

## CHAPTER 8

# STRENGTHENING THE RULE OF LAW WITHIN THE UNION: SOME ADVICE TO BREAK THE DEADLOCK

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### 1 INTRODUCTION

Article 2 of the Treaty on the European Union (TEU) formulates the values on which the Union is built. The article 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.

The first value mentioned, human dignity, may be seen as the ultimate foundation of the whole constitutional edifice. If the human individual is without inherent dignity or without inherent value, then democracy, concern for human rights, freedom and the rule of law would be pointless. But man is gifted with inherent dignity. He is a person and may never be used solely for the purpose of others. So human dignity, or respect for human dignity, deserves pride of place in the summing up of values for the EU.<sup>1</sup>

The second set of values mentioned in this Article is freedom and equality. They are the values of modernity. Most well-known is the summing up of these modern values as the ideals of the French Revolution: *liberté, égalité, fraternité*.<sup>2</sup> They are notoriously difficult to combine and the struggle between the central ideologies of our time, liberalism and socialism, is basically about where to lay the most central emphasis? On liberty, as the liberals do? Or on equality, as the socialists do?

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1 See on the notion of respect for persons: J. Rachels, *The Elements of Moral Philosophy*, 5th Edition by S. Rachels, New York, McGraw-Hill, Inc., 2007, p. 130 ff.; I. Kant, 'The Categorical Imperative', in: J. Rachels (ed.), *The Right Thing to Do: Basic Readings in Moral Philosophy*, New York, McGraw-Hill, 1989, pp. 91-102; B. Giese, *Das Würde-Konzept*, Berlin, Duncker & Humblot, 1975.

2 See: J. Israel, *Revolutionary Ideas: An Intellectual History of the French Revolution from the Rights of Man to Robespierre*, Oxford/Princeton, Princeton University Press, 2014.

The third set of values mentioned in Article 2 Treaty on the European Union is democracy, the rule of law and respect for human rights. They are no values *in itself* because democracy without human beings is useless. Democracy is not an ‘intrinsic’ value.<sup>3</sup> It is only *because* we have human beings with an intrinsic value and dignity that democracy, the rule of law and human rights have meaning and significance. What these ‘instrumental values’ do, is realize the legal ambiance where human beings can flourish. Where freedom and equality may be realized. Democracy, the rule of law and human rights are the *facilitators* of freedom and equality for mankind. They are the legal instruments we have at our disposal to make freedom and equality come true.

Measured against these high-sounding principles, some of the other pieces of information in the Article may sound strange. So when the TEU refers to “human rights, including the rights of persons belonging to minorities”. Why does the TEU add, “including the rights of persons belonging to minorities?”<sup>4</sup> *Of course* human rights also belong to minorities. Why mention the obvious? Human rights belong to the human individual. Who would be so silly to proclaim that human rights do *not* belong to persons belonging to minorities? But quite another claim would be that next to individual human rights we have to distinguish another category of human rights, that is, group rights or collective rights.<sup>5</sup> Group rights are highly problematic because the adoption of this concept would give the group certain rights *against* the human individual, a notion that basically undermines individual rights. Although the idea of group rights idea is very old, even anterior to the idea of rights pertaining to the individual, one may also question the usefulness of adding group rights to individual rights in modern rights talk.<sup>6</sup> And one may question the legitimacy of the addition that 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”.

What to think of this last category of values introduced in Article 2 TEU? The problem is that these notions are vague. And vague to the extent of misleading. Solidarity, with what or with whom? And why is equality between women and men highlighted? Puzzling is also the reference to non-discrimination. Referring to non-discrimination is superfluous after the central significance of equality was introduced.

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3 G.E. Moore, ‘The Conception of Intrinsic Value’, in: J. Rachels (ed.), *Ethical Theory, I, The Question of Objectivity*, Oxford/ New York, Oxford University Press, 1998, pp. 28-42.

4 See on this: J. Waldron, ‘Minority Cultures and the Cosmopolitan Alternative’, *University of Michigan Journal of Law Reform*, 25, 1992, pp. 751-793; J.J. Preece, *Minority Rights: Between Diversity and Community*, Cambridge, Polity, 2005.

5 J. Stapleton (ed.), *Group Rights: Perspectives Since 1900*, Bristol, Thoemmes Press, 1995.

6 In 1947, before the adoption of the *Universal Declaration of Human Rights* by the United Nations, American anthropologists protested against the orientation on individual human rights in: American Anthropological Association, ‘Statement on Human Rights’, *American Anthropologist*, 49(4), October-December 1947, pp. 539-543. On the notion of rights talk, see: M. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, New York, The Free Press, 1991.

And tolerance (respect for the views of others, especially with those of whom we disagree)<sup>7</sup> is important but somewhat out of place in this context. Nevertheless, the start with human dignity, the values to protect this (freedom, equality) and the constitutional values to materialize this (democracy, the rule of law and human rights) are important.

This chapter will reflect on the ambition to combine and harmonize these four categories of values, that is:

1. Human dignity,
2. Freedom and equality,
3. Democracy, the rule of law and human rights,
4. Pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

As stated above, human dignity (1) is the real basis of the whole constitutional edifice. Freedom and equality (2) may be dubbed instrumental values subservient to human dignity. Democracy, the rule of law and human rights (3) are the constitutional tools to realize freedom and equality. And the fourth category is a mixed bag of contemporary preoccupations.

In this chapter, I will focus on the constitutional tools to realize freedom and equality, that is, on democracy and the rule of law. Within the EU, a discussion has emerged on the right balance between the two. Contrary to what most people think, a balance between democracy and the rule of law is far from easy to realize. A considerable part of our constitutional history, both national and international, is dedicated to establishing the right relationship.

## 2 THE PROBLEMS WITH THE RULE OF LAW IN HUNGARY AND POLAND

With one of the values identified as belonging the third category, the EU recently said that there is something wrong. This is with the rule of law. With ‘wrong’, the EU, or rather the European Commission, does not mean that the rule of law in itself is wrong, but that the rule of law is insufficiently respected in some countries of the EU. This is the case with Hungary and with Poland, the EU claims. And the EU has initiated a whole procedure and some sort of dialogue on the rule of law. The EU has issued two ‘Communications’ where the EU-approach towards the rule of law is outlined. In what follows I give a summary of that approach.

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7 S.G. Tallentyre (pseudonym of Evelyn Beatrice Hall), *The Friends of Voltaire*, London, Smith, Elder & Co., 1906, p. 199: “‘I disapprove of what you say, but I will defend to the death your right to say it,’ was his attitude now.” Voltaire as characterized by Tallentyre.

In July 2019, the European Commission issued a Communication on the Rule of Law (COM(2019) 343 final) commenting on what is generally considered to be the EU's "worst Rule of Law crisis since its inception following the authoritarian turn in two Member States".<sup>8</sup> As I said, this is about Poland and Hungary. The criticism on Poland and Hungary is that those countries have turned into "de facto one-party regimes without an independent judiciary that meets the requirements of Article 19 TEU" and thereby have violated the core principles and values on which the Union is founded.

The question is, is this true? Have Poland and Hungary violated the principles of the rule of law? And if so, why? What is the rule of law? Is consensus about the rule of law as great as the EU, or rather the European Commission, wants us to believe? Before we can set ourselves to answer these questions we first have to define what we mean by 'rule of law' and 'democracy'.

