences of the Constitutional Court reflect a professional and political compromise which strengthens the efficiency of the constitutional review by shifting the focus from abstract constitutional review towards a concrete constitutional review in a particular case. The abolition of the actio popularis was explicitly requested by the Constitutional Court itself due to its high workload caused by the abuse or misuse of this type of procedure. Moreover, in its Opinion on act CLI of 2011 on the Constitutional Court of Hungary, the Venice Commission also acknowledged that the actio popularis is not a precondition for the rule of law to prevail in Hungary[80].

The provision of the Fundamental Law that limits the constitutional control of the state budget aims to assure the balance between the scope of economic stability as a basic objective of the Fundamental Law and the protection of fundamental rights. This measure – along with the establishment of the Budget Council (a body in charge of budgetary control on state debts) – may limit the room for action for future governing parties to adopt certain economic policy measures, but it does not put obstacles to the effective protection of fundamental rights. As Article 37(4) of the Fundamental Law states, the Constitutional Court – until the government debt exceeds half of the total gross domestic product – may review the acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these acts only for the violation of these rights. Furthermore, the Constitutional Court shall have the unrestricted right to annul acts having the above subject matters as well, if

[80] CDL-AD(2011)001 – adopted by the Venice Commission at its 86th Plenary Session (Venice, 25–26 March 2011), www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)001-e (accessed 29 November 2019).

the procedural requirements laid down in the Fundamental Law for making and promulgating those acts have not been met.

As it is apparent from the wording of the Fundamental Law, the provision in question is limited both as regards its temporal scope (it applies only as long as the state debt is over the limit) and the aspects of constitutional review (the most essential human rights aspects can still be challenged at the Constitutional Court, and there have been cases, where a revision has been initiated on the basis of these rights). Furthermore, it only applies to the procedures of the Constitutional Court set out in Article 24 Paragraph (2) points b)-e): there is no restriction at all on the powers of the Constitutional Court under the Fundamental Law in respect of *ex ante* norm reviews and the verification of compliance of domestic legislation with international agreements.

Regarding the review of constitutional amendments, the new provision is in line with the former approach of the Constitutional Court. This case-law explicitly confirmed that the Court had no competence to review the substance of the amendments as the Court itself is subordinate to the constitution and cannot review the constitution itself in terms of its constitutional conformity. International examples confirm this approach. The assessment of the Venice Commission on the review of constitutional amendments by constitutional courts concludes that this is a rare feature of constitutional jurisdiction, and that "such a control cannot therefore be considered as a requirement of the rule of law".[81] Therefore, the provision did not introduce a limitation of competences; on the contrary, it established clear rules for the exercise of the competence for the review whether procedural rules were respected and so the control of the constitutional power is even more safeguarded than before.

By way of repealing the rulings of the Constitutional Court delivered before the entry into force of the Fundamental Law, the National Assembly made it clear that the decisions adopted by the Constitutional Court on the basis of the former Constitution did not bind the Constitutional Court in its following decisions. This does not preclude, however, that the Constitu-

[81] Paragraph 49 of Opinion No. 679/2012 on the Revision of the Constitution of Belgium, CDL(2012)031.

tional Court may come to the same conclusions as before, nor does this provision prevent the Constitutional Court from referring to its earlier decisions. The Constitutional Court indeed has exactly continued to follow its former practice after the entry into force of the Fourth Amendment in a number of decisions (e.g. in Decision 10/2013. (IV. 25.), 11/2013 (V. 9.) or 13/2013 (VI.17.) where judges keep referring to earlier Constitutional Court decisions).

It should be stated that the Venice Commission identified a number of positive elements of the reforms, such as provisions on budgetary guarantees, the fact that the Hungarian authorities have taken up the Commission's suggestion to rule out the re-election of Constitutional Court Judges. It also appreciated that the Act CLI of 2011 on the Constitutional Court of Hungary provided for a time limit for the appointment of new judges in order to ensure continuity and the functional immunity of the judges. According to point 31 of the Opinion on the above-mentioned act, rules on the ex-post constitutional review of legal acts were warmly welcomed by the Venice Commission. Point 53 of the same Opinion considered as positive elements the provisions which ensured an extensive possibility to approach the Constitutional Court evenly, especially under exceptional circumstances.

The rules on the composition of the Constitutional Court (election based on 2/3 majority of MPs and high level professional requirements) are high level guarantees of the independence of judges, and so is the length of term of office, which is currently 12 years, as well as the rules on the exclusion of their re-election.

It stems from the above that the role of the Constitutional Court as far as the system of checks and balances is concerned, has not changed with the reform.

Delineation of single-member constituencies

(10) In its report, adopted on 27 June 2018, the limited election observation mission of the OSCE Office for Democratic Institutions and Human Rights stated that the technical administration of the elections was professional and transparent,

fundamental rights and freedoms were respected overall, but exercised in an adverse climate. The election administration fulfilled its mandate in a professional and transparent manner, enjoyed overall confidence among stakeholders and was generally perceived as impartial. The campaign was animated but hostile and intimidating campaign rhetoric limited space for substantive debate and diminished voters' ability to make an informed choice. Public campaign funding and expenditure ceilings aimed at securing equal opportunities for all candidates. However, the ability of contestants to compete on an equal basis was significantly compromised by the government's excessive spending on public information advertisements that amplified the ruling coalition's campaign message. With no reporting requirements until after the elections, voters were effectively deprived of information on campaign financing, key to making an informed choice. It also expressed concerns about the delineation of single-member constituencies. Similar concerns were expressed in the Joint Opinion of 18 June 2012 on the Act on the Elections of Members of Parliament of Hungary adopted by the Venice Commission and the Council for Democratic Elections, in which it was mentioned that the delimitation of constituencies has to be done in a transparent and professional manner through an impartial and non-partisan process, i.e. avoiding short-term political objectives (gerrymandering).

The criticism on the delineation of single-member constituencies is unfounded and lacks the knowledge about the Hungarian election system. Hungary has a mixed electoral system which combines the benefits of non-proportional and proportional systems, providing a balanced and proportional electoral system. Hungary's electoral system is more proportional than some other EU Member States that have non-proportional electoral systems.

The new legislation on the electoral districts was adopted in April 2013.[82] The new regulation on the single constituencies was meant to reduce the number of the members of the Hungarian Parliament and to establish a more proportionate electoral system which had showed 300% disproportionalities at certain territories. The rule which states that the electoral districts cannot cross county borders and the borders of Budapest, and that they must form a block territory remained unchanged under the current legislation.

[82] 2013. évi XXXVI. törvény, https://net.jogtar.hu/jogszabaly?docid=A1300036.TV (accessed 29 November 2019).

In this context it must be emphasized that Decision No. 193/2010 (XII. 8.) of the Constitutional Court[83] annulled the previous legislation on the establishment of electoral districts, both individual and territorial. Joint Opinion No. 662/2012 of 18 June 2012 on the Act on the Elections of Members of Parliament of Hungary adopted by the Venice Commission and the Council for Democratic Elections also identified it as a positive element. The Decision of the Parliamentary Assembly of the Council of Europe acknowledged that by this legislative amendment Hungary complied with the recommendations of the Venice Commission.

The parliamentary elections in Hungary, which took place on 8 April 2018, saw a large surge in voter turnout, one of the largest in Hungarian history since the end of communism. The Report of the Head of the National Election Office states that a total of 8 312 264 citizens have been enrolled as voters. Based on registration as a national minority member, 59 235 citizens could vote for a national minority list. Election turnout was 69.73% calculated on a basis of 5 796 268 voters. This result, on its own, demonstrates the strong legitimacy of the Hungarian Parliament. With such a high turnout, it is entirely misleading to state that the "voters' ability to make an informed choice was diminished" as the reasoned proposal claims.

As far as the reporting requirements on campaign financing are concerned, the Code of Good Practice in Electoral Matters by the Venice Commission does not make any specific regulatory proposals on the reporting deadline,[84] whereas the Guidelines on Political Party Regulation by the OSCE/ODIHR and the Venice Commission recommends reporting within a period of no more than 30 days after the elections. The Hungarian regulations are fully in line with these recommendations.[85]

[83] www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2010-3-008?fn=document-frameset.htm$f=templates$3.0 (accessed 29 November 2019).
[84] www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)024-e (accessed 29 November 2019).
[85] www.osce.org/odihr/77812?download=true (accessed 29 November 2019).

National consultation "Let's stop Brussels"

(11) In recent years the Hungarian Government has extensively used national consultations, expanding direct democracy at the national level. On 27 April 2017, the Commission pointed out that the national consultation "Let's stop Brussels" contained several claims and allegations which were factually incorrect or highly misleading. The Hungarian Government also conducted consultations entitled 'Migration and Terrorism' in May 2015 and against a so-called 'Soros Plan' in October 2017. Those consultations drew parallels between terrorism and migration, inducing hatred towards migrants, and targeted particularly the person of George Soros and the Union.

It should be highlighted that national consultations are a tool for the Hungarian Government to regularly survey Hungarian citizens' opinion since 2010. During the last nine years there were seven national consultations held with the participation of more than 2 million Hungarian citizens. According to the high participations and the results of these consultations, the Government concluded that Hungary is a) pro-European, b) is fighting for a strong Europe, while at the same time c) is urging to reform the politics of Brussels in order that we can live in a Europe that leads the world. In its so called 'National consultation' launched on 31 March 2017, the Hungarian Government gathered people's opinion with the aim of providing guidance for what position to take in the discussion of the future of Europe as well as in its European disputes regarding the issues that significantly affect the life of the Hungarian people. Migration policy, energy prices, tax and labour policies, or the transparency of civil society organisations supported from abroad are all issues that fundamentally affect Hungary's sovereignty and the fact that 1.68 million citizens shared their opinion proves that people find these issues important. The title of the consultation signals the intention to halt the transfer of national competences to the European Union, to stop the politics that is trying to extend beyond what is laid down in the Treaties. The Government aims to preserve the current division of competences between Member States and European institutions. This opportunity for the people to voice their opinions regarding these issues is a manifestation of the principle of democracy. It is important to highlight that Hungary is the only Member State of the EU which decided to openly ask its citizens on how to cope with the migration crisis. After the adoption of the reasoned proposal, on 5 November 2018, the Hungarian Government

launched a consultation on family subsidies providing support for young couples and employment issues for women with children.

The Hungarian national consultations have always had an aim similar to that of the Council's Citizens' Consultation process and that of the online consultation of the European Commission on the future of Europe.

According to the EU Citizens' Consultation process, the participating Member States organised a variety of citizens' consultation activities and could decide on the modalities for the implementation of those activities at national level. Therefore, each Member State was able to discuss different themes that represent importance for its national debate. Hungary is of the opinion that it is important to take into account the different opinions and priorities of the different Member States. Member States need to have the freedom to organise consultations according to their specificities and be able to bring real results on issues that matter to people and certain challenges where solutions are needed.

As a conclusion, the functioning of the Hungarian constitutional system does not raise issues that are in conflict with the fundamental values of the European Union. Therefore, it is not justified to mention the elements of recitals 7–11 in a reasoned proposal requesting the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

Independence of the judiciary and of other institutions and the rights of judges

The Hungarian Government strongly rejects the accusations regarding the independence of the Hungarian judiciary. The performance of the Hungarian Court system is in the frontline of Europe according to the objective index numbers of the EU Justice Scoreboard. In recent years, the general accusations of the politicians of the institutions of the EU and of some Member States, claiming that "there is a problem" with the independence of the Hungarian judiciary, resulted in an enormous damage to Hungary and, last but not least, to the European Union, due to the loss of trust. As

part of the judicial reform that began in 2011, the Hungarian Government has successfully conducted discussions with the Venice Commission and the European Commission on all issues and closed all remaining issues in a satisfactory manner. The core of the sovereignty of a nation is the establishment of its judicial system, and we expect that it be respected, however, the European Parliament's reasoned proposal devoted a separate chapter to the independence of the judiciary and several closed issues are listed as ongoing and unresolved ones or as they would be a question of particular concern. The Hungarian Government notes that the mere fact that certain rules concern courts or judges cannot be interpreted that the issue would be a rule-of-law-related question. Therefore, the Hungarian Government regrets that the reasoned proposal treats those as such and seeks to link – in vain – the modification of those rules to the alleged harm to the principle of the rule of law. This approach is false and misleading.

In Hungary, the Fundamental Law guarantees the personal independence of judges, the judges are only subordinated to law and may not be instructed as regards their judicial activity. A cardinal law determines the detailed system of guarantees of the independence of the judges. Moreover, the organisation of the judiciary is also independent, the administration of the judiciary is not subordinated to the Government.

The administration of the judiciary is headed by the President of the National Office for the Judiciary (NOJ), who is a judge, whose independence from the executive is guaranteed by the Fundamental Law. The President shares competences with the National Judicial Council (hereinafter NJC), which is established by a cardinal law and whose members may only be judges.

Centralised administration of courts / independence of judges and lawyers

(12) As a result of the extensive changes to the legal framework enacted in 2011, the president of the newly created National Judicial Office (NJO) was entrusted with extensive powers. The Venice Commission criticised those extensive powers in its Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted on 19 March 2012 and in its Opinion on the Cardinal Acts

on the Judiciary, adopted on 15 October 2012. Similar concerns have been raised by the UN Special Rapporteur on the independence of judges and lawyers on 29 February 2012 and on 3 July 2013, as well as by the Group of States against Corruption (GRECO) in its report adopted on 27 March 2015. All those actors emphasised the need to enhance the role of the collective body, the National Judicial Council (NJC), as an oversight instance, because the president of the NJO, who is elected by the Hungarian Parliament, cannot be considered an organ of judicial self-government. Following international recommendations, the status of the president of the NJO was changed and the president's powers restricted in order to ensure a better balance between the president and the NJC.

First of all, it must be noted that the Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe with the objective to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. Currently, GRECO comprises of 49 member States (48 European States, including all the Member States of the European Union and the United States of America).

In the framework of its monitoring mechanism, GRECO might address recommendations to the member undergoing the evaluation in order to improve its domestic laws and practices to combat corruption which the country concerned could take into consideration. GRECO assesses the implementation of each individual recommendation contained in the Evaluation Report and establishes an overall appraisal of the level of the member's compliance with these recommendations. Without questioning the importance of the organisation and the value of its recommendations, it should be highlighted that GRECO is formulating similar opinions on other Member States' legislation, as well. Despite repetitive calls from Member States and other international organisations, the European Union's accession to GRECO is still awaited.

As regards Hungary, GRECO made 11 recommendations relating to the ordinary courts and the prosecution system and only 4 of them are considered as "not implemented" yet. GRECO 2018 Interim Compliance Report also stated that 'some progress has been made concerning disciplinary proceedings in respect of prosecutors'.

As for the Hungarian legislation referred to above, it is already a closed case. That is why it is important to note that the Venice Commission at its 16-17 March 2012 session has acknowledged the necessity of improving the efficiency of the previous judiciary system. Concerned bodies (including the European Commission) have identified several positive provisions in both acts referred to above, while also pointing out a few problematic elements that were addressed by the Hungarian Government, as also acknowledged by the GRECO report. The GRECO report further acknowledged that amendments were made to the rules of judicial recruitment and selection procedures between 2012 and 2014, through which the National Judicial Council has received a stronger supervisory function in the selection process.

It should be therefore noted that the NJC has a decisive mandate in the appointing/promoting procedure of judges and it is not the president of the National Office for the Judiciary who has the most important role in the process.

As for the general independence of judges and lawyers as well as the independence of the judiciary, it must be pointed out that each year since 2013 the European Commission adopts its communication on the EU Justice Scoreboard which provides comparable data on the independence, quality and efficiency of national justice systems focusing mainly on civil, commercial and administrative cases.

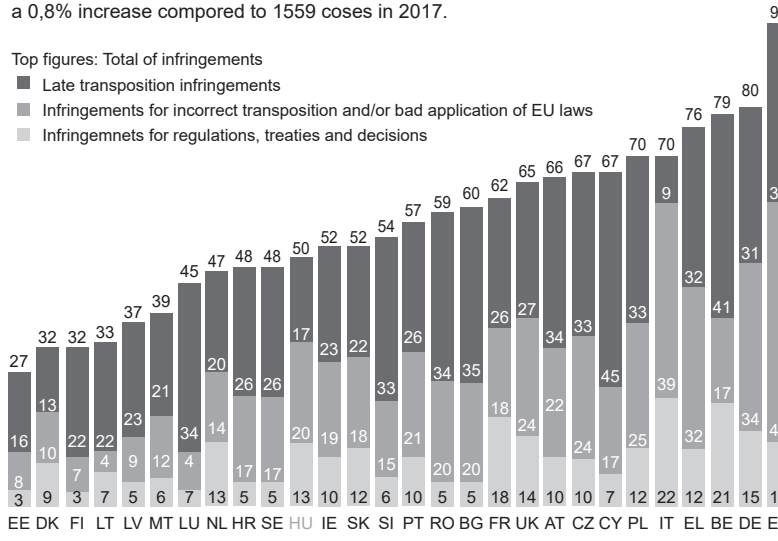
As far as the infringement cases are concerned, every year, the European Commission draws up an annual report on its monitoring of the application of EU law. According to the Commission's 2018 Annual Report[86] published on 4 July 2019, Hungary has the eleventh best result out of the 28 Member States concerning the number of open infringement cases (50) on 31 December 2018.

The follawing chart shows the number of open infringement cases by Member States at the end of 2018:

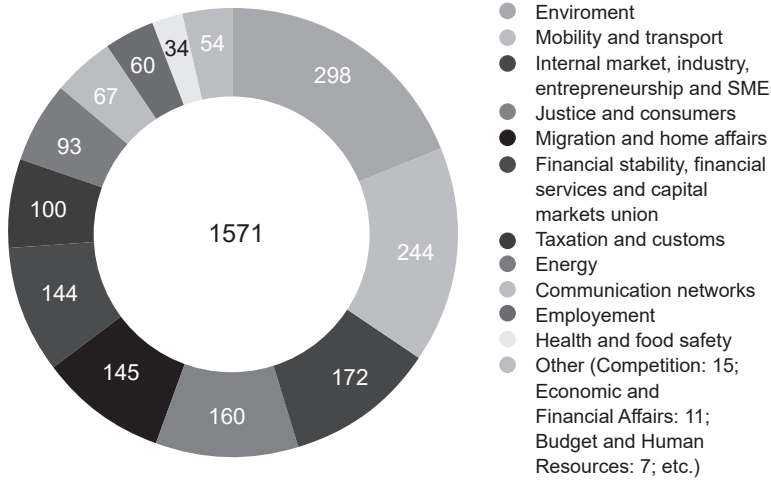
[86] https://ec.europa.eu/info/sites/info/files/eu28-factsheet-2018_en.pdf (accessed 29 November 2019).

Infringements cases open on 31/12/2018 (total)

At the end of 2018, there were a total of 1571 open infringement coses, a 0,8% increase compored to 1559 coses in 2017.

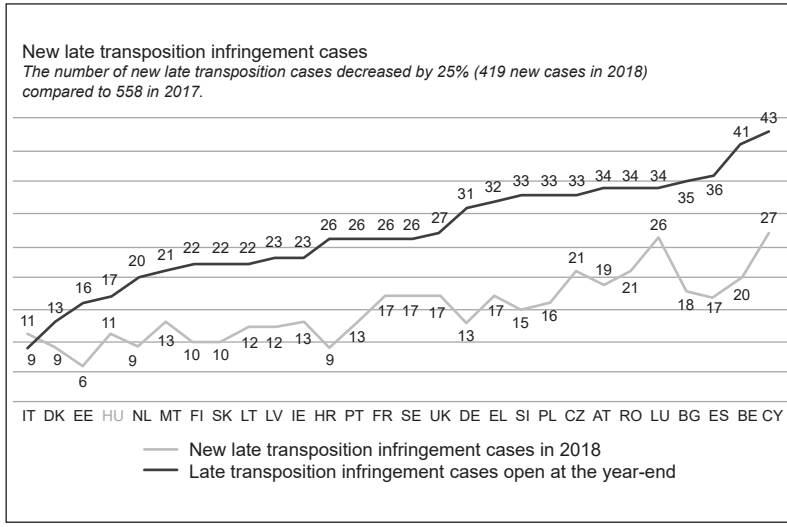


The groph below shows the main policy areas concerned.



