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REVISITING *VAN GEND EN LOOS*

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Waiting for the Existential Revolution in Europe

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Prologue:

Revisiting *Van Gend En Loos*

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to ‘celebrate’ *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor H el ene Ruiz Fabri, Director of the UMR de droit compar e de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

WAITING FOR THE EXISTENTIAL REVOLUTION IN EUROPE

By Jan Komárek*

Abstract

This essay argues, contrary to the widespread beliefs that prevailed after 1989, that the experience of post-communist countries and their peoples, both before and after 1989, can bring something new to our understanding of Europe's present predicament: sometimes as inspiration, sometimes as a cautionary tale. The lessons offered by post-communist Europe concern some deeply held convictions about the very nature of the EU and its constitutional structure. Only if this experience is absorbed in Europe as its own will post-communist countries truly return to Europe – and Europe become truly united.

The cautionary tales of post-communist Europe concern the worrying consequences of the suppression of social conflicts 'in the name of Europe'. Such conflicts get often translated into identity politics, which in the context of European integration often turn against the Union. The second lesson concerns the ill fate of Havel's existential revolution. The attempts of some European constitutionalists to reform individualistic emphasis of the integration project are problematic for the same reason: they turn attention from politics, where real solutions need to be found. This relates to the third suggestion made here: that the experience of living in a collective dream of socialism can be used as an inspiration rather than as something that needs to be erased from the collective memory of Europe.

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Central Europe ‘could approach a rich Western Europe not as a poor dissident or a helpless, amnestied prisoner, but as someone who also brings something with him: namely spiritual and moral incentives, bold peace initiatives, untapped creative potential, the ethos of freshly gained freedom, and the inspiration for brave and swift solutions’.

Václav Havel, 21 January 1990¹

Introduction

Contrary to what Václav Havel hoped in 1990, a belief that there was nothing to learn from post-communist countries prevailed in the West.² The French historian François Furet put it bluntly: ‘With all the fuss and noise, not a single new idea has come out of Eastern Europe in 1989’.³ The ‘existential revolution’ called for by dissident Havel in his famous 1978 essay ‘The Power of the Powerless’ did not happen – either in the West, or in Havel’s homeland.⁴ Instead, the West took 1989 as ‘a restatement of the value of what [it] already [had], of old truths and tested models’,⁵ and the people in post-communist

¹ Speech to the Polish Sejm and Senate, published as ‘The Future of Central Europe’, *New York Review of Books*, 29 March 1990 (available online at <http://vaclavhavel.cz>, where all other texts by Havel quoted here can be found).

² I use the expression ‘the West’ metaphorically to denote the countries which were on the non-communist side of the Iron Curtain. Since the fall of the Curtain, the border between East and West has become contested. See Michał Buchowski, ‘The Specter of Orientalism in Europe: From Exotic Other to Stigmatized Brother’ (2006) 79 *Anthropological Quarterly* 463-482, 464-465.

³ Reported in Ralf Dahrendorf, *Reflections on the Revolution in Europe* (New Brunswick and London: Transaction Publishers 2005 [1990]), 27, who expressed the same view together with numerous other observers from the West: see Barbara J Falk, *The Dilemmas of Dissidence in East-Central Europe: Citizen Intellectuals and Philosopher Kings* (Budapest and New York, CEU Press 2003), 335-337 (mentioning Timothy Garton Ash, Jürgen Habermas or Stephen Holmes).

⁴ Václav Havel (transl. by Paul Wilson), in Jan Vladislav (ed), *Václav Havel or Living in Truth* (London: Faber and Faber 1986, 36-122. After 1989, the most articulate formulation of what this revolution should entail was given in Havel’s speech to a joint session of the U.S. Congress on 21 February 1990 in Washington. On Havel’s ‘existential revolution’ see Aviezer Tucker, *The Philosophy and Politics of Czech Dissidence from Patočka to Havel* (Pittsburgh: University of Pittsburgh Press 2000), 161-165; on Havel’s Washington speech see *ibid*, 174-183.

⁵ Timothy Garton Ash, *The Magic Lantern: The Revolution of ’89 Witnessed in Warsaw, Budapest, Berlin and Prague* (New York: Vintage Books 1999 [1990]), 156.

Europe swiftly accepted it. The only way to freedom and prosperity seemed to be by way of liberal democracy and market economy. 1989 marked the ‘end of history’.⁶

Today, Europe finds itself in deep crisis: economic, political, but most of all, spiritual. The pressure of ‘a new global race of nations’, as the British Prime Minister put it in his *EU Speech*,⁷ determines how Europeans (should) live today. China, not America, seems to be the relevant Other, against which Europe is going to define itself. As a result, its citizens are ‘sidelined and numbed by the repetitive talk of austerity and economic stability, financial leverage and institutional reforms’.⁸ Imaginative political language is rare; instead, economists (and economism) occupy public discourse. To add to these problems, some former post-communist countries seem to be ‘sliding back to authoritarianism’⁹ and the Union is uncertain about how to react. Thinking that these developments reflect ‘a deep-seated nationalism’ or ‘a feeling of resentment and victimization’¹⁰ is however only partly true. After all, the state of democratic politics in some ‘old’ EU Member States is equally worrying and the EU’s approach to its crisis is far from democratic.¹¹

This essay argues, contrary to the widespread beliefs that prevailed after 1989, that the experience of post-communist countries and their peoples, *both before and after* 1989, can bring something new to our understanding of Europe’s present predicament: sometimes as inspiration, sometimes as a cautionary tale. The lessons offered by post-communist Europe concern some deeply held convictions about the very nature of the EU and its constitutional structure. Only if this experience is absorbed in Europe *as its*

⁶ Francis Fukuyama, *The End of History and the Last Man* (New York: Basic Books 1992).

⁷ Speech given on 23 January 2013 at Bloomberg available at <http://www.number10.gov.uk/news/eu-speech-at-bloomberg/>.

⁸ See the manifesto ‘Ending the Honeymoon: Constructing Europe beyond the Market’, available at <http://regenerationeurope.eu>, composed by Moritz Hartmann and Floris de Witte. The manifesto gave rise to a special issue of (2013) *German Law Journal* No 5, edited by its authors.

⁹ See Jan Werner Müller, ‘Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order’ *Transatlantic Academy Paper Series* 2012-2013 No. 3, <http://www.transatlanticacademy.org/publications/safeguarding-democracy-inside-eu-brussels-and-future-liberal-order> and the discussion at Verfassungsblog.de, ‘Ungarn - was tun?’, <http://www.verfassungsblog.de/de/category/schwerpunkte/antworten-auf-ungarn/>.

¹⁰ Both quotations come from Jan Werner Müller, ‘The Hungarian Tragedy’ *Dissent*, Spring 2011, 5-10, 7.

¹¹ See Michael Wilkinson, ‘The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union’ (2013) 14 *German Law Journal* 527-560 and also Scharpf, n 13.

own will post-communist countries truly return to Europe – and Europe become truly united.¹²

The first three sections, which follow this introduction, deal with some consequences of the ideology of the ‘Return to Europe’ for constitutionalism and political culture in post-communist countries. In section 1 I explain how the ideology of the ‘Return to Europe’ quickly silenced voices seeking to find alternatives to market economy and even liberal democracy of the West. Section 2 may remind one of numerous ‘enlargement studies’, which saw the new Member States mainly as a threat (or at least a challenge) to the EU’s constitutional culture. Its main goal is different, however: it is to show the lack of serious engagement with problems and conflicts that post-communist countries’ accession to the EU would inevitably bring. Such conflicts did not disappear, however. Instead they started to emerge after the post-communist countries joined the EU. Section 3 argues that it is the repression of social conflicts and the impossibility of translating them into ordinary politics that explain the current turn to authoritarianism and nationalism in some post-communist countries. Here lies the first lesson to be drawn from post-communist Europe. There is no reason to believe that the rest of Europe is different, since it is haunted by the same problem: there seems to be ‘no alternative’ to the current policies addressing the crisis, while democracy is suspended in the interest of European integration and the survival of the Eurozone.¹³

This capacity of European integration to deprive democratic politics of alternatives relates to a deeper question concerning the nature of European integration and its constitution. Too many attempts to conceptualize European integration still avoid social dimension. European constitutional theory plays no little part in this. As section 4

¹² That it is not the case now is for example documented by the conspicuous absence of post-communist Europe from most ‘big narratives’ of European integration published since 2004. Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford: OUP 2006) is rather exceptional, but this, I would argue, is due to the author’s origins (in Poland). Wojciech Sadurski (Polish by origin) in his recent book *Constitutionalism and the Enlargement of Europe* (Oxford: OUP 2012) presents the Enlargement as a facilitator of processes that were taking place in ‘Old Europe’ anyway rather than a source of the EU’s deep transformation and rethinking.