The *rule of law* is the most common English translation of the concept '*Rechtsstaat*'. The '*Rechtsstaat*' is a concept well-known in the German language<sup>9</sup> and Dutch language,<sup>10</sup> but difficult to translate in English.<sup>11</sup> The German '*Rechtsstaat*', usually associated with the philosophy of Immanuel Kant (1724-1804),<sup>12</sup> is not identical to what A.V. Dicey (1835-1922) called 'the rule of law' in his great description of the British constitution.<sup>13</sup> What in the contemporary European context is presented as the rule of law, though, seems close to what in the German tradition is called the '*Rechtsstaat*'. The '*Rechtsstaat*' is a state that limits its own power by law.<sup>14</sup> The state

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8 D. Kochenov, 'Elephants in the Room: The European Commission's 2019 Communication of the Rule of Law', *Hague Journal on the Rule of Law*, 11, 2019, pp. 423-438, p. 424.

9 R. Gneist, *Der Rechtsstaat*, Berlin/Heidelberg/New York, Springer Verlag, 2013 (1872); P. Kunig, *Das Rechtsstaatsprinzip*, Tübingen, J.C.B. Mohr (Paul Siebeck), 1986.

10 P. Cliteur & A. Ellian, 'De democratische rechtsstaat als legitiem staatsmodel', in: P. Cliteur & E. Afshin (eds.), *Legaliteit en legitimiteit: de grondslagen van het recht*, Leiden, Leiden University Press, 2016, pp. 47-103. This concept 'democratische rechtsstaat' we translated as 'constitutional democracy'; P. Cliteur & A. Ellian, 'Constitutional Democracy as a Legitimate form of Government', in: P. Cliteur & A. Ellian (eds.), *A New Introduction to Jurisprudence*, London/New York, Routledge, 2019, pp. 36-75. See on the rechtsstaat in Dutch: J.P.A. Mekkes, *Proeve eener critische beschouwing van de ontwikkeling der humanistische rechtsstaatstheorieën*, Utrecht/Rotterdam, Libertas drukkerijen, 1940.

11 The French translate '*Rechtsstaat*' usually with '*État de droit*'. See: J. Chevallier, *L'État de droit*, Third edition, Paris, Editions Montchrestien, 1999.

12 J. Hruschka, *Kant und der Rechtsstaat: und andere Essays zu Kants Rechtslehre und Ethik*, Freiburg, Verlag Karl Alber, 2015; G. Dietze, *Kant und der Rechtsstaat*, Tübingen, J.C.B. Mohr, 1982.

13 A.V. Dicey, *Introduction to the Law of the Constitution*, Tenth Edition, with introduction by E.C.S. Wade, London, Macmillan Education, 1987 (1885), p. 183.

14 The German concept '*Rechtsstaat*' is therefore very close to what in the American tradition is called 'constitutionalism'. See: C.M. Zoethout, *Constitutionalisme: Een vergelijkend onderzoek naar het beperken van overheidsmacht door het recht*, Arnhem, Gouda Quint, Arnhem, 1995; C.M. Zoethout, 'The Tension between Controlling the State and Steering Society or Constitutionalism Versus Democracy', in: G. van der Schyff (ed.), *Constitutionalism in the Netherlands and South Africa*, Oisterwijk, Wolf Legal Publishers, Oisterwijk, 2008, pp. 195-206; H. ten Napel, *Constitutionalism, Democracy and Religious Freedom: To be Fully Human*, Oxon, Routledge, Oxon, 2017; J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge, Cambridge University Press, Cambridge, New York, 1988.

which limits its own power by the law can do this by subjecting state power to (i) the principle of legality (ii) fundamental rights (iii) the principle of the separation of powers (*trias politica*), and (iv) judicial review.<sup>15</sup>

*Democracy*, although intertwined with the rule of law, or ‘*Der Rechtsstaat*’, is not identical with the rule of law. According to the famous description by Abraham Lincoln, democracy is government “of the people, by the people, for the people”:

It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they here gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.<sup>16</sup>

Also, Lincoln, like in Article 2 TEU, connects freedom (second category of EU-values) with democracy (third category of EU-values). Democracy is self-government. The people governing themselves. And because the people cannot govern themselves in the direct manner this was organized in ancient Greece.<sup>17</sup> ‘Self-government’, in the modern sense, means having control over the people who govern the people. Modern democracy is *representative* democracy.<sup>18</sup> Those who represent the people, are chosen by the people. And not only are they chosen by the people, they leave their office when required (ministerial responsibility).

### 3 THE COMBINATION OF DEMOCRACY WITH THE RULE OF LAW

And that brings us to the combination of democracy and the rule of law (*Rechtsstaat*). The aim of contemporary democracies is not only to be democracies, but also to honour the rule of law (*Rechtsstaat*). The ideal state is a well-functioning ‘democratic-rule-of-law-state’ (German: *Der demokratische Rechtsstaat*). But that combination of words is cumbersome. So for the translation of the German *Demokratische Rechtsstaat* another word was coined: ‘liberal democracy’ or ‘constitutional democracy’. Both *liberal* democracy and *constitutional* democracy can be used to emphasize that even the

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15 See: P. Cliteur & A. Ellian, ‘Constitutional Democracy as a Legitimate form of Government’, in: P. Cliteur & A. Ellian, *A New Introduction to Jurisprudence*, London/New York, Routledge, 2019, pp. 36-75.

16 A. Lincoln, *Address at Gettysburg, Pennsylvania*, (1863), in: A. Lincoln, *Selected Speeches and Writings*, New York, The Library of America, Vintage Books, 1992, p. 405.

17 E.W. Robinson, *Ancient Greek Democracy: Readings and Sources*, Oxford, Blackwell Publishing, 2004.

18 J.S. Mill, *Considerations on Representative Government*, Amherst/New York, Prometheus Books, 1991.

democratic state is in need of legal limitations.<sup>19</sup> Some have a preference for the term ‘liberal democracy’,<sup>20</sup> others use ‘constitutional democracy’.<sup>21</sup> But that difference in semantics does not concern us here. Both liberalism and constitutionalism are limitations on state power, and so the terms ‘liberal democracy’ and ‘constitutional democracy’ can be used interchangeably.

That brings us back the ambition of the EU to stimulate the rule of law in all countries of the EU. The EU tries to foster liberal democracies or constitutional democracies, and it has some concerns especially about the rule of law in Hungary and Poland. As sociologist Frank Furedi makes clear in his excellent study *Populism and the European Culture Wars: The Conflict of Values between Hungary and the EU* (2018), Hungary has become a sort of obsession for the present European Commission.<sup>22</sup> The EU, or rather the EC, tries to strengthen the rule of law by means of a ‘communication’ around that topic.

Dimitry Kochenov, Professor of EU Constitution Law and Citizenship at University of Groningen, uses Kim Scheppele’s concept of ‘autocratic legalism’ to characterize the situation.<sup>23</sup> The EC tries to remedy the situation with, first, the introduction of a ‘Rule of Law reporting cycle’, and, second, more attention to the financial strings at the Union’s disposal to guarantee that the Rule of Law is complied with.<sup>24</sup> The Commission’s Communication has an optimistically sounding title: ‘Strengthening the Rule of Law within the Union: A Blueprint for Action’. But what action? It formulates actions for EU institutions, Member States and non-governmental actors. As Kochenov states “the Commission restates all the mantras of an ‘EU based on values’, which the problematic Member states are very familiar with”.<sup>25</sup> One may, therefore, question whether this is very useful. Nonetheless, in yearly events on the rule of law, a dialogue is sought with civil society. “All the right buzz words are mentioned”, including cooperation with academia. “The Commission wants everyone to speak with everyone about the Rule of Law, including parliaments, international organizations and institutions.”<sup>26</sup> And what is

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19 A democracy without legal limitations, a democracy without rule of law, would be ‘totalitarian’. See: J.L. Talmon, *The Origins of Totalitarian Democracy*, New York/London, W.W. Norton, 1970.