It should also be noted that regarding the number of 'late transposition' infringement cases, Hungary had always been in the top 3–4 of the Member States with one of the lowest transposition deficit rate.

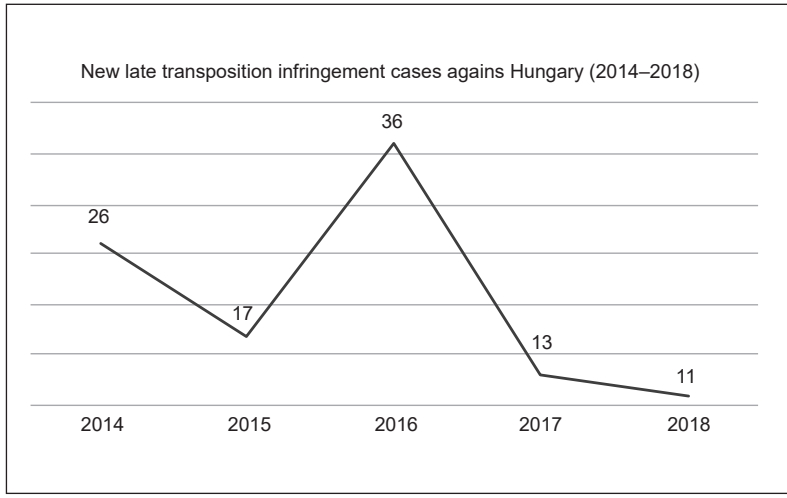
The chart below taken from the Commission's Annual Report illustrates the number of late transposition Infringement cases open at the end of 2018 by the Member States[87] which shows Hungary's outstanding performance compared to other Member States.



It is also noteworthy, that the Commission's 2018 Report identifies a favourable trend regarding the number of new late transposition infringement cases against Hungary:[88]

[87] https://ec.europa.eu/info/sites/info/files/eu28-factsheet-2018_en.pdf (accessed 29 November 2019).

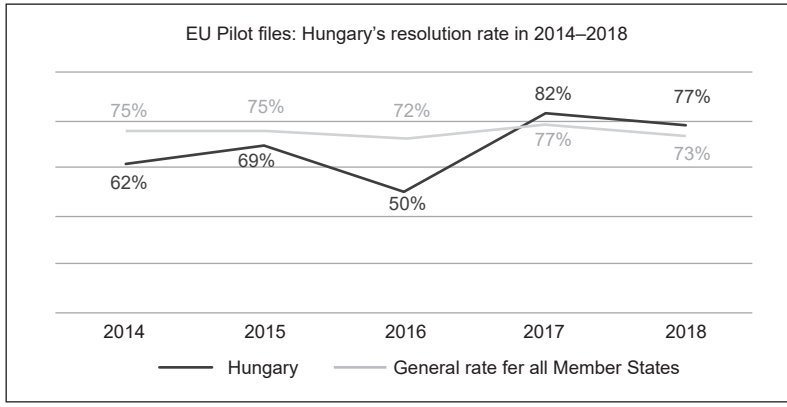
[88] https://ec.europa.eu/info/sites/info/files/report-2018-commission-staff-working-document-monitoring-application-eu-law-member-states-part3.pdf (accessed 29 November 2019).



Furthermore, it should also be highlighted that according to the statistics Hungary is performing better than the EU average when it comes to the average length of Single Market-related infringement procedures (31.6 months in HU, EU average is 38.1) and the implementation of infringement judgements of the Court of Justice of the European Union (20.8 months in Hungary, EU average is 28.2).[89]

According to the Commission's 2018 Report, concerning the Member States' resolution rate in EU Pilot procedures, Hungary has for the past years managed to outperform the Member States' average, with a 77% resolution rate by the end of 2018:[90]

[89] http://ec.europa.eu/internal_market/scoreboard/_docs/2019/performance_by_governance_tool/infringemen ts_en.pdf (accessed 29 November 2019).
[90] https://ec.europa.eu/info/sites/info/files/report-2018-commission-staff-working-document-monitoring-application-eu-law-member-states-part3.pdf (accessed 29 November 2019).



In light of the above, it is highly questionable to criticise Hungary's performance in the context of infringement cases and their "effect on the overall atmosphere in the country".

The figures of the last edition of the Justice Scoreboard published on 26 April 2019[91] show that the Hungarian justice system performs above or well above the EU average, just like in previous years. Regarding the length of proceedings, Hungarian courts are permanently at the top of the EU in many types of cases. According to this year's scoreboard, which reflects the 2017 state, the number of pending first instance administrative cases per 100 citizens is the second lowest among the 28 Member States, just as the average length of EU trademark infringement cases. We earned an excellent place regarding the length of first instance civil and administrative proceedings in general (5th place). This demonstrates the effectiveness of the judicial reform and the new structure.

As far as the independence of the justice system is concerned, the figures based on objective data do not illustrate discrepancies in the Hungarian system, especially regarding the guarantees of structural independence and the separation of the national prosecution service from other powers, which are well-established under Hungarian law.

[91] https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf (accessed 29 November 2019).

As regards the perceived independence of judiciary in Member States, the ranking method the Commission has chosen raises serious concerns. For the purpose of the ranking, all those respondents who have not stated that the independence of courts and judges is very good or fairly good, including those who simply did not take any position on the matter, are practically regarded as having a fairly or very bad perception of the independence of the judiciary. Consequently the ranking obviously does not reflect reality, not even that of the perceived independence, which is already a highly subjective issue. This method of ranking results in a completely misleading interpretation of the data in some cases.

We would also like to note that the data on Hungary presented in this way and the tendency suggested by those figures show a significantly different situation of companies' perception than what can be concluded from other credible sources, such as the German-Hungarian Chamber of Industry and Commerce which has been conducting satisfaction surveys among investors in Hungary for 25 years. Its latest economic report published in April 2019 and based on surveys conducted in February/March 2019, demonstrates a continuous improvement in the assessment of economic policy conditions including legal certainty.

It should also be noted that according to the latest Eurobarometer survey on Rule of Law published in July 2019 the perceived need of improvement of the situation concerning the independence of judges in Hungary does not differ significantly from the EU average. Moreover, in 15 Member States the proportion who thinks that the independence of judges definitely needs improvement in their country is higher than in Hungary.[92]

The independence of the Hungarian judiciary is also supported by the fact that Hungarian judges are willing to challenge legislation proposed or adopted by the Government by means of initiating preliminary ruling procedures before the Court of Justice of the European Union pursuant to Article 267 TFEU. With a yearly average of 20 requests for a preliminary ruling in the past 5 years Hungarian judges are arguably the most active

[92] https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special /surveyky/2235 (accessed 29 November 2019).

in seeking guidance from the Court of Justice, if compared on the basis of the population and the number of courts in the Member states.

Hungarian judges decide cases assigned to them not only quickly and effectively, but also at a high-standard which is partly due to their permanent (self)-training. In this regard it is worth mentioning that according to the European Justice Scoreboard Hungary is the second most active in participation at EU law trainings. The scoreboard also assessed customer satisfaction and citizens' trust in Hungarian courts. As regards the general public, the majority of the respondents think – contrary to opposing rumours – that Hungarian courts perform their work independently and free of influence.

Competences of the president of the National Judicial Office

(13) Since 2012, Hungary has taken positive steps to transfer certain functions from the president of the NJO to the NJC in order to create a better balance between these two organs. However, further progress is still required. GRECO, in its report adopted on 27 March 2015, called for minimising the potential risks of discretionary decisions by the president of the NJO. The president of the NJO is, inter alia, able to transfer and assign judges, and has a role in judicial discipline. The president of the NJO also makes a recommendation to the President of Hungary to appoint and remove heads of courts, including presidents and vice-presidents of the Courts of Appeal. GRECO welcomed the recently adopted Code of Ethics for Judges, but considered that it could be made more explicit and accompanied by in-service training. GRECO also acknowledged the amendments that were made to the rules on judicial recruitment and selection procedures between 2012 and 2014 in Hungary, through which the NJC received a stronger supervisory function in the selection process. On 2 May 2018, the NJC held a session where it unanimously adopted decisions concerning the practice of the president of the NJO with regard to declaring calls for applications to judicial positions and senior positions unsuccessful. The decisions found the president's practice unlawful.

As recognized by the GRECO report and the Venice Commission in March 2019, several steps have been taken by the Hungarian Government to balance the competences of the National Judicial Council and the president of the National Office for the Judiciary. It must be further highlighted that

the referred GRECO report particularly acknowledges the amendments that were made concerning the rules of judicial recruitment and selection procedures between 2012 and 2014 in Hungary, through which the National Judicial Council has received a stronger supervisory function in the selection process. It should therefore be noted that the National Judicial Council already has a decisive mandate in the appointment and promotion procedure of judges and it is not the president of the National Office for the Judiciary who has the most important role in the process.

The assessment of applications to a judicial position is a complex procedure with many stakeholders. The rules of the process guarantee that whenever a candidate is appointed or promoted, elected bodies of judges have a decisive role. It is either a local judicial council determining the ranking of applicants or the National Judicial Council giving prior consent to the appointment of the second or third ranked candidate. In most Member States, such judicial self-governing bodies, consisting of local judges, are unknown. The National Judicial Council regularly uses its 'right to veto' in practice. Therefore, the rules provide that the best suitable candidate wins the vacant position, as a result of the selection procedure.

The statement concerning the "unsuccessful" applications without judicial review is false. It is also worth mentioning, that an unsuccessful applicant can challenge the outcome of the selection process within a preclusive period of 15 days from the time of publication in the Magyar Közlöny (Hungarian Official Journal) of the decision on the appointment of the successful applicant. The complaint shall be submitted in writing to the president of the court affected, and the president shall forward it to the President of the NOJ within five working days, unless the notice of vacancy was published for a post at the Kúria. The President of the NOJ, or the President of the Kúria where applicable, shall be indicated as the requested party. The President of the NOJ, or the President of the Kúria shall forward the complaint within five working days to the competent Fővárosi Törvényszék (Budapest Metropolitan Court). The remedy against the decision is being dealt with in a specific procedure within the judicial system and can therefore be deemed independent from any other authority. It should also be noted that, according to the Act CLXII of 2011 on the Legal Status and Remuneration of Judges, the selection procedure may be considered unsuccessful only on the basis of the objective criteria precisely set out in that act which do not depend on

any discretionary decision. For example if no application is received or the president judge refused all applications because they were submitted late, or the applicant did not remedy the discrepancies indicated within the given short time limit. Both of the instruments cited above ensure the impartial assessment of the candidates and guarantee that the rules of the application process fulfil the recommendations set in the Decision No. 13/2013 (VI. 17.) of the Constitutional Court and by the Venice Commission.

New system of administrative courts

(14) On 29 May 2018, the Hungarian Government presented a draft Seventh Amendment to the Fundamental Law (T/332), which was adopted on 20 June 2018. It introduced a new system of administrative courts.

The administrative court system has a longstanding historical precedent in the Hungarian system. Administrative courts were established in Act No. 26 of 1896 and originally referred to as the Hungarian Royal Administrative Court. The court was disbanded by Hungarian communists in 1949 as part of their effort to undermine the rule of law. After the regime change in 1990, Act No. 26 of 1991 attempted to revive the courts by extending legal regulations on the judiciary, administrative procedures and civil procedures "towards the full establishment of administrative justice." It was withdrawn by a previous socialist government without justification.

It is important to emphasise that legal scholarship, national historical traditions and also international examples justify the existence of the independently functioning administrative judiciary. Based on extensive academic research, the institutional structure, discontinued in 1949 by communist dictatorship, could be rebuilt in a professional manner, fit for the requirements of the 21st century. A multilevel administrative judiciary, institutionally independent from ordinary courts and from the jurisdiction of the Supreme Court, operates in Austria, Bulgaria, Finland, Germany, Greece, Lithuania, Luxembourg, Poland, Portugal and Sweden. In the Czech Republic, regional courts with general jurisdiction adjudicate at first instance, and only the Supreme Administrative Court is a specialized administrative court. In France, Belgium and Italy, it is the Council of State, an organ functionally independent from ordinary courts that carries out the tasks of administrative judiciary.

International examples, especially the well-functioning systems in neighbouring countries prove us that independent administrative judiciary ensures better the self-restraint of executive power and provides more efficient control over actions of the administration.

On 9 November 2018, the Hungarian Government requested the opinion of the Venice Commission regarding the laws on the establishment of the public administration justice system and courts in Hungary. On 4 March 2019, the Venice Commission presented its draft opinion, containing several observations and recommendations. In the spirit of constructive dialogue and in light of the recommendations of the Venice Commission, on 12 March 2019 a draft bill containing amendments supported by the Minister of Justice was put before the Hungarian National Assembly.

Although the Hungarian Government believes that it has every right to follow the examples other Member States, in order not to burden the unfounded international criticism, on 30 May 2019 the Hungarian Government submitted to the National Assembly a legislative proposal to indefinitely postpone the entry into force of the Act on administrative courts. Consequently, by the adoption of Act LXI of 2019, the entry into force of the act on Administrative Courts has been indefinitely postponed.

Compulsory retirement of judges, prosecutors and notaries

(15) Following the judgment of the Court of Justice of the European Union (the "Court of Justice") of 6 November 2012 in Case C-286/12, Commission v. Hungary, which held that by adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries when they reach the age of 62, Hungary failed to fulfil its obligations under Union law, the Hungarian Parliament adopted Act XX of 2013 which provided that the judicial retirement age is to be gradually reduced to 65 years of age over a ten year period and set out the criteria for reinstatement or compensation. According to the Act, there was a possibility for retired judges to return to their former posts at the same court under the same conditions as prior to the regulations on retirement, or if they were unwilling to return, they received a 12-month lump sum compensation for their lost remuneration and could file for further compensation before the court, but reinstatement to leading administrative positions was not guaranteed.

Nevertheless, the Commission acknowledged the measures of Hungary to make its retirement law compatible with Union law. In its report of October 2015, the International Bar Association's Human Rights Institute stated that a majority of the removed judges did not return to their original positions, partly because their previous positions had already been occupied. It also mentioned that the independence and impartiality of the Hungarian judiciary cannot be guaranteed and the rule of law remains weakened.

This is already a closed case, Hungary has fully complied with the relevant court decisions or recommendations. Concerning the 2012 judicial reform Hungary has satisfactorily closed the administrative and infringement procedures with the European Commission – the reopening of these issues is against the principle of rule of law (legal certainty, *pacta sunt servanda, ne bis in idem*). There is no reason to re-open 6-year old compromises.

The Act CLXII of 2011 on the Legal Status and Remuneration of Judges entered into force in 2012, which reduced the age limit for compulsory retirement from 70 to 62 years with the aim of creating a unified, just and solidary pension system, instead of conserving individual privileges and additional rights towards certain professions. Later on, the Court of Justice of the European Union established that this law infringed the EU principle of non-discrimination. Hungary acknowledged the ruling of the Court of Justice and – also in line with the Decision No. 33/2012. (VII. 17.) of the Hungarian Constitutional Court – amended the law (Act XX of 2013) which in case of judges, prosecutors and public notaries set a new age limit (65 years) for compulsory retirement by 1 January 2023. The Commission closed the infringement procedure against Hungary at the end of 2013. Following the ruling of the Court of Justice, the Commission continuously monitored the implementation of the new Hungarian law on retirement and on 20 November 2013 voiced its satisfaction with the measures taken by Hungary to make its retirement law compatible with the requirements of the EU law. It is important to emphasize that the Commission was satisfied with the remedies implemented in Hungary concerning the affected judges, prosecutors and public notaries, including the right of reinstatement without judicial procedure, and the right to compensation. The ruling of the Court of Justice of 6 November 2012 did not question the reasons of the Hungarian Government in justification of the lower retirement age limits (balanced age structure, mobility of judges, etc.) it merely established that the provision

amounts to discrimination based on age. It is also worth mentioning that the Court of Justice did not refer to any infringement of the principle of the rule of law in its judgment. In compliance with the ruling of the Court of Justice there are unified rules in effect for judges, prosecutors and public notaries which allow those who have reached retirement age in the transition period to: a) to remain in office, b) take an administrative leave, c) to retire. The amendments introduced by Act XX of 2013 provided the possibility for retired judges to return to their former posts at the same court under the same conditions as prior to the regulations on retirement, or if they did not want to return, they received a 12-month lump sum compensation for their lost remuneration, and could file for further compensation before the court. The choice made by the judges cannot be evaluated against Hungary.

According to Article 232/J. paragraphs (2) and (3) of Act CLXII of 2011, which was introduced by Article 25 of Act XX of 2013 reinstatement to leading administrative positions was guaranteed. In the case of judges who had an indefinite term appointment to the position of President of Chamber before, if they chose to return, they had to be reinstated to their position. According to the Act, judges who had fixed term appointment could only be reinstated to their positions if those were not occupied at that time. Therefore only the reinstatement to the already occupied temporary positions could not have been guaranteed by the Act, since such a rule would have breached the acquired rights of the newly appointed judges. It must be underlined however, that under the provisions of the Act, in such cases judges could not incur any damages, since the executive allowance had to be paid for the whole duration of the definite appointment. This has been reflected by the European Court of Human Right's decisions in the cases Belegi and others v. Hungary (No. 45438/12) and J. B. and others v. Hungary (No. 45434/12). In both cases the ECHR deemed the claims of the applicants inadmissible on the basis that "the negative effects which the impugned measures had on the applicants' private life did not cross the threshold of seriousness for the issue to be raised under Article 8 of the Convention". Consequently any statement of the report on the motivation of judges is inaccurate as not based on factual data. It should be highlighted that independence and impartiality are requirements that apply to the decisional function of judges but not to the appointment of judges to leading administrative positions, which requirements therefore cannot be included in this context.

The independence of the Hungarian judiciary is beyond doubt. The general criticism is unfounded and false, hence there is no clear risk of a breach by Hungary of the values on which the Union is founded and there was no legal ground to start the Article 7(1) procedure.

Violation of the right to a fair trial (Gazsó v. Hungary)

(16) In its judgment of 16 July 2015, Gazsó v. Hungary, the European Court of Human Rights (ECtHR) held that there had been a violation of the right to a fair trial and the right to an effective remedy. The ECtHR came to the conclusion that the violations originated in a practice which consisted in Hungary's recurrent failure to ensure that proceedings determining civil rights and obligations are completed within a reasonable time and to take measures enabling applicants to claim redress for excessively long civil proceedings at a domestic level. The execution of that judgment is still pending. A new Code of Civil Procedure, adopted in 2016, provides for the acceleration of civil proceedings by introducing a double-phase procedure. Hungary has informed the Committee of Ministers of the Council of Europe that the new law creating an effective remedy for prolonged procedures will be adopted by October 2018.

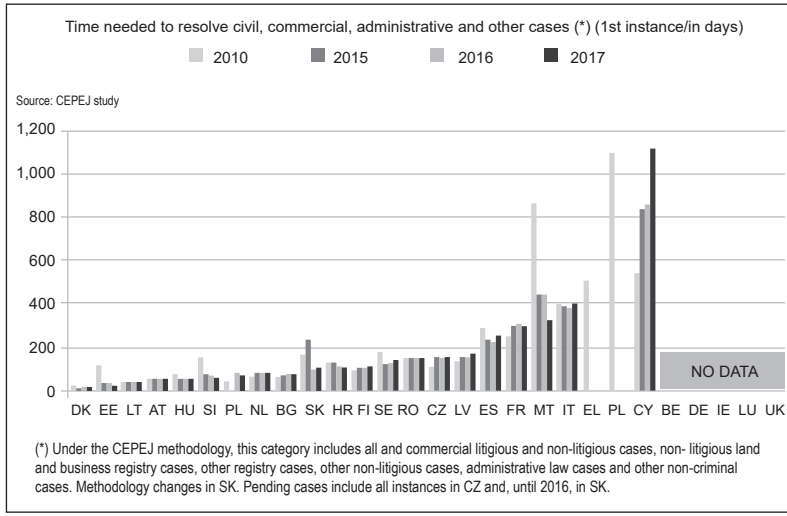
In the case of Gazsó v. Hungary the European Court of Human Rights noted the Government's Action Plan and welcomed its commitment to deal with the issue and encouraged to continue these efforts. The Court ruled that Hungary must introduce without delay and at the latest until 16 October 2016, a remedy or a combination of remedies in the national legal system in order to bring it into line with the requirements of the Convention.