¹³ See Fritz Scharpf, ‘Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability’ in Armin Schäfer and Wolfgang Streeck (eds), *Politics in the Age of Austerity* (Cambridge: Polity Press 2013), 108-142.

shows, at present there are two influential, but rather truncated visions of Europe: one presenting Europe as a safeguard of peace, democracy and human rights; another seeing the EU through the lenses of an economic policy manager that understands the Market as either an area of free trade or a new regulatory space. The social question that invokes solidarity and redistribution does not figure among such accounts. Section 5 puts this issue into the context of European constitutionalism, exemplified by the work of its key proponent, Joseph Weiler. I investigate whether the more recent attempts by Weiler to construct a deeper ethos of European integration can be somewhat helped by Václav Havel's call for 'existential revolution', discussed in section 6. The following section 7 rejects this option, which can be presented as the second important lesson of post-communist Europe and its transformation in the 1990s. The coda brings in perhaps the deepest – and non-transferable – experience of communism, which goes before 1989 and is most controversial. It suggests that the living in a 'collective dream [that] dared to imagine a social world in alliance with personal happiness, and promised to adults that its realization would be in harmony with the overcoming of scarcity of all'¹⁴ should not be forgotten as post-communist Europe's nightmare. It can still inform the EU's ambition to create 'an ever closer union among the peoples of Europe'.

1 In the Name of the 'Return to Europe'

After 1989, any alternative which tried to preserve something positive that may have been achieved when the 'really existing socialism' was being built was firmly rejected. As the former grey zone technocrat Václav Klaus quipped in 1990, shortly after he became the minister of finance in the first post-communist government of Czechoslovakia,¹⁵ the 'Third Way [trying to find a middle way between a socialist planned economy and a capitalist free market] is the fastest way to the Third World'.¹⁶ He soon took over the leadership of the transformation, together with other free market liberals in post-communist Europe supported by an army of Western advisers prescribing 'shock

¹⁴ Susan Buck-Morss, *Dreamworld and Catastrophe: The Passing of Mass Utopia in East and West* (Cambridge, Mass. and London: MIT Press 2000), ix. This is also the message of Buden's book, n 22.

¹⁵ On Klaus' background in the 1968-1989 era see Gil Eyal, *The Origins of Postcommunist Elites: From Prague Spring to the Breakup of Czechoslovakia* (Minneapolis and London: University of Minnesota Press 2003), 78-86.

¹⁶ 'Third Way, No Way?', Notes for the World Economic Forum, Davos, 26 January 2000, <http://www.klaus.cz/clanky/1186>, referring to Klaus' 1990 Davos speech.

therapy'.¹⁷ The dissidents' notions of civil society and antipolitics, transcending both politics and economy,¹⁸ were soon dumped by the new post-communist elites. Most dissidents left politics soon after 1989 and their place was assumed by 'grey zone' technocrats and the former members of *nomenklatura*, who quickly learned the new language of democracy, human rights, the rule of law and, of course, market economy.¹⁹ It was the language that post-communist Europe had to use if it wanted to 'return to Europe' from where the region was, in Milan Kundera's metaphor, 'kidnapped' to the East.²⁰ This goal was almost immediately translated into 'joining the EU' in 1989. An early programmatic document of the Czechoslovak opposition thus stated boldly: '[w]e are striving for our country to once again occupy a worthy place in Europe and in the world. ... We are counting on inclusion into European integration'.²¹

The fierce critic of the 'ideology called transitology',²² Croatian writer Boris Buden, shows that the Return to Europe was a matter of culture too. Since the liberal-democratic capitalist system represents the purest *cultural* embodiment of modernity, and the Soviet-style totalitarianism its total negation,²³ post-communist Europe found

¹⁷ A programmatic text can be found in Jeffrey D Sachs, 'What Is to Be Done', *The Economist*, 13 January 1990, 19-24. On the forceful rejection of the third way in Poland see Dorothee Bohle and Gisela Neunhöffer, 'Why is there no third way?: The role of neoliberal ideology, networks and think tanks in combating market socialism and shaping transformation in Poland' in Dieter Plehwe, Bernhard Walpen and Gisela Neunhöffer (eds), *Neoliberal Hegemony: A Global Critique* (London and New York: Routledge 2006), 89-104. East Germany must not be forgotten in this context, since 'East Germans remained the most reluctant converts to the civic mission of capitalism': see Charles S Maier, *Dissolution: The Crisis of Communism and the End of East Germany* (Princeton: Princeton University Press 1997), 192. The advocates of what could be called the 'third way' lost the 1990 elections, however, and East Germany ceased to exist – on the political map at least, if not in the minds of its former citizens.

¹⁸ See particularly Falk, n 3, chapter 8, Jeffrey C Isaac, 'The Meanings of 1989' (1996) 63 *Social Research* 291-344 and David Ost, *Solidarity and the Politics of Anti-politics: Opposition and Reform in Poland since 1968* (Philadelphia: Temple University Press 1990), chapter 2. See text to n 119.

¹⁹ See Gil Eyal, Iván Szelényi and Eleanor Townsley, *Making Capitalism without Capitalists: The New Ruling Elites in Eastern Europe* (London and New York: Verso 1998).

²⁰ Milan Kundera, 'Un occident kidnappé, ou la tragédie de l'Europe centrale' *Le Débat*, November 1983, 2-24. Kundera speaks of Central Europe's kidnap from the West, but 'the West' meant for most people of 1989 in Central Europe 'Europe' or 'the European Union'.

²¹ 'What We Want', Civic Forum 26 November 1989. Available at <http://chnm.gmu.edu/1989/files/download/1347/fullsize>.

²² Boris Buden, 'Children of Postcommunism' (2010) *Radical Philosophy* No. 159, 18-25. This article is chapter 2 from Buden's fascinating book *Zone des Übergangs: Vom Ende des Postkommunismus* (Frankfurt am Main: Suhrkamp 2009).

²³ See Luciano Pellicani, 'Modernity and Totalitarianism' (1998) *Telos* No. 112, 3-22.

itself helplessly left behind. All it could do was to ‘rectify’²⁴ the past forty years of communism and spend the years after 1989 in the ‘misery of catching-up’ with the West.²⁵

The more spiritual reasons for the reunification of post-communist Europe with the West were soon accompanied by more pragmatic ones. The economic protectionism of the EU helped to persuade the leaders of post-communist countries to seek full EU membership, despite the existing members’ reluctance to admit post-communist countries to their ranks.²⁶ After they had finally decided to open the club to these countries,²⁷ liberal democracy and market economy were the key criteria for membership.²⁸ As the next section argues, they became as ‘unquestionable goods’ as socialism was in the pre-1989 period.

2 Constitutional Submission

The ‘There Is No Alternative’ to the liberal democracy and market economy narrative²⁹ presented the people in post-communist Europe with something that was disturbingly familiar to them. When they lived in ‘really existing socialism’, they were left with no choice but to submit to the laws of historical necessity steering them to a better (socialist) future. Throughout the 1990s, they were again simple ‘marionettes in a historical process that takes place independently of their will and drags them with it to a

²⁴ See Jürgen Habermas, ‘What Does Socialism Mean Today? The Rectifying Revolution and the Need for New Thinking on the Left’ (1990) *New Left Review* 1/183, 3-21.

²⁵ ‘*Das Elend des Nachholens*’, as the title of chapter 3 of Buden’s book (n 22) reads.

²⁶ See Milada Anna Vachudova, *Europe Undivided: Democracy, Leverage, and Integration After Communism* (Oxford: OUP 2005), 82-98.

²⁷ It was Germany’s self-interest which helped to persuade other governments of the need to offer a realistic prospect of full membership to the post-communist countries. See Marcin Zaborowski, ‘More than Simply Expanding Markets: Germany and EU Enlargement’ in Helene Sjursen (ed), *Questioning EU Enlargement: Europe in Search of Identity* (London and New York: Routledge 2006), 104-120.

²⁸ The ‘Copenhagen criteria’, now codified in Article 2 TEU (through reference in Article 49 TEU). On the role of the criteria in the process of preparing and negotiating accession see Vachudova, n 26, 95-96 and 121-123.

²⁹ See Anna Grzymała-Busse and Abby Innes, ‘Great Expectations: The EU and Domestic Political Competition in East central Europe’ (2003) 17 *East European Politics and Societies* 64-73. For those who do not remember or do not know: ‘There Is No Alternative’ was the slogan of Margaret Thatcher, with which she defended her neoliberal policies of the 1980s. See Iain McLean, *Rational Choice and British Politics: An Analysis of Rhetoric and Manipulation from Peel to Blair* (Oxford, OUP 2001), chapter 8.

better future'³⁰ – this time liberal democracy and market economy, which awaited at the end of history.

There is a rich literature concerning the impact of the accession of post-communist countries to the EU on the functioning of their political systems.³¹ Many analysts today agree that while post-communist countries were successful in building democratic *institutions*, they were much less so as regards democratic *culture* – one Czech commentator describes this as ‘democracy without democrats’.³² Accession to the EU contributed to this in various ways: the need to transpose the sheer amount of *acquis* turned parliaments in post-communist countries into ‘approximation machines’, while the political process was not expected to generate its own solutions to problems, since they all came from the EU. Some effects, such as the empowerment of the executive at the expense of other branches of government or the detachment of the supranational norms from societal needs, were not specific to the post-communist context.