20 J. Doomen, *Freedom and Equality in a Liberal Democratic State*, Brussel, Bruylant, 2014; B. Holden, *Understanding Liberal Democracy*, Second Edition, New York, Harvester/Wheatheaf, 1993; Ibn Warraq, *Why the West is Best: A Muslim’s Apostate’s Defense of Liberal Democracy*, New York/London, Encounter Books, 2012.

21 C.M. Zoethout, ‘Does the Multicultural Society Require New Human Rights? An Appeal to the Ideal of Constitutional Democracy’, in: A. Soeteman (ed.), *Pluralism and Law*, Proceedings of the 20th IVR Congress Amsterdam, ARSP Beiheft Nr. 90, 2001, pp. 44-53; T. Fleiner & L. Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World*, Heidelberg, Springer-Verlag, 2009.

22 F. Furedi, *Populism and the European Culture Wars: The Conflict of Values between Hungary and the EU*, London/New York, Routledge, 2018.

23 Kochenov, 2019, p. 425.

24 Kochenov, 2019, p. 425.

25 Kochenov, 2019, p. 426.

26 Kochenov, 2019, p. 427.

the use of discussing those matters with people who have “zero knowledge of the issues at stake”?<sup>27</sup> Apart from that, Kochenov also points out that solving this problem through dialogue and cooperation is impossible because we have to do with calculated choices by the countries concerned. Hungary and Poland simply have different convictions than some of the countries in Western Europe. And certainly different from the EC. Kochenov astutely observes “there can be no ‘prevention’ without clarity as to what you are trying to prevent and the Commission somehow plays as if this was not the case.”<sup>28</sup> And he comes to the conclusion that the Commission absolutely failed to clarify what is the essence of the EU’s Rule of Law problem.<sup>29</sup>

#### 4 THE RULE OF LAW IN THE TEU

Is Kochenov right in his extremely critical judgment on the EC’s plans to ‘strengthen the rule of law’ within the Union? In my estimate he is and the EC is not likely to be successful with the ‘Communication-procedure’ it has chosen. Part of the problem is that the EC has no clear conception of the rule of law. It overlooks the tensions between democracy and the rule of law. And the EC also fails to understand the specifics of the recent constitutional history of Central Eastern countries like Poland and Hungary. For Western countries, the point of reference for the rebirth of democracy is 1945 when Nazism was conquered. For Central European countries it was 1989 when communism was conquered. This is a different constitutional history, as I hope to make clear in the remaining sections of this chapter, with far-reaching consequences for a discussion on the strengthening the rule of law in the EU, or rather finding the *right balance* between democracy and the rule of law.

As we have seen, the rule of law is enshrined in Article 2 of the Treaty on the EU as one of the founding values of the Union. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. These principles have been recognized by the European Court of Justice and the European Court of Human Rights.

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27 Kochenov, 2019, p. 428.

28 Kochenov, 2019, p. 432.

29 Kochenov, 2019, p. 434.



The interpretation that the EC gives to Article 2 TEU can be found in two important documents. First in *Communication From the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps* (Brussels, 3.4.2019 COM(2019) 163 final)<sup>30</sup> and, second, in: *Communication From the Commission to the European Parliament, the European Council, The Council, The European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union, A blueprint for action* (Brussels, 17.7.2019 COM(2019) 343 final).<sup>31</sup>

But although the second communication is introduced as a ‘blueprint for action’ it is difficult to see what kind of action can be based on the somewhat fuzzy presentation of values and ideas in the Communications. The ultimate cause for the fuzzy presentation is probably Article 2 TEU itself. As I made clear earlier, in this Article there are four layers or four categories of values, that is:

1. Human dignity,
2. Freedom and equality,
3. Democracy, the rule of law and human rights,
4. Pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

Now the EC or EU do not bring any order in these four layers. But the problem is the third layer, that is, problems with the rule of law. This is what the EC is concerned about. Hungary and Poland, however, can retort that their political systems are based on democratic decisions. Their leaders have a democratic mandate. Especially in Hungary, this mandate is quite impressive. So the criticism of the EC has to be that Hungary, despite its impressive democratic mandate, nonetheless violates the rule of law. Under those circumstances, the EC should take a position that the balance between democracy and the rule of law is not according to European standards. The EC should – what they have failed to so, so far – present a theory about the most advisable relationship (a ‘balance’ or ‘equilibrium’) between democracy and the rule of law. A report by the Dutch State Commission on the rule of law and democracy has the title *Democracy and the Rule of Law in Equilibrium* (2018).<sup>32</sup> This is a felicitous way of phrasing the problem.

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30 Available at [ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en).

31 Available at [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0343&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0343&from=EN).

32 J. Remkes, *Democracy and the Rule of Law in Equilibrium: Final Report of the State Commission*, No publisher, The Hague, 2018.



Democracy (roughly majority vote) has to be in equilibrium with the rule of law (roughly protecting the rights of individual citizens).<sup>33</sup>

Before we can take a stance on what this balance should be, we should first shoot a glance about what ideas the Hungarian leading political party has about liberal democracy. Needless to say, they want to stress the importance of democracy over ‘liberalism’ or ‘constitutionalism’. They think the democratic aspect of *Der demokratische Rechtsstaat* should get a more heavy emphasis than is the case in other countries. Let us see how the Hungarian leader Mr. Viktor Orbán counters the arguments by the EC.

## 5 VIKTOR ORBÁN AS A FIGUREHEAD OF THE POPULIST REVOLT

In most articles on Poland and Hungary and documents from the EU, it is hard to get a clear picture of the constitutional views of the Hungarian politician Viktor Orbán and his Polish equivalents. It is generally supposed that their ideas are nationalist, populist, dictatorial and therefore not to be taken seriously, except as a warning to what depths democratic politics can sink. The most usual way to evaluate this matter is by claiming that in Hungary democracy has been transformed in some sort of ‘populism’, populism as a kind of bastard democracy.<sup>34</sup> A regime where the will of the people is the ultimate foundation for legitimacy, but a will of the people manipulated by extremely dexterous, ruthless and evil leaders who earned their support from the people by manipulation or the marginalization of vulnerable minorities.

This may well be the case, but nonetheless it may be interesting to see what animates their political worldview. It could be helpful to uphold a more inquisitive attitude towards the Hungarian and Polish views if only to learn more about the apparent success their leaders have in the polls. This seems all the more useful because friend and foe agree that the Hungarian populism of Mr. Orbán’s Fidesz party is quite successful. And if Hungary and Poland are representative for what other countries may experience (something the EC seems to fear), it might be interesting to see what their constitutional ideas are. Is what has happened in Hungary and Poland perhaps a foreboding of what might happen in other countries? And, if so, why?