A new Code of Civil Procedure adopted in 2016 provides for the acceleration of civil proceedings by introducing a double-phase procedure. In the new Criminal Procedure Code (Act XC of 2017 which took effect on 1 July 2018), the enhanced rights of the defence during the investigation will contribute to the expediency and effectiveness of the proceedings. This includes that the defence counsel and the defendant can have access to the case files right after the defendant have been questioned as a suspect during the investigation (according to the former rules, this could have only taken place after the investigation was concluded). At the trial phase, a preparatory hearing will fix the scope of the case and in order to prevent

prolonging tactics, new motion for evidence can be submitted thereafter only in exceptional circumstances. At the appeal stage, the reformatory power of the appeals court is strengthened.

Hungary has duly informed the Committee of Ministers of the Council of Europe that the completion of court proceedings within a reasonable time will be ensured by the new codes of procedure which entered into force in 2018, and a new bill creating an effective domestic remedy for prolonged procedures, which was submitted to the Parliament in October 2018 based on the following principles: objective liability, covering all types of judicial proceedings: out of court settlement procedure, (in lack thereof: a simplified judicial procedure) the swift determination of the claims, and prompt payment of an appropriate compensation.

In this context, it should be mentioned that according to the European Commission's 2019 Justice Scoreboard, the Hungarian justice system is performing well, especially as far as the length of the procedures is concerned. In fact, Hungary is the fifth best regarding the length of time needed to resolve civil, commercial, administrative and other cases. The figure below shows the time needed to resolve civil, commercial, administrative and other cases (1st instance/in days) (source: CEPEJ study):



(*) Under the CEPEJ methodology, this category includes all and commercial litigious and non-litigious cases, non- litigious land and business registry cases, other registry cases, other non-litigious cases, administrative law cases and other non-criminal cases. Methodology changes in SK. Pending cases include all instances in CZ and, until 2016, in SK.

Violation of the right of access to a court (Baka v. Hungary)

(17) In its judgment of 23 June 2016, Baka v. Hungary, the ECtHR held that there had been a violation of the right of access to a court and the freedom of expression of András Baka, who had been elected as President of the Supreme Court for a six-year term in June 2009, but ceased to have this position in accordance with the transitional provisions in the Fundamental Law, providing that the Curia would be the legal successor to the Supreme Court. The execution of that judgment is still pending. On 10 March 2017, the Committee of Ministers of the Council of Europe solicited to take measures to prevent further premature removals of judges on similar grounds, safeguarding any abuse in this regard. The Hungarian Government noted that those measures are not related to the implementation of the judgment.

In Baka v. Hungary, the European Court of Human Rights found a violation of the freedom of expression of the applicant, former President of the Hungarian Supreme Court, on account of the premature termination of his mandate on 1 January 2012 – i.e. three and a half years prior to its normal date of expiry – as a result of his criticisms of legislative reforms expressed publicly in his professional capacity. The Court also found a violation of the right of access to a court on account of the lack of any form of judicial review in this respect. In the course of the execution of the judgment, the Committee of Ministers indicated their expectation to consider — in addition to the payment of just satisfaction in the sum of EUR 100,000 (EUR 70,000 to Mr Baka, and EUR 30,000 costs and expenses awarded to the Court)— adopting further individual and general measures.

The Hungarian Government considers that the measures adopted have fully remedied the consequences for the applicant of the violation found by the ECtHR in this case and that Hungary has thus complied with its obligations under Article 46, paragraph 1 of the Convention, no further measures are necessary. There is no need or possibility for the applicant's reinstatement in his former office because his original term of office had already expired before the judgment was delivered and this is not even required by the judgement of the Court, either. In any event, the position of the President of the Kúria is not vacant and the mandate will not expire until January 2021. At that time, the applicant will be eligible for re-election, the requirement of at least five years of domestic judicial service no longer

being an impediment for him. As regards any financial consequences of the premature termination of the applicant's mandate, *in integrum restitutio* was provided by the just satisfaction awarded by the Court.

No further general measures were found necessary because the violation found by the Court resulted from a one-time constitutional reform of the Hungarian judicial system. As regards the general measures solicited by the Committee of Ministers' decision of 10 March 2017 the Government emphasises that those measures are not related to the implementation of the present judgment since the existence of those guarantees (as regards all Hungarian judges other than the president of the Supreme Court) have never been called into question by the Court. Quite the contrary, the basis for finding that the *Eskelinen-test*[93] was not met in the present case was exactly that, regardless of the unique constitutional status of the President of the Supreme Court within the judiciary, other judges and court executives were not excluded from the right of access to a court in case of their dismissal. As the Grand Chamber found in its judgment: "the applicant, as the holder of the office in question in the period before the dispute arose, was not "expressly" excluded from the right of access to a court. On the contrary, domestic law expressly provided for the right to a court in those limited circumstances in which the dismissal of a court executive was permissible: the dismissed court executive was indeed entitled to contest his or her dismissal before the Civil Service Tribunal. In this respect, judicial protection was available under domestic law for cases of dismissal, in line with the international and Council of Europe standards on the independence of the judiciary and the procedural safeguards applicable in cases of removal of judges. Mr Baka currently works as a President of Chamber judge at the Kúria as his judicial office has never been terminated (only his executive office).

[93] *Vilho Eskelinen & Ors v Finland* [2007] ECHR [GC] 63235/00 (19 April 2007) at the European Court of Human Rights, where the Court considered the scope of the right to a fair hearing in the context of civil proceedings, with particular reference to the acceptable length of proceedings and the necessity of an oral hearing. See further: [h]ttps://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["63235/00"],"documentcollectionid2":["GR ANDCHAMBER"],"itemid":["001-80249"]} (accessed 29 November 2019).

As regards the prevention of a similar premature termination of the office of the President of the Kúria under the law currently in force, the judgment in the present case does not require that rules governing such termination be adopted, it follows only that Hungary should refrain from such premature termination when the next major constitutional reform of the judicial system takes place.

The *Eskelinen-test* (see above) was not overruled in the Baka case, and contrary to the Chamber's judgment, the Grand Chamber's judgment did not even imply that the functions of the President of the Supreme Court were not related to the exercise of sovereign state powers closely enough to justify his exclusion from the right of access to court on account of his dismissal from his executive position being an issue of public law rather than that of civil law. Therefore, the President of the Kúria can be excluded from the right of access to court in accordance with Article 6 of the Convention as long as his exclusion is provided for "expressly" and prior to the actual dismissal. Whereas the Court's judgment indeed implied that it would not regard the exclusion of all judges from the right of access to court in respect of their dismissals from their judicial service to be in conformity with the second condition of the *Eskelinen-test* and thus with Article 6 (although such exclusion had been accepted in cases concerning disciplinary proceedings against judges in Turkey), the Court did not suggest that court executives cannot be excluded from access to court in respect of termination of their executive mandates.

Nevertheless, Hungarian law does not exclude all court executives from that right. Neither is the President of the Kúria excluded from the right of judges of access to the Service Tribunal in disputes concerning their judicial service. However, contrary to the provisions of Act No. LXVI of 1997 on the organisation and management of the judiciary as they were in force at the time of Mr. Baka's presidency of the Supreme Court which did not distinguish between various categories of court executives, Act No. CLXI of 2011 on the organisation and management of the judiciary as in force today does make that distinction and contains detailed provisions on the special status of the President of the Kúria as compared to other court executives. It makes it also clear that access to the Service Tribunal which is ensured to other court executives in disputes concerning their executive mandates is not available to the President of the Kúria in case of his dismissal by the

Parliament (which had elected him) from his executive office (but not from the judicial service).

Access to a court (the Constitutional Court) is ensured even in respect of the premature termination of the mandate as President of the Kúria (without termination of his office as a judge) when this measure takes the form of an act of Parliament. While the judicial remedy offered by a constitutional complaint was not available to Mr. Baka because his mandate was terminated by an amendment to the Fundamental Law (the review of which does not fall within the competence of the Constitutional Court), it was available to and made use of by Mr. Erményi (see Erményi v. Hungary, Appl. No. 22254/14; Chamber judgment of 22/11/2016), Vice-President of the Supreme Court appointed by Mr. Baka, whose executive mandate was terminated at the same time as Mr Baka's.

However, in his case the ECtHR did not agree with the Constitutional Court's assessment [see decision No. 3076/2013. (III. 27.) of 19 March 2013] that the constitutional changes in the competences of the supreme judicial body had been of such a fundamental nature to justify his premature dismissal, corollary to that of the Supreme Court's President.

It follows that the only way to satisfy the requirements of the Convention (both Article 6 and 8) is to refrain from the premature termination of the mandate of President of the Kúria by the constitution-making power in the future whenever and whatever constitutional amendments are made to the functions of the Kúria.

The Government notes that the Committee of Ministers' call for general measures in execution of the Baka judgment is at odds with the general political perception underlying the treatment of this case by various international bodies that the measure complained of by the applicant constituted *ad hominem* legislation, that is, it was directed specifically against the applicant and only the applicant. The Government concludes with satisfaction that that allegation of a political nature no longer constitutes the basis for the consideration of the present case and hopes that the formerly tangible intention to keep this case on the political agenda will no longer prevent the Committee of Ministers from closing it since the legal requirements stemming from the two judgments at issue (identified by the Committee

of Ministers as a group of cases) are clearly satisfied by Hungarian law as currently in force.

[…]

Criticisms concerning the prosecution service

(19) The Venice Commission identified several shortcomings in its Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted on 19 June 2012. In its report, adopted on 27 March 2015, GRECO urged the Hungarian authorities to take additional steps to prevent abuse and increase the independence of the prosecution service by, inter alia, removing the possibility for the Prosecutor General to be re-elected. In addition, GRECO called for disciplinary proceedings against ordinary prosecutors to be made more transparent and for decisions to move cases from one prosecutor to another to be guided by strict legal criteria and justifications. According to the Hungarian Government, the 2017 GRECO Compliance Report acknowledged the progress made by Hungary concerning prosecutors (publication is not yet authorised by the Hungarian authorities, despite calls by GRECO Plenary Meetings). The Second Compliance Report is pending.

The reasoned proposal notes that the Hungarian authorities did not yet authorize the publication of the 2017 GRECO Compliance Report. In this regard Hungary emphasizes that the second Addendum report to the third evaluation round, the fourth evaluation round Compliance and Interim report were published on 1st of August 2019. All of the reports are available on the GRECO's official website.

It must be highlighted that already in 2012 the Venice Commission also found numerous positive aspects of the Acts in question.[94]16 It had been concluded that the general principles for the operation of prosecutors were in line with applicable standards for prosecutors in a democratic society. It was highlighted that most of the issues identified did not stem from the

[94] Opinion No. 668/2012, www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)008-e (accessed 29 November 2019).

revision of the Acts under the new Fundamental Law but were remnants from the overarching powers of the prosecution services left before the democratic transition in Hungary. The Venice Commission also stated that taken on their own, most issues raised in its opinion did not threaten the rule of law, and that the recommendations were made in order to propose ways to improve the prosecution service.

It must be highlighted that the 2017 GRECO Compliance Report (assessing the implementation of the 2015 recommendations) acknowledged that there has been progress concerning prosecutors. As far as the independence of the prosecution service is concerned, the 2015 GRECO report drew only a very limited number of recommendations – the compliance with which is yet to be assessed – and used the word 'potential' expressing that they refer only to theoretical and not factual situations, and recommends further steps merely in order to prevent such potential scenarios.

The disciplinary proceedings against ordinary prosecutors include appropriate guarantees, since there is a possibility of objection due to bias against the person from whom unbiased participation in the procedure cannot be expected, which is a proper guarantee for the objective, impartial conduct of the procedure and a transparent decision. In addition, judicial remedy is also granted. The prosecution service changed its practice following the GRECO evaluation in a way that based on the possibility provided by the Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career, the person who has the disciplinary power, shall appoint a disciplinary commissioner in each disciplinary procedure. GRECO welcomed the amendment making the involvement of a disciplinary commissioner in disciplinary proceedings against prosecutors compulsory.

Regarding the legal criteria of transferring of cases from one prosecutor to another it must be pointed out that Order No. 12/2012 (VI. 8.) of the Prosecutor General was amended in 2015 in a way that the officer of the prosecution service who is entitled to assign the cases – according to the rules of the organisation and operation of the prosecution service – shall assign the file from one case handler to another, and shall include the reason for moving the case in the file.

In this context it should be noted that the Commission in its 2018 and 2019 Justice Scoreboard[95] claims that Hungary is among the Member States where the management power of the prosecution services belongs solely to the Prosecutor General. The executive does not have power to decide on a disciplinary measure regarding a prosecutor, the power to transfer prosecutors without their consent or the power to evaluate and promote a prosecutor. In Hungary neither the executive nor the parliament have the possibility to give general guidance on crime policy or instructions on prosecution in individual cases.

The Fundamental Law of Hungary and the other pieces of legislation fully ensure the independence of the courts and judges in Hungary. Therefore, it is not justified to mention the elements of recitals 12-19 in a reasoned proposal requesting the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

[…]

[95] Figure 55, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf (accessed 29 November 2019).

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Part II

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Part II

The European Union and Central Europe

Contemporary political analysis, whether in the academy or the media or think tanks or, indeed, among politicians themselves, is broadly structured by the proposition that they and all other political actors behave rationally. This rationality is only very seldom examined, but it is generally seen as a single, even monistic concept, reducible to means-ends. But this is simplistic, because it ignores a wide range of problems that undercut means-ends and, possibly even more importantly, sidestep the problem of power. These latter, centrally, involve questions of legitimacy, the acquisition and structures of power, its distribution and redistribution, its renewal and the capacity of power holders to resolve the very wide range of governance (and other) problems that they confront. In this connection the difficulties identified by complexity theory, like emergent properties and Black Swans, have brought into being problems that can be handled, but not resolved (health provision where demand always exceeds supply or Europe's 2015 migration question fall clearly into this category).

In the analysis that follows, a survey and assessment of some of these issues, including a theory of power, is laid out with the objective of bringing a degree of clarity to these political and sociological questions. Methodologically the starting point is a look at the assumption-sets of Europe, of the West and its elites (these are not invariably the same) and to explore the uses of power, the objectives of the elites and, often enough, the contradictions that arise through ignoring or misperceiving relevant factors. What I have tried to do is to look at a variety of contemporary and current political problems, to try and uncover ideological thinking, hidden or overt power plays and to explore how the construction and deconstruction of these issues can be approached. Often enough the approach is unorthodox and at an angle to mainstream thinking. Furthermore, the approach is genuinely multidisciplinary. Concepts, procedures, approaches have been adopted and

adapted from a variety of disciplines – sociology, cultural anthropology, social psychology, history being among them – in order to undergird the centrality of political analysis. In this sense, the argument is unquestionably to be placed in the realm of political theory.

EU-14 and eastern enlargement

(At the time of writing, the EU still had 28 member states, hence until the departure of the United Kingdom became definitive in January 2020, I refer to the Western or old member states as EU-15. In reality, the EU operates with only 27 member states, hence EU-14 would be more accurate politically, though not legally.)

Another dimension of the crisis reflects the continuing divergence between the EU-14 and the post-2004 (new) member states. In sum, what it boils down to is this. In several of the former communist states, though not all, the initial divergence between the former *nomenklatura*, the beneficiaries of the communist system, has not disappeared, but continues to inform politics and, certainly in some cases, it is becoming wider and deeper by the year. Hungary, Romania, Bulgaria, Slovenia, Poland evidently fall into this category.

The former *nomenklatura* was successful in salvaging much of its power, used its political skills to secure its positions in the new system and rapidly, though generally superficially, adopted the then prevailing ideology in the West – the liberal consensus discussed in the foregoing. How sincere this liberalism was is another question, but it succeeded in its aim of making former communists acceptable in the West not only as born again democrats, but as democrats who conformed to the West's expectations of how democrats should behave – accommodating Western demands for access to the new markets, privatising state property (often enough with some of the sale price ending up in private pockets) thereby earning yet more plaudits. The Western left found itself with new recruits who simply followed whatever the liberal consensus demanded of them and ignored (at best) the state interests of the countries they were running.

This accommodating attitude was appreciated in the capitals of the EU-15 (as it then was). I can still remember a conversation with a high level British diplomat in 2002 expressing his relief at the defeat of the Orbán government by the Hungarian left, because (in his view) the centre-

right government had become a Europe-wide nuisance in defending the Hungarian interest. The left, with its weaker domestic rootedness always needed the extra input it was getting from the West and, therefore, was seldom 'a nuisance'.

The problem is that yet again, Central Europe was functioning as Europe's early warning system as Milan Kundera once observed.[96] As the post-communist left moved into the liberal consensus, it performed a couple of intellectual summersaults, in that it dropped Marxism–Leninism, and then rapidly absorbed a universalism that saw nationhood as an obstacle, but, given the shallowness of its liberalism, it was equally capable of using nationhood to rally support at home. The implication is that the post-communist left needed an external support system, whether that was the Soviet Union or the EU did not really matter all that much, because what actually did matter was power and privilege. Given that the EU itself had become a bastion of the liberal consensus, that the Europe that it represented was a liberal-consensus-Europe, the post-communist left acquired a helpful patron, in that it could rely on the EU for support and, equally, use the EU as the criterion of proper behaviour, something that was quite useful in its struggle with the centre-right.

What the post-communist left did not seem to have taken into its reckoning was that this turn would necessarily associate the EU with the left, thereby eroding the Europe of the EU as an idealised future for the formerly communist-ruled societies and that this development conjoined dissatisfaction with the left with unease about the EU. EU membership for Central Europe was supposed to have operated as a way of crossing an age-old threshold that of being accepted as full members of the European comity of states. The irony is that the close relationship between the Europe of the EU, the post-communist left and the liberal consensus ended up by reinforcing the feeling that the EU was riding roughshod over local values, local customs, local ways of doing things and that the left was strongly abetting the EU in this endeavour.

These troubled interactions contributed to the changes in the nature of the European polis, as discussed in the foregoing, and played a role as one factor among several in the emergence of the punitive polis.

[96] Milan Kundera, 'The Tragedy of Central Europe', *New York Review of Books* 31, no 7 (26 April 1984). The quote reads: 'In this sense the destiny of Central Europe anticipates the destiny of Europe in general, and its culture assumes an enormous relevance.'

Central Europe and the European Trapfall: Central Europe's misadventure with the EU

One of Elemér Hankiss's significant contributions to the understanding of social processes is the identification of social trapfalls (*társadalmi csapdák*).[97] In summary form, these trapfalls may be defined as interactive situations where the actors find themselves in aporia, a situation in which none of the parties is capable of movement. Some of them fall into the category of wicked problems[98] or of *Zugzwang*. Trapfalls of this kind also bear a resemblance to István Bibó's *cul-de-sacs* of history.[99] My argument is that the relationship between the West (broadly defined) and Central Europe (again, broadly defined) can be understood as characterised by power relationships that have an analogous aporetic character.