Attention is also paid to the impact of EU membership on their constitutional culture. As regards this aspect, however, the focus is more on the functional needs of European integration and the question whether the post-communist constitutionalism would not hamper the effectiveness of EU law in the new Member States, rather than whether there was something that should remain protected or even taught to the West.³³

Many people, for example, predicted that the EU constitutional orthodoxy would face problems in post-communist Europe because of the newly discovered sovereignty. It was sometimes said that ‘while Western Europe is leaving the twentieth century for the

³⁰ Buden (2010), n 22, 22.

³¹ For an overview see Vachudova, n 26, 224-232. See also the special issue of (2003) 17 *East European Politics and Societies* No. 1, Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer 2006) and Jacques Rupnik and Jan Zielonka, ‘Introduction: The State of Democracy 20 Years on: Domestic and External Factors (2013) 27 *East European Politics and Societies and Cultures* 3-25 (introductory essay to a special issue).

³² Jiří Pehe, *Demokracie bez demokratů: Úvahy o společnosti a politice [Democracy without Democrats: Thoughts on Society and Politics]* (Prague: Prostor 2010).

³³ See especially the numerous contributions in Adam Łazowski (ed), *The Application of EU Law in the New Member States: Brave New World* (The Hague: TMC Asser Press 2010).

twenty-first, Eastern Europe is leaving the twentieth century for the nineteenth'.³⁴ True as these early diagnoses could be,³⁵ the challenges that the EU constitutional orthodoxy is now facing in some of the Member States have to do with something else. They relate to the 'There Is No Alternative' narrative. When these countries negotiated their membership, domestic constitutional debates (if there were any) mostly dealt with the question of how most effectively to give precedence to EU law's primacy and direct effect.³⁶ Raising the possibility of a conflict between their respective normative foundations meant not only joining the ranks of domestic Eurosceptics and nationalists, but also appearing helplessly backward: heading towards the 19th century.

Thus when the power of the European Council to suspend the voting rights of a Member State which would be violating the EU foundational values was questioned before the Czech Constitutional Court, the Court replied that 'these values were in principle in conformity with the values that formed the very foundations of the material core of the constitutional order of the Czech Republic'.³⁷ Their violation would in the Court's opinion 'simultaneously mean the violation of the values on which the materially understood constitutionality of the Czech Republic rests'.³⁸ It would later come as a surprise to some Europeanists who assisted in drafting the integration clauses of the accession states' constitutions to make the application of EU law more effective³⁹ that this law could exhibit some deeply problematic features which they would like to see resisted.⁴⁰

³⁴ Dahrendorf, n 3, 149-150 (Dahrendorf himself did not fully endorse the claim). See for example Wojciech Sadurski, 'Constitutionalization of the EU and the Sovereignty Concerns of the New Accession States: The Role of the Charter of Rights' *EUI Working Paper Law* 2003/11, <http://hdl.handle.net/1814/1363>.

³⁵ I made the same observation in 'European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony', *Jean Monnet Working Paper* No. 10/05, <http://centers.law.nyu.edu/jeanmonnet/archive/papers/05/051001.html>.

³⁶ See Anneli Albi, 'Selected EU Judgments by CEE Constitutional Courts: Lessons on How (Not) to Amend Constitutions?' (2007) 3 *Croatian Yearbook of European Law and Policy* 39-58.

³⁷ Judgment of 26 November 2008, Pl. ÚS 19/08, *Lisbon Treaty I*. The English translation is available at the Czech Constitutional Court's website, <http://www.usoud.cz/view/pl-19-08>.

³⁸ *Ibid*, paragraph 209.

³⁹ See n 36.

⁴⁰ See Anneli Albi, 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums' (2009) 15 *European Law Journal* 46-69.

The 2012 decision of the same court, which declared a judgment of the ECJ to be *ultra vires*, therefore appeared strikingly inconsistent with the line taken by the earlier Czech court.⁴¹ Although one should not read too much into the judgment, which was addressed primarily to the domestic context,⁴² there is something deeply disconcerting about it: the reaction it provoked in certain circles. In his speech to the Hessen Regional Parliament delivered shortly after the Czech Constitutional Court's decision, the German Constitutional Court President Andreas Vosskuhle praised the decision. In his opinion it 'followed' the German example.⁴³ Anybody who has read the Czech decision and has even a sketchy knowledge of the German jurisprudence concerning *ultra vires* review of the EU, however, would agree that this was utter nonsense.⁴⁴ The two judgments are similar only at the most superficial level: as examples of national courts' 'resistance'. The form, and ultimately the substance, of both decisions could not be more different. Damian Chalmers then took the decision as an example of the ECJ's arrogance when engaging national constitutional courts.⁴⁵ But that view is also mistaken, I believe.⁴⁶

I would suggest that these are not simple misreadings of the decision and its context. I worry that, yet again, there is no serious engagement with post-communist Europe. Its experience is taken only to confirm the existing opinions and biases, formed quite independently of what is going on there. One is reminded of a similar 'dialogue' that had been taking place between some economists in the West and their reform-minded

⁴¹ Analysed most recently in Michal Bobek and David Kosař, 'Report on the Czech Republic and Slovakia' in Giuseppe Martinico and Oreste Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Constitutional Comparative Perspective* (Groningen, Europa Law Publishing 2010), 157-190.

⁴² That is how I read the judgment: see my case comment, 'Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*' (2012) 8 *European Constitutional Law Review* 323-337.

⁴³ 'Bewahrung und Erneuerung des Nationalstaats im Lichte der Europäischen Einigung', 1 March 2012, Hessen Regional Parliament (*Landtag*), Wiesbaden.

⁴⁴ Commenting on the decision of his former colleagues, Jiří Malenovský (now an ECJ judge) characterized it as a 'caricature of the German jurisprudence'. See Jiří Malenovský, '60 let Evropských společenství: od francouzského „supranacionálního“ smluvního projektu k jeho německému „podústavnímu“ provádění' (2012) 151 *Právník* 673-722.

⁴⁵ Damian Chalmers, 'The European Court of Justice has taken on huge new powers as 'enforcer' of last week's Treaty on Stability, Coordination and Governance. Yet its record as a judicial institution has been little scrutinized', *EUROPP Blog* 7 March 2012, <http://blogs.lse.ac.uk/europpblog/2012/03/07/european-court-of-justice-enforcer/>.

⁴⁶ See Komárek, n 42, 335-336.

colleagues behind the Iron Curtain since the early 1950s.⁴⁷ The *opinions* of Eastern economists did not matter in that “dialogue”; what was needed in the West was empirical *facts* to be fed into *their* models of economic equilibrium (in the case of mathematical neoclassical economists),⁴⁸ or to be used by early neoliberals as indisputable evidence that a planned economy cannot work.⁴⁹ This “dialogue” (and its importance for the formation of neoliberal economic thought) was never acknowledged in the West since, from its point of view, no dialogue actually existed. It was just a flow of information (and yes, some teaching and learning – from the West to the East).

This exchange, whatever one calls it, had a real influence on the formation of economic policies in post-communist Europe and the establishment of the (neo)liberal consensus in 1989 and the early 1990s.⁵⁰ This relates to the second theme I would like to explore here, which concerns the economic part of post-communist Europe’s transformation and its ultimate accession to the EU. As I will explain, it cannot be ignored, even if we focus on constitutionalism and democracy. Quite to the contrary: we cannot understand the problems of EU constitutionalism without understanding its political economy.

3 Suppressing Social Conflicts

The apparent triumph of liberal democracy and market economy had another, and for the present crisis of the EU much more important, consequence: the losers in the period of democratic transition had no voice in the process; in some instances, they even contributed to their own degradation in the name of a ‘better future’ at the end of history. One cannot overlook, once again, the deeper continuity of the post-communist

⁴⁷ See Johanna Bockman and Gil Eyal, ‘Eastern Europe as a Laboratory for Economic Knowledge: The Transnational Roots of Neoliberalism’ (2002) 108 *American Journal of Sociology* 310-352.

⁴⁸ Bockman and Eyal mention Harvard professor Wassily Leontief as an example (Bockman and Eyal, n 47, 329-330).

⁴⁹ Friedrich von Hayek and Milton Friedman are discussed by Bockman and Eyal, n 47, 331-337.