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33 And not the fashionable ‘minorities’. Human rights protect the human individual, not only against the state, but also against the group. As John Stuart Mill made clear in *On Liberty* (1859): the group, society, the group can be a threat to the individual as the state can. See: J.S. Mill *On Liberty*, 1859, in: J.S. Mill, *On Liberty and other writings*, S. Collini (ed.), Cambridge, Cambridge University Press, 2004 (1989), pp. 5-115.

34 See on populism: D. Reynié, *Les nouveaux populismes*, Édition revue et augmentée, Librairie Arthème Fayard/Pluriel, Paris, 2013; C. Mouffe, *Pour un populisme de gauche*, Paris, Albin Michel, 2018; V. Coussedièrre, *Éloge du populisme*, Paris, Elya Editions, 2012; S. Tormey, *Populism: A Beginner’s Guide*, London, Oneworld Publications, 2019; R. Eatwell & M. Goodwin, *National Populism: The Revolt against Liberal Democracy*, London, Pelican, 2018.

6 VIKTOR ORBÁN'S SPEECH IN 2014

In 2014 Orbán could boast he had won the elections. Not once, but twice. His party did not only win the national elections, but also the EP elections.<sup>35</sup> As a result of this the governing civic, Christian and national power, Fidesz and the Christian Democratic People's Party, gained a two-thirds majority. In a long speech in 2014, Mr. Orbán presents his vision on the most recent history of Hungary. He reminds his audience that in the 20th century there have been three major world-regime changes. They occurred at the end of the First World War, at the end of the Second World War and in 1990. In the 1990's

we succeeded in breaking and displacing the communists, it was clear after the first parliamentary elections that a new world had arrived for us: the wall in Berlin collapsed, elections were held and this is another future.<sup>36</sup>

Orbán refers to the Christian heritage as essential for Hungarian identity. He castigates the 'English prime minister' (*i.e.* Cameron)

who awkwardly avoids his party being identified as Christian Democratic, stands up before the public, stating that Christianity is a core principle of British values, and despite multiculturalism, Great Britain is a Christian country at heart, and this is a fact to be proud of.<sup>37</sup>

Another element that comes forward in Orbán's speech is the idea of the nation.<sup>38</sup> He wants to invent a state that is most capable of making a nation successful. The state is nothing else but a method of organizing a community, a community that does not necessarily share Western values. What he calls for is "understanding systems that are not Western, not liberal, not liberal democracies, maybe not even democracies, and yet making nations successful".<sup>39</sup> "Today, the stars of international analyses are Singapore, China, India, Turkey, and Russia", Orbán claims. He announces that he is doing his best to find ways of parting with Western European dogmas. Only thus, he adds, Hungary is capable of being competitive in the world-race. Commenting on the relationship between

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35 V. Orbán, 'Viktor Orbán's speech at the XXV. Bálványos Free Summer University and Youth Camp', 26 July 2014; Băile Tușnad (Tusnádfürdő), *The Budapest Beacon*, 29 July 2014 – Csaba Tóth.

36 Orbán, Speech 26 July 2014.

37 Orbán, Speech 26 July 2014. See on this: P. Cliteur & A. Ellian. *A New Introduction to Jurisprudence: Legality, Legitimacy, and the Foundations of the Law*, London/New York, Routledge, 2019, p. 75; In April 2013, British Prime Minister David Cameron called Great Britain a 'Christian country'. He even said that Great Britain ought to become 'evangelical' again.

38 Orbán, Speech 26 July 2014.

39 Orbán, Speech 26 July 2014.

liberalism and democracy he says something that he himself introduces as “to be a sacrilege in the liberal world order”:

We needed to state that a democracy is not necessarily liberal. Just because something is not liberal, it still can be a democracy. Moreover, it could be and needed to be expressed, that probably societies founded upon the principle of the liberal way to organize a state will not be able to sustain their world-competitiveness in the following years, and more likely they will suffer a setback, unless they will be able to substantially reform themselves.<sup>40</sup>

We have to “abandon liberal methods and principles of organizing a society”, Orbán adds, and also “the liberal way to look at the world”. In the past 20 years, the established Hungarian liberal democracy could not achieve a number of objectives. But after these ominous words, he adds that his proposals “still respect values of Christianity, freedom and human rights”.<sup>41</sup> Especially this reference to human rights is interesting, and also puzzling. This is all the more so the case because a little further he states boldly “the new state we are building is an illiberal state, a non-liberal state”.

According to the common semantic conventions a liberal democracy is supposed to be a democracy that respects human rights. So how can Orbán claim to respect human rights and still reject liberal democracy?

A third element in Orbán’s vision is the struggle he announces against foreign influence on national political policy. “We have to deal with paid political activists here”, Orbán says.<sup>42</sup> These political activists are paid by foreigners having definite political circles of interest. The nation state has to arm itself against these influences, and therefore it is very apt that a committee was being formed in the Hungarian parliament that deals with constant monitoring, recording and publishing of foreign attempts to gain influence, he says. “We have to know what forces are behind these political activists.”

## 7 AN ILLIBERAL NATION WITHIN THE EU: ORBÁN’S FIVE TENETS OF CHRISTIAN DEMOCRACY

About the EU Orbán has also some disconcerting views. He does not think it is impossible to build an illiberal nation within the EU. “Our EU membership does not

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40 Orbán, Speech 26 July 2014.

41 Orbán, Speech 26 July 2014.

42 Orbán, Speech 26 July 2014.

rule out this option”, he says.<sup>43</sup> And this is the sort of claims which aggravate the temper against his government in the EC, of course.

In a speech in 2018 Orbán elaborates on his views.<sup>44</sup> Here he says that “Hungarian nation-building is succeeding”.<sup>45</sup> For younger listeners among his audience he looks back on the birth of Hungarian democracy in 1990 and his parties’ 16 years in opposition and 12 years in government.<sup>46</sup> During this time his party had built a new “Hungarian model” in economics, but also a new constitutional order based in politics. A constitutional order based on “Christian foundations”.<sup>47</sup>

In his 2018 speech, Orbán also makes a reference to Islam. He says that Hungary will stand steadfast “when the whole of Europe has already submitted to Islam”.<sup>48</sup> The Hungarian prime minister makes only a passing reference to Islam, but a significant one. It clearly shows that Orbán sees some great problems for Europe in the near future if Islam would gain the upper hand in Europe. He again claims the importance of Central Europe to be different from Western Europe. Central European countries have five central tenets.

The first is that every Central European country has the right to defend its *Christian culture*. And defending Christian culture also means that one has the right to reject the ideology of multiculturalism.

The second tenet is that every country has the right to defend the traditional *family model*. This entitles the assertion that every child has the right to a mother and a father.

The third Central European tenet is that every Central European country has the right to defend the *nationally strategic economic sectors and markets* which are of crucial importance to it.

The fourth tenet is that every country has the right to defend its *borders*. And this right is interpreted as ‘the right to reject immigration’.

The fifth tenet is that every European country has the right to insist on the principle of “*one nation, one vote on the most important issues* and that this right must not be denied in the European Union”.<sup>49</sup> In other words, Orbán further explains, “we Central Europeans claim that there is life beyond globalism, which is not the only path. Central Europe’s path is the path of an alliance of free nations.”<sup>50</sup>

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43 Orbán, Speech 26 July 2014.

44 Orbán, Viktor, ‘Prime Minister Viktor Orbán’s speech at the 29th Bálványos Summer Open University and Student Camp’, 29 July 2018. Available at website of the Hungarian Government: [kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-29th-balvanyos-summer-open-university-and-student](http://kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-29th-balvanyos-summer-open-university-and-student).