I am aware that these trapfalls differ and operate in different ways. Nevertheless, they all illustrate a range of problems that arise in bilateral relations and, if they can be overcome at all, they demand that both sides have an awareness of the constraints that structure the actions and dispositions of the other. Aporia is the 'pathless path', a situation in which one finds oneself in an impasse, a state of doubt that is not readily resolved. Wicked problems are prima facie not readily solved at all, because of incomplete understanding or changing requirements.[100] *Cul-de-sac* is a metaphor obviously and in Bibó's usage it reflects a situation where after a series of poor decisions the actors are faced with insoluble problems, above all because these are cumulative and impel the actors towards dogmatism. *Zugzwang*, taken from chess but with a wider usage, indicates a situation that whatever move one makes – and one must move – it will be to one's disadvantage.

If one starts from the assumption, as many do, that rationality can resolve all problems – all it needs is for all the involved parties to think rationally – then aporia and its analogues could not exist, it would be anomalous

[97] Elemér Hankiss, *Társadalmi csapdák: Diagnózisok* (Budapest: Magvető, 1985).
[98] Grint, *Leadership*.
[99] István Bibó, *Bibó István munkái: centenáriumi sorozat*, 12 volumes (Budapest: Argumentum, 2011–2012).
[100] Steven Ney and Marco Verweij, 'Messy institutions for wicked problems: How to generate clumsy solutions?' *Environment and Planning C: Government and Politics* 33, no 6 (2015), 1679–96.

and, indeed, scandalous. True, this proposition assumes that there is only one single, unique rationality. As we know all too well, aporia and its cousins do exist, problems remain unsolved and conflict persists. So either there is something wrong with the initial assumption of universal rationality or there are different, conflicting (competing?) rationalities around and when they clash, they can produce outcomes like aporia. Or, if the protagonists of one rationality are strong enough, they can suppress their competitors. But what is, to my mind, paramount here is to question the existence of the single overriding rationality and to sketch various explanations as to why, as to why and how various types of thinking persist to contradict the single rationality postulate. This proposition, as will be seen, certainly applies to the relationship between the West and Central Europe. And, yes, I am aware that in using the term 'the West' I am making an assumption that homogenises a considerable diversity. Nevertheless, there is a viable argument for a binary opposition between these two parts of Europe and their thought-styles.

I have laid out a number of various impediments to clarity and effective understanding in order to suggest why the 2004–2007–2011 enlargements of the European Union have had unintended consequences and why the relationship between the West (the EU-14) and Central Europe (the EU-11) has been as troubled as it has been. I am aware that these terms are homogenising, nevertheless, as I shall argue, there is sufficient commonality between the groups of states involved to justify my use of these generalisations. Furthermore, this troubled relationship is unlikely to disappear, because the problems are structural and can only be resolved if these structural factors are understood. Otherwise, the analyses and the policies based on them will be flawed.

So in this assessment of Central Europe as a part of Europe and its role in the early part of the 21st century, I want to rely on a number of analytical propositions to arrive at a set of conclusions that will, I trust, offer new insights into the instability that the region has experienced in history. Note that this instability is not related only to the onset of modernity, although the condensing of power associated with modernity has unquestionably intensified that instability.

Cultural trauma

The first such proposition is cultural trauma, deriving from the work of Piotr Sztompka and Jeffrey Alexander.[101] In short form, and to some extent adapting the concept, trauma can be said to occur when a collectivity undergoes rapid, negative change in which the sense of collective agency is weak or absent and stable meanings can no longer be relied on. There is no coherent explanatory narrative as to why, as to why the collectivity had undergone the negative experience or suffering or shock. Subsequent narratives are then constructed and these may or may not be successful in overcoming the traumas. Crucially, these have to restore a viable sense of the future and meaning.

A significant insight from Sztompka is that change is not necessarily benign. Unless the collectivity (or individual) has the sense that it can and does control the change, that it exercises agency, the outcome of any transformation will be to produce a sense of dislocation and disembedding. If the sense of agency is not recovered, then the result will be the rejection of change, apathy or hysteria (following Bibó[102]). Hysteria in this context is a metaphor (and I am well aware of the dangers of the use of medical metaphors), meaning overreaction, the misperception and misunderstanding of the processes in which the collectivity is involved and the attribution of complete power to the external agent and powerlessness to oneself. In reality, this completeness – absolute power without gaps – does not exist, there are always interstices,[103] but they can and do exist as perceptions and attributions, meaning that some will take decisions or, more likely avoid them, in the belief that the opponent is in possession of absolute power.

This latter will further generate a denial of responsibility and seeing the power of the other as successfully implementing all its projects. A moment's thought will show that while the chain of explanation will be logical, it ignores two factors – the role of chance and contingency and the reality that if the initial assumption on which the logical chain is constructed is false or flawed, then the conclusion will likewise be untenable.

[101] Piotr Sztompka, 'The Ambivalence of Social Change: Triumph or Trauma?', *Papers / Wissenschaftszentrum Berlin für Sozialforschung*, 00–001 (2000); Jeffrey Alexander, *Trauma: A Social Theory* (Cambridge: Polity, 2012).

[102] Bibó, *Bibó István munkái*.

[103] Leszek Kołakowski, 'Hope and Hopelessness', *Survey* 17, no 3 (Summer 1971), 37–52; 'Tézisek reményről és a reménytelenségről', *Magyar Füzetek* 7 (Paris, 1980).

Ideological thinking

There can be a variety of obstacles to clarity of thought and analysis, giving rise to trapfalls, regardless of the claims made for Enlightenment rationality. To start with, here is Arendt on ideological thinking:

> Ideological thinking orders facts into an absolutely logical procedure which starts from an axiomatically accepted premise, deducing everything else from it; that is, it proceeds with a consistency that exists nowhere in the realm of reality. The deducing may proceed logically or dialectically; in either case it involves a consistent process of argumentation which, because it thinks in terms of a process, is supposed to be able to comprehend the movement of the suprahuman, natural or historical processes. Comprehension is achieved by the mind's imitating, either logically or dialectically, the laws of 'scientifically' established movements with which through the process of imitation it becomes integrated. Ideological argumentation, always a kind of logical deduction, corresponds to the two afore-mentioned elements of the ideologies – the element of movement and of emancipation from reality and experience – first, because its thought movement does not spring from experience but is self-generated, and, secondly, because it transforms the one and only point that is taken and accepted from experienced reality into an axiomatic premise, leaving from then on the subsequent argumentation process completely untouched from any further experience. Once it has established its premise, its point of departure, experiences no longer interfere with ideological thinking, nor can it be taught by reality.[104]

Arendt, of course, was discussing totalitarianism which is not the subject of this section, but – given the evidence – it would be an error to avoid using the concept of ideological thinking in analogous situations. In effect, what I'm arguing is that ideological thinking can live without terror or propaganda and can be a part of the lifeworld of societies with insufficient agency. Indeed, it can offer a pseudo-explanation to those sections of society which feel themselves blocked, unable to exercise agency. These are present in Western societies, not just in Central Europe.

[104] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, 1976), 518.

Another dimension of this phenomenon is historicism,[105] the attribution of agency to history itself, that history has a purpose and those who question it, are on its 'wrong side'. I'll come back to the proposition that history has sides, but what historicism of this kind does is similar to the foregoing, a claim that if something is inscribed in history, then we are helpless, there are laws of history and we can do no other than obey them.

This is the doctrine of historical inevitability much beloved of Marxists–Leninists and currently accepted, *sotto voce* perhaps, by the liberal fundamentalists (to be analysed later). The methodological flaw in historicism is that it is linear and teleological, it makes an untested (and unfalsifiable) assumption about the future and then adjusts its narrative accordingly. Inconvenient truths will be screened out. The communist legacy in Central Europe inevitably strengthened the belief among some that there is a linearity in history and the demand for agency was pointless. After 1989, there was certainly an expectation that the end of communism, 'the return to Europe', would bring about the recovery of agency, but – as we shall see – this expectation went awry.

A third aspect of the uses and abuses of history is again identified by Arendt[106] and this is the phenomenon of reading history backwards, of identifying a particular historical event as being of central significance and then claiming, tacitly or explicitly, that all (most, many) antecedent processes led up to it and subsequent processes are explicable only in the light of that event. This is a little like Freud's single traumatising experience, though I don't want to stretch that simile too far. In the last three decades, Auschwitz has played this role, even if that event has next to no resonance in much of non-Europe, thereby weakening the claims of European universalism. *Stunde null*, the end of World War Two, was analogous, but has now been overtaken by Auschwitz. For the United States, 9/11 – a symbolic representation if ever there was one – has come to play this role. Most national narratives of the collective self will have established one or more such singular events. In the West as a whole, colonial guilt, especially the slave trade, while not tied to any one date, has been playing a similar role.

[105] Karl Popper, *The Poverty of Historicism* (Boston: The Beacon Press, 1957).
[106] Hannah Arendt, 'Hannah Arendt: From an Interview', *New York Review of Books*, 26 October 1978.

Note here that only European slave trading counts. The Arab slave trade, including the enslavement of Europeans, and the existence of African slave traders likewise do not count, they have been screened out because they disturb the starting point of the single event.

Contingency is one of the keys to Arendt's thinking about history, some things did happen by chance, not everything was intentional. Without the acceptance of contingency, we end up with a linear view of the past, and one that is constructed precisely to legitimate a particular proposition in the present. These narratives readily become the handmaidens of ideologies and they will distort our understanding of ourselves. Liberalism is not different from nationalism in this regard – the content is, but the structure is alike. I am not at all sure that those who do not understand their history are condemned to repeat it – that sounds decidedly linear to me – nonetheless without a knowledge of the past, we lack insight into aetiology and compensate for this by valorising what we do know or have had constructed for us. The valorisation may be positive or negative, that which is indifferent can be ignored or screened out.

The practice of reading history backwards has, arguably, become increasingly widespread as the liberal hegemony has enlarged its scope. Probably every closed system is constrained to do so in order to secure its legitimacy in the present. This then becomes a designed past with a purposiveness, with the aim of protecting one's position in a conflict and simultaneously undermining that of one's opponent.

This topos should drive professional historians up the wall, in as much as professionalism is about trying to establish as objective a version of the past as possible. There can be no one hundred per cent value-free history, of course. It goes without saying – this has been one of the central themes in my writing – that absolute objectivity is impossible. We are valorising beings. Historical truth is necessarily elusive given the problem of selection criteria (who chooses these criteria, why these, who is she anyway?) and inevitable given the double hermeneutic. All the same, there is a qualitative distinction to be made between someone setting out – fake history – to use the past for political or cultural purposes and someone (still) committed to the ever more lonely pursuit of reconstructing the past, in all its multiple formats, *sine ira et studio*.

Hybridity

Another dimension of this topos can be derived from Bruno Latour's critique of modernity, of being 'modern'.[107] In summary form, the Enlightenment – scientific rationality – became the touchstone of modernity and anything that seemed to deviate from it or really did so was (and is) dismissed as irrational. In other words Enlightenment rationality and the modernity that is its symbiote are avowedly normative. At the same time, being modern – note that it is simultaneously a descriptive and a normative term – sought to establish a monopoly of both description and prescription for itself and claim that it and it alone had the answers. The appearance of this monopoly was clearly in evidence for several decades after the Second World War and equally during the Cold War, which acted as a freezer on various competing ideas. But this appearance was deceptive. There were always elements of reenchantment,[108] a counter-movement to Weber's *Entzäuberung*, divergent currents of thought, competing explanations of the world, rejection of the hegemonic rationality. The flourishing of astrology or UFO sightings or New Ageism or wicca illustrates this clearly.

The significance of Latour's argument is that European lifeworlds are far more of a hybrid than the protagonists of the hegemonic elite are ready to admit. Let us accept that something along the lines of a rational, hence modern, world does exist, but it does so in competition with other ways of understanding the world that the rationalists dismiss as irrational. The ongoing contest remains open and colours, indeed, structures the supposedly 'pure' rationality of those who claim to speak in the name of modernity. When this claim is linked to political power, when political power is legitimated by reference to this idealised modernity, then we are looking at something that resembles a mythic narrative of a particular collective self and not the world of universal reason.

The significance of this proposition in this context hinges on the monopoly claim of rational modernity and, equally, the insistence by the West on this monopoly certainty in every European context, but equally so globally. Hence the modernities that Central Europe has sought to construct

[107] Bruno Latour, *We Have Never Been Modern*, trans. by Catherine Porter (Cambridge, MA: Harvard University Press, 1993).

[108] Elemér Hankiss, 'Legenda profana, avagy a világ újravarázsolása' in *Jelbeszéd az életünk* ed. by Ágnes Kapitány and Gábor Kapitány (Budapest: Osiris, 2002), 96–123.

against the dominant mode of the West were repeatedly perceived as deviant and as a challenge. In this sense, Europe as a whole – above all post-2004 Europe – should itself be seen as a hybrid and a parallel hybridity exists in each and every European state. These implications of Latour's insight inevitably impinge on the relationship between the West and Central Europe, not least in the sense that the West is broadly accustomed to its own hybridity and, for the most part, prefers to ignore it. Coping with the hybridities of Central Europe, on the other hand, constitutes a trapfall.

Binary opposition

Various insights can be drawn from Horowitz's assessment of ethnic conflict[109] that are equally applicable to other binary oppositions, to the effect that once a polarisation begins, the pre-existing multiple actors tend to coalesce around one or other polarity. My point here is that the EU-as-Europe has in some significant respects moved into the role of Central Europe's binary other, a role that the West has played repeatedly in the past (as we shall see), but which it did not play as long as the Soviet power suppressed the region's aspirations. Indeed, during communism, the West was a kind of myth-land, the locus of the desirable other, but with EU membership this gradually began to change.

Horowitz has a number of relevant points to make in this connection, though he, of course, is dealing mainly with Asia and Africa. First, there was a misconception about what EU membership was supposed to bring about. For the EU this was about reuniting Europe, preventing the return of communism, enlarging Europe's sphere of security and, to my mind most importantly, operating as a supremely effective conflict resolution mechanism.

I rather think that Central Europe shared some of these expectations, but had others that were not encoded in the enlargement, not least (primarily?) that they would be free to construct their own modernities that had a family resemblance to those of the West (the plural here is deliberate), but were derived from local elements. This aspiration ran into the one-size-fits-all thinking of the EU and thereby reactivated the two-fold suspicion in

[109] Horowitz, *Ethnic Groups*, esp. ch. 4.

Europe, that of the West towards the East[110] and the partially dashed hopes of the East as regards the West. It should be stressed here that there are not absolute categories, that there are overlaps and successes as well as the trapfalls that I am arguing have come to play an increasingly troubling role in the EU. Basically, while the EU has made a few concessions to Central Europe, it has regarded its own definition of modernity and rationality as beyond questioning. I think that it is fair to suggest that the new Central European member states of the EU did not regard their Central European identities as being of primary importance. It was the encounter with the EU institutional order and, maybe, the EU-14 that changed things and began to promote a shared set of attitudes, above all in the Visegrád 4 (V4). It was in this sense that binary opposition emerged, even if I am not suggesting that the encounter with the EU structures everything that the V4 do.

Where the EU fell down, and did so with far-reaching consequences, was to fail to apply one of the founding principles of European integration to the EU-11, namely the parity of esteem of all member states, respect for status, acceptance of the legitimacy of difference in the context of the V4. There was palpable friction. By 2016 references were around that the V4 had become the 'dirty four', because of their objections to the EU's migration policy in the first place. It was hard to read this as anything other than disrespect for the V4 states as entitled to equality of esteem. The failure to offer Central Europe the affirmation of group worth was all the harder for the Central Europeans to swallow, given their aspirations for a 'return to Europe'. Now, it would seem, the Europe to which they had returned was not giving them the parity of status that is particularly vital for small and medium sized states. The long and complicated story of the EU directive on posted workers illustrates this proposition clearly.[111]

The pressure from Brussels to conform began, therefore, to be decoded as a conflict over identity, one between an idealised EU identity and that of the Central Europeans. A binary opposition had emerged, in the context of *longue durée* history, reemerged.[112] Two relatively loose collective identities were condensing themselves and found themselves engaged in ongoing friction. The key difficulty with this state of affairs, this stand off

[110] Wolff, *Inventing*, passim.

[111] Marek Benio, 'Let's make posted workers feel really secure', *Euractiv*, 4 February 2019.

[112] Horowitz, *Ethnic Groups*, 198–99, quoting Gaetano Mosca, *The Ruling Class* (*Elementi di Scienza Politica*), trans. by Hannah D. Kahn (New York: McGraw Hill, 1939): 'every social type has a tendency to concentrate into a single political organism'.

between the EU and Central Europe is twofold. It has revived memories of past oppression – the slogan 'we are not a colony' heard from time to time is suggestive – and second, it exemplifies a weakness in the EU as the embodiment of the integration process. The EU used to pride itself on its soft power, but has been unable to utilise this for its disputes with Central Europe.

This is strange. Integration was launched to effect reconciliation between France and Germany, something that it achieved fully, but as argued in Part I, the cultural capital of the European polis (Commission, Parliament) does not stretch to applying these soft power methods to Central Europe. My guess is that this is to do with the EU's inexperience with new binary oppositions – it has dealt with the pivotal one (France and Germany) – and somehow resents having to revive the forms of knowledge of the past. Instead, it has started increasingly to behave like a Great Power, wielding sticks instead of carrots, as the punitive polis. It has thereby exacerbated the conflict, rather than diminishing it. And the Central Europeans, seeing their interests and identities at risk, have begun to reciprocate. Again, the 2015 migration crisis shows this process most clearly.

People who listen only to those who share their views are likely to cluster, have their views reinforced and to erect ever stronger boundaries against anything that challenges their received opinions. This applies especially to institutions, but also to opinion formers, those who have been involved in the construction of a strong narrative and are, in effect, captives of it, above all, because their cognitive maps are largely closed.

The effects of closures of this kind tend to be medium to long term and, basically, result in stasis, in a kind of immobile conservatism. (I would suggest that mobile conservatism is summed up by 'we must change a little in order that we may stay the same' a slight adaptation of Tancredi's suggestion in *The Leopard*[113]). Immobile conservatism, on the other hand, insists on the timelessness of its authority, polices the boundaries of expression – using the authority of state where it can – and is generally committed to an unvarying status quo. Challenges, which have historically been the lifeblood of the European intellectual world, are disdained, ignored or rejected. The belief in being a superior moral order makes engagement with alternatives superfluous.

[113] Giuseppe di Lampedusa, *The Leopard*, trans. by Archibald Colquhon (London: Collins Harvill, 1960), 30.

The foregoing paragraph could well have applied to Catholicism before the Reformation, to the attitude of some Protestant sects after it and the Muslim Arab world after around 1300. For many, it will be regarded as scandalous to apply it to what calls itself liberalism in our times.[114] But the characteristics of hegemonic thought bear a more than uncanny resemblance to faith systems that have become rigid and in consequence constitute one of the social trapfalls that are at the heart of this analysis.

Cultural trauma again

Let us return to trauma at this point and look at 1945 as the base line, in order to highlight the different trajectories of Western and Central Europe. Trauma there most certainly was – throughout Europe. Europe was destroyed by war, physically, in human terms and mentally. This raised two key questions – how did we get there and how do we ensure that this never happens again? 1945 was a kakotopia in the literal, non-metaphorical sense. Somehow Europe had to be led out of this trauma in such way as to offer an answer to the two questions. The answer to the first was to accept that the subjection and humiliation, the *vae victis*, of Germany after the First World War had played a direct role in the lead up to the Second World War, so that this was not to be repeated. The answer to the second was that a method was to be found to ensure this. The highly innovative solution was to secure acceptance of a supra-state institution that would control the sinews of war – coal and steel at the time (how times have changed) – and thereby to make war impossible. This, of course, was the launching of European integration with the Coal and Steel Community and further integration thereafter.

There is a line of argument that it was the United States that was responsible for this process, but I do not accept this. The role of the US was indeed important as the guarantor of peace, its role was certainly a necessary condition for the construction of the European integration, but it was not sufficient on its own. The will of a relatively small European, mostly Christian Democrat elite was central to the process. This is crucial,

[114] I have dealt in greater detail with epistemological closures elsewhere, George Schöpflin, 'An epistemological crisis', in *Reframing Europe's Future: Challenges and failures of the European construction*, ed. by Jody Jensen and Ferenc Miszlivetz (London: Routledge, 2014), 7–18.

because it ensured that in the West the integration narrative was owned certainly by the elites and to an extent by the wider population.