⁵⁰ See n 17 and more generally Johanna Bockman, *Markets in the Name of Socialism: The Left-Wing Origins of Neoliberalism* (Stanford: Stanford University Press 2011). The term ‘neoliberalism’ is now used in ideological battles much like ‘communism’ used to be. In this essay, I essentially mean ‘a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong property rights, free markets, and free trade’. The role of the state is minimal. See David Harvey, *A Brief History of Neoliberalism* (Oxford: OUP 2005), 2. It is notoriously difficult to define neoliberalism today; see eg Philip Mirowski, ‘Postface: Defining Neoliberalism’ in Philip Mirowski and Dieter Plehwethe (eds), *The Road From Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Cambridge, Mass and London: HUP 2009), 417-455.

experience with the times of the building of an actually existing socialism, noted above. One commentator from the West for example wrote:

If the people of formerly communist Europe can endure the hardship that the policies of stabilization, liberalization, and institution-building inflict, they will emerge at the end of the greatest upheaval that any democratic government has ever brought deliberately upon its own people, at the other end of the valley of tears, into the sunlight of Western freedom and prosperity.⁵¹

Tears there were, indeed, but to speak against economic reforms meant to speak against the Return to Europe and democratic transformation at the same time, since both were tied to market economy. Moreover, the market building project was identified with state building⁵² and also concerned the much desired (re-)modernization of post-communist society on its return to Europe from its 'Eastern kidnap'.⁵³

The experience of some dissidents also spoke against any state intervention in the market economy. Justifying his original support for Václav Klaus' neoliberal reforms, Havel said, 'We wanted a *normal* market system of economics'.⁵⁴ As Barbara Falk explains, '[n]ormal meant the opportunity to unburden oneself of politics because a normal situation was one where economics dominated politics, and not the other way around',⁵⁵ as experienced in planned economies before 1989.

Those most affected by the reforms thus sometimes supported them in the name of the 'greater good'. This is best illustrated by the example of the Polish opposition movement, Solidarity, which started out as an independent trade union in 1980, but was in fact a coalition of workers (such as its leader and later President of Poland Lech Wałęsa) and liberal intellectuals (Adam Michnik, Bronisław Geremek or Tadeusz

⁵¹ Michael Mandelbaum, in his introduction to Shafiqul Islam and Michael Mandelbaum (eds), *Making Markets: Economic Transformation in Eastern Europe and the Post-Soviet States* (New York: Council on Foreign Relations Press 1993), 15.

⁵² See Stephen Holmes, 'The Politics of Economics in the Czech Republic' (1995) 4 *East European Constitutional Review* 52-55.

⁵³ See text to n 23 and also Eyal, n 15, 160-169, describing the rituals of post-communist life, consisting for example of conducting a small, but well-attended and televised ceremony celebrating the fact that the Czech Republic's budget year 1993 ended in surplus.

⁵⁴ Quoted in Falk, n 3, 331 (emphasis on 'normal' added by Falk).

⁵⁵ *Ibid.*

Mazowiecki).⁵⁶ As David Ost documents in his study of Solidarity's transformation after 1989,⁵⁷ as soon as the prospect of democratic reform's success became clear, the leaders of Solidarity - mostly the liberal intellectuals - started to play down the importance of the active citizenry ('civil society'), where the labour class had a prominent place, and began to stress the foundations of democracy in private property and free market.⁵⁸ Some of them, such as Adam Michnik, even presented labour activism as a threat to democracy and future reforms. Liberal intellectuals of Solidarity thus radically reinterpreted the notion of civil society, the central conceptual innovation of the Central European dissident movement.⁵⁹ While in the early 1980s they saw labour activism as 'the embodiment of the free, autonomous public activity that they believed to be the grounding of a democratic system',⁶⁰ in 1989 and thereafter, they defended their neoliberal economic reforms, which were manifestly against the interests of the labour class, 'on the ground that this was what building civil society [and hence democracy] was all about'.⁶¹ They came from the adoration of labour to the fear and even disdain of it.

As Ost emphasizes throughout the 1990s, 'Solidarity consistently sought to organize labor anger away from *class* cleavages and toward *identity* cleavages instead'.⁶² This is what explains Solidarity's metamorphosis into illiberal populist right, represented by the Kaczynski brothers, and similar developments in other post-communist countries,⁶³ including Hungary, which is now troubling European liberals so greatly,⁶⁴ or the Czech Republic, which is all the more peculiar, since it was one and the same person, Václav

⁵⁶ On the history of Solidarity see Ost, n 18.

⁵⁷ *The Defeat of Solidarity: Anger and Politics in Postcommunist Europe* (Ithaca and London: Cornell University Press 2005)

⁵⁸ See Ost, n 57, 40-43.

⁵⁹ See n 18

⁶⁰ *Ibid*, 41.

⁶¹ *Ibid*, 192.

⁶² *Ibid*, 35. For a restatement see David Ost, 'The Invisibility and Centrality of Class After Communism' (2009) 22 *International Journal of Politics, Culture, and Society* 497-515.

⁶³ Briefly explored in Ost, n 57, 180-184, with further references. See also Ivan Krastev, 'The Strange Death of the Liberal Consensus' (2007) 18 *Journal of Democracy* 56-63 (written even before Orbán's Fidesz took power in Hungary!).

⁶⁴ See n 10 – although it must be stressed that Müller is far from blind to 'the plight of the victims of post-communism' - at 9. It however seems that Müller ascribes these plights to the failure of reforms, leading to 'capitalism, in its worst, corruption-ridden form to boot' rather than their 'success', if success is measured by what at least some Western advisers wanted to achieve at the beginning of transition.

Klaus, who first imposed his ‘no alternative’ on the citizens only to turn to nationalism when these policies started to create true social conflicts.⁶⁵

All this could sound like a biased leftist critique of economic reforms that were ‘necessary’,⁶⁶ but Ost’s argument is wider than that. It is a strong defence of the centrality of class conflict in liberal democracy. Ost explains that ‘[h]istorically, mobilization of non-elites along class lines has been the best way to secure democratic inclusion since in this way, interests can be negotiated, with the differing sides recognized as essential parts of the same community’.⁶⁷ He is acutely aware of the controversy concerning the relevance of social class in today’s politics; he nevertheless warns that ‘[t]o say class is no longer relevant because it no longer explains social dynamics or because we live in a post-modern world where such narratives no longer make sense - this is to concede the terrain of class organization to others’.⁶⁸

Marco Dani argues that the post-war constitutional settlement in Western Europe was able to accommodate class struggles into its structures, particularly through political rights, which ‘could give rise to a type of adversary politics primarily centred on redistribution’,⁶⁹ but is very pessimistic about the ability of the EU to replicate such structures at the supranational level. At the same time, he refers to recent findings of Neil Fligstein, who in his *Euroclash* finds that three main constituencies emerge from the adjustment of European society to economic integration: the winners (or insiders),

⁶⁵ See Seán Hanley, *The New Right in the New Europe: Czech Transformation and Right-Wing Politics, 1989–2006* (London and New York: Routledge 2006), chapter 8.

⁶⁶ But see also Maurice Glasman, ‘The Great Transformation: Polanyi, Poland and the Terrors of Planned Spontaneity’ in Christopher GA Bryant, Edmund Mokrzycki (eds), *The New Great Transformation? Change and Continuity in East-Central Europe* (London and New York: Routledge 1994), 191-217, with a comment by Steven Lukes, ‘Is there an Alternative to Market Utopianism?’, *ibid*, 218-221.

⁶⁷ Ost (2009), n 62, 498. See also Ost, n 57, 29-34. For a historical argument in this vein see Gregory M Luebbert, *Liberalism, Fascism, or Social Democracy: Social Classes and the Political Origins of Regimes in Interwar Europe* (New York and Oxford: OUP 1991).

⁶⁸ Ost, n 57, 204.

⁶⁹ See Marco Dani, ‘Rehabilitating Social Conflicts in European Public Law’ (2012) 18 *European Law Journal* 621. Dani does not use the term ‘class conflict’ and uses ‘social conflict instead’, in the context of his study they can be considered synonymous. For a wider political-historical argument see Stefano Bartolini, *The Political Mobilization of the European Left, 1860–1980: The Class Cleavage* (Cambridge: CUP 2000).

losers (or outsiders), and most importantly, a more ambiguous swing constituency, ‘situational Europeans’.⁷⁰

Dani opines that these three constituencies ‘have not evolved in social classes and political parties’, but that is only partially true. Such conflicts do get articulated politically, but at the national level.⁷¹ Like post-communist Europe, where real social conflicts arising from the reforms were suppressed in the name of the Return to Europe (and later translated into the language of illiberal nationalism), in the context of Dani’s analysis, Europe plays the part of a protective shield from real issues in a different way: it allows organizing anger away from the conflict between those who benefit from integration and those who are the losers in the process, and navigate this conflict against Europe, or what is worse, the *German* Europe.⁷² It is mostly because the EU is seen as the problem, rather than its solution. To turn Europe into the solution of many a European citizen’s precarious situation, however, would require opening the question of what Europe should represent – something that concerns the EU as a whole, and not just its post-communist part.

4 European Union’s Civilizing Mission

The difficulty of translating social conflicts arising from the process of European integration into something other than identity politics of Euroscepticism and nationalism⁷³ reflects a deeper problem affecting European democracies today: their decreasing capacity to make *political* choices over their macroeconomic policies,⁷⁴ resulting in their inability to address the social question: ‘the capacity of a society

⁷⁰ Dani, n 69, 638. Neil Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (Oxford: OUP 2008), 211-213.