45 Orbán, Speech 29 July 2018.

46 Orbán, Speech 29 July 2018.

47 Orbán, Speech 29 July 2018.

48 Orbán, Speech 29 July 2018.

49 Orbán Speech 29 July 2018.

50 Orbán, Speech 29 July 2018.

As if the EC is not sufficiently teased, Orbán makes some positive references to the American president Trump, but also to Putin – two figures hated “by representatives of the European liberal elite”.<sup>51</sup>

## 8 ORBÁN ON MIGRATION FROM ISLAMIC COUNTRIES

In his 2018 speech Orbán also picks up the matter of Islam and Muslim immigration to Europe, he already hinted at in his 2014 speech. He claims that the whole of Europe depends on whether Turkey, Israel and Egypt are stable enough to curb and halt the Muslim influx coming from the Middle East. If any of these three countries loses its stability, there will be serious security consequences for the whole of Europe, Orbán tells his audience. Also, the state of Israel is hugely important in this.

We can say the same of Israel: without Israel, a geographical area of radical Islam would develop, which Europe could only see as a threat. So it is in our interest for these countries to remain stable and to have stable political regimes and leaders.<sup>52</sup>

Orbán’s positive remarks about Turkey, Egypt and Israel might easily tempt us to overlook his critical warnings against immigration from Islamic countries. Orbán clearly sees this as a threat and a challenge. Here the EU is not without blame. European leaders have been inept in defending Europe against immigration. “The European elite has failed”, Orbán says. And the “European Commission is the symbol of that failure.”<sup>53</sup> What has gone wrong with the EC? Today’s European Commission is partisan because it sides with the liberals. “It is biased because it is working against Central Europe.”<sup>54</sup> And the EC is not a friend of freedom, because, instead of securing freedom, it is working towards building a European socialism. “We should be happy that its days are numbered.”<sup>55</sup>

Instead of building a Christian Europe, Europe under the leadership of the present EC is restyled after the ideas of the ‘Open Society’. With ‘open society’ Orbán does not refer to the ideas introduced by the philosopher Karl Popper in his book *The Open Society and its Enemies* (1945),<sup>56</sup> but to the Open Society Foundations by the Hungarian businessmen George Soros. According to its website, the aim of the Open Society Foundations is:

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51 Orbán, Speech 29 July 2018.

52 Orbán, Speech 29 July 2018.

53 Orbán, Speech 29 July 2018.

54 Orbán, Speech 29 July 2018.

55 Orbán, Speech 29 July 2018.

56 K.R. Popper, *The Open Society and its Enemies*, 2 Vols, London/Henley, Routledge & Kegan Paul, 1977 (1945).

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The Open Society Foundations are active in more than 120 countries around the world. Our national and regional foundations and thematic programs give thousands of grants every year toward building inclusive and vibrant democracies.<sup>57</sup>

The website again:

The George Soros is the founder and chair of the Open Society Foundations. He has given away more than \$32 billion of his personal fortune to fund the Open Society Foundations' work around the world.<sup>58</sup>

For those who agree with Soros's ideas, he is a philanthropist, but for Orbán he is an evil genius using enormous amounts of money to infiltrate countries with a globalist, anti-Christian, anti-conservative and vicious liberal message that saps the foundations of traditional Hungarian society. This Open Society means having a society without borders. Orbán even uses the contested notion of replacement when he says "European people can be readily replaced with immigrants."<sup>59</sup> The family has been transformed into an optional, fluid form of cohabitation. And national identity or national pride are seen as negative and obsolete notions. The worst is perhaps that the state no longer guarantees security in Europe. "The situation in the West is that there is liberalism, but there is no democracy."<sup>60</sup>

Against the background of the values of the EU we have analysed, this is an important remark. 'Liberal democracy', the combination of 'liberalism' or 'constitutionalism' or the rule of law on the one hand and democracy on the other, is not an ideal to be realized for Orbán, but an oxymoron. Liberalism, in the sense it has developed in the Western world, cannibalizes on the democratic element of liberal democracy. This is not his choice of words, but mine. But I think it reflects what Orbán tries to say.

Orbán also refers to Western political leaders working together with technology giants filtering news items that are uncomfortable for the liberal elite. Negative news reports on migrants, immigrants and related topics are simply distorted to adapt them to the news liberals want to hear. The liberals once pretended to be in favour of freedom of speech and freedom of opinion. This is no longer the case. The liberal concept of freedom of opinion has gone. Liberals see the diversity of opinion as important up until the point that they realize that there are opinions which are different from theirs. Political correctness and self-censorship are ubiquitous.<sup>61</sup> As a goal for the future he mentions

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57 Open Society Foundations. Available at [opensocietyfoundations.org](https://opensocietyfoundations.org).

58 Open Society Foundations. Available at [opensocietyfoundations.org](https://opensocietyfoundations.org).

59 Orbán, Speech 29 July 2018.

60 Orbán, Speech 29 July 2018.

61 Orbán, Speech 29 July 2018.

blocking the transformation of Europe into a post-Christian and post-national era. As an alternative to liberal democracy we have to inaugurate Christian democracy.

## 9 ORBÁN'S CHRISTIAN DEMOCRACY

Orbán realizes that this notion of Christian democracy may sound strange. But Christian democracy is not about defending religious articles of faith. So he does not defend Christian religious articles of faith as a state policy. He does not advocate the reintroduction of Christian symbols like the crucifix in government buildings or public schools.<sup>62</sup> States or governments have no competence on questions of damnation or salvation. What does Christian democratic politics mean? It means that, according to Orbán:

The ways of life springing from Christian culture must be protected. Our duty is not to defend the articles of faith, but the forms of being that have grown from them. These include human dignity, the family and the nation – because Christianity does not seek to attain universality through the abolition of nations but through the preservation of nations. Other forms that must be protected and strengthened include our faith communities. This – and not the protection of religious articles of faith – is the duty of Christian democracy.<sup>63</sup>

Orbán again contrasts his concept of Christian democracy with liberal democracy. What makes liberal democracy 'liberal'? Liberal democracy is in favour of multiculturalism, Orbán claims. And Christian democracy gives priority to Christian culture. Christian culture is from the nature of the concept an 'illiberal concept'. Liberal democracy is pro-immigration. But Christian democracy is anti-immigration. Liberal democracy is also to be mistrusted because it sides with adaptable family models. Christian democracy, though, rests on the foundations of the Christian family model. This is, again, an illiberal concept.<sup>64</sup>

Castigating liberalism seems one of the core themes of Orbán's programme. "There is no such thing as a liberal. A liberal is nothing more than a communist with a diploma". So he says basically that liberals are all communists, as one observer summarized his views.<sup>65</sup>

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62 See on this: P. Cliteur, 'The Crucifix and the Ideal of a Religiously Neutral State', *Journal of Church and State*, 61(2), 2018, pp. 181-191.

63 Orbán, Speech 29 July 2018.

64 Orbán, Speech 29 July 2018.

65 See the comments quoted in: A. Jamieson, 'Orban lashes out at slow EU growth, "sinister menaces" and George Soros', *Euronews*, 17 February 2020.