If these post-war leaders – Adenauer, Robert Schuman, de Gasperi and others – had not pushed forward the integration project, it would not have happened or certainly not in the comparatively short time and the level of commitment that had enough steam and idealism behind it to persist after the 1954 setback, the failure of the European Defence Community. But the narrative had been established at the elite level and was successful. Consequently, war has become inconceivable in Europe and democracy so rooted as to make it exemplary and binding. In a word, these elites demonstrated that societies can be led out of trauma, that agency can be recovered and ideological thinking and its concomitant miseries can be set to one side. Let it be added at this point that the method of ending the trauma did have its unintended, negative consequences as well. The commitment to democracy was real enough, but the concept of democracy in that particular historical context was clearly elite-led and technocratic. A small, largely unaccountable managerial elite was entrusted with some of the sovereignty of the nation state. And, as it turned out, this became a dynamic process as ever larger areas of sovereignty came under the purview of the integration process. Inevitably, after several decades of success, the contradiction between managerial technocracy and democracy as popular sovereignty figured ever larger in the European political field, but that came later; at the outset and for quite some time to come, the process and the narrative worked.

If that is a rough picture in what happened in the West, Central Europe underwent a very different course. The starting point was near identical – ruin, destruction, havoc, a devastation arguably more severe than in the West (for example Warsaw, I have personal memories of a destroyed Budapest after the siege of 1944–1945) – to which can be added the vast, coercive population movements not really paralleled in the West other than in Germany.[115] But then the stories diverged. The new post-war narrative or narratives were not aimed to lead Central Europe out of the trauma of wartime destruction, but to entrench Soviet power. The communist narrative did, of course, have a vision of the future, but the imposition of Soviet power was increasingly at variance with local aspirations. There was a breach,

[115] R M Douglas, *Orderly and Humane: The Expulsion of the Germans after the Second World War* (New Haven: Yale University Press, 2012).

meaning that the region did not own the narrative, but had to make do with one devised for different purposes (entrenching communism). The effect of this in the longer term was to relaunch the antecedent sense of helplessness, of lack of agency.

Here an interpretation of the *longue durée* of Central European history will be helpful.

Central Europe: Defining a thought-style[116]

There are serious methodological problems in trying to define 'Central Europe'. The definition must capture the greatest number of possible shared factors and simultaneously exclude what is not Central European. This enterprise should be feasible if the conceptual boundaries are clear, if we concentrate on the non-material as well as the material factors and we accept that all definitions have both a descriptive and an evaluative dimension, meaning that defining 'Central Europe' is no more and no less ideological (though more difficult) than defining France. It should follow that geographical definitions on their own are banal and insufficient, but then so are history, politics, gastronomy on their own. One should try to identify the shared elements of all these dimensions. This ultimately demands that we step back and look at something less self-evident – the way in which people think about themselves, the way in which they construct their worlds, their identities, their criteria of making sense of their lives and defining the good life.

This brings us to social construction theory.[117] It starts from the premise that the world in which we live is constructed by us and that once constructed, it is not open to change very readily, even though we can deconstruct it as often as we like. To recapitulate, in constructing, what we do is to establish ways of narrating the world and we do this in response to how we experience events, change, the impact of material factors etc. These responses are shared discourses and give rise to discursive fields. The narratives in question are bounded, that is, they include and exclude, meaning that they are the bases

[116] The analysis that follows is a somewhat abbreviated extract from my *The Dilemmas of Identity* (Tallinn: Tallinn University Press, 2010), 240–66.

[117] Anderson's 'imagining' (*Imagined Communities*) is one variant of this, as is Berger and Luckman: Peter L Berger and Thomas Luckman, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (London: Penguin, 1991).

of an identity. The collectivity in question fixes these boundaries and then protects them by constructing a myth-symbol complex that sacralises the construct. Finally, the collectivity which has undertaken this enterprise can be said to have acquired particularity, though it will equally be a part of wider, 'universal' processes.

The central argument to be put forward in this section is that Central Europe is marked by a very particular set of experiences that can be summarised as a series of semi-consensual, semi-coercive transformations from outside in which local elites were either active or marginal or oppositional and the bulk of the population was excluded. The particular experience of these cumulative transformations, their residues and interpretations when taken together create the thought-styles and thought-worlds that are identifiable[118] and specific to Central Europe. Where Central Europe differs from France, say, is that it never underwent the experience of a strong, centralised political power that could condense cultural meanings sufficiently for it to become national.

The coming of modernity

The coming of modernity in the 17–18th centuries confronted these collectivities with an acute dilemma, one that continues to inform attitudes, responses and identities in the region. In essence, the dilemma is this: without modernisation, the future of these collectivities is dim and their cultural reproduction is directly threatened by the superior power accumulated in the West, meaning that they must condense sufficient power to define their own models of modernity. However, their abiding historical experience has been one of failure in this respect. They have succeeded in securing cultural reproduction, but it is always seen as contingent on the wishes of more powerful neighbours and their domestic models of modernity are at risk.

For Central Europe, both the Reformation and the Counter-Reformation came from outside. It is correct, of course, that the area had been absorbed into Western Christianity, but it was peripheral to both Rome and the centres of Protestant reform, the German lands and Geneva. It was in this sense that Central Europe was affected, not in any way necessarily unwillingly, by the Reformation and then subsequently, rather less

[118] Mary Douglas, *How Institutions Think* (Syracuse NY: Syracuse University Press, 1986).

voluntarily by the reconversion to Catholicism launched in the 16th and 17th centuries. The key factor here was that the region was not directly involved in the formulation of the innovations and the new thought-worlds and thought-styles were the work of outsiders, just as feudalism had been. What is central in this connection was that neither variant of Western Christianity fully suppressed the other and the two lived on as competing plausibility structures,[119] the contest sometimes being bloody, as during the Thirty Years War. They infused politics with added dimensions of defined reality that claimed sole representation of the truth and access to the ultimate sacred postulate; in the pre-Enlightenment period with pre-political populations religion commanded considerable authority and stamped its forms on elites and societies alike.

The central feature of the contest was the irreducible conflict between individual and mediated, collective access to authority, with Protestants insisting on the former and Roman Catholics on the latter. The Protestant emphasis on individual conscience contradicted the Catholic claim for obedience and hierarchy. Although broadly speaking the Catholic thought-style emerged preeminent, and to some degree still colours modes of expression and articulation, it was also affected and in some cases eroded by Protestant values that could emerge as rebelliousness or distrust for constituted authority. But the polarity further meant that Western Christianity was potentiated and not overtaken by stasis, as tended to happen to Orthodoxy,[120] and lived on, particularly in the countryside, until well into the 19th century and, maybe, beyond. The residues of this transformation, then, constructed a thought-world that constituted the cognitive matrix into which the concepts of later transformations were integrated (or not, as the case may be).

The next transformation was the imperial one and it was secular, though with traditional religious elements in the legitimation of the ruler (divine right). In the 18th century, the new organisational techniques that gave rise to the modern state were imported by the empires, but the corresponding ideas that these techniques worked more efficiently if society consented were not taken on or only very partially.[121] The absolutist state, for this is the term used to describe the process, concentrated on enhancing its

[119] Berger, *The Sacred Canopy*.

[120] William H McNeill, *Europe's Steppe Frontier* (Chicago: University of Chicago Press, 1964), ch. 2.

[121] Charles Tilly (ed.), *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975), 3:83.

capacity for coercion and extraction, argued as an instrument for the general improvement of a thoroughly backward society.[122] By comparison with the developed West, these societies were, indeed, backward (for example illiteracy, technological in efficiency in agriculture, poor infrastructure).

In fact, one of the central difficulties was that they barely existed as societies, they were an agglomeration of peoples not conscious of themselves in the way in which the rational Enlighteners supposed. They understood their worlds as bounded by the village; they were largely illiterate or where they were literate, their reading was narrow; their concept of politics was severely restricted. Their backwardness had various sources, preeminent among them being second serfdom; full emancipation of the serfs had to wait until the 19th century. Furthermore, the relatively complex middle strata – bourgeoisie, merchants, professionals, administrators – who were ready to contest the drive for legibility by the state and whose consent to rule the state came to accept in the West were largely absent in Central Europe.[123]

Thus the drive by the imperial state to condense power and extend legibility ran into unexpected obstacles. There was the structural one of the sheer difficulty of making an undifferentiated society 'rational' by the new techniques, which had after all been elaborated in a different cultural context. The empires found themselves saddled with the wrong kind of people and so did the successors of empire – this was a standard problem for would be radical reformers in Central and South-Eastern Europe and elsewhere; and it is still a problem. And this was matched by the resistance of those whose power was diminished by the rise of the state – the nobility. The traditional nobility where it existed was as conservative as the peasantry, though it was conservative about its privileges and status rather than being concerned about the unchanging nature of the traditional village commune.

Here, the ruler embarking on rationalising reforms encountered an insuperable paradox. Imperial legitimation rested ultimately on the proposition that the ruler exercised power by divine right and birth, as a part of the natural order. The problem was that the nobility also claimed its privileges as deriving from the same source. As long as the two were broadly in accord there was no serious legitimation crisis, but once the modernisation from above was launched and introduced rationalisation as an added, and

[122] This is the version put forward by Judson, *The Habsburg Empire*.
[123] Bauman, *Legislators*, 127.

modern, source of legitimacy, as well as significantly adding to the power of the ruler, there was bound to be trouble.[124]

Consent was the solution, but this could only be obtained where ruler and nobility were broadly operating within the same political space, where the ruler believed that a measure of power could be redistributed to other actors and where the nobility did not feel that the ruler was alien, in other words where the nobility had a degree of voice in how power was exercised. The example of Poland was instructive. It was precisely because the Polish elites acting in concert finally decided to launch a modernisation of the state with the 3 May 1791 constitution that would have moved power quite a long way towards citizenship that the surrounding empires decided to put an end to such dangerous experimentation and partitioned what had been left over from earlier partitions.[125] In essence, the imperial rulers of Central Europe sought only a partial modernisation and to impose this without the civic norms that were an implicit part of the package.[126]

This meant that the division between state and society, the weakness if not absence of reciprocity and the preservation of the privileges of the ruler as exempt from democratic control replicated the standard pattern of transformation from above and the consequent resistance to it. The imperial attempt at transformation ignored the rationalities of society, its cultural capital, its attachment to its own rather than the ruler's norms and in the end, because modernity is predicated on the consent of society, society won. But it was a victory won at a cost. It created a lasting ambivalence towards the modern state and thus to modernity. It set the pattern for a moral legitimation to resistance – moral, because these societies were seeking to define their moral norms against external attack – and thereby made the connection between society and modernity very hard to attain. Crucially, the impersonal norms of modernity were and are distrusted and personal ones of informalism are preferred, thereby enhancing the incompleteness

[124] Hans-Ulrich Wehler, *Nationalismus: Geschichte, Formen, Folgen* (Munich: C H Beck, 2001), passim.
[125] Piotr S Wandycz, *The Lands of Partitioned Poland 1795–1918* (Seattle: University of Washington Press, 1974).
[126] Carlile A Macartney, *The Habsburg Empire 1790–1918* (London: Weidenfeld, 1968), passim.

and hybridity that these societies are notionally trying to leave behind, given that they equate success with modernity as they see it in the West.

The next transformation chronologically was the direct consequence of imperial absolutism – the reception of nationalism. The cognitive framework into which these new ideas were brought consisted of the amalgam of the Counter-Reformation thought-style with Protestant resistance coupled with the rationalising aims of empire and neo-feudal resistance. The need was to find a set of ideas with which to resist imperial claims that would be superior to nobiliary power. It had to be nobiliary power plus something that could counteract the imperial version of modernity.

So if empires sought to establish their hegemony by constructing a reality-definition based on efficiency, power and rationality, legitimated by reference to modernity and simultaneously the natural order, then the local elites found themselves in a quandary. Some, though far from all, accepted the imperial legitimation. Others resisted. The forms of resistance were determined by the residues, the inherited mindsets and cultural capital, as well as by the way in which the concepts surrounding modernity were taken over from the West.

The concept of the nation

The concept of the nation that was imported from the West, therefore, was necessarily narrowed by the aims for which the concept was to be deployed and equally by the structural weakness of an absence of a political society and nation. Both these had to be redefined or, maybe, reinvented if the anti-imperial project was to succeed. Historically, the concept of nation had existed in Central Europe largely as it had in the West. It was the *corpus politicum*, the restricted number of people with the right of access to political power. In the West, the new middle strata appropriated this idea and the accompanying discourse and claimed that nationhood was the property of all within a given state territory. In Central Europe, where statehood was claimed by the imperium, the Western concept had to be recalibrated to suit local conditions. The local elites, which as we have seen were qualitatively different from their counterparts in the West, had two options. They could rely on ancient territorial rights, like the historic kingdoms of Hungary or

Bohemia and claim power in the name of all the people who lived there, or where these antecedent political forms were absent, they could try to define a 'people' and claim power accordingly, by arguing that the 'people' in question had always existed and the areas they inhabited was the territory that they should claim for their states. The confusion of conflicting definitions of people, territory, state, nation, modernity and legitimations had far-reaching and generally negative consequences.

If the standard, ideal-typical model of modernity in Europe is one where in broad terms state and society are correlated with respect to etatic, civic and ethnic identity-forming processes,[127] then in Central Europe the picture was much more complex. Etatic identities were controlled by the imperial state elites and legitimated by pre-modern discourses of dynasty, privilege, birth etc. There was some conversion of aristocratic power into bureaucratic, though this was never particularly successful. Civic identities were underdeveloped because the imperial state could have no concept of citizenship – this is an absolutely essential factor to grasp – given that it based its claim to power on pre-modern dynasticism, which excluded the bulk of the population from political participation. Consent by the ruled was at most a partial requirement for the exercise of power and could always be ignored where it was denied. Thus empire was necessarily on a collision course with popular sovereignty and this was what the Holy Alliance was about.

In effect, empires functioned by reserving certain vital sovereign powers for themselves, like the right to control (some) taxation and coercion without consent. The contest over the right of legislatures to control taxation, which had been fought in England in the 1640s (ship money) had no counterpart in Central Europe. Indeed, the idea was regarded as dangerous. In 1914, Francis Joseph needed no parliamentary consent to declare war; war-making was a part of the imperial *reservatum*. The Austrian *Reichsraat* had been prorogued. Legitimation, therefore, was an uneasy mixture of old and new and the personal loyalty of the ruler was not sufficiently dynamic to offset to new radical claims to power made in the name of the people-as-nation or nation-as-people.

[127] I have argued this in George Schöpflin, *Nations, Identity, Power: The New Politics of Europe* (London: Hurst, 2000).

The nineteenth century: A continuous contest

The 19th century for Central Europe was, therefore, the site of a continuous contest. The empires were strong enough to hold off the sub-elites as these dug deeper and deeper into the resources they had at their disposal – the demand for political power legitimated by people-as-nation – but they could not eliminate them. Much as the memory of imperial rule is sometimes seen through a hazy blur of benevolence,[128] in reality empires were unviable in the end because they had lost the argument. The plausibility structures that they sustained and sustained them grew threadbare or were gradually transformed into ethno-nationalism, as happened with Germany. Austria–Hungary did not have that option and Russia tried it, but lacked the capacity and the power of attractiveness to make it stick.

The problem for the future was that the form and content of the Central European variant of nationhood bore the marks of the incomplete journey to modernity that these nations made. Vitally, being at most only partly territorial, they could not evolve etatic and civic norms that could transcend ethnic differences. Their territoriality was always questioned and the security even as to core territory was a luxury that they never enjoyed, quite unlike France or the Netherlands, say.

When it comes to the Central Europeans' own experience of constructing modernity, it is hard to see anything other than partial success at best and this lack of success certainly influences attitudes currently. From the perspective of the region, this has created a sense of incompleteness, indeterminacy, marginalisation and powerlessness.[129] Incompleteness, however, assumes that somewhere out there, there exists completeness and this, in turn, implies that the concept of Europe is radically condensed into a model that the Central and South-East Europeans can try to adopt, but because this reductionism damages the effectiveness of the original, it is never actually reached. The outcome is a frustration, which at worst can become the seed-bed of nativism, populism and xenophobic, rejectionist nationalism.

All the major European models of identity politics relied heavily on the hegemony of the most numerous ethnic component in the state and imposed its own model of modernity on the rest. Taking this model over

[128] François Fejtő, *Rekviem egy hajdanvolt birodalomért* (Budapest: Atlantisz, 1990).
[129] Czesław Miłosz, *The Witness of Poetry* (Cambridge, MA: Harvard University Press, 1983).

proved disastrous in Central Europe for a number of reasons. First, the numerical proportions were different, no dominant ethnic group enjoyed the overwhelming demographic superiority that characterised France, say, together with an effective state system that could provide citizenship in exchange for assimilation.[130]

Second, the dominant model was able to offer its citizens and subjects an acceptable share of prosperity, a fairly competent administration and relatively uncorrupt politics. In Central Europe, this was not the case. Third, the dominant model was misread, in as much as the hegemonic ethnic group had the self-confidence to redistribute power throughout society, albeit slowly at times; this was hardly true of Central Europe. Fourth, the French state offered the population a unique and uncontested model of modernity; the Central Europeans were dealing with ethnic groups that had begun to define their own models of modernity.

The communist narrative

The communist narrative was based on something utterly different and attempted to establish something that looked quite new – to do away with ethnicity altogether and to create class-driven identities that would have 'transcended' nationhood. This proved to be illusory, but the attempt had far-reaching consequences, for Central Europe is still marked by the experience. Pivotally, communism was bizarrely, even absurdly, reductionist. It had a model of modernity which was more contingently Soviet Russian than its proponents claimed, above all in its determination to set up simple, easily controllable structures and systems, while simultaneously generating greater complexity. This was deeply contradictory and confusing, and eventually resulted in the demise of communism – the victim of the very complexity that it created but denied.

However, for those forced to live in it, it represented a moral order,[131] albeit a negative moral order, against which identities, meanings and life strategies could be defined. Above all, communism established a kind of

[130] Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France 1870–1914* (Stanford: Stanford University Press, 1976).

[131] Robert Wuthnow, *Meaning and Moral Order: Explorations in Cultural Analysis* (Berkeley, CA: University of California Press, 1987), 331–49.

existential security, so that there were predictabilities despite its arbitrary, discretionary nature. In this situation, the search for order and meaning and for the sources of coherence that is fundamental to all collectivities,[132] looked to ethnicity. Ethnicity, however, while it is excellent at providing collective solidarity, has little or nothing to offer for those seeking answers to the problem of democracy and civility. From this perspective, being Polish or Czech or Hungarian, say, had nothing concrete to offer as far as political power was concerned, other than a vague symbolic sense of community that was always understood as superior to communism – seen as simultaneously alien and oppressive.

The end of the communist system, therefore, meant not only the unavoidable quest for a new set of identities, but a quest with quite inadequate cultural capital. In the circumstances, two broad sources were used – 'democracy' and ethnicity. I have put the word 'democracy' in quotation marks, because it was read as a powerful discourse, a highly attractive alternative when communism had ceased to be exemplary and binding,[133] but for the most part it remained a discourse, as its practical, operational, procedural aspects were not and could not be understood.[134] It was perfectly understandable in the conditions of the reception that the values of democracy, which the West was itself very largely unable to conceptualise, that the institutions of democracy would often remain on paper and that in the absence or weakness of a civil society, civility would be more honoured in the breach than in the observance.[135]

Where there emerged a major and in many ways inadequately defined collision between the West's slow, continuous redefinition of democracy and the underlying structures of post-communism was in the area of ethnicity. The post-communists, despite their negative memories of combining modernity and democracy, had and have no real alternative to pursuing this goal. In the light of the weakness of civil society and the eroded state, identity

[132] Mircea Eliade, *The Myth of the Eternal Return: Cosmos and History* (London: Penguin, 1954), passim.