⁷¹ See Hanspeter Kriesi, The Mobilization of the Political Potentials Linked to European Integration by National Political Parties, paper presented at the Conference on “Euroscepticism”, Amsterdam, 1-2 July 2005 and also Hanspeter Kriesi et al, *West European Politics in the Age of Globalization* (Cambridge: CUP 2008). See also Cf. Albena Azmanova, ‘After the Left–Right (Dis)continuum: Globalization and the Remaking of Europe’s Ideological Geography’ (2011) 5 *International Political Sociology* 384-407.

⁷² See Ulrich Beck (Rodney Livingstone transl), *German Europe* (Cambridge: Polity 2013).

⁷³ For an analysis of this conundrum see Ulrich Beck and Edgar Grande, (Ciaran Cronin transl), *Cosmopolitan Europe* (Cambridge: Polity 2007).

⁷⁴ See Wolfgang Streeck and Daniel Mertens, ‘Public Finance and the Decline of State Capacity in Democratic Capitalism’ in Schäfer and Streeck, n 13, 26-58.

(known in political terms as a nation) to exist as a collectivity linked by relations of interdependency'.⁷⁵

Many instruments of economic and social policy were de-politicized in postwar Western Europe, and European integration was an important part of this process (together with the globalization of trade and capital movement liberalization).⁷⁶ This in fact reduced the capacity of governments to negotiate social conflicts at a time when the social compromise could no longer be paid out by the real economy at the end of the 1970s. This is what explains the rise of neoliberalism at that time.⁷⁷ At the level of ideas, particularly political and constitutional theory, some influential understandings of the EU have helped to promote this 'depoliticization' of economic policy by supranational integration.⁷⁸ One presents the EU in terms of political liberalism, stripped of any critical analysis of the redistributive effects which the constitutional arrangements can bring about. Another is focused on the Market and places the legitimacy processes exclusively at the level of the Member States.

Many accounts of the EU are concerned with the limitations of a nation state or the need to discipline its vices. Jan Werner Müller, in his intellectual history of democracy in Europe, argues that 'European integration was part and parcel of the new "constitutionalist ethos", with its inbuilt distrust of popular sovereignty', which developed in post-war Europe in reaction to the horrors of Nazism.⁷⁹ The EU (and the European Convention) thus served as an external check on states whose political

⁷⁵ Robert Castel (Richard Boyd transl and ed), *From Manual Workers to Wage Laborers: Transformation of the Social Question* (New Brunswick and London: Transaction Publishers 2003), xx. See also Alexander Somek, 'The Social Question in a Transnational Context' *LEQS Paper* No. 39/2011, available at <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPapers.aspx>.

⁷⁶ See Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP 1999), 28-42 and also Scharpf, n 13, 109-114 or Christopher J Bickerton, *European Integration: From Nation-States to Member States* (Oxford: OUP 2012), chapter 4.

⁷⁷ See Daniel Stedman Jones, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics* (Princeton: Princeton UP 2012), chapter 6 or Mirowski and Plehwethe, n 50. For a (much) less charitable reading see Harvey, n 50, chapter 2.

⁷⁸ On the notion of depoliticization see Herbert Marcuse, *One-Dimensional Man* (London: Routledge & Kegan Paul 1964).

⁷⁹ See *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press 2011), 148-149.

regimes Müller describes as ‘constrained democracies’.⁸⁰ It resonates in the literature on EU constitutionalism too: in the work of Miguel Maduro, who partly translates federalist arguments into the context of European integration (without explicitly saying so),⁸¹ and partly promotes extending democratic representation beyond state borders,⁸² or Mattias Kumm and Daniel Halberstam, for whom the EU represents a space where various constitutional principles can compete with each other (Halberstam’s ‘constitutional heterarchy’)⁸³ or be harmonized through the Dworkinian principle of ‘best fit’ (Kumm).⁸⁴ What they all have in common is their use of the vocabulary of liberal democracy stripped of its economic/social dimension: as if constitutional democracy in the EU travelled back before its post-war transformation analysed by Marco Dani.⁸⁵ Mattias Kumm’s idea of ‘legitimatory trinity’ of global public law (which he applies in the context of international law and EU law too), according to which human rights, democracy and the rule of law have become the largely uncontested criteria of law’s claim to legitimate authority, illustrate this well.⁸⁶ One is reminded of another trinity: *liberté, égalité, fraternité*, where the last can be translated as solidarity,⁸⁷ to realise the contrast here.⁸⁸

⁸⁰ See also P Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press 2008). On the postwar debates on democracy see Martin Conway and Volker Depkat, ‘Towards a European History of the Discourse of Democracy: Discussing Democracy in Western Europe, 1945-60’ in Martin Conway and Kiran Klaus Patel (eds), *Europeanization in the Twentieth Century: Historical Approaches* (Basingstoke: Palgrave 2010), 132-156.

⁸¹ Miguel Poiaras Maduro, ‘Europe and the Constitution: *What if this is As Good As It Gets?*’, in Joseph HH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003), 74-102.

⁸² Miguel Poiaras Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’ (1997) 3 *European Law Journal* 55-82 and Miguel P Maduro, *We the Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Oxford: Hart Publishing 1998), chapter 5.

⁸³ Daniel Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in Jeffrey L Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press, Cambridge 2009), 326-355.

⁸⁴ ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, (2005) 11 *European Law Journal* 262-307.

⁸⁵ See text to n 69. On the liberal separation of politics and economy see Michael Walzer, ‘Liberalism and the Art of Separation’ (1984) 12 *Political Theory* 315-330 or Ellen M Wood, *Democracy against Capitalism: Renewing Historical Materialism* (Cambridge: Cambridge University Press 1995), chapter 1.

⁸⁶ ‘Legitimatory trinity’ was the term used by Mattias Kumm in a presentation at the LSE, European Public Law Theory seminar, 19 January 2012.

⁸⁷ This is an oversimplification in some sense, since there is a controversy in France concerning the ‘reduction’ of fraternity to solidarity. See e.g. Michel Borgetto, *La notion de fraternité en droit public français: Le passé, le présent et l’avenir de la solidarité* (Paris: L.G.D.J. 1993), 628.

⁸⁸ But it can be indicative of the dominance of Anglo-American political theory, since as Nathan Glazer notes in his Foreword to Pierre Rosanvallon (Barbara Harshaw transl), *The New Social Question:*

In reality, until very recently solidarity was given scant attention in EU political and constitutional theory.⁸⁹

Joseph Weiler's ideas of 'constitutional tolerance'⁹⁰ and Europe as Community⁹¹ are different in that they genuinely seek to re-think the liberal tradition of constitutionalism and come up with a new vocabulary, focusing on the notions of *community* (among states) and *transnational human intercourse* stripped of nationality and state affiliation as its principal referent.⁹² Besides its other problems, which I consider in the next section, it nevertheless shares the disregard of the social question in European constitutionalism.

Besides the danger of disregarding the social question, which can lead to its translation into the language of illiberal nationalism, there is another problem with this essentially liberal-democratic reading of the EU: it hides the fact that it could be the current constitutional culture of the EU *itself*, exemplified by its present turn to executive dominance at the expense of control by parliaments and courts, which has contributed to the present turn to authoritarianism in some states.⁹³ To call the EU into action to defend the principles of liberal democracy, as Jan Werner Müller has recently done,⁹⁴ in fact helps the EU to maintain the questionable path to its own form of 'authoritarian liberalism' exercised by the heads of (some) states together with the ECB, IMF and financial markets.⁹⁵

Rethinking the Welfare State (Princeton: Princeton UP 2000), ix, 'only the first two – liberty and equality – have received the wholehearted support of American during our two-hundred year history'.

⁸⁹ See Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213-241, 213.

⁹⁰ Joseph HH Weiler, 'Federalism without Constitutionalism: Europe's *Sonderweg*', in Weiler and Wind, n 81. 7-23.

⁹¹ Suggested by Weiler in his seminal 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403-2483, reprinted in Weiler's collection of essays *The Constitution of Europe: 'Do the New Clothes Have An Emperor?'* and *Other Essays on European Integration* (Cambridge: CUP 1999), 10-101.

⁹² *Ibid*, 90-96.

⁹³ See Marco Dani, 'The "Partisan Constitution" and the Corrosion of European Constitutional Culture', *LEQS Paper* No. 68/2013, available at <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPapers.aspx>, or Jacques Rupnik, 'How Things Went Wrong' (2012) 23 *Journal of Democracy* 132-137, 136.

⁹⁴ See n 9.

⁹⁵ Wilkinson, n 11.