At the National Conservatism conference in Rome, organized by the Edmund Burke Foundation in February 2020, the Hungarian prime minister called economic success the prerequisite to conservative politics.<sup>66</sup> Criticism of his authoritarian tendencies he counters with referring to the one-sided orientation of the liberal press. In Hungary, he said, the world of the media is not like it is in Western Europe. In Western Europe, 90% of the media belongs to progressive liberals and only 10% to conservatives. “There is greater balance in Hungary,” he declared. He even claimed that he is one of the few European conservative politicians who can say what he thinks.<sup>67</sup>

Now there are the accusations of ‘populism’. But Orbán contradicts these by presenting a new vision on the nature of populism. When he was young, Orbán said, populism meant that a politician promises something that he is unable to realize. “But if a politician promises something and does indeed realise it, that isn’t populism, it’s democracy”, he stated.<sup>68</sup> Again he refers to the economic successes of his policies. In 2010 his government undertook to create one million new jobs over a period of ten years, and now, after nine years, there are at 860 thousand new workplaces.<sup>69</sup>

Two dates stand out as important for the successes of his Christian democracy and the failure of West European liberalism. First 2008. In that year the liberals were unable to handle the economic crisis in his country. Second 2015. In that year liberals failed to protect their citizens and their national borders. “In this sense, liberal democracy is at an end”, the prime minister said, emphasizing that we need something new, that is, Christian democracy instead of liberalism.<sup>70</sup>

During his speech in Rome in February 2020, Orbán made also some remarks on Muslim immigration, a theme he embarked upon in his earlier speeches. With relation to the migration crisis, Orbán indicated that there is not a single Muslim migrant in Hungary. This is the great difference with the countries of Western Europe where the proportion of the Muslim community is increasing, while the Christian community is decreasing. “According to the liberals, this is fine, because they don’t like Christian society”, he added. It is, in fact, the liberal mindset that forces Muslim immigration to Europe.<sup>71</sup> This seems to be one of the most important moral questions Orbán presents the E U with: is it morally allowed to restrict immigration from Muslim countries to Europe? Or would European legislation, international treaties or fundamental rights in European constitutions stand in the way of this exclusionary immigration policies? And if the answer to the previous question is ‘yes’, should we change these constitutions, human

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66 V. Orbán, ‘The Prerequisite to Conservative Politics Is Economic Success’, in: Website of the Hungarian Government, 4 February 2020. Available at [kormany.hu/en/the-prime-minister/news/the-prerequisite-to-conservative-politics-is-economic-success](http://kormany.hu/en/the-prime-minister/news/the-prerequisite-to-conservative-politics-is-economic-success).

67 Orbán, ‘The Prerequisite to Conservative Politics Is Economic Success’.

68 Orbán, ‘The Prerequisite to Conservative Politics Is Economic Success’.

69 Orbán, ‘The Prerequisite to Conservative Politics Is Economic Success’.

70 Orbán, ‘The Prerequisite to Conservative Politics Is Economic Success’.

71 Orbán, ‘The Prerequisite to Conservative Politics Is Economic Success’.

rights treaties, and other legal guarantees for equal treatment of all the citizens in the world?

For liberals, this is, of course, anathema. They think all citizens of the world have a right to equal treatment. The question is whether this is true. All citizens *within the jurisdiction of the nation state* have a right to equal treatment, but do all citizens of the world have a right to equal treatment? Migration expert Myron Weiner writes:

Citizenship is determined by country of birth or by the citizenship of our parents, not by choice. Consequently, one's life chances depend upon being born in a prosperous country or to parents who are citizens of a prosperous country, where there are opportunities for advancement and there is no persecution.<sup>72</sup>

Weiner continues with:

If the number of migrants is large enough, the local population may find itself outnumbered by people who speak another language, belong to another culture, and perhaps seek to change the political system.<sup>73</sup>

This reference to an ambition of some migrants to change the political system has long been ignored. But nowadays Europe is confronted with Salafist movements that openly confess that they want to change democracy into an Islamic theocracy.<sup>74</sup> How can democracy defend itself against these ambitions? Should we develop a more militant concept of democracy, and exclude those who openly confess they want to abolish democracy by using the democratic system to gain power?<sup>75</sup> Curious enough, the European Commission is very much concerned with the rule of law in Hungary and

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72 M. Weiner, 'National Sovereignty and the Control of Immigration', *The International Migration Review*, 30 (1), Spring 1996, pp. 171-197. See also: M. Weiner, *The Global Migration Crisis: Challenge to States and to Human Rights*, HarperCollins Series in Comparative Politics, London, HarperCollins, 1995, p. 172.

73 Weiner, 1995, p. 173.

74 D. Verhofstadt, 'Salafisme versus democratie', in: A. Ellian, G. Molier en B. Rijpkema, red., *De strijd om de democratie*, Amsterdam, Boom, 2018, pp. 333-357; D. Verhofstadt, *Salafisme versus democratie*, Antwerpen/Utrecht, Houtekiet, 2016; R. Lohker, *Die Salafisten: Der Aufstand der Frommen, Saudi-Arabien und der Islam*, München, C.H. Beck, 2017; AIVD and NCTV, *Salafism in the Netherlands: Diversity and Dynamics*, No publisher, The Hague, 2015.

75 See on militant democracy: C.M. Zoethout, 'On Blasphemy, an Idealistic Constitutional Provision and "Militant Democracy": Constitutional Topics in the Netherlands', *European Public Law*, 22(2), 2016, pp. 461-472; A. Guiora & K.J. Ingle, 'Militant Democracy', in: P. Cliteur & A. Guiora (eds.), *Populist and Islamist Challenges for International Law*, Chicago, American Bar Association, 2019, pp. 97-161; B. Rijpkema, *Militant Democracy*, London/New York, Routledge, 2018; A. Ellian & B. Rijpkema (eds.), *Militant Democracy- Law, Political Science and Philosophy*, Berlin/Heidelberg/New York, Springer Verlag, 2018.

Poland, but why is the EC so silent about the Salafist ambition to sap the foundations of European democracies?

During the conference in Rome Orbán also stated that there was not a single Muslim migrant in Hungary. And this differs from the countries of Western Europe where the proportion of the Muslim community is increasing, while the Christian community is decreasing.

For liberals, these kind of remarks are convincing proofs that Mr. Orbán and other populists follow a xenophobic if not racist agenda; but is that the most viable way to understand their anti-immigrationist attitudes? Perhaps it is more appropriate to understand these as protectionist, protecting democracy against the possible threat of radicals who want to abolish this system. The problem with liberalism seems to be its *fearlessness*. Liberals cannot understand that democracy is a brittle system.

#### 10 ORBÁN'S CHRISTIANITY: IS IT ATHEIST CHRISTIANITY?

Orbán's successes at the polls cannot be contested. But the question is whether the cultural analysis he presents to explain this success is equally convincing. He claims that liberalism is the root evil of the cultural malaise in Europe, and Christian democracy is the solution. Is that true? Is liberalism really that bad and Christian democracy really that good?

First, there is the question what Orbán understands by 'Christian democracy'. He seems to develop that concept as the complete antithesis to the liberal mindset. He seems to forget, however, that the Christian concern for the other, neighbourly love, the Good Samaritan, also plays a role in the opening of borders by European politicians he so much despises. Christianity *in the sense interpreted by Orbán* may be a moderating force, but the concept of self-negating boundless love is also open to radical interpretations. These interpretations are in fact also prevalent in European politics. In other words, there is a radical left-wing interpretation of the gospel that plays an important role in not only the recent history of Christianity but that goes back to the founding figure, Christ himself.