[133] Max Weber, *Collected Methodological Writings*, ed. by Hans Henrik Bruun and Sam Whinster, (London: Routledge, 2012).

[134] Piotr Sztompka, 'The Intangibles and Imponderables of the Transition to Democracy', *Studies in Comparative Communism* 24 no 3 (September 1991).

[135] Tomaž Mastnak, 'Fascists, Liberals and Anti-Nationalism' in *Europe's New Nationalism: States and Minorities in Conflict*, ed. by Richard Caplan and John Feffer (Oxford: Oxford University Press, 1996), 59–74.

must be based primarily on ethnicity, even if ethnicity is an insufficient basis for both modernity and liberty, lacking as it does a strong concept of civic norms. For the West, however, the post-1989 encounter with Central Europe was traumatising, above all in the context of the disintegration of Jugoslavia, an experience that was almost universally misread. (Robert Kaplan's *Balkan Ghosts* attributed the wars of Jugoslav succession to 'ancient hatreds' and nationalism, whereas in reality these were mostly instrumental uses of the past. The book was thoroughly debunked by Noel Malcolm.[136])

The Western response was to try to marginalise ethnicity and to impose what it believed were non-ethnic approaches to the exercise of power. This was the thrust of the message that the West delivered to the post-communist world. The message was, as I have argued, both flawed and misplaced. It was flawed because it assumed that the West is, if not without sin (and thus in a good position to cast stones) certainly not without ethnicity; this is an error. And secondly it was misplaced because it wholly misunderstood the reliance on ethnicity in Central Europe, attributing it to 'ancient hatreds' and a kind of generic if not actually genetic deficiency on the part of the people of the region. The collapse of Jugoslavia had much to do with this.

Thirdly, the West never accepted that the end of communism was the functional equivalent of a decolonising moment, a move to national emancipation, where nationhood had a strong ethnic element. Indeed, the proposition that the formerly communist-ruled states were in any sense colonies was entirely unacceptable to Western opinion. The Soviet Union may have been described as 'the evil empire', but it did not follow that those ruled by this empire were in any sense subjected to colonisation. Structurally, Soviet rule was not that different from the empires that the West had largely abandoned by 1989, but the status of a former colony was not made available to Central and South-Eastern Europe. One can wonder why. Some of it could be explained by the short term consideration that ex-Soviet Russia would become a normal democracy, so let's not insult it by insisting that its satellites had been colonies. Another possible explanation could have been that colonies did not exist in Europe, pace Cyprus, Malta and Ireland, even if these were overwhelmingly a British problem. Maybe too, somehow colonies were only colonies if they were overseas, which then gave the European landward empires – now upright democracies – a free pass.

[136] Robert Kaplan, *Balkan Ghosts: A Journey Through History* (New York: St. Martin's Press, 1993); Noel Malcolm, 'Seeing Ghosts', *The National Interest* 32, (1993), 83–88.

And, still speculating, if the region had been accorded ex-colonial stratus, then perhaps it would have had to have been treated with greater empathy.

A twofold process of mutual misunderstanding

In this sense, much of the 1990s and thereafter was spent in a twofold process of mutual misunderstanding. The West has constructed its own images and discourses about Central Europe and the Central Europeans have returned the favour. Misunderstanding is not intended here to signal failure, on the contrary. But it does mean that the transmission and reception of Western concepts of democracy took place without much understanding of the cultural baggage with which it arrived – as if there could be such a thing as cultural innocence[137] – so that the outcome was a series of unintended consequences and the trapfalls noted above, notably that that Western institutions did not function in the way in which they did in the West. Institutional authority was markedly lower, for one.

The nature of the Central European identity, therefore, should be seen as an amalgam of the various historical-political experiences that the region has undergone. It should be stressed that there has been considerable similarity of the types of legitimation and power, the forms of knowledge and discursive fields constructed and, logically, of the responses that emerged. The sense of intermediacy and lack of agency, together with a distrust of power, are central in this respect. Since the reception of democratic systems, the patterns of development have been broadly alike. The preference for interpreting Europe as a symbolic recompense for the communist period and the disregarding of European Union procedures are very much a shared pattern throughout the area.

Pivotal here is the legacy of the Baroque, as noted above, the modernisation of the Counter-Reformation, and the meta-languages constructed then. This underlies the persistence of historicism, the sentimentality, the penchant for hyperbole, the suspicion of 'pragmatism' (read as opportunism) and the articulation of the self through these discursive fields as ethnic communities in search of parity of esteem.

[137] Mary Douglas and Steven Ney, *Missing Persons: A Critique of Personhood in the Social Sciences* (Berkeley: University of California Press, 1998), 90–93.

So, what then are the key elements of the Central European thought-style? First, there is a certain preference for religious or moral metaphors, rather than, say, scientific ones, though both exist. There are metaphors of wholeness counterpointed by a fear of fragmentation and incoherence. There is a clear presence of historicising rhetoric, of looking for the explanations for one's collective problems in a meaning that is attributed to the past; and the past is seen as an active agent, undercutting human agency. To some extent, this is a reflection of the preference for thinking in structures over thinking pragmatically or positivistically – structures once identified appear to make human agency and individual responsibility futile. A kind of determined positivism is the counter-discourse. There are well-established discourses with an overt moralising purposiveness and a corresponding suspicion of detachment.

Western discourses by contrast hide their moralising quality behind technocratic, scientific and objective language. Central Europeans like to rely on aestheticising non-aesthetic phenomena. They have a certain fear of being forever marginal, of not being actors in history, of not having recognition on equal terms and ultimately of their own disappearance. Correspondingly, there is a longing for centrality, one that they half know is unattainable, because it is mythicised. Community and ethnicity tend to be seen as one, there is an ethnic path-dependence and the denial of this, underpinned by universalist counter-discourses imported from the West.

Finally, the region is haunted by its own sense of indeterminacy and incompleteness, of not having voice, of being disregarded, and with completeness the good life, is elsewhere. Are they victims? Not necessarily and though victimhood discourses do surface from time to time (cf. Croatia and Serbia, Hungary and Trianon, Czechs and Munich), not least in an unvoiced belief that the West owes Central Europe something, some compensation for past suffering.

With these antecedents, the integration of Central Europe into the particular West that had come into being after 1945 was never going to be easy. If for the West exit from trauma was successful, Central Europe's functional equivalent – the hopes invested in European integration – proved more problematical, above all because of the design flaw explored in the foregoing. Western exit from trauma had its roots in Western experience. Imposing these on Central Europe was bound to result in friction. Broadly, three strategies could be observed – resistance, mimesis and implementation.

The differences between the West and Central Europe may be summarised as these. First, the concept of citizenship in post-communist Europe was different, certainly weaker than the criteria in Western Europe. Second, the problem of agency (already discussed) had not been remedied. Third, the cognitive elites mentioned above were well established under communism, indeed to some extent they were constructed by the communist system. Djilas's *New Class*[138] had successfully entrenched itself, was able to ensure that its status would be passed on to the next generation and in effect oversaw the creation of a class structure where the hereditary transmission of class status was the norm. Towards the end, upward social mobility was largely blocked. The outcome to a greater or lesser extent was the emergence of social closures, with a would-be hegemonic elite, dependent on the West, in perpetual conflict with its counterpart, the native elite.

The new elites

When communism collapsed, these *soi-disant* elites claiming to represent the West and 'progress' – the reform communists, the technocrats, managerial elites – saw to it that their high level positions in society would be safeguarded by the political system. To this end, they adopted and adapted to the newly minted language of the liberal hegemony and presented themselves as liberals and democratic socialists. The West was happy to oblige. The problem with this new dispensation was that it left a sizeable section of society excluded and for many, the sight of former communists still in a powerful position was thoroughly unacceptable, resulting in very deep cleavages that amounted to segmentation (not quite in Furnivall's sense,[139] but with a family likeness).

In a more than ironic sense, there came into being a deep domestic cleavage, largely excluding liminality (it can never be excluded entirely), but in terms of the liberal democratic teleology, the state of affairs was, indeed, liminal, that is to say, in an intermediacy that bore the hallmarks of both the old and new, but with no movement towards a clear outcome. On the

[138] Milovan Djilas, *The New Class: An Analysis of the Communist System* (London: Thames & Hudson, 1957), passim.
[139] John S Furnivall, *The Governance of Modern Burma*, 2nd edition (New York: Institute of Pacific Relations, 1960).

other hand, if we interpret the post-communist political order along the line of Western expectations, that there would have been a smooth 'transition' from communism to Western-style liberal democracy, then this has not come about. Instead, there is the near classic intermediacy of the region, with elements that suggest a dichotomy and the ongoing tension between them. This seems irresoluble, the dilemma of all late modernisers, and where it is not perceived as such, the chances are high that what rules is mimesis. The political order may look like a functioning Western democracy, but the reality lies elsewhere.

The outcome of these aforementioned *longue durée* social processes and the blockages has been the emergence of well established structures and counter-structures, neither strong enough to eliminate the other, each broadly relying on long term historical discourses – 'the West' and the 'nation'. I've put both those categories in scare quotes, because they are both socially constructed, by legislating elites.[140] The West of the Central European liberals is very much an imagined West ('imagined' as used by Anderson[141]), while the nation is an amalgam of memory regime tropes and an equally imagined narrative of the collective self. Note here that what has been successfully constructed can be lived as sociologically real.

This means, of course, that neither can be undermined or discredited by waving evidence from reality. The historical element takes us back to the coercive or semi-coercive transformations that the region has undergone and, above all, to resistance. It is probably no exaggeration that 'resistance' has a near mythic legitimating quality in the region as a morally superior category. It is fascinating that a collection of essays by Mihály Babits, the great Hungarian writer and poet of the interwar period, that was published in 2008, bore the title *Légy ellenállás* [Be Resistance].[142] Resistance, it seems to me, is an all azimuths affair – if it's there, resist.

The difficulty with this bi- or multi-directional resistance is that the outcome is something approaching stasis, one that no amount of evidence to the contrary seems capable of dissolving. Shifts of electoral fortune simply transfer power from one elite to the other and neither can mobilise sufficient authority, power or legitimacy to marginalise the other, so that the blockage

[140] Bauman, *Legislators*.

[141] Anderson, *Imagined Communities*.

[142] The reference is to Babits's poem *Ha nem vagy ellenállás…* [If you are not resistance…].

remains. Indeed, while Hungary may be an extreme case, it is noteworthy that the political analyst Ervin Csizmadia has argued that what has emerged in the Hungarian system is that political elites look for complete system change and not a change of government.[143]

There is no untainted word, one without negative connotations, to describe those for whom the nation, in its ethnic as well as its civic dimension, is a living category. Nativist, nationalist, populist have all been captured by their antagonists and turned into stronger or milder abuse. Nevertheless, the category is a real one, it overlaps very broadly with the victims and descendants of the victims of the communist system, even while their Western-orientated counterparts describe themselves as liberals and identify with their counterparts in the West.

Note here that the liberalism of either has moved on from its classical roots (Mill, Tocqueville) and its 20th century iterations like Isaiah Berlin's.[144] These self-identified liberals see themselves as under pressure from the populists (I'm using this term *sine ira et studio*) and have increasingly erected boundaries around themselves, developed identifying discourses and sacralised their values. Indeed, for some the closure has begun to resemble Mary Douglas's 'wall of virtue',[145] the singular attribution of virtue to oneself and of vice to their binary other, the populists. This is fully reciprocated, of course.

The stasis is least noticeable where the end of communism was marked by a revolution or a transformation with revolutionary colouring (the Czech Republic, Estonia). A partial cleansing of the mythological stables of Augeus evidently did have a therapeutic effect. Elsewhere, where power was transferred rather than seized, where elites did more or less transparent deals, where there was little or no popular mobilisation, the stasis rules and has produced a quality all its own.

[143] Ervin Csizmadia, *Miért 'alaptalan' a magyar demokrácia?* (Budapest: Gondolat, 2014).
[144] Isaiah Berlin, 'Value pluralism'.
[145] Douglas, *Natural Symbols*.

Liminality

In the early 1990s, Zygmunt Bauman perceptively noticed that the category that best described the immediate aftermath of the end of communism, and I imagine he was thinking primarily of Poland, was liminality.[146] Bauman took the term from van Gennep's *The Rites of Passage*[147] who used it to describe the intermediate, ritual process of movement from boyhood to male adulthood. Bauman's use was somewhat different, for him it still had the meaning derived from threshold (Lat. *limen, liminis*), but meant that elements of the old coexisted with the new. I think that Bauman saw this state of affairs as an interim phase and, given that his thinking was marked by linearity, he quite probably expected that these systems would develop in a particular, identifiable direction, but not that liminality would be a lasting condition.[148] In other words, it would no longer be liminal *strictu senso*, because it has acquired lasting quality. I'm not suggesting that what we have currently, the stasis, will last for ever, but it is hard to see what would shift it. Electoral victories evidently do not, there is no event or discourse on the horizon that would constrain either party to reassess and, if the change is to be occasioned by a Black Swan,[149] then by definition that cannot be predicted. So Central Europe is providing yet another paradox, that of the non-transitional liminality.

There is mounting evidence to suggest that Central Europe is yet again, as Kundera argued,[150] Europe's early warning system, that processes affecting the developed West first emerge in the less resilient social and political structures further east. The liberal current, or liberal hegemony, is well established in Western democratic systems and has begun to show

[146] Zygmunt Bauman, 'After the Patronage State: A Model in Search of Class Interests', in *The New Great Transformation*, ed. by Christopher Bryant and Edmund Mokrzycki (London: Routledge, 1994), 14–35.

[147] Arnold van Gennep, *Les Rites de Passage* (Paris: Picard, 1909/1981).

[148] It is worth noting here that Gramsci offered a similar assessment, 'the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear' Antonio Gramsci, *Selections from the Prison Notebooks*, ed. by Quinton Hoare and Geoffrey Nowell Smith, (London: International Publishers, 1971), 276; Bauman returns to this in his 2012 article: Zygmunt Bauman, 'Times of Interregnum', *Ethics and Global Politics* 5, no 1 (2012), 49–56.

[149] Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (London: Penguin, 2007), passim.

[150] Kundera, *The Tragedy*.

what mature hegemonies generally exhibit – a reluctance to accept its own contingency, to insist on the immanence of its claims and to sacralise what it can.[151] It is noteworthy that democracy, on this view, can only be liberal democracy, that Social Democracy, Christian Democracy or Conservatism have all become non-legitimate or less legitimate sub-variants of the liberal hegemony. This state of affairs is marked by the monopoly claim of liberalism and necessarily points towards moral monism.[152]

The central conflict, which liberalism in effect denies, is whether values on their own are the sufficient condition of democracy, constituting a system in which popular sovereignty and elections play a subordinate role. In the eyes of some – more than a few – liberal values should be the superordinate norm and those who disagree can be and are dismissed as populists or in some cases silenced.

In effect, the liberal current has been moving towards the kind of worldview that in other contexts is described as fundamentalism. In an inverted sense, this is what Olivier Roy argues in the context of religion,[153] but what it shares with religion is the claim of universality. In this, religion and liberalism are alike. Roy's starting point is that secularism is now the dominant cultural space, religion exists within it, reversing the previous state of affairs. The effect of this is to strip religion of the local, particular cultural norms into which it is embedded and to impel it towards a purity that readily becomes puritanical. This process can be seen with Islam-in-Europe, where the local non-European cultural norms are absent, thereby allowing the puritanical versions of Islam, like Wahhabism, to emerge.[154] Furthermore, this fundamentalism, purity, is most attuned to globalisation precisely because it is stripped of its cultural roots – given that these roots are now in secularism. My added point is that this phenomenon is not restricted to religion, but has enveloped secular liberalism.

Following Roy's argument, culture can be defined as the productions of symbolic systems, imaginative representations and institutions that are spe-

[151] On the significance of the ethos of contingency see: Peeter Selg, 'Justice and Liberal Strategy: Towards a Radical Democratic Reading of Rawls', *Social Theory and Practice* 38, no 1 (February 2012), 83–114.

[152] Berlin, Isaiah 'On the Pursuit of the Ideal', *New York Review of Books* 35, no 4 (17 March 1988).

[153] Olivier Roy, *Holy Ignorance: When Religion and Culture Part Ways* (Oxford: Oxford University Press, 2013).

[154] Ernest Gellner, *Postmodernism, Reason and Religion* (London: Routledge, 1992), 9–11.

cific to a society.[155] Belief systems that consider themselves to be the bearers of a universal message make a claim to be transcending cultures. From this perspective, faith is not a simple belief or social conformism. It lays claim to a relationship with the truth that does not come under the heading of 'culture' because it transcends it, it is supra-spatial and supra-temporal.

Amanda Anderson describes this universalist truth claim as being a 'privileged mobility among elites [that] synecdochally masquerades as global community, or the coming together of humanity, bespeaking a profound investment in the exceptional individualism of the intellectual class, their enabling but anomalous detachment from ordinary, provincial loyalties'.[156] These elites are 'naively unaware of their own imbrication in relations of power'. Anderson is referring to the 18th century elites, but her assessment is equally applicable to the present day.

The version of liberalism that has emerged bears the marks precisely of this – a belief in its own universalism. This explains the centrality of human rights as the core principle of liberalism, it is the assertion of a universal moral claim that is not rooted in any culture, that indeed can eliminate local cultural norms that stand in its way and, therefore, has no need to pay heed to its own contingency. There can be no contingency if one is universal, supra-spatial and supra-temporal or, at any rate, makes this claim and does so apodictically.

Thus, human rights is not a finite project. By making its claims universal, it is applicable wherever and whenever, and can never be satisfied. It is thus 'a great sized monster of ingratitudes',[157] it expands, seeks to encompass all humans interactions, and by so doing endangers the private sphere by merging it with the public (it has this in common with Marxism–Leninism).

Universalist liberalism

This universalist liberalism has its own concept of what history is and should be. It selects particular historical processes that will underpin its claims and, furthermore, can be seen as a source of shame and guilt for the elites of the

[155] Roy, *Holy Ignorance*, 26.
[156] Amanda Anderson, *The Way We Argue Now: A Study in the Culture of Theory* (Princeton: Princeton University Press, 2006), 73.
[157] William Shakespeare, *Troilus and Cressida*, Act 3 sc. 3 ll. 145–46.

past. The Holocaust, racism and colonialism are the prime moments[158] in this context. They are decontextualised and used to strengthen the moral superiority of the elites of today as against those of the past. Professional history lives on, but is not a part of this narrative, because the selective use of the past has to serve the purpose of establishing a memory regime and, at the same time, a positive–negative polarity that legitimates the liberal elites. Note here that the historians' past is proscribed, because it can be employed to discredit the elite if it has been caught out in inconsistency. This is a fairly general observation. There is, of course, nothing like inconsistency to discredit something or someone, so the past can be dangerous.

Unusually the liberal elite does not claim a particular past of its own, because it presents itself as timeless, as the necessary and inevitable outcome of European historical development – pure teleology and historicism (in Popper's sense). But the real past, the recovery of contrary elements of the past, is potentially a threat because it can then be seen that things really were done differently there. This can make alternatives possible in the present, hence the past is interpreted by the criteria of the elite to create a coherent past, coherent in terms of the ideology.

If the Holocaust is currently regarded as the central event in European history – thereby screening out the rest of the Second World War and the trauma it left behind – then it is highly inconvenient that it was not until well into the 1960s that the Holocaust acquired its centrality and did so for the purposes of American Jewish identity construction.[159] The sacralisation of the Holocaust in Europe arrived later, with the collapse of communism, and the new visibility of the sites where the Holocaust took place.

Hence the memory regime topos adds a noteworthy dimension to identity construction.[160] A supra-state, supra-ethnic elite – the liberal hegemony – has put together a variant of the past that denies much of it, above all anything that might legitimate the ethnic elements of popular consciousness. Instead, it emphasises a timelessness that implies that liberalism has liberated itself from its historical roots and can thus be universal.[161]

[158] See Bruckner, *The Tyranny of Guilt*.