The second large group of theories focuses on the market. It comes in two versions: one trying to separate the market from politics, effectively arguing for an ordo-liberal economic constitution;⁹⁶ another seeing the EU as an additional regulatory space, where no contested choices are being made.⁹⁷ They correspond to the idea that it is still the Member States that are in control – as the ‘Masters of the Treaty’, who are able to legitimize policy decisions made at the supranational level that have redistributive effects.⁹⁸

It is however less and less possible to imagine the EU Member States as independent of the EU and its institutional structures. As Chris Bickerton powerfully argues, the very understanding of the state has changed in Europe due to the interdependence of the EU and its Member States, both horizontal and vertical.⁹⁹ The current debates in the United Kingdom concerning the UK’s departure from the EU provide compelling evidence of this.¹⁰⁰

But there is a spiritual argument too, going beyond pragmatism of those accustomed to the cold language of cost-benefit analysis. In my view, it is exactly the many people in post-communist Europe – now 11 of the 28 Member States – who see the EU as a civilising project along Müller’s line of reasoning. Whenever concerns are raised about democracy (or the rule of law and human rights, to invoke the other central values of political liberalism), people point to the fact that the return to past totalitarian is not possible *because of the EU* – irrespective of the actual capability of the EU to prevent that.

⁹⁶ For an overview of these theories see Christian Joerges, ‘What Is Left of the European Economic Constitution? A Melancholic Eulogy’ (2005) 30 *European Law Review* 461-489 (who is deeply critical of the ordo-liberal idea of stripping the economic, and by implication the social, from the political) or Manfred E Streit and Werner Mussler, ‘The Economic Constitution of the European Community: From “Rome” to “Maastricht”’ (1995) 1 *European Law Journal* 5-30.

⁹⁷ See Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: OUP 2005).

⁹⁸ Andrew Moravcsik, *The Choice of Europe: Social Purpose and State Power from Messina to Maastricht* (London: UCL Press 1998). For a sophisticated articulation of this understanding of the EU in terms of public law see Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press 2010).

⁹⁹ See Bickerton, n 76.

¹⁰⁰ For mere legal/constitutional difficulties see Adam Lazowski, ‘Withdrawal from the European Union and Alternatives to Membership’ (2012) 37 *European Law Review* 523-540.

Furthermore, seeing the EU as a market ignores policies in fields such as the Area of Freedom, Security and Justice, which increasingly emancipate themselves from their (purportedly) original Single Market rationale. Both distorted pictures of the EU – the political-liberal and the market-centred – are nicely captured in the recent UK Prime Minister David Cameron’s ‘Europe Speech’. In his view, the ‘main, overriding purpose’ of the EU today is ‘not to win peace, but to secure prosperity’ through victory in ‘a new global race of nations’.¹⁰¹

Here I do not want to pursue a rather predictable critique concerning the fact that, with Croatians joining the EU, mass killing and atrocities in war will again be something many living European citizens know from *their own* experience (being on both sides, one must add). For them, the credo ‘never again’ is not a platitude. Nor do I want to remind people that for post-communist Europe membership of the EU is an assurance that they will have more (if never complete) freedom to negotiate their relationship with Russia.

It is in the link between peace in Europe and the ability of European states to negotiate the relationship between markets and people and to address the social question that the civilizing project of political liberals meets the Market.¹⁰² Among the reasons for World War II, which ultimately made European integration possible, was the subordination of ‘the substance of society itself to the laws of the market’.¹⁰³ As Alexander Somek notes, ‘European intellectual and political history has been witness to a variety of attempts to find a “third way” over and against the alternative between unbridled capitalism on the one hand and authoritarian socialism on the other’.¹⁰⁴ Western Europe’s embedded capitalism provided a response which had worked for some time – during the period of

¹⁰¹ N 7.

¹⁰² See Wolfgang Streeck, ‘The Crisis in Context: Democratic Capitalism and its Contradictions’ in Schäfer and Streeck, n 13, 262-286.

¹⁰³ See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press 1957 [1944]), 71. For a summary of Polanyi’s analysis see Martin Höpner and Armin Schäfer, ‘Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting’ (2012) 66 *International Organization* 429-455, 432-434.

¹⁰⁴ Alexander Somek, ‘Europe: Political, Not Cosmopolitan’ *Discussion Paper of the WZB Rule of Law Center* SP IV 2011-803, <http://econpapers.repec.org/paper/zbwvzbrlc/spiv2011803.htm>, 35. See also Alexander Somek, ‘What Is Political Union?’ (2013) 14 *German Law Journal* 561-580.

the *trente glorieuses* (roughly after the War to the mid-1970s).¹⁰⁵ Europe's turn to neoliberalism at the end of the 1970s seemed to provide a remedy for its failure (which was again due to many external factors).¹⁰⁶ That seemed to work until the present crisis, which threatens the very existence of the integration project.

The EU and its institutions were indispensable in both periods (before the end of the 1970s and after that) to the extent that the current Member States have transformed into entities that cannot meaningfully govern their societies without being part of the Union.¹⁰⁷ That however means that the EU cannot escape this question and hide behind the walls of technocratic expertise or the vicissitudes of global financial markets. The question of balance between markets and people, implied in the European social question, is deeply political and *must be answered*.¹⁰⁸ What contributes to the depoliticization of this question, however, is the prevailing understanding of European constitutionalism, which reflects the abovementioned truncated visions of European integration.

5 Disenchanted Constitutionalist

If there is one person who has ensured that the constitutional reading of European integration is firmly established in the studies of European integration across various disciplines, it is Joseph Weiler. Most of his works collected in *The Constitution of Europe*¹⁰⁹ provide the starting point for students of European integration, especially those interested in its deeper ethos.

Weiler analysed what I call above the political-liberal and market narratives of European integration. Only rarely, however, does he touch upon the social question. In

¹⁰⁵ See Barry Eichengreen, *The European Economy Since 1945: Coordinated Capitalism and Beyond* (Princeton and Oxford: Princeton UP 2007).

¹⁰⁶ See Bickerton, n 76, 125-131, Gareth Dale & Nadine El-Enany, 'The Limits of Social Europe: EU Law and the Ordoliberal Agenda' (2013) 14 *German Law Journal* 613-650.

¹⁰⁷ See Bickerton, n 76. In this respect Bickerton takes the previous analysis by Andrew Moravcsik (n 98) to a conceptual level and provides a challenging perspective for Lindseth, n 98.

¹⁰⁸ For conflicting accounts of whether the EU is capable of this see Floris de Witte, 'EU Law, Politics and the Social Question' (2013) 14 *German Law Journal* 581-612 and Dale and El-Enany, n 106.

¹⁰⁹ Weiler (1999), n 91.

the ‘Transformation of Europe’ he gets closest to this issue when analysing the impact of the Commission’s One Market Strategy.¹¹⁰ Weiler observes:

A ‘*single European market*’ is a concept which still has the power to stir. But it is also a ‘*single European market*’. It is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicized choice of ethos, ideology, and political culture: the culture of ‘the market’.¹¹¹

This theme is later largely unexplored, however. Most of Weiler’s intellectual energy in the 1990s and 2000s was devoted to the political-liberal shortcomings of the EU, particularly its failure to take fundamental rights seriously and its simultaneous adventures in documentary constitution-building.¹¹² The potentially corrupting effects of the Market ideology on the political ethos of European integration are not taken up.¹¹³ Sometimes it even seems that Weiler believes in a sort of natural law of market integration, the virtues (and vices) of which are not critically examined.¹¹⁴

Weiler has only recently grown more perceptive of the vices of the Market. His work in progress, ‘On the Distinction between Values and Virtues in the Process of European Integration’, takes issue with them at several points.¹¹⁵ Weiler thus laments the Market’s ‘very internal set of values and ethos of competition and material efficiency coupled with the culture of rights’, which all contribute to ‘that matrix of personal materialism, self-centeredness, Sartre style ennui and narcissism in a society which genuinely and laudably values liberty and human rights’.¹¹⁶ Through this peculiar ‘culture of rights’ the Union, in Weiler’s words, ‘puts into place a political culture which cultivates self-

¹¹⁰ Commission of the European Communities, ‘Completing the Internal Market’, Brussels, 14 June 1985 COM(85) 310 final.

¹¹¹ Weiler (1999), n 91, 87.

¹¹² See various essays in Weiler (1999), n 91.

¹¹³ Weiler’s programmatic ‘The Reformation of European Constitutionalism’ (1997) 35 *Journal of Common Market Studies* 97-131 (reprinted in an abridged form in Weiler, n 91, 221-237) is quite indicative in this respect: one wants to ask where is (critical) political economy and its own discovery of the process of European integration, exemplified by works of eg Stephen Gill or Bart Van Apeldoorn. For an overview see Alan W Cafruny and J Magnus Ryner, ‘Critical Political Economy’ in Antje Wiener and Thomas Diez (eds), *European Integration Theory* 2nd Ed (Oxford: OUP 2009), 221-240.

¹¹⁴ See Joseph HH Weiler, ‘Epilogue: Towards a Common Law of International Trade’ in Ibid (ed), *The EU, The WTO and the NAFTA* (Oxford: OUP 2000), 201-232.