Second, there is the question – intimately connected with the first one – what Orbán understands by 'Christianity'. What kind of 'Christianity'? Is it Roman Catholicism? Protestantism? Some ecumenical form of what C.S. Lewis called 'mere Christianity'?<sup>76</sup> There is a famous anecdote about the English Prime Minister Disraeli who, when asked

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76 C.S. Lewis, *Mere Christianity*, A revised and amplified edition, with a new introduction, San Francisco, Harper, 2001 (1952).

what religion is, had answered: “My religion is that of all wise men.” “But what is that?” His interlocutor continued, and Disraeli answered: “Wise men never say.”<sup>77</sup>

This is a wise standpoint. The reason why this is wise is because once you would explain what sort of Christianity you favour as the foundation of the political order, people would disagree about this. Once you start enumerating the religious ideas which are at the core of Christianity, the group of believers would disintegrate into quarrelling groups and individuals. So better *suggest* that you are in substantial agreement and ‘never say’ what the core of the worldview is you surmise to share with others.

One way of ‘Christianity’ as the moral foundation of the social and political order is defending that His will, as revealed in the Bible, would give us direction for the political choices we have to make. The God of the Bible is a personal god with certain moral convictions, expressing promises to his people, but also with certain commands. Would Orbán advocate to study these commands and follow them? If so, that would be a very hazardous course of action to take. There are, of course, valuable lessons to be learned from the Holy Scripture,<sup>78</sup> but we find also commands that are difficult, if not impossible, to implement in a modern context. The question is: does Orbán want to take a *theistic* concept of God as the guiding star of contemporary politics? Or is his conception more *atheist*, that is, without the guiding star of the personal god, as point of reference? In the latter sense, his ‘Christianity’ might be called ‘atheistic Christianity’. This atheistic Christianity might be described as the acceptance of Christianity as a cultural factor, as a cultural inheritance of certain values, but without the commanding figure of a god, that is, God, as the source and legitimating authority of our moral choices. My impression is that we have to understand Orbán’s Christianity in the second sense. He sees Christianity as a cultural tradition, as a source of moral values, not as the worldview that makes contemporary politics dependent on the view of the one specific god who talks to us in the Bible.

## 11 WHO WILL REFORM WHO OR WHAT?

The question is, of course, whether the EU will reform Polish and Hungarian politics or that the EU *will be reformed* by its dissident members. Who will reform who exactly? The outcome of this discussion is far from clear. One of the elements in this discussion is the systematic undervaluation of the Central Eastern tradition of democracy. We should never forget that since the fall of the Berlin Wall Central European democracies have

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<sup>77</sup> B. Nanamoli, *A Thinker’s Notebook: Posthumous Papers of a Buddhist Monk*, Kandy, Sri Lanka, Buddhist Publication Society, 1972, p. 211.

<sup>78</sup> See on this: T. Beal, *Biblical Literacy: The Essential Bible Stories Everyone Needs to Know*, New York, HarperOne, 1989; R.E. Friedman & S. Shawna, *The Bible Now: Homosexuality, Abortion, Women, Death Penalty, Earth*, Oxford, Oxford University Press, 2011; M. Walzer, *In God’s Shadow: Politics and the Hebrew Bible*, New Haven/London, Yale University Press, 2012.

developed their own traditions. For Western democracies the point of reference is 1945 when the Nazis were conquered. For Central European democracies the point of reference is 1989 when communism or Stalinism, was conquered. Paul Blokker from the department of sociology, University of Trento (Italy), presents us an enlightening overview of the Central Eastern perspective on democracy and the rule of law.<sup>79</sup>

I want to conclude this chapter on the rule of law-discussion within the EU with some remarks about the particular Central European conception of democracy. In the 'Communication on the Rule of Law' as issued by the European Commission, there is hardly any 'communication'. There is the issuing of a set of commands. Naturally, this is not something the targeted countries, Poland and Hungary, know to appreciate. They voice their dismay in their own contributions to this 'Communication'. Hungary's *State Secretariat for EU Relations* starts its answer with:

In its communication of 3 April 2019 on Further Strengthening the Rule of Law within the Union – State of play and possible next steps, the European Commission invites Union institutions and Member States, as well as other stakeholders, to contribute ideas to how the rule of law toolbox could develop in the future. The fact that the Commission will return to this issue as early as in June 2019 with its own conclusions and proposals and the lack of venues for a structured dialogue with stakeholders seem to make the consultation a rather symbolic exercise. However Hungary, as a Member State firmly committed to the respect for the rule of law, considers it important to contribute to the consultation.<sup>80</sup>

Hungary responds to the EC by saying that the nature of the rule of law concept is less clear than the EC seems to think. It contests that the rule of law is under pressure in Hungary. It also questions the sources upon which the EC bases its ideas on the rule of law ('external experts and non-governmental institutions') and Hungary has some critical remarks reminiscent to the views of Kochenov which I quoted before. Hungary ends its contribution to the Communication with:

In its current form the communication points in a direction where mutual trust is replaced by institutionalised mistrust, constitutional dialogue is replaced by expectations of unilateral alignment and cohesion is further weakened by new

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79 P. Blokker, 'Dilemmas of Democratisation from Legal Revolutions to Democratic Constitutionalism', *Nordic Journal of International Law*, 81, 2012, pp. 437-470.

80 Prime Minister's Office Hungary, State Secretariat for EU Relations, *Position paper of the State Secretariat for EU Relations of the Prime Minister's Office, Hungary on the Consultation about the Communication of the European Commission on 'Further strengthening the Rule of Law within the Union'*, Budapest, 28 May 2019. Available at [ec.europa.eu/info/sites/info/files/stakeholder\\_contribution\\_on\\_rule\\_of\\_law\\_-\\_hungary.pdf](http://ec.europa.eu/info/sites/info/files/stakeholder_contribution_on_rule_of_law_-_hungary.pdf).

lines of division between Member States, instead of focusing on strengthening the unity of the European Union.

So the communication between Hungary and the EC seems to be in a deadlock.

I want to end this chapter with some remarks about the history of Central European countries because I think this can be illuminating for an evaluation of the conflict we are witnessing. I remind the reader that we are talking about the right balance between the rule of law and democracy, so about an equilibrium between the two constitutional values the EU vowed to defend. And a balance between the rule of law and democracy also means a balance between the judiciary power and the legislative power. The rule of law gives power to the judiciary. Democracy gives power to the executive and the legislative branch. Since the days of Montesquieu (1689-1755) a discussion is conducted about the right balance between the state powers.<sup>81</sup> This discussion is intimately connected with the discussion between the EC and Hungary.

Since the days of the end communism a ‘judiciary-dominated tendency’ came to the fore in Central European politics.<sup>82</sup> Claiming legal rights was an important element in the struggle against communism. As Blokker says:

An important part of the struggle against communism had been based on a legal language of rights and the invocation of the existence of such rights in a formal sense against the abuses of the political regime.<sup>83</sup>

Especially Charter 77 was very successful in this. In the original declaration of Charter 77, the adherence to the Helsinki Act of 1975 by the incumbent regime was welcomed. In Poland, we saw the same development with *Solidarnosc*. This very successful dissident movement stated that the legal system must guarantee basic civic freedoms and respect principles of equality of all citizens and institutions of public life before the law.<sup>84</sup> But this did not only lead to the fall of communism, it also led to a predominant position of judges afterwards. It was the judiciary that had to implement those rights. They were not written in the sky, not some sort of natural law that could be invoked against tyrannical regimes, it also led to a prominent position of judges after regime change. Is that a development with *only* positive consequences? Not everyone is convinced. This is a description of this phenomenon by constitutional scholar Ran Hirschl:

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81 Montesquieu, *Oeuvres complètes*, II, Texte présenté et annoté par Roger Caillois, Éditions Gallimard 1951 (*De l'Esprit des lois*, 1748, Chapitre VI, De la Constitution d'Angleterre), pp. 396-407.