[159] Peter Novick, *The Holocaust and Collective Memory: The American Experience* (London: Bloomsbury, 1999).

[160] Aleida Assmann and Linda Shortt (eds), *Memory and Political Change* (London: Palgrave Macmillan, 2012).

[161] Francis O'Gorman, *Forgetfulness: Making the Modern Culture of Amnesia* (London: Bloomsbury, 2017).

In real terms, this is not actually the case, because no amount of such 'liberation' can erase the contingent Western origins of European (and US) liberal thought and practice. So what we have is a memory tailored to the needs of the elite – most memory regimes are like this – but because the liberal past is relatively thin, the memory is itself more than etiolated. Still, there is a clear genealogy that can be derived from Locke and his followers.

The significance of this metamorphosis of liberalism and liberals is that while the shift took place in the West, this necessarily impacted on Central Europe, given the interdependence with the eastward enlargement of the European Union. The bearers of this neo-liberalism or, to use John Gray's word,[162] hyper-liberalism, were and are thoroughly impatient with their own local norms and even more so with those of the semi-alien Central Europeans. They tend to regard attachment to these norms as undesirable, as argued above, because they have come to constitute the negative other. But in the process of change, the deculturation and deterritorialisation of liberalism, as per Roy, the liberal current constructed its own identity markers, boundaries and a perceptible hardening of its discourses, with the inevitable inclusions and exclusions.

The two central constitutive components of this neo-liberal current are social liberalism and economic liberalism. Social liberals proclaim a normativity that champions certain excluded groups – as long as these are seen as universal and not local, so long as they can be fitted into a universalist framework. There is a moral message here, along the lines that all humanity is one and that cultural differences are irrelevant or should be so. The shift from assertion to normative, from the is to the ought, is ignored and the starting assumption of a single humanity is not examined. This is clearly comparable to what Arendt examined. And, in addition, the decultured liberal current entirely ignores its own particularity, its own history, its own local norms, which ends up, therefore, as a neo-colonialist moral imperative. Yet again, the West is imposing its own norms as universal on the non-West.

The economic side of liberalism has a clear belief that markets are all, that freedom of the market will resolve all. The reality that this is not the case that the operation of the global market has created very serious inequalities of status, of declining expectations and redistributive injustice is ignored. The underlying assumption of market freedom is that equilibrium will ensure an equality of outcomes. This ignores the Pareto principle of

[162] Gray, *The Problem*.

unequal distribution and likewise that there cannot be an equal or even-handed distribution of certain positional goods. In unequal societies, the rich will be much better placed to acquire them in their exercise of unequal economic power, which can thereby be converted into other forms of power. Chief among these is social status and positional goods. The cementing of inequality, the parallel decline of redistribution, has brought into being a new kind of class society, not class in the Marxist sense, but in terms of the growing rigidity of status. Here the phenomenon of assortative mating,[163] that elites marry increasingly within their own status group, adds to the problem. Inequality becomes that much more difficult to overcome when social status is not subject to social diversity. This last is particularly ironic in the light of the emphasis placed by liberalism on just that, on diversity. But that is more verbal than real.

It is the essentialisation of European values that will or should generate the most concern in Central Europe, for these values are understood as they have been defined and condensed in the EU-14, or to be precise by certain elites in the EU-14; and there they are proclaimed as exemplary and binding.[164] The second factor of concern is that the definition of these values and corresponding to much of the elite opinion, is that the values are seen as definitive and, correspondingly, final. Hence the values are not open to challenge and point the way towards an epistemological closure. Third, this project entirely ignores Isaiah Berlin's warning that some values are incommensurable. Fourth, it assumes tacitly that the values it defines are exclusively an elite concern and that counter-elites and the voters are a barely tolerable necessity. Fifth, formally the values in question are those laid down in Article 2 of the TEU, but this definition is not, and cannot be, total and, importantly it does not mention values like contingency, consistency fairness and acceptance of error, nor for that matter the centrality of the integrity of evidence implied by the rule of law. Sixth, the use of the word 'empire' carries with it the implication that where – in the perception of the elites in question – these values are not practised or understood, it is desirable, even legitimate, to ensure their acceptance by colonial or semi-colonial methods. And, maybe the most troubling factor of them all is that setting of these values in stone directly contradicts the Enlightenment legacy that insists that there is no privileged knowledge and everything can be (should be?)

[163] David Goodhart, 'A Post-Liberal Future', *Demos*, 304.
[164] Weber, *Collected Methodological Writings*.

the object of cognitive growth. If my reasoning is correct, as I believe to be, then what we are dealing with is no longer an argument derived from reason, but is a faith system, and faith systems start from propositions that are non-negotiable. A non-negotiable codification of European values? Now there's a thoroughgoing contradiction in terms.

Perhaps the emergence of this self-reproducing elite would matter less if it were smaller, but estimates[165] place them at around a fifth to a quarter of the population. This suggests that it has acquired a critical mass. By way of historical comparison, the pre-modern aristocracy seldom exceeded five per cent of the population, making radical transformation easier. Where the aristocracy of birth exceeded that five per cent, as in Poland or Hungary, modernity – defined in this context as the equality of citizenship – was that much more difficult to attain. The new liberal elite, having transformed itself into a self-reproducing status group by birth, resists anything that threatens that status and, in consequence, has sought to redefine democracy as a question of values rather than rule by consent and the guardian of those values is, of course, the liberal elite. Thus the concept of citizenship encoded in the tacit social contract of democracy, but especially of liberal democracy, is increasingly felt to be breached by the inequality generated by the global market and, equally, the winners of globalisation, the cognitive elites.[166]

One of the consequences of the rise of this cognitive elite is that the terms of social mobility have been quietly changed. Whereas the Enlightenment promise was to do away with the privilege of birth, there is growing evidence of the return of the hereditary transmission of class status, as the cognitive elite, which largely overlaps with the liberal elite, transfers the advantages of its elite status to its children and reinforces the same status with assortative mating. If we add the emergence of material inequality to the mix, we can see the dynamic underlying of the anti-elite movements that liberals dub 'populist'. At the same time, as far as Central Europe is concerned, the developments sketched in the foregoing are lived as extraneously transferred into the region as morally superior and is somehow historically inevitable, as the sole way to be. Thus from the Central European perspective, the world

[165] David Goodhart, *The Road to Somewhere: The Populist Revolt and the Future of Politics* (London: Hurst, 2017), 47; Guilluy, *Fractures françaises*, 8–10.

[166] Discussed at length by Goodhart, *The Road to Somewhere*.

of globalisation and all its concomitants appear as yet another attempt at exogamous social engineering.

Is universalism a necessary condition of liberalism? These days most liberals would reply with an indignant affirmative to this question, always assuming anyone had the impudence to pose it. Yet the topos is not self-evident. In the Enlightenment tradition, access to reason and cognitive growth are indeed inherently, immanently and, for what it's worth, normatively present. But liberalism? Is liberalism an inseparable part of the Enlightenment? One can make a tenuous connection between universal reasoning and individualism, though this would be at the cost of discarding forms of collective knowledge (a high cost, often enough), the ones that Mary Douglas identifies as 'classifications, logical operations, and guiding metaphors [that] are given to the individual by society'.[167]

There is no clear explanation as to why a reasoning individual must of necessity be liberal and why she should insist that her liberalism (whatever contingent form it may take) be normatively universal. Bounded liberalism is perfectly possible both in theory and in practice. Thus the Cisleithanian half of Austria–Hungary had numerous features that made it liberal, even while this was far less true of Hungary. Similarly, in interwar Czechoslovakia, there was a liberal system for the Czechs, but rather less so for the non-Czechs (who made up the majority).[168]

Hence it is possible to decouple liberalism from universalism and, indeed, in many ways this is desirable, because what passes for liberalism in the West tends to be imposed if not coercively, then certainly normatively on the non-West, making it illiberal. This process has more than a hint of asymmetric power about it and contradicts one of the basic assumptions of European integration, that it seeks to find an equilibrium between the various asymmetries of power.

[167] Douglas, *How Institutions Think*, 10.

[168] Lukaš Novotný, Michal Štehlik and Endre Tóth, *Nemzeti kisebbségek Csehszlovákiában 1918–1938* (Bratislava: Pro Futuro Hungarica, 2018).

The colonial past

The colonial past raises another, equally significant and similarly occluded issue. The West, to put it crudely, lacerates itself over its bad behaviour during its imperialist days (for example collective and individual apologies for slavery). And this colonial guilt underlies attitudes to third world migrants, to the effect that we-the-West have an enduring responsibility in this regard and, as Central Europe is for these purposes a part of we-the-West, the states of the region have exactly the same responsibility towards the issue. This attitude entirely overlooks two irrefutable historical facts. The states of Central Europe were not empires, had no colonial possessions, and, indeed, had been parts of four – five if we count the Soviet empire as different from the Russian – different empires themselves, generally at least two. Consequently Central Europeans do not have post-colonial guilt.[169] The West finds this inexplicable, basically because it has a monistic concept of what constitutes Europe and European values.

Let us look at this liberal universalism from another perspective. It was not all that long ago that the current known as national liberalism still existed. Its proponents supported many of the basic liberal tenets, notably free trade and individual freedom, but argued their case within the framework of the national state, a state structured around a dominant ethno-national core.[170] This necessarily meant assigning a role to nationhood, to the national element that undergirds social norms. If the rule of law is a necessary condition for democracy, then something else is needed for the redistribution of power, trust, the glue that holds citizenship together. Note that on its own citizenship is a cold concept, unless it is closely tied to shared narratives of the collective self that link it to a cultural intimacy.[171] Besides, it has little or nothing to say about the informal norms of society. Indeed, Putnam's[172] work has shown demonstrably that there is a clear nexus between the ethnic dimension of nationhood and social solidarity. Paying

[169] Lubomir Zaoralek, 'Growing awareness of colonial past fuels radicalisation, says Czech minister' *The Guardian*, 15 June 2017.

[170] Peter Wagner, *Progress: A Reconstruction* (London: Verso, 2016).

[171] Michael Herzfeld, *Cultural Intimacy: Social Poetics in the Nation-State* (London: Routledge, 2005).

[172] Robert D Putnam, 'Pluribus Unum: Diversity and Community in the Twenty-first Century', 2007.

one's taxes and being polite are not a sufficient condition of integration, as incomers, like Simmel's stranger,[173] are wont to discover.

There is a further factor in the context of nationhood that has to be explored, the relationship between majorities and minorities – minorities of any kind. In sum, the dominant majority will inherently, structurally, define the overall narrative. However much self-limitation the majority may pursue, that can never be sufficient for the minority not to suspect secret agendas; it has to live with the knowledge that its narratives will always be secondary. In any event, it is extremely difficult to sustain two high cultures within the same polity. Majorities do not like to be challenged in this way on their home turf and will regularly suspect the minority having some political loyalties beyond the polity of their citizenship, usually with some justification. Minorities, then, are particularly vulnerable to the hermeneutic of suspicion.[174]

Arguably, the relationship between Central Europe and the West can be seen in this frame. There is a *longue durée* disdain in the West for Central Europe, that it is the haunt of hairy barbarians, where there is an inferior Europe.[175] A near perfect illustration was the discovery and proof (in 2017) that Western-owned hypermarkets regularly sold branded goods in Central Europe, foodstuffs for the most part, that were of lower quality than what was made available to consumers in nearby Austria or Germany.[176] There is something deeply symbolic about this if one examines it from an anthropological perspective, roughly that food is a sacralised commodity and that lower quality food – like the umbles that go into humble pie – is given to one's inferiors. It was noteworthy that at first the EU refused to intervene, as all the food safety regulations had been adhered to. In a word, the West–East downslope described by Larry Wolff[177] was alive and well.

In the light of the foregoing, the post-2004 tensions can, therefore, be seen as deriving from what is all too often lived as an exogamous engineering project. One can find expressions of this in the economy, in society, in politics and above all in morals (the human rights discourse). The central

[173] Simmel, *The Stranger*.

[174] Rita Felski, 'Critique and the Hermeneutics of Suspicion' *Journal of Media and Culture* 15, no 1 (2012).

[175] Wolff, *Inventing*, ch. 1.

[176] Átlátszó, 'V4 stance on food quality: Second-rate food for second-rate citizens?', *Átlátszó*, May 30, 2018.

[177] Wolff, *Inventing*.

difficulty is that Central Europe does not and cannot own the narrative of Europe and of European integration. When it seeks to validate its own perspectives, it is dismissed as anti-European populism, illiberalism or worse. Understandably so, because the voicing of an alternative makes clear the contingency of the majority, that it is only one possible way of being European, thereby it challenges the majority at its most vulnerable point and functions as a dislocating factor that the majority cannot tolerate. The outcome is to reproduce the *longue durée* dependant relationship.

There are two escape routes in majority–minority relations and that between the West and the EU on the one hand and Central Europe on other has begun to acquire the features of such a relationship. One of these is for members of the minority to assimilate, in some cases this is accepted, in others it is not, and one would have to examine the issue case by case. But in West–East relations, this simply will not work. In the past, assimilation was regarded as a positive step, but these days it is condemned as depriving groups of their culture. Equally, and this is the tacit side, majorities can thereby ignore minorities and treat them as not fully members of the community of cultural intimacy.[178]

The other strategy is to run parallel societies, conceivably on a consociational basis.[179] Majorities do not really understand this phenomenon and either tolerate it or ignore it, but the kin state, if there is one, does not care for it either. Various stresses and tensions ensue. But majority and minority do grow together over time, albeit quite disproportionately. The minority will take on many of the attributes of the majority – sometimes positively, sometimes negatively – whereas the majority can mostly afford to ignore minorities. If we apply this model to the relationship between the West and Central Europe, a number of phenomena become clearer, notably the sense of indeterminacy of the latter that was not finally eliminated, as many had hoped. Thus in the West–East context, we have a paradox. Central Europe is too large to be ignored and assimilated, but its existence as an 'alternative Europe' is troubling and equally there is disappointment that the Europe that Central Europe would like to rejoin does not really exist – it's an imagined Europe.

[178] cf. Putnam, *Pluribus Unum*.
[179] Arendt Lijphart, *Democracy in Plural Societies* (Yale: Yale University Press, 1977), 23–52.

In the European context, that of the EU, the system is so tightly coupled that deviance from EU regulations cannot be tolerated.[180] There is an argument to support this strict policing, that the transfers from the net contributors to the net beneficiaries (Central Europe) are derived from taxpayers' money, hence must be properly scrutinised. Few would dispute this, but when the issue of the transfers is converted into a moral argument, that these are unilateral and of benefit only to the recipient, hence the latter should conform in all fields, that ignores the reciprocal nature of the relationship – that Central Europe offers free access to Western capital and lives with the siphoning off of a significant part of its skilled labour force and the East to West capital transfers; to this can be added that the EU transfers are overwhelmingly used to pay Western contractors, a proposition that seldom forms a part of this exchange.

The outcome of these economic processes is not restricted to the economic realm, but have their consequences in society, culture, morality and perhaps most importantly in attitudes towards Europe. In broad cultural terms, the reason for entry into the EU can be summarised as 'the return to Europe'. This had various dimensions. Economic, reaching Western levels of GDP per capita, was one of them. But so was the security that the EU (and NATO) were meant to offer. And if the Soviet experience meant being subordinated to Moscow, the EU – it was hoped – would operate by the principle of parity of esteem. These hopes have not come into being and, it may be, these aspirations were unrealistic in the first place, but what I suspect has been the most unwelcome is the realisation that the membership of the EU has a number of unexpected consequences, unintended no doubt, but troubling all the same.

The middle income trap

In economic terms, from the current perspective, it looks as if the region is caught in the middle income trap.[181] The strategies of the EU, based as they are on the assumptions of market equilibrium – and these, as we know, are

[180] On tight coupling see Charles Perrow, 'Getting to Catastrophe: Concentrations, Complexity and Coupling', *The Montréal Review*, December 2012.

[181] Jesus Felipe and Arnelyn Abdon, *Tracking the Middle-income Trap: What Is It, Who Is in It, and Why?* Levy Working Papers No 715 (New York: Levy Economics Institute, 2012).

flawed – has resulted in a clear increase in the GDP per capita of these states, but there is no question of convergence. The ranking order of economic development (by GDP per capita) is that not one of the EU-11 has overtaken any of the EU-14. The Czech Republic, Slovenia are ahead of Greece and Portugal, but then so they were in 2004, by 2019 several other EU-11 states had also moved ahead of the two weaker EU-14 states. Otherwise nothing has changed. And, it was the four freedoms of the EU that resulted in the outmigration of c.20 million people from the EU-11. A July 2016 IMF analysis[182] suggests that this may have slowed down domestic growth by seven per cent. According to one assessment, this also represented a subsidy of c.€200 billion from the EU-11 to the EU-14, given the investment in training and education that these EU-11 citizens had received at home. In addition, these incomers compensated for the demographic decline in several West European states. Overall this can be seen as a net loss for the periphery.[183]

Fubini adds a further factor. EU competition rules strictly forbid state aid, but the Commission does allow special tax arrangements for underdeveloped regions in order to help economic growth and job creation. The unintended consequence has been a contest between states to attract Western investment with sweetheart deals, often enough meaning that these investors pay next to no corporate taxes. Tax income is made up by very high levels of sales tax, well above the OECD average, a burden which falls on the consumer.

The underlying problem, however, is not just that the EU as a large institution is slow to change, but that it simultaneously claims to be neutral ideologically as the guardian of the treaties, but at the same time it has adopted the neo-liberal agenda hook, line and sinker. This neutrality, then, is very much open to question, as argued in the first part of the book.

The basic problem is that there are structural obstacles that make it difficult for the EU-11 to catch up. The inference is that EU membership conserves an economic asymmetry that transfers do not cure. The key issue is capital shortage, exacerbated by the capital transfers from the EU-11 to the EU-15. The result is that innovation can happen at the level of ideas, but their development requires capital inputs and these come from elsewhere or do not come at all. The development of Skype illustrates this proposition.

[182] IMF, 'Emigration and its Economic Impact on Eastern Europe', *Discussion Note*, July 2016.
[183] Federico Fubini, 'The Roots of European Division', *Project Syndicate*, 17 May 2019.

The innovators included Scandinavians, but the heavy lifting was done by Estonians. When the project took off, it was purchased by US capital. The story is far from unique. The Hungarian pharmaceutical company Chinoin was clearly in need of capital injection by the mid-1980s and when privatisation was made legally possible, the French Sanofi concern purchased and assimilated it. What is known as the 'Blue Banana', the *Banane bleu* to give its French name after the (French) innovators, is a vaguely banana-shaped region of Europe, stretching from Manchester to Lombardy. This is where the concentration of innovative technology is to be found, and there are clusters in Scandinavia. But the EU-11 remains outside the zone.

Given the de facto permeation of the EU – European Parliament, Commission – by these liberal values, the contingent nature of which is screened out – it is not surprising that the alliance between the EU and a supporting intelligentsia of media, NGOs and think tanks should have grown ever closer. It is a powerful mutual support and legitimation system. For many on the liberal left, the Commission is the guarantor of the truth and, in many ways, the repository of ultimate rationality. That role was previously ascribed to the state, but the state blotted its copybook by becoming too etatist and too committed to rational redistribution, to its power of allocation, not to mention its suspect relationship to the nation.

From this perspective, the Commission is in a vastly superior position precisely because of its technocratic non-accountability. Probably this helps to explain why the Commission and its power are not subject to the hermeneutic of suspicion with which the left scrutinises sources of power. So the EU is, at one and the same time, both like a state and is not a state, an ideal ambiguity for those who want a state to regulate some activities, but not to have so much power and legitimacy as to acquire all the accoutrements of sovereignty. Even so, the Commission's power inherently weakens member state power, thereby underwriting more space for liberal individualism. As the veteran Social Democrat Wolfgang Streeck put it, 'the EU was in fact overly centralised, suffocating self-determination and democracy in its member states, [a proposition] for which there is a lot to be said'.[184]

With the Commission, the liberal elite can define some of the agenda, like human rights, but especially where issues of morality are concerned

[184] Wolfgang Streeck, 'Caution: European Narrative. Handle with Care' in *European Union and Disunion: Reflections on European Identity*, ed. by Ash Amin and Philip Lewis (London: British Academy, 2017), 15.