¹¹⁵ Available at <http://www.iilj.org/courses/2010IILJColloquium.asp> and quoted here with the author’s permission. Parts of this essay have already been published, as I indicate in further footnotes.

¹¹⁶ Ibid, 41.

interested individuals’, who cannot ‘internalize that in democracy, them’, meaning the failing or corrupt government, ‘is actually us’.¹¹⁷

This last point reaches far beyond the critique of the Market and concerns the political-liberal vision of the EU as well. It goes even farther, to the very foundations of the integration project. These, according to Weiler, shall consist in ‘[r]edefining human relations, the way individuals relate to each other and to their community’.¹¹⁸ This is the core of Weiler’s critique and, in my view, the core of his *oeuvre* concerning European integration. As such it would require a much more detailed examination, which cannot be pursued here. What I want to do instead, in line with the broader theme of this essay, is to look at the experience of post-communist Europe, from the times both before and after 1989. It can point up some important lessons, if only in the form of a cautionary tale, to those in search of Europe’s deeper ethos.

6 Existential Revolution that Failed

The dissidents’ notion of civil society, which bridged the Anglo-American Lockean and the continental Hegelian traditions, tends to be considered their most important contribution to political theory.¹¹⁹ It encompasses active citizens who get involved in public affairs outside official political structures, particularly party politics.

Yet, civil society in post-communist countries is weak.¹²⁰ As noted above, moreover, the overall condition of democracy in these countries seems rather bleak as well.¹²¹ How can we explain this? Contrary to what some people believe, I do not think the reason for this lies in deep continuities between the ‘totalitarian’ past and ‘liberal’ present, or, more precisely, this continuity is not the decisive reason for the worrying state of post-

¹¹⁷ Joseph Weiler, ‘Editorial: Individual and Rights: The Sour Grapes’ (2010) 21 *European Journal of International Law* 277-280, 279. For a critique pursued in this vein see Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford: OUP 2008).

¹¹⁸ Weiler, n 115, 2.

¹¹⁹ See n 18.

¹²⁰ Marc Morjé Howard, *The Weakness of Civil Society in Post-Communist Europe* (Cambridge: CUP 2003).

¹²¹ See sections 2 and 3 *supra*.

communist democracies. The problem lies in the very notion of civil society (and antipolitics) as developed by dissidents and its ability to bring about what it promises. The pursuit of the idea of civil society was, as Barbara Falk notes, a ‘carefully constructed political strategy’, which took account of geopolitical realities and the apparent impossibility of overthrowing the communist regime by force – as the 1956 and 1968 revolutions had taught Hungarian, Polish and Czechoslovak oppositionist. The target of dissidents’ strategy, aimed at civil society, was ‘not the party-state (this was the grave error of the revisionists in all three countries) but *the people* themselves’.¹²² The strategy thus did not intend to challenge the regime itself.

The Charter 77 movement in Czechoslovakia thus made a simple plea to the communist authorities: to abide by the international obligations to respect fundamental human and political rights which they entered into by the Final Act of the Helsinki Accord in 1975.¹²³ Charter 77’s spiritual authority was Jan Patočka, a philosophy professor who was officially excluded from teaching, but kept giving unofficial seminars in his living room throughout the 1950s and 1960s.¹²⁴ These were attended by many later dissidents of the Charter 77 movement. Václav Havel read Patočka as a teenager, but entered into a philosophical conversation with him only once: before they were interrogated by the State Police when Charter 77 was published in January 1977. After an interrogation lasting several hours Patočka died, and it was therefore their ‘Last Conversation’.¹²⁵

Charter 77’s appeal to the rest of society was primarily to ‘live in true’. In Václav Havel’s famous metaphor, it could for example mean that a greengrocer who had been obediently placing in the window of his shop the slogan calling on workers of the world to unite would stop doing so – and thus liberate himself. If everybody did so, the post-

¹²² Falk, n 3, 316, emphasis added.

¹²³ On Charter 77 and its philosophy see Tucker, n 4, chapter 5 or Falk, n 3, chapter 6.

¹²⁴ On Patočka and his philosophy see Tucker, n 4, chapters 2-4. See also Richard Rorty, ‘The Seer of Prague’ *The New Republic*, 1 July 1991, 35-40.

¹²⁵ The title of Havel’s essay on Patočka, where Havel refers to Patočka as his main intellectual influence. The essay is reproduced in H. Gordon Skilling, *Charter 77 and Human Rights in Czechoslovakia* (London: Allen & Unwin 1981), 242-244. See also Tucker, n 4, 88.

totalitarian control of society would break down. That was the ‘power of the powerless’ in Havel’s view.¹²⁶

The reason Havel’s essay resonated so much in the West and still speaks to (some of) us today was that Havel did not limit his ethical claim to the people living in the conditions of post-totalitarianism. What he called for was nothing less than an ‘existential revolution’, aimed at the crisis of contemporary society as a whole – liberal West and post-totalitarian East alike.¹²⁷ This revolution, in Havel’s words, ‘should provide hope of a moral reconstitution of society, which means a radical renewal of the relationship of human beings to ... the ‘human order’, which no political order can replace’.¹²⁸ In fact, Havel was rather sceptical of the ‘framework of classical parliamentary democracy’ and suggested the notion of post-democracy, which however needed to be developed through practice.¹²⁹ The existential revolution would lead to ‘[a] new experience of being, a renewed rootedness in the universe, a newly grasped sense of higher responsibility, a newfound inner relationship to other people and to the human community’.¹³⁰

We do not need to go into details of Havel’s diagnosis of the crisis of modernity, based on his reading of the philosophy of Martin Heidegger.¹³¹ Havel’s spiritual affinity to Heidegger needs to be mentioned for another reason. As Aviezer Tucker notes, ‘the dissident emphasis on personal authenticity, antimodernism, and dismissal of institutions as inherently alienating and corrupt prevented Havel and his fellow dissidents from understanding the significance of reconstructing the institutions of the state, especially those that should enforce the rule of law’.¹³² These misunderstandings proved fatal after 1989, at least to those who hoped that the ‘Velvet Revolution’ would bring about a true moral reconstitution of society. Instead, to use Tucker’s vitriolic but sadly accurate characterization, ‘[i]n a state of normative confusion and political

¹²⁶ See Havel, n 4. Quoted from the online version of the essay available at <http://vaclavhavel.cz>.

¹²⁷ Ibid, sections XX-XXII.

¹²⁸ Ibid.

¹²⁹ Hence Havel rejected to give more precise contours to the idea in his essay.

¹³⁰ Havel, n 4.

¹³¹ Tucker, n 4, chapter 6 and 7.

¹³² Ibid, 17. See also *ibid*, 247.

disorientation, and in a political environment lacking a developed and active civil society, the former dissidents did little to prevent the resurgence of old patterns of political corruption and civil passivity'.¹³³ The Velvet Revolution resulted in the Velvet Corruption,¹³⁴ further contributing to the frustration of the people of post-communist countries.

The dissidents were equally suspect of the very notion of politics. The notions of civil society and the existential revolution were therefore connected by 'antipolitics' or 'nonpolitical politics'.¹³⁵ They appealed to morality and virtue and held in deep contempt Machiavellian technology of power. In the second important essay written before 1989, *Politics and Conscience*, Havel describes what he means by that:

I favor 'antipolitical politics', that is, politics not as the technology of power and manipulation, of cybernetic rule over humans or as the art of the utilitarian, but politics as one of the ways of seeking and achieving meaningful lives, of protecting them and serving them. I favor politics as practical morality, as service to the truth, as essentially human and humanly measured care for our fellow humans. It is, I presume, an approach which, in this world, is extremely impractical and difficult to apply in daily life. Still, I know no better alternative.¹³⁶

Dissidents' moral scruples about engaging in the 'technology of power' however meant that the societal transformation was soon dominated by more cynical technocrats coming from the 'grey zone': people who neither actively supported nor opposed the communist regime,¹³⁷ but who had the social capital necessary to guarantee them a place among the new elites. Politically, the most important ones were economists, who came to design reforms deemed necessary. As we noted above, with active support from the West they rejected any 'third way' and prescribed neoliberal reforms based on dogmatic

¹³³ Ibid, 247.

¹³⁴ The title of chapter 8 of Tucker's book, turning from the intellectual history of the Czech dissident movement to economic and political history of post-communist transformation in the 1990s.

¹³⁵ Tucker, n 4, 185-195. See also TA Rowland and SA Rowland, 'Contemporary Central European Reflections on Civic Virtue' (1995) 21 *History of European Ideas* 505-513.

¹³⁶ Quoted from the online version of the essay available at <http://vaclavhavel.cz>.