82 Blokker, 2012, p. 438.

83 Blokker, 2012, p. 441.

84 Quoted in: Blokker, 2012, p. 442.

Over the past two decades the world has witnessed an astonishingly rapid transition to what may be called *juristocracy*. Around the globe, in numerous countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries. Most of these polities have a recently adopted constitution or constitutional revision that contains a bill of rights and establishes some form of active judicial review. National high courts and supranational tribunals meanwhile have become increasingly important, even crucial, policy-making bodies. To paraphrase Alexis de Tocqueville's observation regarding the United States, there is now hardly any moral, political or public policy controversy in the new constitutionalism world that does not sooner or later become a judicial one. This global trend toward the expansion of the judicial domain is arguably one of the most significant developments in late twentieth and early twenty-first century government.<sup>85</sup>

Characteristic for what Hirschl calls a 'juristocracy' and others a 'dicastocracy' is, according to Blokker:

1. A strong emphasis on order and stability,
2. The idea of constitutional law as higher law (and thus particularly entrenched against the influence from politics)
3. The idea of fundamental rights, and
4. The idea of a guardian of the constitution in the form of a constitutional court.<sup>86</sup>

In other words, the rule of law got the upper hand over democracy. Liberal democracy, or constitutional democracy, in the sense it was interpreted after the fall of the Berlin Wall meant more emphasis on liberalism, less emphasis on democracy. And that also meant more power for the judiciary and less for the executive and the legislative powers in the state. Blokker, following constitutional scholar, Mark Tushnet, warns us about problematic consequences of a system that relies too heavily on constitutionalism as an element of liberal democracy. It means a backlash for democracy in the sense of self-government. Tushnet used the term 'democratic debilitation' to indicate the process that occurs "when the public and their democratically elected representatives cease to formulate and discuss constitutional norms, instead of relying on the courts to address

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85 R. Hirschl, 'The Political Origins of the New Constitutionalism', *Indiana Journal of Global Legal Studies*, 11 (1), 2004, pp. 71-81, p. 71. See also the comments in: Blokker, 2012, p. 446.

86 Blokker, 2012, p. 446.



constitutional problems”.<sup>87</sup> In other words, ‘universal constitutionalism’ negatively affects the possibility of democratic politics, as Blokker summarizes the situation.<sup>88</sup>

Another constitutional scholar who warns against the dangers of too much emphasis on the constitutional element in constitutional democracy is Wojciech Sadurski. Sadurski does not speak of *dicastocracy* or *juristocracy* but of *courtocracy*. In the words of Blokker, a “too enthusiastic assessment of constitutional courts as the ultimate and only interpreters of constitutional norms and values” overlooks a potential negative and educational effect of constitutional review. It may help to generate the perception that the rights discourse is an obscure activity for lawyers. “In a freedom-based democracy the citizen is a constitutional interpreter”, the German scholar P. Häberle wrote in 1975, quoted by Blokker.<sup>89</sup>

The displacement of democratic decision making can be observed in a series of rulings by the Hungarian Constitutional Court regarding the so-called Bokros package. This was an austerity programme entailing severe cuts in social benefits. The Hungarian Constitutional Court obstructed the Bokros package (1995) with the argument that the principle of ‘legal security’ was violated. This judicial activism by the Hungarian Constitutional Court was much criticized. It was “not fulfilling its democratic role in representing the voters and following the Hungarian Constitution”.<sup>90</sup> According to some critics it was concerned with serving the interests of the political elite and party interests. Blokker summarizes the criticism of those objecting to the judicial activism of the Hungarian Constitutional Court with the argument:

Observers have argued that instead of serving the common good of the Hungarian public, the Constitutional Court actually engaged in a conservative, obstructionist move, prolonging socialist understandings of social rights anachronistic in post-communist times, responding to special interest groups, and thereby obstructing necessary reforms and potentially contributing to the structural deterioration of the viability of the state welfare system.<sup>91</sup>

This critical attitude towards the Hungarian Constitutional Court can also be ventilated towards other Constitutional Courts in Central European countries, that is, the Polish Constitutional Court. The Polish Constitutional Court is often accused of being too much influenced by the Catholic Church.<sup>92</sup> The Polish Constitutional Tribunal struck down a

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87 M. Tushnet, ‘Policy Distortion and Democratic Debilitation. Comparative Illumination of the Counter-majoritarian Difficulty’, *Michigan Law Review*, 94(2), 1995, pp. 245-301, p. 275.

88 Blokker, 2012, p. 450.

89 Blokker, 2012, p. 552.

90 Blokker, 2012, p. 454.

91 Blokker, 2012, p. 454.

92 Blokker, 2012, p. 456.

legislative act because this failed to respect the 'right to life' of the unborn. This 'right to life' was nowhere to be found in the actual constitutional text.

Is this a wholly new or unexpected? Of course, it is not. Constitutional scholars have always known that there must be some sort of balance between constitutionalism and democracy. Overemphasis on constitutionalism leads to a dicastocracy which is the antithesis of a democracy. Legal philosopher Jeremy Waldron sketches the problems with judicial review in a long overview of all the democratic legislation that failed to see the light of day because of over-enthusiastic judges and courts. Between 1889 and 1935, more than 170 statutes – state and federal – dealing with labour matters were struck down by the American courts.<sup>93</sup> Waldron describes this under the heading 'A disgraceful history'.<sup>94</sup>

That brings us back to the beginning of this chapter. In my reformulation of the values of Article 2 TEU we can discern four layers of values. First, the ultimate foundation of these values, that is, human dignity. Second, the two moral and political ideals directly related to human dignity, that is, freedom and equality. Third, the two constitutional instruments to realize freedom and equality, that is, democracy and the rule of law. Fourth, several contemporary ideals. As I said, the last layer is at its best arbitrary and at worst fog. Criticizing countries because of a lack of pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women, creates a confusing constitutional cacophony and obstructs any chances of an agreement. Better is to focus on the *two* constitutional values I have identified as the third layer: democracy and the rule of law. Dialogue on 'strengthening the rule of law within the EU' is impossible without taking democracy into account. And the focus has to be on the *equilibrium* of these two constitutional ideals. If this discussion would also be held against the background of the different constitutional histories of the countries concerned, this would enhance the possibilities of an agreement.

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93 J. Waldron, 'Judicial Review of Legislation', in: A. Marmor (ed.), *The Routledge Companion to the Philosophy of Law*, New York/London, Routledge, 2012, pp. 434-448, p. 434. See also: J. Waldron, 'The Core of the Case Against Judicial Review', *The Yale Law Journal*, 115(6), April 2006, pp. 1346-1406, also in: J. Waldron, *Political Political Theory: Essays on Institutions*, Cambridge, MA, Harvard University Press, 2016, pp. 195-246.

94 Waldron, 2012, p. 434.