(for example gay marriage) and the Commission adopts these, thereby abandoning the neutrality that is notionally a part of its guardianship of the treaties. It follows that criticism of the EU is, and is seen as, criticism of the liberal agenda and vice-versa. Even differing from the EU, thinking about alternative ways of defining Europe, counts as anti-liberal, anti-progressive, anti-European and being on the wrong side of history.[185] These are then dismissed as populism. Although valiant efforts have been made to try and define populism, to identify its all too elusive core, in common parlance populism is being hostile to the EU, to European integration – as interpreted by liberals and by the Commission. No wonder that Central Europe hardly gets a look in. So, in effect, there has been a far-reaching fusion of the European project and the liberal agenda.

Most technocracies seek to regulate whatever they can and the Commission is regularly accused of overregulation, with some justification. All the same, the EU is committed to dismantling regulation at the member state level and to replace it with its own lighter or heavier touch; within this regulatory framework, however, allocation should be in the hands of market actors. The weaker parties are pushed aside in the name of efficiency.

The Commission also claims to act in the name of democracy, but (as we have seen) it is a democracy without a *demos*, a democracy based on values (which values, exactly?), a democracy without debate about the *finalités*, a democracy with little input from below (that is feedback and self-correction). Rather, the debate is continued with lobbies and the chorus of think tanks, NGOs and so on – the Commission's ecosystem – and these have come to constitute a surrogate *demos*. What emerges from these discussions is no longer up for debate. By this process, debate is mostly concentrated in Brussels and is marginalised when it takes place in the member states. Local, regional, member state input into the Brussels debate – the policy process – is tenuous, even if debates in Berlin or Paris have greater weight than those in Bucharest, Bratislava or Vilnius. And matters are obviously different in Council, where member state interests dominate.

The hegemonic liberal current, having established itself over the last twenty years as a site of discursive power and having concluded its de facto alliance with the Commission, is as a result in a dominant position in Europe. In some respects, it is vulnerable to the temptations of funda-

[185] Drew Hinshaw and Marcus Walker 'In Orban's Hungary, a Glimpse of Europe's Demise', *Wall Street Journal*, 9 August 2018 is a fairly typical illustration.

mentalism precisely because it found itself without intellectual and other ideological challenges, at any rate until the aftermath of the 2008 crisis. And, as argued previously, the system is equally vulnerable to Lotman's explosions.

To the degree that it has become fundamentalist, it has begun to exhibit the characteristic features of fundamentalism, notably the intolerance of anything that pollutes the purity. In this sense, it has come to resemble an orthodoxy together with the moral monism that Isaiah Berlin warned about. It is in many ways a faith system, which readily ignores evidence. The centre is inevitably squeezed.

The concept of deculturation that helps to make sense of this process is very cogent and – as argued above – while Olivier Roy applies it to fundamentalist religion, it also works for liberalism. Indeed, this liberal fundamentalism is severely hostile to all cultural spaces and markers other than its own. It is decultured in as much as it ignores, rejects, excoriates, local, national cultural norms and imposes its own non-national moral codes on whatever it encounters in the name (religious surely) of a single humanity, which doesn't exist other than at the most banal level.

These social, economic, cultural and political developments having their origin in the West have not left Central Europe unscathed. Indeed, in some respects Kundera's early warning topos was swiftly observable.[186] Basically where the exit from communism was smooth and non-revolutionary, the carry-over, the salvaging of power by the members of the previous regime, came to constitute one of the central cleavages. In simple terms, the beneficiaries of communism retained sufficient power and knowledge (money, networks, property) to play a much more prominent role than their counterparts, the successors of the defeated elites of the post 1945 period.

Their contemporary counterparts may broadly be described as the victims of communism and their descendants, who were slower to move into the political sphere, though they were present in culture. The central difficulty was to formulate a set of political doctrines that were conservative, democratic, drawn from the native traditions and acceptable to the West, which was policing these developments. It is worth noting that this policing was far more stringent towards the newly emerging post-communist centre-right. The suspicion, covert and overt, that being right-wing in Central Europe placed you within touching distance of fascism, was never

[186] Kundera, *The Tragedy*.

far away. The flipside of this stance, and whilst I cannot prove it, I have the sense that this suspicion seems to have led Western elites to accept the sudden, rapid, overnight conversion of former communists into staunch democrats. No de-communisation was expected or encouraged, even while post-war Germany was regularly criticised for pursuing de-Nazification rather lightly. The resentment that this generated among the victims of communism was ignored. Well, the left generally looks after its own, even when some of those given safe haven had a decidedly murky past and would never have passed the most basic human rights test. The contrast here between the former communist left and the scrutiny of the right is striking. Nor did the Western elites fully understand the political problems of the Central European right.

For a start, they had to compete with the communist successor elites, so their definitions of self necessarily drew on the encoded ideas of resistance and the recovery of agency. After two decades, the two currents are reasonably well defined and, as suggested earlier, can be said to constitute social segments competing for power. To be sure, the rise of the hegemonic liberal elite great aided their counterparts in Central Europe, not least because by insisting on values rather than the consent of the governed, they could side-step the outcome of elections.

Potential and actual trapfalls

The list of potential and actual trapfalls is quite long. It includes false expectations, mutual incomprehension, mutual ignorance, idealisation (of the West) and disdain (by the West for Central Europe), flawed narratives of Central Europe (some of them historicising), unreliable translators (the language deficit), the Larry Wolff argument of a *longue durée* process of regarding Central Europe as the barbarian other, the already mentioned asymmetries of power, the clash between human rights and conflict resolution, the mutual perceptions of double standards and, maybe, the readiness to rush to judgement on the basis of inadequate evidence.

An all but poignant trapfall can be discerned in the complex and at times conflictual relationship between the European integration process and Central Europe after the 2004–2007–2011 enlargement. Central Europe approached this moment as the culmination of the aspiration to rejoin Europe. Rejoining, in so far as it can be reduced to a few propositions, was as

much a cultural expectation as anything else. From the EU-14's perspective, it was seen as a success, a turning point whereby Central Europe would be converted into what Europe of the EU had become. Herein lay, and lies, the trapfall.

Historically, the EU Commission had played the role of the protector of the small member states against the larger ones and was seen by them as a positive force. It was dealing with the structural asymmetries of power in Europe. This role was already undergoing change by the 2004 enlargement as the Commission was accumulating more and more power. Symbolically this could be seen in the size of the *acquis*, widely described as 120,000 pages in 2004 (though it was never made clear in which language).

Let it be added that this accumulation was legal, via the transfer of competences, and often the most effective solution to problems that could not be resolved bilaterally. Environmental protection or food safety are only two such areas. But as this process continued, the accumulation acquired emergent properties, that is to say the Commission's power was greater than the sum of its parts.[187] And, by the same token, it was less and less accountable. Eastward enlargement transformed the picture in an unexpected direction.

Whereas the older EU member states had, in effect, grown up with the Commission and the *acquis* and saw themselves in a mutual relationship with it, for the post-2004 member states – described as 'new' for a decade – the pattern was significantly different. While they were committed to joining the EU and negotiated all the chapters, their relationship with the Commission was more something akin to dealing with 'Brussels-Centre', obviously this was something other than Moscow-Centre, but still possessing a certain, albeit distant kinship. The kinship was that of dependence and asymmetry of power. Accepting the Rules of the Club was the mantra, as if these rules were set in stone.

How far these memories of Moscow were evoked is hard to say, but the asymmetry of power is real enough. Indeed, the asymmetry has been enhanced by the condensing of what calls itself 'European values', the protector and guarantor of which is the Commission and is not something that the Commission is in a hurry to give up. This asymmetry lies not in the infringement procedures so beloved of the media – they are often trivial or technical – but in the narrative that emanates from Brussels to the effect

[187] Urry, *Global Complexity*, 23.

that while there may be difficulties with member states from among the EU-14 (like the UK), but the real awkward squad is bound to be one or other of the EU-11. Too often, this adds up to a double standard. If the EU-11 member states feel, the emphasis on feel, that they are expected to adhere to a higher standard than the EU-14, then their resentment will be more intense. And it really won't do to be told that it is pure coincidence that Hungary and Poland are constantly singled out for criticism (as I have been in my political role).

If nothing else, it was impolitic for the Commission to declare early in 2011 that the Hungarian media law was seriously troubling and then to admit that a few technical issues aside, it would pass muster. It was as if the Commission's response was dictated by media coverage and by the statement of leftwing politicians opposed to the centre-right government in Hungary. It was as if there was no independent scrutiny by the Commission itself. What kind of a technocracy is it that allows itself to set its goals by what the media tell it? (I had a ringside seat during much of this in 2010–2017.)

The accumulation of power in Brussels meant that its preservation was a part of the tacit agenda. There could be some variation in the accession conditions, but nothing substantial. The new member states had to change far more than the EU did. The paradox of it all was that accession had the appearance, and to some extent the reality, of an imposition of power. True, it was consensual, no one was forced to join the EU, but in the absence of alternatives, the process was lopsided, if not actually one-sided. And that, of course, fell into the *longue durée* historical pattern of a transformation of an exogamous origin.

This perpetual conflict and the mounting polarisation have the consequence of recreating the trauma from which rejoining Europe was supposed to be the escape route for Central Europe. It is or constitutes by analogy the kind of social trapfall that Hankiss explored in his writings, except that it is discernible at the European level, rather than within a national community. As with other such trapfalls, there is no advantage to be seen for any of the participants, but overcoming it would require a major transformation, even a reversal, not that this is likely at this time.

The Central European project can be summarised as the hope of recuperation and re-establishment on firm foundations of the modern national self. This self was badly disturbed by communist rule and is currently assailed by the pseudo-universalists of the liberal hegemony in association with the

EU. Hence the trauma is perpetuated and overcoming it appears as elusive today as ever.

There are various factors that have contributed to these flaws in the EU–Central Europe relationship, as has been argued. It would be misleading, indeed methodologically unacceptable, to narrow the assessment down to a single factor, but high on the list has to be the mutual misperceptions on both sides, equally significant are the varying expectations of the parties to the relationship, their different cultural capital (in the widest sense), the divergent lessons drawn by the parties from their interactions, the dynamic that tended to intensify with the passage of time, the continuous shifting between the political, the economic and the legal processes in order to strengthen one's position and inevitable discrepancies that arise from asymmetries of power. The asymmetry of power is one of the most fundamental givens of intra-European relations and central to the entire integration process has been the assumption that the key actor in the process, the Commission, will do what it can to ease them. When there have been gaps in this endeavour, friction was unavoidable and that friction has, at times, intensified into overt disputes.

Above all, where one party to a conflict concludes that it is being subjected to inconsistent treatment – and all member states believe that they can proceed from parity of esteem – then matters will degenerate. Obviously, this matter of asymmetry is not a purely EU–Central Europe problem, though it has been from that perspective that this analysis has been argued.

Some concluding thoughts

The argument in the introduction to this monograph and in the monograph itself is fundamentally about how we should understand the exercise of political power, primarily in Europe but with applicability elsewhere, at a time when complexity (both in the conventional sense and as used by complexity theory) has made governance immensely more difficult. The range of problems that can only be handled and not resolved has multiplied and elites appear unable and unwilling to update their cultural capital in order to be able to try new solutions. One should add to this the problem of the level at which a problem is handled most effectively; the centre is not invariably the best place for this. Sometimes, ruling elites reject the

innovation suggested by competing elites and non-elites (branding them populist) and, therefore, no longer political actors with legitimacy.

This rejection – and I have seen it in practice when politicians overtly refuse to listen to counter-arguments – is dangerous for the most obvious of reasons, it promotes ignorance and makes it far more difficult to engage with other views. There is, indeed, something strangely contradictory in the thought-world that calls itself liberal. On the one hand, it 'celebrates' and 'embraces' diversity, on the other it flees from it when the diverse thinking threatens their preconceptions of the world. Self-styled 'liberal' think tanks are among the worst offenders.

The consequent constriction of liberal thought finds that it has no answers to these inconvenient issues and shuts them out. The result is not just bad policies, but exacerbation of the problems through the inability and/or unwillingness to take new issues into consideration. And matters are made worse by obfuscation and the deliberate spreading of unreliable information, whether as 'fake-news' or through agnotology, the deliberate construction of ignorance. What is noteworthy here is that the much trumpeted transparency can, sometimes will, end up by strengthening misperceptions and misunderstandings through information overload.[188] Excessive information, burying sensitive issues in a mass of detail and impenetrable jargon are clearly agnotological techniques that are well known in politics.

The very strong tradition of linear thinking in Europe is a part of this and the evident reluctance to deconcentrate power in order to make systems more resilient is another. The dangers are – certainly should be – self-evident. Elites that do not accept change are likely to be coerced into doing so and to redistribute power in ways that are far less congenial. I'm not suggesting that we are at the threshold of a Europe-wide revolution, but the pressure for change from beyond the ambit of the hegemonic elites is palpable. It is my hope that this writing will offer insights that will help existing elites, counter-elites and non-elites to recast the system in a direction that is consensual, avoids the worst upheavals and is, at the same time, effective and resilient.

One of the realities illustrated by Europe's integration experience is that however much people, elite and individuals talk about renewal, the past cannot be eliminated entirely. It is not that the past lingers on but will be overcome, or as Gramsci envisaged it, and given his Marxism, he really did

[188] Lotman, *The Unpredictable Workings*.

seem to believe in radical, maybe even all out change, but it is rather the case that systems of power go on shaping attitudes, belief systems, identities long after they have disappeared. State power appears to be central on this, but that proposition demands further research. Still, it is very clear to anyone assessing Europe with even a moderate degree of detachment, that the 2004–2007–2011 enlargements have not worked in the way in which Brussels (Berlin, Paris and so on) would have wanted it.

The one size fits all thinking of the Monnet method has only partially brought about a more integrated Europe and one of the factors that has played a role has been the assumption sets of the formerly communist ruled societies and elites. These patterns of government become a part of the collective self, of the power environment in which societies live, to which they have become used, which is a part of their comfort zones. This does not mean that they particularly like or approve of these systems of governance, but they live it as real and, hence, are uneasy with change, above all if the societies in question have been exposed too often to change over which they feel they have had no control.

The implication is twofold. The member states are now and maybe always were too divergent in small ways or large to be governed so extensively from a single centre. Thus the discourse of the 'EU as empire' is, perhaps, not so wide of the mark. The ultra-liberal Guy Verhofstadt ('ultra' is my word, but then I did encounter him rather regularly in the European Parliament) came very close to supporting the idea that in a world of empires Europe too should be an empire, a doomed liberal empire in the words of Wolfgang Streeck.[189]

The other thought is that federalism can only come into being through ever-intensifying centralisation – the Jacobin concept of Europe – and that would mean the accumulation of yet more power at the centre. The consequence hardly needs to be mentioned – protests from the periphery. If these are ignored, and the liberal elites tend to prefer ignoring, European ungovernability beckons. It follows, or should, that rethinking Europe should start from the proposition that Brussels should do less, the member states more, as Mark Rutte (already quoted) argued. What Rutte did not say, though, is that this necessarily means accepting that the national identities of the member states, and that includes what everyone is at pains

[189] Streeck, *The EU*.

to deny, their ethnic identities, will have to become the core of European governance. This is not a message that will be popular in the European quarter in Brussels.

There is, in addition, a further problem. It is a theoretical one, but with real-time consequences. In the simplest terms it is about Carl Schmitt and Taleb's Black Swan concept and whether Schmitt's friend–enemy distinction remains viable in 21st century globalisation. Schmitt's distinction is self-evidently a binary opposition and the question is whether this distinction, this understanding of politics is still fully applicable. Obviously, in many contexts it will be, but in the era of globalisation this no longer holds true for all situations. Seeing the world in binary oppositions is very deeply encoded in European thinking. It can certainly be derived from Christian and other cosmologies that divide the world into good and evil, into virtue and sin, into positive and negative polarities and tend to construct social phenomena in this binary way, ascribing virtue and vice.

Left and right in politics is an obvious example, as is liberalism v. populism or the West v. communism. Once these categories were established, they were and are reproduced and become the default condition in our cognitive worlds. Schmitt's friend–enemy distinction simply took this binary thinking to its logical conclusion. And, it should be added, Anglo–Saxon adversarialism is the high citadel of binarism. Indeed, it is seen in Anglo–Saxony as a positive virtue and is contrasted with the negative polarity of the 'cosy consensus' politics of the Continentals. Underlying binary thinking, indeed it is a very powerful underpinning, is linearity, that there is an underlying direction in history which then provides the criterion of deciding between positive and negative. Most obviously, this linear view of events is to be found in the mythic narrative of progress, including the equally dubious belief that history has a purpose and message. No amount of counter-argument, notably Popper's *Poverty of Historicism*, has been able to shake this belief system.[190]

Binary thinking, on the other hand, is constantly challenged by non-linear processes, so that the phenomenon identified by Horowitz is no longer clear cut.[191] When small causes have disproportionately large effects – the butterfly effect – the mind-set that sees binarism, friend–enemy, as the dominant mode of action, there will be inexplicable, unintended outcomes

[190] Popper, *The Poverty*.
[191] Horowitz, *Ethnic Groups*.

that are then read as ill-intentioned manipulation or external intervention. Likewise with emergent processes, when the accumulation of factors produce an outcome that qualitatively exceeds the inputs and there is no equilibrium state – the ongoing transfer of power to the EU can be seen in these terms.

Given binary thinking, it becomes very difficult to identify non-linear processes as structural and have aleatoric effects. Give chance a chance, as one might say. In essence, the much simpler world of there being only one right answer is coming to an end, with the result that friends and enemies are impossible to identify. Black swans and their progeny are flapping their wings.

What is also noteworthy in this connection is the general, though not invariably explicit trend to ignore ambiguity and liminality, not to mention the role of chance and accident. This is quite understandable, given that linear thinking pushes one towards clear, unquestionable categories, in which one's interlocutor or opponent is necessarily placed in one of the two categories available. In reality, the world is constantly reproducing in-betweens – liminality – in which the sanctioned categories lose their clarity. And, as suggested earlier, this liminality looks like being long lasting, maybe there is nothing new struggling to be born. Gramsci was writing in a very different era.

At its worst, this binary thinking establishes a tacit or explicit belief in historical inevitability, a belief that is all too often transformed into faith. Technocracy operates on the basis of an assumption that There Is No Alternative to its projects. This is the celebrated TINA, which has all the lineaments of historical inevitability. What is interesting is that Marxism–Leninism constructed an escape hatch for itself from its doctrine of inevitability and law-governed processes, in order to explain why proletarian consciousness was not as it should have been, for example why workers did fire on workers in 1914. This escape hatch was the false consciousness allegedly promoted by Lenin's crafty bourgeoisie.

I cannot identify a liberal equivalent, at this time anyway. Faith rules and deviants are deviants. That in turn promotes sacralisation or privileged knowledge and the ever more intolerant rejection of questioning. Indeed, rejection may be too weak, as the phenomenon can and does resemble excommunication, with corresponding sanctions. Heretics are not burnt at the stake, but they can be subjected social media show trials with dismissals and ostracism as the consequence.

These processes of radical exclusion can also be interpreted as purification rituals. These have a very long tradition in Christianity, it is a repeated trope, with the aim of purity as perfection.[192] European secularism has rejected the Christian belief system, but has adopted much of its thought-world and methods. Perfection is, of course, unattainable, hence the purification, together with the passions that drive it, resurface again and again.

In the context of Europe and the polis, certainly at the level of everyday politics, the assessments of the foregoing have no purchase. They are dismissed as 'theology', as irrelevant to the daily tasks faced by 'real' politicians. And there's the rub. Without a deeper analysis and understanding, the crises will proliferate and the ad hoc solutions will only exacerbate the situation. But that sounds like crying for the moon.

[192] Holland, *Dominion*.

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