¹³⁷ See n 15. For an interesting argument about spiritual affinity between intellectual dissidents and monetarist technocrats see Gil Eyal, 'Anti-politics and the Spirit of Capitalism: Dissidents, Monetarists, and the Czech Transition to Capitalism' (2000) 29 *Theory and Society* 49-92. Eyal's argument is essentially that the two groups shared 'an elective affinity between their respective perceptions of the social role of intellectuals and their understandings of how society should be ruled' (p. 51).

readings of new gods: Hayek and von Mises primarily. Václav Klaus' words are characteristic of the spirit of the time. He once remarked: 'I often use the line by F.A. Hayek that the world is run by human action, not by human design. To talk about planning an economic system is to talk in old terms, and I find myself sometimes having to teach Westerners about what the market really means'.¹³⁸ No wonder Klaus was called 'a Lenin for the bourgeoisie'.¹³⁹

The free market philosophy therefore positively dissuaded citizens from engaging actively with politics outside elections. First, by excluding any discussion of possible 'third ways', delegitimizing them as socialist and not making the radical break necessary to liberate from communism; second by the free market philosophy's very desire to rule out any involvement by politics in the operation of the economy. This dogmatic approach found fertile ground in post-communist societies, since it continued on from their previous experience: there is no need for politics, since the Big Theory has answers for everything. *This time for sure.*

7 The Hope for Europe?

Reading Weiler's essay makes dissident experience – not from before 1989, but from the times of post-communist transformation - directly relevant to his concerns. Weiler's call is in fact a call for 'existential revolution' in European integration, aiming at individuals, their mutual relationship and the relationship to community.¹⁴⁰

Like Jan Patočka and Václav Havel, Weiler appeals for citizens' sacrifice and perfection. The former is present in Weiler's understanding of values and virtues, the central categories of his essay. In his view, 'a central part of [values'] allure' is that they 'contain an altruistic component. Virtues involve exertion. Things that demand sacrifice are cherished more than things that come easily. Sacrifice invests things with value'.¹⁴¹ The perfectionist emphasis on individual responsibility is also manifest in Weiler's critique

¹³⁸ Quotation from Tucker, 223-224.

¹³⁹ The title of chapter 5 of Abby Innes, *Czechoslovakia: The Short Goodbye* (New Haven and London: Yale University Press 2001).

¹⁴⁰ Compare quotes of Weiler at n 118 and Havel at n 130.

¹⁴¹ Weiler, n 115, 11.

of ‘the culture of agency’, which releases individuals from their responsibility for solidarity and respect for human rights.¹⁴² Weiler’s words, that these values ‘risk the impoverishment of private virtue’ since they ‘responsibilize others, and deresponsibilize the self’,¹⁴³ remind one of Havel’s critique of political parties, which release ‘the citizen from all forms of concrete and personal responsibility’.¹⁴⁴

Perfectionism forms Weiler’s prescription for Europe’s cure as well:

The redress if any, may be found in greater attention to the spiritual dimensions to our lives and that of our children; the way we think of ours and educate, and cultivate theirs. Education to the necessary virtues of decency and true human solidarity, if achieved, can easily enough counteract the almost inevitable impact of the structure and process of governance. If achieved.¹⁴⁵

The last sentence is written in a sceptical key, like Havel’s call for antipolitical politics, quoted above.¹⁴⁶ There is a danger of the same sad result, Velvet Corruption, which in Havel’s case ended in his ‘political tragedy’.¹⁴⁷ Attractive as any ethical call can be for those who are already virtuous, it will not change the worrying course of European integration. It is not steered by philosophers like Weiler, but pragmatic technologists of power: Merkiavellism, not virtuous antipolitics, is what governs in Europe.¹⁴⁸

European constitutionalists should thus become more interested in the constitution of politics, or the political, no matter how unappealing the reference to Carl Schmitt may be.¹⁴⁹ Political theorists of European integration should stop celebrating the ‘constrained democracy’, which forms one of the foundation stones of the European postwar constitutional settlement.¹⁵⁰

¹⁴² Ibid, 16 and 40.

¹⁴³ Ibid, 16.

¹⁴⁴ Havel, n 4, section XX.

¹⁴⁵ Weiler, n 115, 44.

¹⁴⁶ N 136.

¹⁴⁷ John Keane, *Václav Havel: A Political Tragedy in Six Acts* (London: Bloomsbury 1999).

¹⁴⁸ See Beck, n 72, 45-65.

¹⁴⁹ See particularly Michael Wilkinson, ‘Political Constitutionalism and the European Union’ (2013) 76 *Modern Law Review* 191-222.

¹⁵⁰ For a much less celebratory account see Marco Duranti, ‘“A Blessed Act of Oblivion”: Human Rights, European Unity and Postwar Reconciliation’ in Birgit Schwelling (ed), *Reconciliation, Civil Society, and the Politics of Memory: Transnational Initiatives in the 20th and 21st Century* (Bielefeld: Transcript Verlag 2012), 115-139.

This of course does not explain how to politicize European integration and to save its peace mission which, contrary to what many people believe today, is not exhausted.¹⁵¹ Here, I think, to give citizens a vote about who is to become the President of the European Commission is too little.¹⁵² Those who write about and engage with European politics must make clear what the redistributive consequences of different decisions are. Different social classes may find more affinities irrespective of state borders and some (if not most) Germans may eventually find more sympathy with Greeks and others, once they find out about where the money really goes. The effort on the part of some European institutions to obscure this and to keep Europeans divided along national borders is remarkable.¹⁵³ It is of course a much more complicated matter how this socio-economic division should be translated into politics, but that is where the real challenge lies.

Coda: Reclaiming the Communist Past for Europe's Future

There is one more lesson of post-communist Europe, however, reaching beyond the experience of dissidents: that of everybody living under the conditions of 'really existing socialism'. It is still impossible to say in post-communist countries that life was not so bad before 1989 – if you acted as the obedient greengrocer putting the slogan in your window, of course. People in post-communist Europe are not expected to 'have critically reflected memory of the communist past'.¹⁵⁴ It seems that it is the West which imposes its own version of history on them. One transitologist, Anders Åslund, thus dismisses any complaint concerning the misery of catching up with the West in the following way: '[e]conomic decline and social hazards have been greatly exaggerated, *since people have forgotten how awful communism was*'.¹⁵⁵ The dealing with the past in post-communist

¹⁵¹ See section 4.

¹⁵² See eg. Simon Hix, *What's Wrong with the European Union and How to Fix It* (Cambridge: Polity 2008).

¹⁵³ As the ECB did in its report 'The Eurosystem Household Finance and Consumption Survey, Results from the First Wave', Statistics Paper Series 2, April 2013. Paul de Grauwe and Yuemei Ji, 'Are Germans Really Poorer than Spaniards Italians and Greeks?' *Social Europe Journal*, 16 April 2013, available at <http://www.social-europe.eu/2013/04/are-germans-really-poorer-than-spaniards-italians-and-greeks/>, noted on account of the report: 'Rarely have statistics been misused so much for political purposes as when recently the ECB published the results of a survey of household wealth in the Eurozone countries'.

¹⁵⁴ Buden (2010), n 22, 22.

¹⁵⁵ Anders Åslund, *Building Capitalism: The Transformation of the Former Soviet Bloc* (Cambridge: CUP 2002), abstract, emphasis added.

Europe does not seek to find and understand what it was really like to live in the ‘actually existing socialism’. Instead, it seeks to establish the myth of collective suffering, where it is ‘them’, the communists, who are responsible for the evil that emerged from the communist experiment.¹⁵⁶

Voices that try to challenge such myths have only recently started being raised. Boris Buden, who can be considered one of them, acknowledges that communism was an emancipation project that failed.¹⁵⁷ He however adds: ‘one should never feel ashamed for struggle for freedom. This applies today for all those, who tore down the Wall twenty years ago, but even more for those standing in front of the new ones today’.¹⁵⁸ The *pre-1989* experience of collectivism should not be considered something that needs to be ‘rectified’, or even as a sign of backwardness, which threatens the establishment of democracy,¹⁵⁹ but something that could serve as a source to overcome ‘self-centred individualism’, rightly despised by Weiler.

Here however, I have no advice to offer besides this reminder: Europe has a much better hope of overcoming its current crisis if it becomes spiritually united. This, however, cannot happen by East Central Europe trying to ‘return’ to the West or becoming one. It lies in the recognition of its unique experience, which is not to be overcome or, even worse, forgotten, but used as a reservoir for Europe’s future flourishing.

¹⁵⁶ See Milan Kopeček, ‘In Search of “National Memory”: The Politics of History, Nostalgia and the Historiography of Communism in the Czech Republic and East Central Europe’ in Ibid (ed), *Past in the Making: Historical Revisionism in Central Europe after 1989* (Budapest and New York: CEU Press 2008).

¹⁵⁷ On the centrality of emancipation in Europe’s current predicament see Alexander Somek, ‘Europe: From Emancipation to Empowerment’ *LEQS Paper* No. 60/2011, available at <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPapers.aspx>.

¹⁵⁸ Buden (2009), n 22.

¹⁵⁹ See Vladimir Tismaneanu, *Fantasies of Salvation: Democracy, Nationalism and Myth in Post-Communist Societies* (Princeton: Princeton UP 1998), 60–61.